SALE OF LANDED PROPERTY BY DEBENTURES. DOES IT BREACH THE FEDERAL CONSTITUTION?

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A) Introduction

When a company pledges its land to a financial institution as security for a loan, the land is usually secured by a debenture and a charge under the *National Land Code 2020*[1]*(*'NLC')*.* Upon the company's default, the chargee (in most cases the financial institution) will dispose of its security privately, using the debenture instead of the laborious procedures under the NLC. This procedure was approved by the Federal Court in *Melatrans Sdn Bhd v Carah Enterprise Sdn. Bhd & Anor*[2] ('Melantrans') where the Federal Court had decided that a chargee and debenture holder may, despite the existence of an NLC charge, choose to sell the charge property through the receiver and manager as the agent of the company. This decision was subsequently codified in *375(2)(a) of the Companies Act 2016*[3] which inter alia states that "Unless the instrument [which confers on the debenture holder the power to appoint a receiver or receiver and manager] expressly provides otherwise- (a) a receiver or receiver and manager is the agent of the company…."

This article aims to argue that both the decision of *Melantrans* and *S375(2)(a) of the Companies Act 2016* have essentially contravened two constitutional provisions in the Federal Constitution: particularly Article 8 (1)[4] and Article 13 (1).[5] By allowing a debenture holder to sell the chargor's property, (thereby avoiding the relevant process of the NLC), it is submitted that the chargor company will essentially be deprived of its property without going through the relevant legal process. It is further argued that the sale via debenture also breaches the equality provision under Article 8 because whilst the lender/chargee is not allowed to circumvent the mandated process of sale under the NLC if the chargor is an individual, the lender/charge may do so if the chargor is a company.

This article adopts the doctrinal approach to evaluate the issues raised.

B) Passing the Preliminary Hurdles

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[1] The National Land Code (Revised 2020) Act 828 ("the Act") came into force on 15 November 2020. It replaces its predecessor the National Land Code (Act 56 of 1965) which was in force since 1 January 1966. The preamble to the Act reads: "An Act to amend and consolidate the law relating to land and land tenure, the registration of title to land and dealings therewith and the collection of revenue from within the States of Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territories of Kuala Lumpur, Putrajaya and Labuan for purposes connected therewith."

[2] *Melatrans Sdn Bhd v Carah Enterprise Sdn. Bhd & Anor* [2003] 2 MLJ 193 (FCt)

[3] S375 (2) Companies Act 2016 "Unless the instrument expressly provides otherwise— (a) a receiver or receiver and manager is the agent of the company; (b) a person appointed as a receiver may act as receiver and manager; or (c) a power conferred to appoint a receiver or receiver and manager includes the power to appoint— (i) two or more receivers or receiver and managers; (ii) a receiver or receiver and manager additional to a receiver or receiver and manager in office; and (iii) a receiver or receiver and manager to replace a receiver or receiver and manager whose office has become vacant.

[4] Federal Constitution, Article 8 (1) All persons are equal before the law and entitled to the equal protection of the law.

[5] Federal Constitution, Article 13 (1) No person shall be deprived of property save in accordance with law.

To prove the author's argument, two preliminary questions must first be answered. Firstly, are constitutional rights enforceable horizontally? In other words, can an individual enforce his constitutional rights against another individual? The other preliminary issue that needs to be addressed is whether companies (as artificial persons) are entitled to enforce their constitutional rights.

The issue of horizontal enforcement of constitutional rights was answered by the author in his article entitled 'Making Rights a Reality: A Case for Enforcing Constitutional Rights Horizontally' which was published in the Journal of the Centre for Research in Law and Development in Asia.[6] In that article, several reasons were provided to explain why individuals could enforce their constitutional rights horizontally against another individual. One of the reasons given relates to natural rights. Using the theory of Natural Law, the author argued that natural rights being God-given rights existed even before the idea of a constitution was conceptualised. Hence, if natural rights were applied horizontally prior to the creation of a constitution, it is absurd to assert that natural rights cannot be enforced horizontally just because they are codified in the constitution today.[7]

The answer to the second query is found in an article that the author had co-authored entitled "Are Corporations Protected Under the Constitution During a Pandemic? First Things First — A Comparative Analysis Between Malaysia, India and The United States of America". In that article which was published in the Malayan Law Journal in 2022,[8] various grounds were advanced to justify why the Malaysian courts should allow companies (as artificial persons) the right to enforce their constitutional rights when countries like India and the United States have both recognized and allowed companies to enforce their constitutional rights. The approach of the Indian courts is particularly relevant to Malaysia because of the close (and at times identical) resemblance in the language of the provisions between both these constitutions.[9]

C) Interpreting the Federal Constitution

When it involves interpretation, the Federal Constitution should never be placed in the same status as ordinary legislation. The rationale was elegantly described by the Privy Council in the following manner:

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[6] Mark Goh, 'Making Rights a Reality: A Case for Enforcing Constitutional Rights Horizontally' which was published in the Journal of the Centre for Research in Law and Development in Asia.' (2021) 28-49.

[7] Mark (n6), 35-36.

[8] Mark Goh and Vigneshwari Manivannan, 'Are Corporations Protected Under the Constitution During a Pandemic? First Things First — A Comparative Analysis Between Malaysia, India and The United States of America' [2022] 2 MLJ cxcv.

[9] The Federal Court in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases,* [2021] 3 MLJ 759 (FCt*),* reminded the parties that "[the Federal Constitution] was inspired from other written constitutions such as that of India's and the United States" at 802 [102]. "It follows that because of the close resemblance in the language of these two provisions – para 1 of the Schedule and Art 226 of the Indian Constitution – the decisions of Indian courts upon the analogous provision are to be accorded greater weight when determining the width of the power conferred by the paragraph, than decisions of courts in those jurisdictions where the equipollent provision is absent. These jurisdictions include England, Australia, New Zealand and Canada." per Edgar Joseph JR FCJ in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (SCt), 233.

> "It is true that a constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the word's changes, but the changing circumstances illustrate and illuminate the full import of that meaning."[10]

Hence, the canons of construction employed in interpreting ordinary statutes cannot be applied in the same fashion to the Federal Constitution.[11] This is because the Federal Constitution's status as 'the law behind the law'[12] allows the Federal Constitution to stand above other legislations.[13] However, this however does not mean that the Federal Constitution is not guided by any rules of interpretation. On the contrary, the Federal Constitution should be seen as a living and dynamic piece of legislation. The provisions in the constitution should be construed broadly rather than pedantically, with less rigidity and more generosity than other legislations.[14]
Lord Sankey in *Edwards v AG of Canada*[15] likened a constitution to a "living tree capable of growth and expansion within its natural limits."

Echoing a similar view, the Federal Court in *Badan Peguam Malaysia v Kerajaan Malaysia*[16] held that the 'Federal Constitution is a living document and without doing violence to the language' the 'Federal Constitution should receive a fair, liberal and progressive construction so that its true objects must be promoted.'[17]

In interpreting a constitution, a judge should not merely limit his role to discovering existing law. When a declared law leads to an unjust result or raises issues of public policy or public interest, the judge should find ways of adding moral colours or public policy so as to complete the picture and do what is just in the circumstances. Hence, in interpreting constitutional provisions, a judge cannot afford to be too literal. He is justified in giving effect to what is implicit in the basic law and to crystallize what is inherent. His task is creative and not passive. This is necessary to enable the constitutional provisions to be the guardian of people's rights and the source of their freedom.[18]

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[10] *James v Commonwealth of Australia* [1936] AC 578.
[11] Prof. Datuk Dr. Shad Saleem Faruqi, 'Constitutional Interpretation In a Globalised World' (Malaysian Bar, 26 November 2005) https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/constitutional-interpretation-in-a-globalised-world (date accessed 12/6/2023) See also the observation by Datuk Seri Gopal Sri Ram, 'The Dynamics of Constitutional Interpretation' [2017] 4 MLJ i.
[12] "Having regard to the fact that the Constitution was comparatively short and expressed in reasonably wide language setting out guiding principles, it must be treated as the law behind the law and interpreted and applied in an organic, developing, and progressive manner." *Virelala and Others v Ombudsman of the Republic of Vanuatu*, [1997] 4 LRC 282.
[13] "First, a written constitution is an instrument that is sui generis. Therefore, the canons of construction employed in the interpretation of ordinary statutes do not apply to constitutions." *Minister of Home Affairs v Fisher* [1980] AC 319,329.
[14] 'A constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way-with less rigidity and more generosity than other Acts.' Federal Court in *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981]1 MLJ 29, 32.
[15] *Edwards v AG of Canada* [1930] AC 124,136.
[16] *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285.
[17] *Badan Peguam Malaysia* (n 16) [116].
[18] See *Dewan Undangan Negeri Kelantan & Anor. v Nordin bin Salleh & Anor* [1992] 1 MLJ 697*; Mamat bin Daud & Ors v Government of Malaysia & Anor* [1988] 1 MLJ 119 which was referred by the Federal Court in *Pendakwa Raya*

In *Ashok Tanwar v State of Himachal Pradesh*, the Indian Supreme Court decided that constitutional provisions are not governed by the ordinary rules of interpretation. The Indian Supreme Court observed that:

> "[C]onstitutional provisions cannot be cut down by technical construction rather it has to be given liberal and meaningful interpretation. The ordinary rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the Constitution."[19]

To achieve the broad and liberal interpretation of the Federal Constitution, the courts are guided by two approaches, namely the prismatic approach and the harmonious construction approach.[20]

The Prismatic Approach

This approach was lucidly explained by the Federal Court in *Lee Kwan Woh v Public Prosecutor*[21]in the following manner "…When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II."

The prismatic approach interprets constitutional provisions in a multifaceted way. Constitutional rights are seen as comprising a spectrum of specific rights which are implicitly subsumed into these provisions,[22] thus resulting in constitutional rights having a penumbra of meanings.[23]

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v Kok Wah Kuan [2007] MLJU 521*,(FCt),* [10], (vii) "Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a 'living instrument' when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life." *Boyce v The Queen* [2004] UKPC 32.

[19] Civil Appeal case 8248 of 2004 [326].

[20] 'Interpretation is an art and not a science and is influenced by the judge's perception of his role at the heart of the legal system.' Prof. Datuk Dr. Shad Saleem Faruqi (n11)

[21] *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 311 [8].

[22] "The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights." per Lord Hoffmann in *Boyce v The Queen* [2004] UKPC 32.

[23] This "penumbra of rights" notion is the only way to ensure that the existing rights are not rendered illusory.' Jayanthi Naidu, 'The Rise and Rise of Administrative Finality' [2004] 2 MLJ lxxii, lxxxlxxxiii.

In relation to the interpretation of the Federal Constitution, the Federal Court in *Lee Kwan Woh v Public Prosecutor*[24] had this to say:

> "…the Constitution is a document sui generis governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution."

In applying the prismatic approach, the courts are required to interpret any provisos that seek to limit or derogate fundamental rights restrictively.[25]

There are also limitations in the prismatic approach. In *The Speaker of Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v Ting Tiong Choon & Ors and other appeals,*[26] the Federal Court applied the limitation that was set out by his lordship Abdoolcader J in *Merdeka University Berhad v Government of Malaysia* onto the prismatic approach in the following way.

> "The court is not at liberty to stretch or pervert the language of the constitution in the interests of any legal or constitutional theory, or even,… for the purpose of supplying omissions or of correcting supposed errors."[27]

As a fundamental principle of interpreting the Federal Constitution, the prismatic approach is now firmly recognized and adopted by a list of superior court decisions chiefly the Federal Court decisions of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases*[28], *Letitia Bosman v Public Prosecutor and other appeals (No 1)*[29] and *Alma Nudo Atenza v Public Prosecutor and another appeal* which best described the approval in the following manner:

> "We begin by acknowledging that in interpreting any constitutional provision…, certain principles must be borne in mind:…
> (c) it is the duty of the courts to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the FC, in order to reveal the spectrum of constituent rights submerged in each article (see Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301 at para 8)."[30]

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[24] *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 312.
[25] *Lee Kwan Woh* (n24), 312.
[26] *The Speaker of Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v Ting Tiong Choon & Ors and other appeals* [2020] 4 MLJ 303.
[27] *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356,360.
[28] *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] MLJU 668.
[29] *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277.
[30] *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1,32-33.

The Harmonious Construction Approach

When interpreting the constitution, the rule of harmonious construction complements the prismatic approach.

The rule of harmonious construction suggests that courts are duty-bound to interpret the Constitution in order to produce harmony between the various provisions of the Constitution. According to MP Jain, the rule of harmonious construction requires "…the Constitution [to] be so interpreted as to give effect to *all* [emphasis mine] its parts. The presumption is that no conflict or repugnancy was intended by the framers between the various provisions of the Constitution. Accordingly, it had been laid down that if certain provisions in the Constitution appear to be in conflict with each other, these provisions should be interpreted so as to give effect a reconciliation between them so that, if possible, the effect could be given *to all*. [emphasis mine] This is, what is known as, the rule of harmonious construction…"[31]

In *Lina Joy v Majlis Agama Islam Wilayah & Anor*[32] the High Court ruled that harmonious construction which requires the court to give effect to the relevant articles should be read conjunctively and disjunctively. In *Krishnadas v Maniyam,*[33] the Federal Court reiterated that:

> "As a general rule a court will adopt that construction of a statute which will give some effect to all the words which it contains,…Where it is impossible to give a full and accurate meaning to every word appearing in a section of a statute, the duty of the court is to give the words an interpretation that produces the greatest harmony and the least inconsistency."

Speaking in regard to the harmonious construction, the Federal Court in *Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir* quoting from NS Bindra's Interpretation of Statute[34] observed that:

> "The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions….no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument….[and]…if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous."[35]

In *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* the Court of Appeal cogently explain the harmonious construction of the constitution in the following way:

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[31] M.P. Jain, *Indian Constitutional Law* (8th ed Lexis Nexis 2020), 853.
[32] *Lina Joy v Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119, [para 27].
[33] *Krishnadas v Maniyam* [1997] 1 MLJ 94, 101.
[34] NS Bindra, *Interpretation of Statute* (8th Ed The Law Book Company, 2001), 947–948
[35] *Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir* [2010] 2 MLJ 285, [para 27].

> "The Court is to interpret the Constitution and to uphold its provisions without fear or favour. In interpreting the Constitution, the Court must carefully consider the language used in the relevant provisions particularly and in the whole, of the Constitution generally. Any particular provision of the Constitution should not be interpreted in isolation or compartmentalised; but must be looked at in relation to the other provisions of the Constitution so as to arrive at a harmonious interpretation and to give effect to the basic structures of the Constitution as drafted by its framers. To achieve this, the provisions of the Constitution must be construed broadly and not in a pedantic way. Thus, the normal rules of interpretation do not always necessarily apply to the interpretation of the Constitution…"[36]

Sultan JCA in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased*.[37] The principles are as follows:(a) courts must avoid head on clash of seemingly contradicting provisions and they must construe the contradictory provisions so as to harmonise them; (b) the provision of one section cannot be used to defeat the provision contained in another unless the court, despite its effort, is unable to find a way to reconcile their differences; (c) when it is impossible to completely reconcile the differences in contradictory provisions, the courts must interpret them in such way so that effect is given to both the provisions as much as possible; (d) courts must also keep in mind that interpretation that reduces one's provision to a useless number or dead is not harmonious construction; and (e) to harmonise is not to destroy any statutory provision to render it fruitless.[38]

The combined approach of the prismatic and harmonious construction will not only reveal the multifaceted meanings of the constitutional provisions, but it will also allow one or more articles in the constitution to explain, clarify and elucidate the other articles in the constitution, thus producing a melodic symphony within the Federal Constitution.

D) Applying the Harmonious and Prismatic Approach to the Word 'Law' in Article 160 of the Federal Constitution.

The application of the harmonious and prismatic approach of liberal interpretation to the word "law" in *Article 160 of the Federal Constitution*, it is argued, will, in different situations, result in a spectrum of meanings instead of a single meaning.

Incorporating Natural Justice into the word 'law' in Article 160(2)

[36] *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] MLJU 1062, [2013] 6 MLJ 468, [44].

[37] *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased* [2017] 5 MLJ 771(CA).

[38] See para 45 of Yang Arif Hamid Sultan JCA's decision where his lordship cited the Supreme Court decision of *India in CIT*

- *v Hindustan Bulk Carriers (2003) 3 SCC 57* in support of his decision.

The Federal Court in *Public Prosecutor v Gan Boon Aun,*[39] noted that the word 'includes'[40] in *Article 160(2) of the Federal Constitution* allows the said Article to have a non-exhaustive definition.[41] To determine the extent of the meaning of the term 'law' in *Article 160 (2)* of the Federal Constitution, reference to various case laws will serve as an important guide.

Using the prismatic approach, the Federal Court in *Public Prosecutor v Gan Boon Aun,* decided that the word 'law' in the phrase 'in accordance with law' in *Article 160(2)* "does not merely refer to domestic law" but it also encompasses "legal doctrines established by judicial precedents, or whatever that has the force of law [including] the common law…being the common law of England (see art 160(2) of the Federal Constitution read with s 66 of the Interpretation Acts 1948 and 1967)."[42]

Using the same approach, the Privy Council in *Ong Ah Chuan v Public Prosecutor* further broadened the term 'law' whenever found in the constitution to include the doctrine of natural justice (which forms the fundamental aspects of the common law of England). Lord Diplock, who was sitting in the Privy Council in Singapore in *Ong Ah Chuan's* case was then deciding on *Articles 9 and 12 of the Singapore Constitution* (which is in *pari materia* to *Articles 5 and 8 of Malaysia's Federal Constitution*), had this to say about the word "law" wherever it is found in the constitution:

> 'In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer to a system of law which *incorporates those fundamental rules of natural justice* [emphasis added] that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules."[43]

The view that natural justice forms part of the term "Law" in *Article 160* was also echoed in *Alma Nudo Atenza v Public Prosecutor and another appeal*[44] where his Lordship Richard

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[39] *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 (*FCt*).

[40] ''Pertinent to 'law' in the phrase 'in accordance with law', art 160(2) of the Federal Constitution stipulates that 'Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof', with that common law being the common law of England (see art 160(2) of the Federal Constitution read with s 66 of the Interpretation Acts 1948 and 1967). Article 160(2) uses the word 'includes'. Hence, art 160(2) is a non-exhaustive definition." n 39, para 14. This part of the decision was subsequently quoted with approval by Gopal Sri Ram in his speech entitled 'The Dynamics of Constitutional Interpretation' [2017] 4 MLJ i.

[41] *Public Prosecutor v Gan Boon Aun* (n 39), [14]

[42] *Public Prosecutor v Gan Boon Aun* (n 39), [para 14]. This decision was subsequently referred to by the Federal Court decision in *Alma Nudo Atenza v Public Prosecutor and another Appeal* [2019] MLJU 280 [101].

[43] *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64,71 and *Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 [71B-C] which was affirmed by the Court of Appeal in *Perbadanan Perwira Harta Malaysia and Anor v Mohd. Baharin bin Hj Abu* [2010] MLJU 272.

[44] *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] MLJU 280 (FCt).

Malanjum, speaking on behalf of the Federal Court held that the term "Law" in *Article 160* must satisfy certain basic requirements; namely the condition that 'the principles of natural justice and the right to a fair trial are observed.'[45] The Federal Court however cautioned that for common law to be relevant and applicable in this country, such 'common law must be in operation at the commencement of the [Federal Constitution].'[46] Natural justice, it is argued, came into existence even before the Federal Constitution was created.

The Privy Council's view in *Ong Ah Chuan* was subsequently applied to *Article 13* of the Federal Constitution by the Federal Court in *S. Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors*[47] the Privy Council decision of *Government of Malaysia & Anor v Selangor Pilot Associatio*[48][8] and the Court of Appeal in *Totti Trading v Public Prosecutor.*[49] In *Totti Trading* the Court of Appeal was of the view that the rules of natural justice and procedure which form an integral part of the common law must be fully satisfied before one's property can be forfeited without any compensation. The right to be heard is one of the pillars of the rules of natural justice. Any breach of these rules amounts to a contravention of *Article 13* of our *Federal Constitution*.[50]
At the same time, the court has cautioned that Parliament may by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees.[51]

In *Lee Kwan Woh v Public Prosecutor,*[52] the Federal Court took a step further, linking natural justice to the rule of law. The Federal Court in *Lee Kwan Woh* reasoned that 'the rules of natural justice which form part of the wider concept of "procedural irregularity" formulated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374* forms an integral part of the rule of law. Accordingly, the rule of law in all its facets and dimensions is included in the expression "law" wherever used in the Constitution.'[53]

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[45] "Law" must therefore satisfy certain basic requirements, namely: a. it should be clear;b. sufficiently stable; c. generally prospective; d. of general application;e. administered by an independent judiciary; and f. the principles of natural justice and the right to a fair trial are observed." *Alma Nudo Atenza* (n 44),[104]. 'The "law" thereof also refers to a system of law that incorporates the fundamental rules of natural justice that formed part and parcel of the common law of England. And to be relevant in this country such common law must be in operation at the commencement of the FC.' *Alma Nudo Atenza* (n 44), [107].
[46] *Alma Nudo Atenza* (n 44),[107].
[47] *S. Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors*[1982] 1 MLJ 204, 206 where his lordship said "Article 13(1) in my opinion ensures the sanctity of private property. That clause guarantees the right of any person not to be deprived of his property save in accordance with law which simply means that no one can be deprived of his property merely on the orders of the Executive but that he may be deprived of his property only in accordance with law. In my view the proper interpretation of the word "law" is not as in Comptroller-General of Inland Revenue v NP [1973] 1 MLJ 165 which is with respect, too restrictive, but as interpreted in Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64 71 [1981] AC 648 in the judgment of the Privy Council dealing with the very same words "in accordance with law" appearing in a provision of the Singapore Constitution."
[48] *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133 135; [1978] AC 337, 347.
[49] *Totti Trading v Public Prosecutor* [2018] 5 MLJ 683, [19]. "We refer to Article 13(1) of the Federal Constitution which protects the rights of one property. Article 13 guaranteed that "no person shall be deprived of property save in accordance with law". Whereas Article 160 of the Federal Constitution defined "law" to includes "written law, the common law in so far as it is in operation in the Federation or any part thereof, or any custom or usage having the force of law in the Federation or any part thereof."
[50] *Totti Trading* (n49), [19].
[51] *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204* referred to by the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257, [17].
[52] *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301.
[53] *S. Kulasingam & Anor* (n47), 315.

Access to Justice as a component of 'law' in Article 160(2)

By using both the harmonious construction and prismatic approach, the courts have also incorporated access to justice into the word 'law' in *Article 160* of the *Federal Constitution*. According to Bryan Garth and Mauro Cappelletti, access to justice is considered the most fundamental human right of all human rights.[54]

The significance of this right was elucidated by Lord Diplock in *Bremer Vulken Schiffbau und Maschinenfabrik v South India Shipping Corp*[55] where his lordship held that 'Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective rights. The means provided are courts of justice to *which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.'* [emphasis mine]

Elaborating on the right of access to justice, the Federal Court in *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor*[56] cited with approval the decision of *Educational Company of Ireland Ltd v Fitzpatrick (No 2) [1961] IR 345 per Budd J* at p 368 which explained the right in the following manner:

> "…if 'an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of the other citizens to respect that right and not to interfere with it.'

The right of access to justice, therefore, allows a person who has suffered any damage due to an infringement of his constitutional right, the right to seek redress from the courts against persons who have alleged to have infringed his right, and the courts are tasked to ensure that they provide effective remedies where rights are wrongfully breached.[57]

By adopting the prismatic approach, the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* had decided that the common law right of access to justice is part of the word 'law' whenever it is mentioned in Part II of the Federal Constitution, particularly in *Article 5*

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[54] "… access to justice can…be seen as the most basic requirement – the most basic "human right" – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all.", Bryan Garth and Mauro Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1978] 27 Buffalo Law Review 181, 184-185.

[55] *Bremer Vulken Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] 1 All ER 289, 295.

[56] *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor* [2011] 2 MLJ 281, 297.

[57] *Shamala a/p Sathiyaseelan* (n 56)*, 297* affirming the decision of Walsh J in *Meskell v Coras Iompair Eireann [1973] IR 121*, *133* and *Byrne v Ireland* [1972] IR 241.

of the Federal Constitution.[58] This view was affirmed by the subsequent decision of another Federal Court in *Public Prosecutor v Gan Boon Aun.*[59]

In *Danaharta Urus Sdn. Bhd. v Kekatong Sdn. Bhd. (Bar Council Malaysia, Intervener*[60]*,* whilst agreeing with the Court of Appeal that the right of access to justice is the common law in operation for the purpose of *Article 160(2),* using the rule of harmonious construction, the Federal Court qualified the right by saying that the right to access of justice can always be limited by Parliament.[61]

In some cases, the courts have ventured further by connecting 'access to justice' to the rule of law which is another facet of 'law' in *Article 160(2)* of the *Federal Constitution.*
In *Public Prosecutor v Aluma Mark Chinonso (Negerian) and another appeal,* the court ruled that the rule of law as advocated by Aristotle, Dicey, and Lord Bingham essentially relates to the public having access to justice.[62]

In the Canadian Supreme Court's decision in *Trial Lawyer's Association of British Columbia v British Columbia (Attorney General)*[63], a case which was cited with approval by the Federal Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*[64], the Supreme Court of Canada held that.

"…[A]ccess to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the…courts…."[65]

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[58] "Article 5(1) may be selected to illustrate the point that is sought to be made since it is one of the provisions relied on in this case. That article proscribes the deprivation of life or personal liberty, save in accordance with law. 'Law' wherever mentioned in Part II of the Constitution includes — by statutory direction — the common law of England (see art 160(2) read with s 66 of the Interpretation Acts 1948 and 1967). It is now well-settled that by the common law of England the right of access to justice is a basic or a constitutional right. See Raymond v Honey [1983] 1 AC 1 at p 13; R v Secretary of State for the Home Department, ex parte Leech [1993] 4 All ER 539. In Thai Trading Co (a firm) v Taylor & Anor [1998] 3 All ER 65 at p 69, Millett LJ described it as a fundamental human right. Thus, the common law right of access to justice is part of the 'law' to which art 5(1) refers. In other words, a law that seeks to deprive life or personal liberty (both concepts being understood in their widest sense) is unconstitutional if it prevents or limits access to the courts." *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. This view was affirmed by the subsequent Federal Court decision in *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12, [3].

[59] *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12, [13].

[60] "Article 160(2) must therefore be construed as referring to the common law which is in operation at the date of the Federal Constitution subject to it being modified at any time by any written law as provided by s 3(1). To that extent it is qualified and not absolute. The reference to common law in art 160(2) is therefore a reference to common law in that sense and it is in that sense that the right must be incorporated into art 8(1). As the continued integration of the common law right of access to justice into art 8(1) is dependent on any contrary provision that may be made by any written law as provided by s 3(1) it cannot amount to a guaranteed fundamental right." See *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257 FCt, 267.

[61] "The rule of harmonious construction, therefore, demands that both the provisions be so construed as to give meaning and effect to them with the result that access to justice shall be available only to the extent that the courts are empowered to administer justice. The corollary is that the manner and extent of the exercise of the right of access to justice is subject to and circumscribed by the jurisdiction and powers of the court as provided by federal law. As a matter of fact, whenever a law is passed either enlarging or curtailing the jurisdiction and powers of the courts it has a direct bearing on the right of access to justice. The right is determined by the justiciability of a matter. If a matter is not justiciable there is no right of access to justice in respect of that matter." *Danaharta Urus (*n 60*)*, 270 affirmed by the FCt in *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] MLJU 195.

[62] *Public Prosecutor v Aluma Mark Chinonso (Negerian) and another appeal* [2020] MLJU 694, [para 28].

[63] *Trial Lawyer's Association of British Columbia v British Columbia (Attorney General)* [2014] SCC 59.

[64] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] MLJU 69.

[65] *Trial Lawyer's Association of British Columbia* (n63),39.

Having explained both the constitutional methods of interpretation and the respective principles that govern them, these methods of interpretation will now be applied to a sale by debenture to determine the constitutional legality of such a sale.

E) Does a Sale by Debenture Contravene the Federal Constitution?

I) Breaching Article 13(1) of the Federal Constitution

Article 13(1) proclaims that 'No person shall be deprived of property save in accordance with law.' It was established in the earlier part of this article that 'person' should include companies.[66]

Breaching 'Access to Justice' and 'Natural Justice'

Based on the prismatic interpretation of the word 'law' in the context of *Article 13* read with *Article 160 (2)*[67] of the Federal Constitution that would mean that no person shall be deprived of property save in accordance *with access to justice and/or natural justice*.[68](emphasis mine) Applying the prismatic interpretation to the Federal Constitution, it is argued that by allowing the chargor's immovable property to be sold via a debenture despite the presence of an NLC charge, *Article 13* of the *Federal Constitution* is contravened in the following ways.

Firstly, the Chargor is prevented from exercising his right of access to courts if the Chargor's immovable property is sold using a debenture. There are no avenues for the Chargor to raise his arguments against the Chargee other than to the Chargee alone. Applying the principles of access to justice as mentioned above,[69] the Chargor should have, in the words of the House of Lords in the United Kingdom in the case of *Polanski v Conde Nast Publications Ltd*[70] 'the right to bring or defend himself in proceedings in the court of law'[71] which is clearly absent in a sale by debenture. On the other hand, the NLC explicitly preserves the Chargor's right of access to courts. Under *S256(2)* of the NLC, the Chargee is duty-bound to apply to the High Court to obtain an order for sale before the Chargor's property can be sold. This gives the Chargor a chance to ventilate his case before an independent tribunal. In view of the word 'shall' which appears in the provision,[72] the Chargee's omission or failure will nullify any subsequent sale of the Chargor's property.

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[66] See supra under the sub-heading 'Passing the Preliminary Hurdles' pp 2-3.

[67] Article 160(2) "Law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

[68] Please refer to pp 6-11 supra of this article for the relevant explanation and justification to import concepts like natural justice, access of justice and the rule of law.

[69] Article 160(2),(n 67).

[70] *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637.

[71] *Polanski ((n 69)* p644 paras 30-31. Cited with approval by the Federal Court in S*hamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor* [2011] 2 MLJ 281, 301.

[72] 'Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.'S256(2) National Land Code 2020.

When the debenture holder chooses to sell the charge property through the receiver and manager despite the existence of an NLC charge, the defaulting Chargor (whom the Chargee has alleged to have breached the debenture) is unable to defend his case and provide any reasons before an independent body as to why he did not pay his installments. This is a denial of the Chargor's right to a fair trial and the right to be heard by an independent and impartial body (the twin principles of *nemo judex in causa sua* and *audi alteram partem*) which are the main elements of natural justice[73] and forms part of the definition of "law" in Article 13 of the Federal Constitution. Unlike an order for sale which must be held at the High Court before the property is sold via the NLC, the principle of natural justice is expressly preserved under various sections of the act, particularly sections *254*[74]*,256,*[75] *258*[76] *and section 263(2)(h).*[77] Under the NLC, not only must the chargor be informed of the hearing date,[78] but he is also given the right to present his argument before the court by 'showing [any] cause to the contrary' under *s 256* of the Code[79] before his property is sold. These safeguards are completely absent in a sale by debenture.[80] It was held by the Supreme Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*[81] that orders or judgments which are obtained from a breach of natural justice are defective and such orders can be set aside through a collateral proceeding

[73] "A fair trial is generally defined as a trial by an impartial and disinterested tribunal in accordance with law. The right to a fair trial is generally construed in the light of the rule of law…. In this connection, the common law has long recognized two minimum fair trial guarantees known as the principle of natural justice: (i) the principle of judicial impartiality (nemo judex in causa sua) and (ii) the right to be heard (audi alteram partem) (Jackson, P, *Natural Justice* (2nd Edn Sweet & Maxwell, London 1973). The right to a fair trial has also evolved to encompass a right to access to the courts, public hearings, and a hearing within a reasonable time." CA in *Hong Yik Plastics (M) Sdn. Bhd. v. Ho Shen Lee (M) Sdn Bhd & Anor* [2020] 1 MLJ 743,748.

[74] "Section 254 National Land Code requires the service of a default notice in a statutory form (Form 16D), (a) specifying the breach complained of, (b) requiring it to be remedied within the period of one month or a period as agreed and (c) warning the chargor of proceedings to obtain an order for sale if the breach is not remedied. The use of statutory forms generally avoids mistakes." FCt in *V Letchumanan v. Central Malaysian Finance Bhd* [1980] 1 MLRA 671, 673.

[75] "…, at the hearing of proceedings directed under the Code, the chargor will have the opportunity of 'showing cause to the contrary' within the meaning of s 256 of the Code; in other words, the right to be heard." SCt in *Kimlin Housing Development Sdn Bhd* [1997] 2 MLJ 805, 818. Other cases include the SCt decision *in Low Lee Lian v. Ban Hin Lee Bank Berhad [*1997] 1 MLJ 77 on what amounts to a 'cause to the contrary' which was referred to by the CA in *Tan Swee Thiam v. United Overseas Bank (Malaysia) Bhd* [2019] MLRAU 205. In *Sivadevi Sivalingam v. CIMB Bank Berhad* [2018] 5 MLJ 82 *the* CA held that s 256 affords a chargor-debtor an opportunity to remedy the breach before the chargee-bank enforces its right to pursue an order for a judicial sale as statutorily prescribed.

[76] "Consequently, the amended conditions of sale bearing some different terms or directions from the original conditions has to be served again in accordance with s 258(1)(a) of the NLC on the chargor. Failure to do so is a clear transgression of the statutory provisions of that section. Moreover, the ex parte hearing of the originating summons on the application to extend time, without service to the chargor, is perceptibly not in accordance with the law relating to civil procedure - (see s 256(2) NLC)." SCt *in M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1993] 1 MLRA 688, 699.

[77] "…. where a purchaser at the judicial sale does not complete the contract on the due date and seeks an extension of time to pay the balance of the purchase price, he must apply to court for such extension, in which event the chargor has a right to be heard and a denial thereof will render any registration of the sale procured thereby null and void as being ultra vires the powers of the Code."' *Kimlin Housing Development Sdn Bhd* (n75), 819.

[78] "While the procedure under s 256 is meant to be speedy and summary in nature, the learned Judge hearing such applications for an order for a judicial sale, must nevertheless be concerned as to whether the appellant has been properly served; that the procedural requirements of O 83 of the Rules of Court 2012 have been complied with; and that within the "very narrow question whether the material produced before him by the chargor constitutes cause to the contrary." Per her Ladyship, Mary Lim in *Tan Swee Thiam v. United Overseas Bank (Malaysia) Bhd* [2019] MLRAU 205 [39].

[79] 'Under ss 256 and 261, the chargor is not only given the opportunity to show cause as to why his property should not be sold but also to participate in the deliberation on matters affecting his interest, such as the reserve price, the time, venue and conditions of sale.' Wan Yahya SCJ in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294,* 311B. This view was affirmed by the SCt in *Kimlin Housing Development Sdn Bhd* (n75), 818.

[80] "Clearly, in the event of proceedings being brought under the Code to enforce a statutory charge over land, a chargor possesses certain valuable rights – none of which is possessed by a borrower company under a debenture in common form." *Kimlin Housing Development Sdn. Bhd.* (n75), 818

[81] *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd.* [1998] 1 MLRA 183.

without going through an appeal.[82] Applying the ratio of *Badiaddin* in a foreclosure proceeding via debenture, it is argued that since the process of the sale itself breaches both concepts of natural justice, any transaction resulting from this foreclosure is defective and the Chargor should be entitled to set aside these transactions through a collateral proceeding.

II) Breaching Article 8(1) of the Federal Constitution

Article 8(1) of the Federal Constitution states as follows:
"All persons are equal before the law and entitled to the equal protection of the law."
As mentioned earlier, it was established in the earlier parts of this article that 'persons' whenever appearing in the Federal Constitution should include companies.[83]

There are two issues that must first be considered in *Article 8(1).* They are:

a. whether a company is discriminated against under *Article 8(1)* and
b. whether the concepts of access to justice and natural justice are incorporated into *Article 8(1)* of the Federal Constitution.

Once both these issues are considered, the issue of whether a sale by Debenture will breach *Article 8(1)* will be answered.

Is a Company Discriminated under Article 8(1) of the Federal Constitution in a Sale by Debenture?

Test for equality

Article 8(1) guarantees two separate and distinct rights, namely, (i) equality before the law; and (ii) equal protection of the law.[84] According to tried principles of constitutional interpretation, each of these rights must be treated separately since each right is derived from a distinctly different source.[85]

Commenting on *Article 14* of the *Indian Constitution* (which is in pari materia with Article 8 of the Malaysian Constitution) D.D. Basu in his authoritative work entitled "Commentary on the Constitution of India" has this to say:

> "The expressions 'equality before the law' and 'equal protection of laws' do not mean the same thing, even if there may be much in common... Equality before the law is a dynamic

[82] "The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, "save that specifically it includes orders that have been obtained in breach of rules of natural justice". His Lordship Mohd Azmi FCJ, *Badiaddin Mohd Mahidin & Anor* (n81), [4]
[83] See supra under the sub-heading 'Passing the Preliminary Hurdles' pp 2-3.
[84] "Article 8 of the FC deals with equality before the law and equal protection of the law and that equality means" Federal Court in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561, 668.
85 *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, 347.

concept having many facets. One facet – the most commonly acknowledged – is that there shall be no privileged person or class, and none shall be above the law."[86]

D.D. Basu's definition was refined by the courts in Malaysia. In *Public Prosecutor v Khong Teng Khen & Anor*[87] the Federal Court referring to the Indian case of *Kedar Nath v State of West Bengal*[88] defined the test on equality (which later came to be known at the 'reasonable classification test') in the following manner:[89]

"The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons … for the purpose of legislation.."

In *Ong Ah Chuan v Public Prosecutor*[90] Lord Diplock said on p 72:

"Equality before the law and equal protection of the law require that like should be compared with like. What art 12(1) (our Article 8(1)) assures to the individual is the right to equal treatment with other individuals in similar circumstances."

In *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)*[91] the Federal Court held that the equality provision in *Article 8(1)* meant "...that there must be a subjection to equal laws applying alike to all persons in the *same situation*."[92] (emphasis mine). In the same breath, the Federal Court had also decided that to determine whether a law is discriminatory under Article 8(1), "the validity of a law relating to equals can therefore only be properly tested if it applies alike to all persons in the *same group* (emphasis mine) [which] can only be ascertained by the application of the doctrine of classification."[93]

The same position was also adopted in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners),*[94] when the Federal Court clarified the test of equality in *Article 8(1)* by declaring that people who are in the like circumstances should be treated equally.

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[86] D.D. Basu, *Commentary on the Constitution of India; Vol* 1 (8th ed, LexisNexis 2007), 958.
[87] *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166.
[88] *Kedar Nath v State of West Bengal* AIR 1953 SC 404, 406.
[89] *Public Prosecutor v Khong Teng Khen & Anor* (n 87),170. "What is meant by the 'equal protection of the law'? We must answer that question. If all men were created equal, and remained equal throughout their lives, then the same laws would apply to all men. But we know that men are unequal; consequently, a right conferred on persons that they shall not be denied 'the equal protection of the laws' cannot mean the protection of the same laws for all. It is here that the doctrine of classification … steps in and gives content and significance to the guarantee of the equal protection of the laws. … … … A law based on a permissible classification fulfils the guarantee of the equal protection of the laws and is valid; a law based on an impermissible classification violates that guarantee and is void." H.M Seervai, *Constitutional Law of India, Universal Law Publishing Co Ltd* (4th Ed) Vol 1, 439.
[90] *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.
[91] *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257.
[92] The Federal Court referred to the case of *Vide Southern Railway Co v Greene 216 US 400.*
[93] *Danaharta Urus Sdn Bhd* (n91),274 [36].
[94] *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners*) [2019] 3 MLJ 561, 668.

One of the principles that the Federal Court in *Public Prosecutor v Lau Kee Hoo,*[95] had distilled from examining the cases of *Ong Ah Chuan v Public Prosecutor*[96] and *Runyowa v The Queen*[97] is the principle that "...Article 8(1) assures ...the individual ... the right to equal treatment with other individuals in *similar circumstances.'*[emphases mine] It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others.'[98] It is argued that this principle should not be restricted only to criminal law but extend to all areas of law. Applying this principle to the context of a debenture, it is submitted that corporate chargors should not be prohibited from relying on the statutory rights which are available to individual chargors under the NLC since both come 'within a single class of chargors'.

Not only must there be classification; the classification must also be reasonable or permissible, not arbitrary,[99] meaning that there must be a nexus between the basis of classification and the object of the legislation under consideration.[100]

In the case of *Malaysian Bar v Government of Malaysia*[101] Mohamed Azmi SCJ held that the classification must (i) be founded on an intelligible differentia distinguishing between persons that are grouped together from others who are left out of the group; and (ii) the differentia selected must have a rational relation to the object sought to be achieved by the law in question.

It is argued that when a charge property of a corporate chargor is sold through a debenture instead of an order for sale via the NLC, the sale contravenes the equality provision of *Article 8(1) of the Federal Constitution.*

This argument is supported by the fact the equality principle, which requires a law (in this case, the NLC) to operate alike on all persons under like circumstances,[102] should be applied to all chargors, irrespective whether the chargor is a company or an individual. In other words, all chargors (companies and/or individuals alike) should be treated equally[103] and accorded the

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[95] *Public Prosecutor v Lau Kee Hoo [1983]* 1 MLJ 157. In *Malaysia Airline System Berhad v. Joyce Tan @ Tan Siew Eng (ENCL 1) [2017] MLRHU 1689* the High Court held at para 116 that "….In construing art 8 of the Federal Constitution, the Federal Court in Beatrice At Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 1 MELR 1; [2005] 1 MLRA 320; [2005] 3 MLJ 681; [2005] 2 CLJ 713 held that the equal protection, which is contained in that Article, extends only to persons in the same class."

[96] *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.

[97] *Runyowa v The Queen* [1967] 1 AC 26

[98] *Public Prosecutor v Lau Kee Hoo* (n95), 162.

[99] Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor [*2010] 2 MLJ 333*,* [27] and affirmed by the Federal Court *in Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751,768.

[100] Federal Court in *Datuk Haji Harun Bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, 160.

[101] *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165, 170 quoting *Datuk Haji Harun Bin Haji Idris(n100).*

[102] "What Article 8(1) means is that there must be a subjection to equal laws applying alike to all persons in the same situation (see *Vide Southern Railway Co v Greene 216 US 400)*." See *Malaysia Airline System Bhd v Joyce Tan @ Tan Siew Eng* [2017] MLJU 2301 (HCt)[36] applying *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257 (FCt).

[103] "Thus, if a law deals equally with all persons of a certain well-defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and, therefore, there is no discrimination amongst equals." See *Charanjit Lal v Union of India AIR* 1951 SC 41. See also the Federal Court decision of *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293, 304 where the court held as follows "…Equal treatment under the law does not imply that all people should be

same protection given by the NLC.[104] Just because the chargor is a company, the chargee cannot circumvent the NLC by contracting out of the fundamental right (*Article 13* of the *Federal Constitution* in this case) which is enshrined in the constitution.[105] When the chargee prevents a corporate chargor from exercising its statutory right under the NLC, the chargee breaches *Article 8(1)* of the *Federal Constitution* because whilst an individual chargor is allowed to rely on the statutory protection under the NLC, a corporate chargor who is in the same position is prohibited from doing so.

Furthermore, this classification is reasonable. There is clearly a nexus between the basis of classifying them as "chargors" and the object of the legislation (NLC in this case) which is designed to protect the rights of chargors[106] and to prevent chargees from indiscriminately selling off the chargors' property.

In *Ahmad Tajudin bin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang,*[107] the Court of Appeal laid down three essential elements which the applicant must prove to establish[108]

A chargor company is unfairly discriminated against under *Article 8(1)* of the *Federal Constitution* when its property is sold using a debenture instead of the NLC because the protection which is afforded to an individual chargor under the NLC is not available in a sale by debenture if the chargor is a corporate chargor, thus preventing a corporate chargor from arguing its case before an independent tribunal. This discrimination will cause the chargor company to lose its charge property faster than an individual chargor.

'Access to Justice' and 'Natural Justice' As Elements of "Law" in Article 8(1)

Access to Justice: A Facet of Article 8

In the earlier part of this article,[109] it was conclusively established that a debenture prevents a chargor from exercising his right of access to justice.

Besides being a common law right, the right of access to justice is also given an additional constitutional protection in Malaysia. This view is supported by the decision of the Court of

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treated alike. People differ in terms of abilities, personalities, and culture. It would defy common sense to treat a child in the same manner as an adult when it comes to matters of voting or criminal culpability. All the law requires is that like persons in like circumstances should be treated alike. Under the doctrine of classification, one may in certain instances discriminate between classes but no one within a particular class should be singled out for discriminatory treatment."

[104] "Equality before the law and equal protection of the law require that like should be compared with like. What art 12(1) (our Article 8(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances." per Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64,72 and cited with approval by the FCt in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257,273.

[105] *Basheshar Nath v Commr of Income-tax, Delhi and Rajasthan* AIR 1959 SC 149 referred to in Dato Gopal Sri Ram, 'The Workman and the Constitution' [2007] 1 MLJ clxxii, clxxxii.

[106] "The relevant provisions of the NLC, to wit, ss 254–265 of the NLC conferring the rights upon chargors aforsesaid are designed for their protection." SCt in *Kimlin Housing Development Sdn Bhd(Appointed Receiver And Manager) (In Liquidation) v Bank Bumiputra (M) Bhd & Ors*[1997] 2 MLJ 805,820, [B—D].

[107] *Ahmad Tajudin bin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1996] 2 MLRA 456.

[108] *Ahmad Tajudin bin Hj Ishak* (n107), 466.

[109] See supra under the sub-heading "Breaching Article 13(1) of the Federal Constitution" at p19-22.

Appeal in *Kekatong Sdn. Bhd v Danaharta Urus Sdn. Bhd* [110] where the Court of Appeal, after considering various English and Malaysian cases[111] concluded that "access to justice is an integral part of art 8(1)."[112]

Using the harmonious construction, the Federal Court affirmed but limited the Court of Appeal's view on this point. According to the Federal Court:

> "… access to justice under art 8(1) is a general right which can be fulfilled only by laws enacted conferring jurisdiction and powers on the courts under the specific authority contained in art 121(1). While art 8(1) deals with the right per se art 121(1), on the other hand, confers power on Parliament to set up an institutionalized mechanism with power and jurisdiction to determine the extent and manner in which that right should be exercised. Articles 8(1) and 121(1) are therefore not in conflict but complement each other. The jurisdiction and power of the courts as provided by law is clearly the dominant element that determines the boundaries of access to justice. Article 8(1) cannot therefore be read in isolation. As both the provisions of the Constitution bear upon the same subject, they must be read together and be so interpreted as to effectuate the great purpose of the instrument, that is to say, the Federal Constitution. The rule of harmonious construction therefore demands that both the provisions be so construed as to give meaning and effect to them with the result that access to justice shall be available only to the extent that the courts are empowered to administer justice."[113]

In *Abad Arena Juara Sdn Bhd v. Rajesh Jaikishan*[114] the Court of Appeal reiterated that "access to justice is a fundamental right guaranteed under our Federal Constitution." As such "the public should not be deterred to seek justice through courts as access to justice stands as a fundamental guarantee."[115]

In *Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors*[116] the Court of Appeal warned that "no person should be shut out from access to justice…To deny any party the right to be heard in a court of justice to establish the facts and for a judgement made on the facts, is a denial of the fundamental elements of a fair and just decision."[117]

The Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor*[118]was of the view that "the protection afforded by arts 5(1) and 8(1) of the Federal

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[110] *Kekatong Sdn. Bhd v Danaharta Urus Sdn. Bhd* [2003] 3 MLJ 1.
[111] The Court of Appeal considered the following cases before concluding that access to justice is part of Article 8: *Pierson v Secretary of State for the Home Department* [1997] 3 All ER 577 (folld); *R v Secretary of State for the Home Department, ex parte Leech* [1993] All ER 539 *(folld) and Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 (folld) followed; *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 (refd) referred; *R v Lord Chancellor, ex parte Witham* [1997] 2 All ER 779.
[112] *Kekatong Sdn. Bhd* (n110),19,[A-B.]
[113] *Kekatong Sdn. Bhd v Danaharta Urus Sdn. Bhd* [2004] 2 MLJ 257, 269 to 270, [26].
[114] *Abad Arena Juara Sdn Bhd v. Rajesh Jaikishan* [2019] MLRAU 307.
[115] *Abad Arena Juara Sdn Bhd* (n114),[14].
[116] *Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors* [2014] 3 MLJ 661,CA.
[117] *Racha ak Urud* (n116),[27].
[118] *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289.

Constitution will be illusory" if an aggrieved person is prevented from going to court and seeking the relevant relief for his case.[119]

The principle stated by the Court of Appeal in *Sugumar* was later clarified in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* where the Federal Court held that 'access to justice' is a combined right of *Article 5 and Article 8* of the *Federal Constitution*. The court reasoned that when a person is affected by the law/ or a particular act(s), which affects the person's life, that person should have the right to approach the courts to challenge the said act and ask for a remedy or relief from the courts.[120]

Applying these principles, one can contend that in a sale by debenture, the chargor is prevented from bringing his case before a court or tribunal. This effectively prevents the chargor from exercising his constitutional right of access to justice, thereby breaching *Article 8(1)* of the *Federal Constitution.*

In *Thene Arulmani Chelvi a/p Arumugam v London Weight Management Sdn Bhd*[121] the Court of Appeal held that terms that prohibit or restrict a contracting party from seeking remedy against a defaulting party or a party in breach, amount to a prohibition of access to justice which must be struck down for violation of *section 29 [of the Contracts Act 1950*.][122] Viewed from a constitutional perspective, these terms also violate Article 8 of the Federal Constitution since the chargor's statutory right to challenge the sale of his property under the NLC[123] is not available to the chargor if the property is sold via debenture. Hence, a corporate chargor is not given the same protection *vis a vis* a chargor who is an individual.

Breaching Natural Justice- The Procedural Aspect of Article 8.

In *Datuk Haji Harun bin Haji Idris v Public Prosecutor*[124] the Federal Court had divided the equality provision in *Article 8(1)* into the substantive and procedural aspects. This view was affirmed in the decisions of the Court of Appeal in *Lim Guan Eng v Public Prosecutor and another appeal*[125] and *Mat Shuhaimi bin Shafiei v Public Prosecutor*.[126]

Other cases that adopted a similar position is the Court of Appeal's decision of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*[127] where the court held that '…the expression

[119] *Sugumar Balakrishnan* (n118), 308.
[120] "In Article 5(1), 'life' is not confined to mere animal existence. It encompasses an entire spectrum of rights integral to meaningful human existence. A law necessarily impacts the life of any person and where he is affected by it and seeks to challenge it, he – no matter whether he be a pauper or an aristocrat – has the same right as anyone else to approach the Courts for a remedy. It is here that we see Article 8(1) falling into place. Collectively when strung together, the two provisions formulate a principle which we now know to be 'access to justice'." *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] MLJU 15*,* [93]
[121] *Thene Arulmani Chelvi a/p Arumugam v London Weight Management Sdn. Bhd.* [2019] MLJU 856, CA.
[122] *Thene Arulmani Chelvi* (n121), [61].
[123] "… by virtue of subsection (3) of s. 256, the chargee, if his application shows the National Land Code preconditions for applying have been fulfilled, he is prima facie entitled to an order unless the existence of a cause to the contrary is shown. If the chargor thinks there exists a cause to the contrary, it is up to him to satisfy the court that it exists." Federal Court in *Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21*,* 40 at [B-C].
[124] *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, 165–166.
[125] *Lim Guan Eng v Public Prosecutor and another appeal* [2018] 1 MLJ 433, [19].
[126] *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145, [57].
[127] *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, 286.

'law' which appears in….. 8(1) of the Federal Constitution includes procedural law' and *Mat Shuhaimi bin Shafiei v Kerajaan Malaysia* where the Court of Appeal reminded us to that the equality which Article 8 seeks to govern include both substantive and procedural fairness.[128]

One of the many aspects of procedural law or fairness[129] is the concept of natural justice. In *Lee Kwan Woh v Public Prosecutor*[130] the Federal Court through his lordship Gopal Sri Ram, held that "the rules of natural justice, which is the procedural aspect of the rule of law, is an integral part of arts 5(1) and 8(1). In short, procedural fairness is incorporated in these two articles."[131]

In *Raja Abdul Malek Muzaffar Shah Bin Raja Saharuzzaman v Setiausaha Suruahanjaya Pasukan Polis & Ors*[132] the Court of Appeal speaking through his lordship Gopal Sri Ram again decided that procedural fairness, for which natural justice is a subset of has its roots in Article 8 of the Federal Constitution.[133] Hence, procedural fairness, it should be noted includes, but is not limited to the rules of natural justice.[134]

In *Alma Nudo Atenza v Public Prosecutor and another appeal*[135] delivering the decision on behalf of the Federal Court, his lordship, Richard Malanjum CJ had decided that the word "law" in Article 5(1) and *in other fundamental liberties provisions in the FC* [emphasis mine] must…be in tandem with the concept of rule of law…"[136] One of the concepts of the rule of law which the term 'law' must adhere to 'is the principles of natural justice and the right to a fair trial [which must be]…observed.'[137]

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[128] *Mat Shuhaimi bin Shafiei v Kerajaan Malaysia* [2017] 1 MLJ 436, 448,[32]. See also the Court of Appeal's decision in D*eputy Chief Police Officer, Perak & Anor v Ramesh a/l Thangaraju* [2001] 1 MLJ 161 wherein delivering the judgment of the Court of Appeal, Gopal Sri Ram JCA (as he then was), had this to say at pp 165 and 166 of the judgment, "It is, I think, settled beyond argument that procedural and substantive fairness are constitutionally guaranteed by the Federal Constitution. The cumulative operation of arts 5(1) and 8(1) of the Federal Constitution ensures this."

[129] Please take note that the cases have used the terms 'procedural law' and 'procedural fairness' interchangeably.

[130] *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 (FCt).

[131] *Lee Kwan Woh* (n130), [17].

[132] *Raja Abdul Malek Muzaffar Shah Bin Raja Saharuzzaman v Setiausaha Suruahanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308, CA

[133] "I prefer the term 'procedural fairness' to the traditional nomenclature 'rules of natural justice'. It is a concept that includes but is not limited to the rules of natural justice. It is a very interesting area of the law. When I commenced writing this judgment, I was sorely tempted to deal with the full breadth of the argument advanced by counsel. It would have involved, amongst other matters, an historical examination of the concept of procedural fairness, a discussion on the effect upon administrative actions of the humanizing provisions of art 8(1) as explained by the Privy Council in Ong Ah Chuan v PP [1981] AC 648 at pp 670–671; [1981] 1 MLJ 64 at pp 70–71 and, of course, a consideration of the full impact of the landmark decision in Dewan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697. It is, as I have said, a very interesting area of the law that has offered me much temptation to enter upon a discussion of it." *Raja Abdul Malek Muzaffar Shah Bin Raja Saharuzzaman* (n132), 315.

[134] *Raja Abdul Malek Muzaffar Shah Bin Raja Saharuzzaman* (n 132),316. See also Choo Chin Thye, 'The Role of Article 8 of the Federal Constitution in the Judicial Review of Public Law in Malaysia' [2002] 3 MLJ civ at pcxi.

[135] *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1.

[136] *Alma Nudo Atenza* (n135), [101] "Law", as defined in Article 160(2) of the Federal Constitution read with section 66 of the Interpretation Acts 1948 and 1967, includes the common law of England. The concept of rule of law forms part of the common law of England. The "law" in Article 5(1) and in other fundamental liberties provisions in the FC must therefore be in tandem with the concept of rule of law and NOT rule by law. (See: Lee Kwan Woh (supra) at paragraph [16]; *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at paragraph [17])."

[137] The Federal Court then proceeded to state the list of basic requirements the "law" in a system based on the rule of law must fulfill, though the requirements are 'by no means exhaustive.' a.it should be clear; b.sufficiently stable; c.generally prospective; d.of general application; e.administered by an independent judiciary; andf.the principles of natural justice and the right to a fair trial are observed. See *Alma Nudo Atenza* (n 135), [104 and 105].

In *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)*[138] the Federal Court referred to the decision of the Court of Appeal with approval when it reaffirmed the principle that the expression 'law' in *Article 8(1)* refers to a system of law that incorporates the fundamental principles of natural justice of the common law[139] subject however to the fact that the principle of natural justice is not absolute and Parliament can expressly exclude the principles of natural justice in specific circumstances.[140]

The cases above have conclusively shown that the concept of natural justice is firmly housed under the category of procedural law in the term 'law' in *Article 8(1)* of the *Federal Constitution*.
It was proven in the earlier part of this article that a sale by debenture has breached the concept of natural justice. Since natural justice is elevated to a constitutional position viz, *Article 8(1)* of the *Federal Constitution*, a breach of natural justice (which was proven above) will also lead to a breach of *Article 8(1)* of the *Federal Constitution*.

III) How Does a Breach of Article 8(1) Lead to a Breach of Article 13(1) of the Federal Constitution?

To determine the relationship between *Article 8(1)* and *Article 13(1)* of the *Federal Constitution*, the position of *Article 8(1)* within the context of the Federal Constitution must first be considered.

The Supremacy of Article 8(1) in the Federal Constitution

In *Dr. Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia*, the Court of Appeal had expressly declared that when "interpreting the other parts of the Constitution, the court must bear in mind the all-pervading provision of [Article] 8(1)]."[141] This view was approved by the Federal Court in *Badan Peguam Malaysia v Kerajaan Malaysia*[142] Again in *Lee Kwan Woh v*

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[138] *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257.

[139] "We would sum up our views on this part of the case as follows: (i) the expression 'law' in art 8(1) refers to a system of law that incorporates the fundamental principles of natural justice of the common law: Ong Ah Chuan v Public Prosecutor; (ii) the doctrine of the rule of law which forms part of the common law demands minimum standards of substantive and procedural fairness: Pierson v Secretary of State for the Home Department; (iii) access to justice is part and parcel of the common law: R v Secretary of State for the Home Department, ex parte Leech; (iv) the expression 'law' in art 8(1), by definition (contained in art 160(2)) includes the common law." *Danaharta Urus Sdn Bhd* (n138), 265, [8]

[140] "Article 160(2) must therefore be construed as referring to the common law which is in operation at the date of the Federal Constitution subject to it being modified at any time by any written law as provided by s 3(1). To that extent it is qualified and not absolute. The reference to common law in art 160(2) is therefore a reference to common law in that sense and it is in that sense that the right must be incorporated into art 8(1). As the continued integration of the common law right of access to justice into art 8(1) is dependent on any contrary provision that may be made by any written law as provided by s 3(1) it cannot amount to a guaranteed fundamental right. It is in the same position as in S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204 where it was held that the legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees" *Danaharta Urus Sdn Bhd* (n138), 267, [17].

[141] *Dr. Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, [8].

[142] "It is my respectful view that when interpreting our Federal Constitution, one must bear in mind the all-pervading provisions of art 8(1) (see *Dr. Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia*)." *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, [86].

Public Prosecuto[143]3 the Federal Court reiterated that the court must interpret the other provisions of the Federal Constitution in light of the humanising and all-pervading provision of Article 8(1). In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*[144] the Court of Appeal approved the famous case of *Maneka Gandhi v Union of India* where Article 14 of the Indian Constitution (which is in pari materia with Article 8(1) of the Malaysian Constitution) was declared by the Supreme Court of India to be the foundation and pillar of the Indian Constitution."[145]

In *Mahisha Sulaiha Abdul Majeed v Ketua Pengarah Pendaftaran & Ors and another appeal Article 8(1)* was subsequently elevated by the Court of Appeal as "one of the constituent pillars of fundamental rights under Part II of the Federal Constitution" as it "has an all-pervading influence on the interpretation of the rest of the Federal Constitution."[146]

The cases above and a string of other judicial decisions of high authority[147] have led an author to conclude that the brooding omnipresence of *Article 8* has placed this constitutional provision "in an unassailable position within the Federal Constitution."[148] As the capstone of the Federal Constitution, it is submitted that the judiciary *should always* [emphasis mine] consider Article 8 when it is interpreting any provisions of the Constitution.

Incorporating Article 8(1) of the Federal Constitution into the term 'Law' under Article 13(1).

Applying the harmonious construction approach, it can be argued that the sale of a property via debenture breaches *Article 13(1)* of the *Federal Constitution* because the chargor was dispossessed of his property in breach of the 'law' in its constitutional sense; in particular, the breach of *Article 8* of the *Federal Constitution.*

This argument finds its support in the following authorities.

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[143] *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 313. See also *Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors* [2000] 4 MLJ 107 where the Court of Appeal held at 117 that "[Article 6], like most other Articles of the Federal Constitution, must be read in the light of the humanising and all-pervading provisions of art 8(1)."

[144] *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

[145] "In Maneka Gandhi v Union of India, the Supreme Court of India explained the content and reach of art 14 of the Indian Constitution, which is in pari materia with art 8(1) of the Federal Constitution, as follows: Now, the question immediately arises as to what is the requirement of art 14: what is the content and reach of the great equalizing principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic." *Tan Tek Seng* (n144), 283-284.

[146] *Mahisha Sulaiha Abdul Majeed v Ketua Pengarah Pendaftaran & Ors* [2022] 5 MLJ 194, 290.

[147] Other cases include Federal Court decisions of *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] MLJU 887,[para 84[, *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] MLJU 280, [126], *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285,[86], *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277,[223]. See also the Court of Appeal decisions of *Mat Suhaimi Bin Shafiei v Public Prosecutor [2014] 2 MLJ 145;* [2013] MLJU 1342; [2014] 1 AMR 539; [2014] 5 CLJ 22,[47], *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213,[8] and *Public Prosecutor v Aluma Mark Chinonoso(Nigerian)* [2020] MLJU 694, [27] to name some.

[148] "As a constitutional provision, art 8 has been regarded as primus inter pares ('first among equals')…and transcends all other constitutional provisions. Article 8 is in an unassailable position at law if public law violations can be framed within its scope. It is the brooding omnipresence that tempers the action of public authorities and compels due observance of the rule of law." Choo Chin Thye, 'The Role of Article 8 of the Federal Constitution In the Judicial Review of Public Law in Malaysia'[2002] 3 MLJ civ at p. cxxvi.

In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*, the Court of Appeal extended the definition of the word "law" in *Article 160(2)* of the *Federal Constitution* to include the Federal Constitution and State Constitutions.[149]

This view was subsequently reinforced and clarified by the Federal Court in *Public Prosecutor v Kok Wah Kuan*[150] where the Federal Court decided that "Law as a whole in this country is defined in art 160(2) to include 'written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof". Further, 'written law' is defined in *Article 160(2) to include 'this Constitution and the Constitution of any State'.* (emphasis mine) It is obvious, therefore, despite the amendment, the courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the Federal Constitution, State Constitutions and any other source of law recognized by our legal system. The jurisdiction and powers of the courts cannot be confined to federal law."

The same position was affirmatively adopted by the Court of Appeal as recently as 2022 when it held that "[t]here is no dispute that 'law' (per art 160) includes the Federal Constitution."[151] Linking the Federal Constitution to the *Interpretation Acts 1948 and 1967*,[152] the Federal Court in *Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Ano*[153] observed that the word 'law' in *Article 160(2)* which includes 'written law' should also encompass the Federal Constitution since *Section 3* of the *Interpretation Acts 1948 and 1967* defines the meaning of 'written law' to include the Federal Constitution amongst others.

In *Samivellu v PP*[154] his lordship Mohammed Azmi J (as he then was) observed that

> "The term 'law' is defined both by art 160(2) of the Federal Constitution and Item (43C) of s 2(1) of the Interpretation and General Clauses Ordinance 1948 to include written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or in any part thereof. 'Written law' is defined by Item (97) of the Interpretation and General Clauses Ordinance 1948 to mean all Ordinances and Enactments in force in the Federation or any part thereof and all subsidiary legislation made thereunder and *includes the Federal Constitution*." (emphasis mine)

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[149] "And the expression 'written law' that appears within the definition above quoted is itself defined by the same article as follows: 'Written law' includes this Constitution and the Constitution of any State." *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan& Anor* [1996] 1 MLJ 261, 282 (CA)

[150] *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1, 21-22.

[151] *Mahisha Sulaiha Abdul Majeed v Ketua Pengarah Pendaftaran & Ors and another appeal* [2022] 5 MLJ 194, [237].

[152] Interpretation Acts 1948 and 1967 (Act 388).

[153] "The starting point to this question is the definition of the word 'law'. Article 160 of the Federal Constitution defines 'law' as to include '… written law, the common law in so far as it is in operation in the Federation or any part thereof'. Section 3 of the Interpretation Acts 1948 and 1967 (Act 388) further defines 'common law' as 'the common law of England'. The said section also defines the meaning of 'written law' which includes the Federal Constitution, Acts of the Federal Parliament, Emergency Ordinances by the Yang di-Pertuan Agong under art 150, Federal Subsidiary Legislation, 13 State Constitutions, Enactments and Ordinances of State Assemblies, State Subsidiary Legislations and local authority by-laws. *Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor* [2020] 4 MLJ 581, [34].

[154] *Samivellu v PP* [1972] 1 MLJ 28,29 This view was referred by the Court of Appeal in *Indah Water Konsortium Sdn Bhd v Yong Kon Fatt* [2007] 5 MLJ 250, [53].

Based on the authorities and legal principles presented above, it is submitted that the breach of *Article* 8(1) (which was proven above) will inevitably lead to a breach of *Article 13(1)* because the word 'law' in *Article 13(1)* encompasses the Federal Constitution, of which *Article 8(1)* is part of.

F) Interpreting Section 375(2)(a) of the Companies Act 2016 in Light of Article 13 of the Federal Constitution

S375(2)(a) of the Companies Act 2016 inter alia states that "Unless the instrument [which confers on the debenture holder the power to appoint a receiver or receiver and manager] expressly provides otherwise- (a) a receiver or receiver and manager is the agent of the company."[155] This section is a codification of the decision of the Federal Court in *Melantrans* where the Federal Court had decided that "….the provisions of the NLC prescribing for judicial sale could not apply to the facts in the instant appeal because the R&M was acting as agent of the chargor."[156]

It is submitted that *S375(2)(a)* of the *Companies Act 2016* being a general section governing the position of receivers and managers in relation to debentures must be read subject to the NLC if the security which the lender holds consists solely of or it includes real property. The condition(s) and/or regulations imposed by the NLC are additional conditions that the lender must comply with, over and above the registration of the charge under the *Companies Act 2016.*

Three reasons are provided in support of this opinion**.**

Firstly, it was resolved by the Federal Court in *Abdul Samad bin Hj Alias v The Government of Malaysia & Ors,*[157] that where there are conflicting provisions between two or more legislations and the question arises as to which of the two should govern the case, the court is duty bound to see the terms of which provisions are more appropriate in the circumstance of the case. The Federal Court proceeded to apply the principle of linguistic cannons of construction on the use of legal maxims, particularly the maxim of '*generalia specialibus non derogant'* – general statements or provisions do not derogate from special statements or provisions, or conversely, '*specialia derogant generalibus'* – special provisions derogate from general provisions.

In *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn. Bhd, In Liquidation)*[158] the Supreme Court had to consider whether the sales tax had priority of

[155] Companies Act 2016, s375(2) "Unless the instrument expressly provides otherwise— (a) a receiver or receiver and manager is the agent of the company; (b) a person appointed as a receiver may act as receiver and manager; or (c) a power conferred to appoint a receiver or receiver and manager includes the power to appoint— (i) two or more receivers or receiver and managers; (ii) a receiver or receiver and manager additional to a receiver or receiver and manager in office; and (iii) a receiver or receiver and manager to replace a receiver or receiver and manager whose office has become vacant."
[156] *Melantrans* (n2), 210.
[157] *Abdul Samad Bin Hj Alias v The Government of Malaysia & Ors* [1996] 3 MLJ 581, 590.
[158] *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn. Bhd, In* Liquidation) [1995] 2 MLJ 600 *(FCt)*

payment over preferential payments and the claims of the debentures holders pursuant to the relevant provisions in the *Companies Act 1965* (then), the *Sales Tax Act 1972*[159] and the *Government Proceedings Act 1956*.[160] Applying the maxim of *specialia generalibus derogant* the Federal Court decided that the *Companies Act of 1965* which specifically dealt with companies prevailed over the general provisions of the *Government Proceedings Act 1956*.[161]

Applying the ratios of the Federal Court in *Abdul Samad Bin Hj Alias* and Supreme Court in *Ler Cheng Chye* above onto debentures, it is asserted that where the security of the debenture comprises wholly or partly of land, the specific legislation of the NLC should prevail over *S375 (2)(a) of the Companies Act 2016* which is a general provision governing the position of receivers and managers in relation to debentures generally.

This opinion also finds its support in the Federal Court decision of *K. Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn. Bhd. v MBF Finance Bhd & Anor*.[162] In *K Balasubramaniam,* the Federal Court distinguished *Kimlin* on the grounds that *Kimlin*[163] "was concerned with land charged under the National Land Code 1965 ('the Code')' whereas the security in *K Balasubramaniam* only consisted of movable properties.[164] Following the decision of *K Balasubramaniam,* one can conclude that if the security involved includes immovable property, the sale must be conducted by way of the NLC.

This view was reiterated by the Court of Appeal in *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor*[165] where his lordship Low Hop Bing decided that the sale which was conducted by the Chargee via the power of attorney in the debenture was invalid because it did not go through a judicial sale which was mandated by the *National Land Code 1965*. According to his lordship:

"In the present case the power of attorney is a security and the donee/chargee, as agent, had used the authority under the power of attorney not for the benefit of their principal, the donor/chargor, but for their own benefit to achieve the objective of the debenture arrangement between the donor/chargor and the donee/chargee. Therefore, in fact and in law the sale must be deemed to have been affected or undertaken by the chargee rather than by the chargor. It was only a legal formality that the chargor was named as the vendor in the sale and purchase agreement as the sale was made pursuant to the power of attorney. Since the sale was undertaken or effected by the chargee and not by the chargor then legally it should have been affected in accordance with the provisions of the National Land Code

[159] Sales Tax Act 1972, ss6(a), s22(2),s23, s69(1) and 70.
[160] Government Proceedings Act 1956, s10(1),(2).
[161] "s 292(1) of the Companies Act 1965 must be read as an exception to the general provision of s 10(1) of the Government Proceedings Act 1956" *Director of Customs, Federal Territory* (n158), 611.
[162] *K. Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn. Bhd. v MBF Finance Bhd & Anor* [2005] 2 MLJ 201.
[163] *Kimlin* (n75)
[164] "Kimlin did not consider the effect of ss 233(1) and 277(5) of the Act and there was no necessity for Kimlin to do so, as the subject matter was land charged under the Code and which the then Supreme Court held could only be sold by the receiver and manager under the provisions of the Code by way of a judicial sale." *K. Balasubramaniam* (n162),[36]
[165] *Lim Eng Chuan Sdn. Bhd. v United Malayan Banking Corp & Anor* [2011] 1 MLJ 486.

pertaining to the charges. In other words, there should have been a judicial sale. Since the sale was not a judicial sale under the Code, therefore, the sale was invalid."[166]

The final argument is found in the rules of construction, particularly the rule on harmonious constructions of statutes which requires amongst others different statutes that relate to the same issue to be interpreted harmoniously.

In *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased),*[167] the Court of Appeal had decided that " [the] concept of harmonious construction of statutes has two parts, one is harmonious construction in relation to the various provisions of the statute itself and the other part is in relation to other statutes."[168]

According to the Court of Appeal, this doctrine is invoked when a conflict arises between the parts or provisions of the statute *or between two or more statutes*.(emphasis mine) The Court of Appeal in *Tebin bin Mostapa* had also imposed a caveat on the application of harmonious construction, saying that "a construction that reduces one of the provisions to a 'useless lumber' or 'dead letter' is not harmonious construction."[169]

According to the Federal Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi Mukhtar,*[170] the doctrine of harmonious construction requires legislations to be construed in a way that would achieve a harmonious result, which method should coherence in the law.

By applying the rule of harmonious construction between *S375 (2)(a) of the Companies Act 2016* and the NLC, it is argued that provisions of the NLC (including the requirement of judicial sale) will only be applied where the security of the lender comprises wholly or partly of land. This interpretation will result in the NLC complementing the Companies Act 2016 and vice versa. Any other interpretation will make the NLC a '*useless lumber'* or '*dead letter.'*

Conclusion

When measured against the Federal Constitution, this article has demonstrated that the decision of the Federal Court in *Melantrans* which was later codified in *S375 (2)(a) of the Companies Act 2016* has contravened two constitutional provisions in the Federal Constitution: namely *Article 8(1)* and *Article 13(1).*

[166] *Lim Eng Chuan Sdn. Bhd.*(n165), 521.
[167] *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2017] 5 MLJ 771 (CA)
[168] *Tebin bin Mostapa* (n167), 796.
[169] *Tebin bin Mostapa* (n167), 797.
[170] *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi Mukhtar* [2020] 1 CLJ 123, [79]. This principle was affirmed by the subsequent Federal Court decision in *Majlis Perbandaran Seremban v Tenaga Nasional Berhad* [2020] MLJU 1680.

To solve this conundrum, it is submitted that *S375 (2)(a) of the Companies Act 2016* should therefore be read in conjunction and subjected to the NLC. Doing so will preserve the legality of *S375(2) of the Companies Act 2016* and allow both the Companies Act 2016 and the NLC to complement each other.