# Insolvency law through the lens of human rights theories

**Dr. Eugenio Vaccari* and Dr. Tara Van Ho****

## <a> Introduction

What would insolvency[1] look like if we imagined it behind a Rawlsian veil of ignorance?[2] Would it be a system designed to promote the common good at the expense of individual entitlements?[3] Or would it be a system where pre-insolvency entitlements are impaired only when strictly necessary to maximise net asset distributions to creditors?[4] Who would be protected by this system? Would it be creditors and workers only or would larger groups of stakeholders feature?

The purpose(s) of insolvency law has been debated for decades. Scholars have traditionally argued that in insolvency procedures, rational people would choose a course of action that promotes either efficiency and/or equality.[5] With few notable exceptions,[6] the efficiency-equality dichotomy has never been challenged. In this Chapter, we challenge that dichotomy by bringing together Fineman's vulnerability theory and the principles and tools of Business and Human Rights (BHR).[7] In doing so, we establish a stronger normative and practical argument for an equitable approach to insolvency law.

At the heart of the competing philosophies of insolvency is a concern over Jackson and Baird's 'common pool problem':[8] if a pool is commonly owned without a controlling mechanism, self-interested co-owners will fish without restraint. In doing so, they will deplete the pool to unsustainable levels and undermine the common interests in the lake. Applied to insolvency, this means that if individual creditors were allowed to act in their own self-interest, they would

* Senior Lecturer in Law at Royal Holloway, University of London (UK).
** Senior Lecturer in Law, Essex Law School and Human Rights Centre, University of Essex (UK).

The Chapter covers literature and case law published before 1 November 2022. The authors are grateful to Drs Jennifer LL Gant (University of Derby), Dimitrios Kyritsis and Jessica Lawrence (both University of Essex), and participants in the Global Business and Human Rights Scholars Association 2023 workshop for their insightful comments on earlier drafts of this Chapter. The final version of this Chapter also reflects an INSOL Talk with Dr Gant and Chrystin Ondersma (Rutgers University) <https://www.insol.org/Focus-Groups/Academic-Group/Events-and-Podcasts>. The usual disclaimers apply.

[1] We use 'bankruptcy' to refer to procedures involving individuals, and 'insolvency' to corporate ones.
[2] J Rawls, *A Theory of Justice* (Harvard University Press 1971). Please see chapter 7 of this book for a detailed discussion of 'A Rawlsian Approach to Insolvency Law' by Stathis Potamitis and Xenophon Paparrigopoulos.
[3] E Warren, 'Bankruptcy Policy' (1987) 54(3) U Chi L Rev 775; K Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72(3) Wash U LQ 1031.
[4] TH Jackson and RE Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75(2) Va L Rev 155.
[5] ibid 178.
[6] BE Adler, 'A Theory of Corporate Insolvency' (1997) 72(2) NYU L Rev 343; A Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107(6) Yale LJ 1807.
[7] K Udofia, 'Treatment of Employees in Corporate Insolvencies: An International Human Rights Law Perspective' (20 May 2019) <https://www.pressreader.com/nigeria/thisday/20190416/282033328588071> accessed 1 November 2022.
[8] TH Jackson, *The Logic and Limits of Bankruptcy Law* (Beardbooks 1986) 11-13; DG Baird and TH Jackson, *Cases, Problems and Materials on Bankruptcy* (Foundation Press 2020) 39-43.

undermine the collective interest of the group.[9] In response, procedural collectivists argue that creditors should be treated as a singular class sharing rateably in the proceeds generated by the sale of a debtor's assets. In their view, the purpose of insolvency is to maximise creditors' returns, principally by means of the distribution of the debtor's assets.[10]

Collectivity denies a legal right to pursue individual remedies against the debtor. This is because all creditors—despite not being affected in the same manner—are faced with a 'common disaster': the fact that there is not enough money to repay creditors as a going concern.[11] This approach to collectivity is a 'central and seemingly indispensable feature' of insolvency law.[12]

Proceduralists argue that individual contracts (or pre-insolvency entitlements) should remain unaffected by the insolvency proceedings.[13] If this were not the case, parties would be incentivised to use insolvency law in a strategic manner.[14] It follows that a proceduralist system characterised by across-the-board redistributions is preferable to individualised distributional policies, as the former allows for the maximised net assets for distributions to creditors.[15] The issue with their theoretical approach—and much of the debate that followed[16]—has been an attempt to collectivise people's (and companies') thinking. In the proceduralist narrative, 'variation of insolvency rights is only justified when those rights interfere with group advantages associated with creditors acting in concert'.[17]

Jackson's approach to collectivity has stood the test of time as the most prominent mechanism within insolvency law. However, a case has been made for a more informed understanding of collectivity using path-dependency and historical institutionalism methods.[18] Other scholars have powerfully and convincingly argued that insolvency law is not and should not be a one-purpose system, meaning that it should serve interests other than simply maximising creditors' returns.[19] Those that espouse value-informed communitarian approaches suggest that high-priority creditors such as fixed and floating charge holders should share their entitlements with low-ranking creditors. In this Chapter, we augment the current debates by bringing together a BHR-based critique with the socio-legal concept of vulnerability to suggest amendments to the proceduralist understanding of the purpose and limits of corporate insolvency law. In doing so, we call for expanding the concerns accounted for when seeking Pareto and Kaldor-Hicks efficiency in insolvency or restructuring procedures.[20]

---

[9] Baird and Jackson (n 8).
[10] K Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (Yale University Press 1997); C Frost, 'Bankruptcy Redistributive Policies and the Limits of the Judicial Process' (1995) 74(1) NC L Rev 75.
[11] Report of the Review Committee, *Insolvency Law and Practice* (Cm 8558, June 1982) para [232].
[12] RJ Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005) 33.
[13] Jackson and Scott (n 4) 161, 202.
[14] ibid 161.
[15] ibid 202.
[16] A Duggan, 'Contractarianism and the Law of Corporate Insolvency' (2005) 42(3) Can Bus LJ 463; RJ Mokal, 'Contractarianism, Contractualism, and the Law of Corporate Insolvency' (2007) 1 Sing J Legal Stud 51.
[17] V Finch and D Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017) 29; Jackson (n 8); BE Adler, 'The Creditors' Bargain Revisited' (2018) 166(7) U Pa L Rev 1853.
[18] E Vaccari, 'OW Bunker: A Common Law Perspective on Multi-lateral Co-operation in Insolvency-Related Cases' (2017) 28 ICCLR 245; E Vaccari, 'The Ammanati Affair: Seven Centuries Old, and not Feeling the Age' (2018) 93(3) Chi-Kent L Rev 831 (Vaccari, 'Ammanati').
[19] Warren (n 3) 800.
[20] See also Mokal (n 16) 54-7.

This Chapter's primary value lies in rephrasing the theoretical debate on the purpose(s) of corporate insolvency law by employing Fineman's vulnerability theory and international human rights law (IHRL) to challenge current approaches to collectivity. Scholars have considered the relevance of Fineman's vulnerability theory to corporate distress scenarios.[21] However, to date there have been no attempts to combine a human rights critique with Fineman's vulnerability theory within the context of a proceduralist understanding of the purpose of insolvency law. As we explain below, Fineman's theory can assist in challenging and deconstructing the underpinning assumptions in insolvency law, but it is not well-designed to offer an alternative reconstruction of the law. For that, we turn to IHRL and its subfield of BHR.

There have been attempts to apply a human rights approach to consumer bankruptcy situations, the proceduralist tenets of bankruptcy,[22] and occasionally insolvency law.[23] These attempts have principally drawn on the UK Human Rights Act 1998 (HRA 1998), the future of which is uncertain[24] and the focus of which was to regulate vertical relationships between the state and the individual.[25] This naturally limits the relevance of the HRA 1998 for insolvency law matters. In contrast, the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) were specifically designed to consider the horizontal impacts on human rights stemming from conduct that might normally be considered a 'purely private' matter, like insolvency or employment contracts. The UNGPs are the most authoritative statement on the international obligations in relation to business impacts on human rights. Non-binding in their own right, the UNGPs reflect existing international law on state obligations[26] while their expectations for businesses have been incorporated into numerous international and domestic legal frameworks.[27] This Chapter brings together insolvency and BHR expertise to draw attention to the distributional and allocative issues raised by insolvency cases and identifies alternative practices to address inequalities in insolvency scenarios.

In the remainder of the Chapter, we first outline current competing narratives in insolvency law. After examining the concepts of procedural collectivity and natural egality, including a

---

[21] See JLL Gant, 'Optimising Fairness in Insolvency and Restructuring: A Spotlight on Vulnerable Stakeholders" (2022) 31(1) IIR 1; 'Floating Charges and Moral Hazard: Searching for Fairness for Involuntary and Vulnerable Stakeholders' in J Hardman and A MacPherson (eds), *The Floating Charge in Scotland: New Perspectives and Current Issues* (EE Publishing 2022); 'Vulnerability, Resilience, and Employees: Can a Higher Degree of Fairness be Achieved by Looking Beyond Traditional Insolvency Norms?' in J Harris (ed), *Insolvency: A Research Agenda* (Elgar 2023) (forthcoming); 'Reconsidering Fairness for Vulnerable and Involuntary Stakeholders in Insolvency and Restructuring' in E Vaccari and E Ghio (eds), Insolvency Law: Back to the Future? (INSOL Europe 2022) (Gant, 'Reconsidering Fairness') and Chapter 11 of this book on 'Vulnerability and Insolvency Law'.

[22] N Pike, 'The Human Rights Act 1998 and its Impact on Insolvency Practitioners' (2001) 1(Feb) Insolv L 25; W Trower, 'Human Rights: Article 6 – The Reality and the Myth' (2001) 2(May) Insolv L 48; M Simmons, 'Human Rights and Insolvency: An Update' (2001) 17 IL & P 203; PJ Omar, 'Insolvency Law and Human Rights: An Update' (2009) 6 Int CR 369; C Ondersma, 'Overlooked Human Rights Concerns in the Restructuring and Insolvency Context' in PJ Omar and JLL Gant (eds), *Research Handbook on Corporate Restructuring* (EE Publishing 2021) 466.

[23] J Ulph and T Allen, 'Transactions at an Undervalue, Purchasers and the Impact of the Human Rights Act 1998' (2004) Jan JBL 1; J De Lacy, 'Company Charge Avoidance and Human Rights' (2004) Jul JBL 448.

[24] Ondersma (n 22) 466; C Ondersma, 'A Human Rights Framework for Debt Relief' (2014) 36(1) U Pa J Int'l L 269; C Ondersma, 'A Human Rights Approach to Consumer Credit' (2015) 9(2) Tul L Rev 373.

[25] Human Rights Act 1998, arts 6, 8-9.

[26] M Krajewski, 'The State Duty to Protect Against Human Rights Violations through Transnational Business Activities,' (2018) 23 Deakin Law Review <https://ojs.deakin.edu.au/index.php/dlr/article/view/804> accessed 1 November 2022.

[27] UN Working Group on Business and Human Rights, 'Guiding Principles on Business and Human Rights at 10: Taking Stock of the First Decade,' UN Doc A/HRC/47/39 (2021).

discussion of their theoretical and practical limitations, we consider calls for reform through the modular approach and the team production theory of insolvency and briefly examine how English courts have used the principles of equity and fairness to date. Finally, we introduce Fineman's vulnerability theory to deconstruct insolvency law, and IHRL and BHR to offer a means of reconstructing the legal framework.

## <b> The debate on procedural collectivism, natural equality, and equity

Collectivity is one of the defining factors of insolvency proceedings, providing for a singular or universal treatment of debtors in the name of Pareto efficiency and egality.[28] In this section, we explore the traditional understanding of collectivity as well as efforts to challenge or modify such vision through the modular approach and the team production theory. We explain the shortcomings of the current understanding of this notion, leading us to explore an IHRL-based approach in the remainder of the Chapter.

## <b> Traditionalist understandings of collectivity

Proceduralist scholars view 'collectivity' in negative terms, as the absence of individual remedies.[29] These academics argue that should rational creditors be placed behind a Rawlsian veil of ignorance, they would not favour solutions that benefit the fastest, most skilled and most sophisticated of them.[30] Instead, they would opt for approaches that equally share the burden of the debtor's failure on all the debtor's creditors. As such, the proceduralist egalitarian notion of collectivism has developed with the following three tenets:

1. insolvency proceedings must address the claims of all the company's creditors;
2. creditors have *in lieu* rights in insolvency proceedings;
3. creditors of equal standing have equal rights.[31]

Necessary corollaries to the proceduralist approach are cost-effective[32] and strictly rateable[33] distributions of debtors' assets (*pari passu* distribution) to minimise the 'common pool problem' by limiting individual, self-interested and value-destroying actions.[34] The common pool problem is seen as a multi-party version of the 'prisoner's dilemma'[35] where the rational involved parties realise that individual actions such as the enforcement of their claims against the debtor will deplete the pool of assets available for distribution while increasing procedural costs. Nevertheless, these creditors are pushed to betray the common good for a (potentially) individual larger gain. Proceduralism is a mechanism to limit individual, self-interested and value-destroying actions.

---

[28] H Eidenmüller, 'What is an Insolvency Proceeding?' (December 2016) Law Working Paper no 335/2016 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712628#> accessed 1 November 2022.
[29] K van Zwieten, *Goode on Principles of Corporate Insolvency Law* (Sweet & Maxwell 2019).
[30] Jackson (n 8) 17.
[31] H Anderson, *The Framework of Corporate Insolvency Law* (OUP 2017) 20.
[32] TH Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91(5) Yale LJ 857, 862; Anderson (n 31) 3.
[33] R Mokal, 'The Authentic Consent Model: Contractarianism, Creditor's Bargain, and Corporate Liquidation' (2001) 21(3) Legal Studies 400, 421.
[34] Against: A Flessner, 'Philosophies of Business Bankruptcy Law: An International Overview' in JS Ziegel (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (OUP 1994) 25-6.
[35] W Poundstone, *Prisoners' Dilemma* (OUP 1993); RC Picker, 'Security Interests, Misbehaviour, and Common Pools' (1992) 59(2) U Chi L Rev 645, 648.

One of the main problems with this view of 'collectivity' lies in the exceptions recognised to its operation. For instance, there are frequent deviations from the absolute priority rule.[36] This rule mandates that lower ranking creditors are entitled to distribution only if higher ranking ones are paid in full.[37] Some of these exceptions are warranted by the law through the introduction of preferential treatments for categories of creditors.[38] Additionally, where a suspension of enforcement rights is offered as an option rather than as a necessary corollary of the statutory procedure,[39] parties seem reluctant to make use of it.[40] This behaviour impliedly dismisses the proceduralist argument that creditors behind a Rawlsian veil of ignorance would opt for collective procedures and reinstates the centrality of the prisoner's dilemma.

It may not always be necessary to depart from the collectivist narrative to protect pre-insolvency entitlements whilst promoting the public interest[41] or the preservation of value for selected creditors and the economy.[42] As stated elsewhere, 'equitable concepts could be employed to introduce a more nuanced understanding of the notion of 'collectivity''.[43] This approach would embrace collectivity while challenging the proceduralist, egalitarian notion of collectivism.

As noted above, the proceduralist egalitarian notion of collectivism rests on three tenets.[44] One outstanding point is to determine how essential it is that creditors have *in lieu* rights, and that creditors of equal standing have equal rights (points (2) and (3) above). English courts primarily focus on the first element, limiting the prominence of the other ones. In *Re 19 Entertainment*, the Court was asked to recognise a foreign insolvency proceeding.[45] It determined that a foreign insolvency proceeding was one 'in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation.'[46] As such, the Court demonstrated a concern only for the first element of the English test, whether the proceedings address the concerns of all creditors.

This light-touch understanding of procedural collectivity has been advocated in other judgments,[47] although occasionally there have been instances where English courts have

---

[36] A Casey, 'The Creditors' Bargain and Option-Preservation Priority in Chapter 11' (2011) 78(3) U Chi L Rev 759; in contrast see DG Baird, 'Foreword: The Creditors' Bargain – Past, Present and Future' in BE Adler (ed), *Research Handbook on Corporate Bankruptcy Law* (EE Publishing 2020) xxiv.
[37] Bankruptcy, 11 US Code § 1129(b)(2)(B)(ii).
[38] With limited exceptions, pre-insolvency contractual preferential treatments are unaffected. The key provisions on preferences in liquidation procedures are ss 174A-176A Insolvency Act 1986 (IA 1986).
[39] Part A1 moratorium, introduced by Corporate Insolvency and Governance Act 2020 (CIGA 2020).
[40] Between 26 June 2020 and 31 May 2022, in England & Wales only 38 Part A1 moratoria were obtained, significantly lower than the Government's expectations. Compare: The Insolvency Service, *Commentary – Monthly Insolvency Statistics May 2022* (17 June 2022) <https://www.gov.uk/government/statistics/monthly-insolvency-statistics-may-2022/commentary-monthly-insolvency-statistics-may-2022>; *Final Impact Assessment,* <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf> both accessed 1 November 2022.
[41] M Stubbins, 'What Kind of World Are We Living in? Creditor Wealth Maximisation, Contractarianism or Multiple Value in the Post-Enterprise Act 2002 Insolvency Regime' (2019) 32 Insolv Int 78, 79.
[42] C Lamont, 'Re-structuring Leasehold Estates under Chapter 11 of the US Bankruptcy Code and in England and Wales – a Comparison' (2018) 31 Insolv Int 69, 70.
[43] Vaccari, 'Ammanati' (n 18) 831.
[44] Jackson (n 8).
[45] *Re 19 Entertainment Ltd* [2016] EWHC (Ch) 1545, para [14].
[46] ibid.
[47] *Re Lines Bros Ltd* [1983] Ch 1 at 20; *Re Stanford Int'l Bank Ltd* [2010] EWCA (Civ) 137.

adopted more 'robust' views of the notion of collectivity.[48] The European Union's (EU) *Virgos-Schmit Report* also adopts a light-touch notion of 'collectivity' by stating that a 'collective action needs clearly determined legal positions to provide for an adequate bargaining power' for the affected creditors.[49] As such, the second and third tenets of procedural collectivity are left aside.

Unfortunately, in approaching the notion of collectivity, English courts adopt an unwarranted narrow focus on one specific category of stakeholders, the company's creditors. In *OGX*, albeit in an *obiter dictum*, the High Court clarified that the right to be heard cannot be invoked by any claimant.[50] For a procedure to be considered collective, only directly affected parties, meaning the company's creditors, should be included in a bankruptcy proceeding.[51] This is not and should not be the only possible approach.

## <b> The UNCITRAL approach

The UNCITRAL Guide to Enactment of the Model Law on Cross-Border Insolvency (the Guide) expressly states that collectivity should result in coordinated, global solutions for all *stakeholders* of an insolvency proceeding.[52] Achieving collectivity may mean that classes of creditors are subject to differential treatments.[53] The same concept was later restated by the European Preventive Restructuring Directive[54] and in the UK by CIGA 2020. In other words, the notion of collectivity refers to the nature of the procedure.

Because (classes of) stakeholders can be treated differently to achieve collective outcomes, there is no need for procedures to be egalitarian. On the contrary, the Guide expressly allows affected 'creditors'—an unfortunate limitation—the right to submit claims, participate in the procedure and receive an equitable distribution.[55] As the Guide suggests, if collective procedures are simply those insolvency proceedings that address the claims of all the company's stakeholders, what is needed to make a collective framework individualist-maximiser and difference-enhancer?

## <b> Towards a modular approach

Insolvency scenarios raise challenges that go beyond traditional common pool problems. These include anti-common issues, occurring whenever the use of a resource for the stakeholders' best interest is prevented by a veto power exercised by a minority of players.[56] Anti-common

---

[48] *Rubin v Eurofinance SA* [2012] UKSC 46; *PricewaterhouseCoopers v Saad Investments Ltd* [2014] UKPC 35/5.
[49] EU Council reference 6500/1/96, REV1, DRS 8 (CFC), 3 May 1996, para [8].
[50] *Nordic Trustee ASA v OGX Petróleo e Gás SA* (*Re OGX Petróleo e Gás SA)* [2016] EWHC (Ch) 25.
[51] ibid, para [50].
[52] UN Commission on Int'l Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014), [69] <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> accessed 1 November 2022.
[53] ibid [70].
[54] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18.
[55] ibid [70].
[56] RJ de Weijs, 'Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool and Anticommons' (2012) 21(2) IIR 67.

practices may lead to underuse or sub-optimal use of the assets and have led to the adoption of mechanisms such as the cross-class cram-down.[57] There are also semi-common issues, described as 'encompassing the tragedies of both the commons and the anti-commons'[58] because the deflective behaviour of one party proportionately harms both that party and every other member in the group. Finally, there are free rider issues whenever an interested stakeholder decides to 'wait-and-see', to reap the benefits from the interventionist approach of other stakeholders whilst not putting any efforts towards achieving a commonly beneficial goal.[59]

The acknowledgment of what we call 'revised common pool dilemmas'[60] suggests the need for alternative principled approaches capable of being translated into corporate distress rules that results in less conflicting and more equitable deviations from proceduralist tenets. Drawing on broader scholarship advocating for contractualising social problems in a manner that avoids both statist and market-oriented approaches,[61] Schillig called for contractualising insolvency law.[62] For various reasons, attempts at doing this have failed,[63] making it even more pressing to develop a principled recalibration of insolvency law.

One such approach is the modular view of corporate insolvency law.[64] The proponents of a modular approach argue that the need for cost-effective and timely insolvency procedures requires deviating from 'one-size-fits-all' assumptions.[65] Insolvency frameworks should be flexibly and modularly designed to distinguish between viable and non-viable businesses; address the issues of cross-over of commercial and personal insolvency; and recognise different cultural, social, and economic norms.[66] Such an approach is especially promising when it comes to protecting the interests of 'vulnerable' categories of debtors, such as sole entrepreneurs and micro and small enterprises.[67] In fact, the procedures involving smaller enterprises may benefit from diminished procedural requirements and additional attention to unique issues, such as the personal implications of those corporate failures.[68]

## <b> The team production theory

[57] This is when a restructuring plan is made binding on one or more dissenting classes of creditors.
[58] LA Fennel, 'Commons, Anticommons, Semicommons' in K Ayotte and HE Smith (eds), *Research Handbook on the Economics of Property Law* (EE Publishing 2011) 17.
[59] S Grossman and O Hart, 'Takeover Bids, the Free Rider Problem, and the Theory of the Firm' (1980) 11(1) Bell Journal of Economics 42.
[60] This taxonomy was first introduced by E Vaccari, 'Insolvency Statutory Rules and Contractual Freedom: A Study on the Limits of Corporate Insolvency Law in the Anglo/American Tradition' (PhD Thesis, City, University of London 2018).
[61] M Schillig, 'Corporate Insolvency Law in the Twenty-First Century: State Imposed or Market Based?' (2014) 14(1) JCLS 1.
[62] ibid.
[63] DG Baird, 'A World Without Bankruptcy' (1987) 50(2) Law & Contemp Probs 173; BE Adler, 'A World Without Debt' (1994) 72(3) Wash U LQ 811; Schwartz (n 6).
[64] RB Davis et al, *Micro, Small and Medium Enterprise Insolvency: A Modular Approach* (OUP 2017).
[65] ibid; E Vaccari, 'A Modular Approach to Restructuring and Insolvency Law: Executory Contracts and Onerous Property in England and Italy' (2022) 31 Norton Journal of Bankruptcy Law and Practice (West) 534.
[66] Vaccari (n 65).
[67] See Davis (n 64).
[68] A successful example is the Small Business Reorganization Act of 2019. For an analysis of the approach taken by other jurisdictions, see (among others): E Vaccari, D Ehmke and F Burigo, 'MSMEs in Distress: Regulatory Costs and Efficiency Considerations in the Implementation of Preventive Restructuring Mechanisms. An Anglo-German-Italian Perspective' (2023) J Int'l & Comp L (forthcoming).

Another complementary approach that builds on the 'team production theory of corporate law'[69] is to better value those who make company-specific commitments.[70] Many corporations often entail multiple internal and external actors involved in 'joint value creation'.[71] Similarly, LoPucki argues that corporations should be seen as production teams where their constituents or team members (creditors, managers, workers) delegate the board of directors to act for the benefit of the company and subordinate their legal rights to the preservation of the entity's going concerns.[72] Because of their membership, these theorists claim 'team members' such as employees are entitled to something more than compensation for their work.[73] As such, the corporation's representations should favour policies that respect worker's rights, such as prioritising reorganisations over pre-insolvency entitlements or asset distribution and creditor maximisation.[74] According to the managerialist underpinnings[75] of the team production conceptualisation, insolvency law should 'consider the value of an employee's firm specific human capital contribution to the debtor company and the natural dependencies that employees have on their employment and job security'.[76] As observed elsewhere, some salaried workers may contribute with 'more than just their labour for livelihood [in] service economies [and industries] requiring a high level of skill and intellect'.[77]

The team production theory shares similar underpinnings (law and economics background) with proceduralism. Despite being widely replicable and applicable,[78] it has so far lacked a cross-border dimension, as it has been influential primarily in the US academic and policy debate.[79] Evidence persuasively demonstrates that the team production framework operates best in private companies, primarily those with independent boards.[80] In insolvency contexts, the team production theory may be difficult to prove for large corporations with a dissatisfied workforce, because it is challenging to identify with sufficient accuracy the interests of the members of a production team and their individual contribution to the company.[81]

Furthermore, one of the major issues with the team-production approach is that it proves and assumes too much. The law should protect the constituents' interests to preserve the entity's going concern when there is evidence that those constituents worked towards that goal for a reasonably long period of time. When there is no such evidence, reliance on the team production approach lacks justification and corporations are better understood as pool of assets.[82] Additionally, corporations serve different purposes and address different issues in

---

[69] MM Blair and LA Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) Vand L Rev 247.
[70] JLL Gant, 'The Role of Social Policy in Corporate Rescue and Restructuring: A Messy Business' in PJ Omar and JLL Gant (eds), *Research Handbook on Corporate Restructuring* (EE Publishing 2021) 479.
[71] F Bridoux and JW Stoelhorst, 'Stakeholder Relationships and Social Welfare: A Behavioral Theory of Contributions to Joint Value Creation' (2015) 41(2) Academy of Management Review 229, 229.
[72] LM LoPucki, 'A Team Production Theory of Bankruptcy Reorganization' (2004) 57(3) Vand L Rev 741.
[73] AA Alchian and H Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62(5) Am Econ Rev 777; R Harris, 'The History of Team Production Theory' (2015) 38(2) Seattle UL Rev 537.
[74] LoPucki (n 72) 743. See also N D Martin, 'Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In' (1998) 59(2) Ohio State LJ 429, 439.
[75] J Burnham, *The Managerial Revolution: What is Happening in the World* (John Day Co 1941).
[76] Gant, 'Reconsidering Fairness' (n 21).
[77] Gant (n 70) 479.
[78] T Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1970) 23-24; 109-110.
[79] Limited exceptions apply: BR Cheffins and R Williams, 'Team Production Theory across the Waves' (2021) 74(6) Vand L Rev 1583.
[80] E Pollman, 'Team Production Theory and Private Company Boards' (2015) 38(2) Seattle UL Rev 619.
[81] LoPucki (n 72).
[82] For a comprehensive criticism, see AJ Meese, 'The Team Production Theory of Corporate Law: A Critical Assessment' (2002) 43(4) WM & Mary L Rev 1629.

different times and contexts. Hence, a generalised approach based solely on the team production conceptualisation may be unwarranted.

## <b> The need for a new approach

Insolvency procedures continue to be guided by economic paradigms. However, scathing criticism of creditors' wealth maximisation led Parliament to empower insolvency judges to craft flexible remedies capable of achieving fair, equitable and just results for the parties involved, especially in restructuring scenarios.[83] If the judiciary and practitioners focus on the concepts of vulnerability, resilience, fairness[84] and team-effort in interpreting the law, the law as practiced is sufficient to achieve equitable rather than egalitarian outcomes.[85]

An individualist-maximiser and difference-enhancer insolvency system would mitigate proceduralist tenets whenever this is needed to achieve substantially and procedurally fair outcomes for the benefit of vulnerable and firm-specific investors. This is only possible if achieving the stakeholders' interests and limiting their harm from the debtor's distress is viable.[86] Korobkin states that while an employee might have an interest in retaining their job, if the business is not viable the insolvency procedure cannot take a course of action that, ultimately, goes against the interests of many other claimants, including other vulnerable players.[87] Protecting nonviable interests by attempting to rescue unviable businesses is not a sound way of reducing stakeholders' vulnerability.[88]

While we agree with Korobkin's observation, we believe that it is possible to strengthen the case for a revised understanding of the procedural nature of insolvency law by conducting a critique of its collective foundations based in vulnerability theory and IHRL.

## <a> Justice and equity in English liquidation procedures

Before turning to Fineman's vulnerability theory and IHRL, it is instructive to look at English courts' interpretation of the notion of justice and equity in liquidation procedures. The purpose of this exercise is to assess if and to what extent English courts depart from proceduralist tenets, as well as if and to what extent more detailed guidance is needed.

Pursuant to the IA 1986, companies can be wound up by the court if the judicial authority is of the opinion that it is just and equitable to do so.[89] Courts are required to balance competing

---

[83] S Paterson, 'Judicial Discretion in Part 26A Restructuring Plan Procedures' (24 January 2022) <https://ssrn.com/abstract=4016519> accessed 1 November 2022.

[84] For the notion of fairness, see (among others): JLL Gant, 'Reconsidering Fairness for Vulnerable and Involuntary Stakeholders in Insolvency and Restructuring' in E Ghio and E Vaccari (eds), *The Emerging New Landscape of European Restructuring and Insolvency* (INSOL Europe 2022) and the further references listed in (n 21). [I KNOW YOU PROBABLY NOTICED IT AND YOU INCLUDED YOU ARTICLE TO HIGHLIGHT IT, BUT ALSO THE FIRST ARTICLE IS INCLUDED IN FTN 21. I AM HAPPY TO LEAVE THE REFERENCE AS IT IS, IF IT IS COMPLIANT WITH OSCOLA]

[85] On the limited validity of proceduralist theories in the 'real world', see DR Korobkin, 'The Role of Normative Theory in Bankruptcy Debates' (1996) 82(1) Iowa L Rev 75, 113.

[86] DR Korobkin, 'Vulnerability, Survival, and the Problem of Small Business Bankruptcy' (1994) 23(2) Capital University L Rev 419.

[87] ibid.

[88] ibid.

[89] IA 1986, s123(1)(g) for registered companies, s124A(1) for petitions on grounds of public interest by the Secretary of State and s221(5)(c) for unregistered ones.

reasons and identify public policy interests by making a winding up order,[90] particularly where companies are solvent.[91] Yet, we are still left in the dark as to the criteria pursuant to which these 'matters' are assessed. Are vulnerability, resilience, fairness and team-effort considered in the discretionary exercise of the courts' powers?[92]

Based on the principles outlined in *Re PAG Management*,[93] courts have used their discretionary powers when this was expedient to protect the public, and even in the absence of any claim that the company was acting illegally.[94] To assess if the public interest is at risk, courts consider:

> all the relevant interests against each other in order to arrive at the just and equitable result, considering both those matters which constitute reasons why a company should be wound up compulsorily and those which constitute reasons why it should not.[95]

Overall, courts have been cautious in exercising their discretion. They have mainly relied on objectively ascertainable factors to employ their discretionary powers,[96] such as where it was proven that the debtor's actions lacked 'commercial probity'.[97]

Departures from strictly proceduralist approaches have occurred when the just and equitable winding up of a company was necessary to address a catastrophic loss of trust and confidence among the directors, such that the company's business could no longer be conducted.[98] In *Strathmore*, Newey J held that in exercising their discretion under the law, courts should consider the direct and indirect consequences arising from the conduct of the debtor, the respective sophistication and experience of the parties, and whether vulnerable parties were taken advantage of.[99] Equally, in *Yesilkaya*, the Court implemented a team production view of managerial relationships, but refused to grant the order because the petitioner did not come with 'clean hands'.[100] On that occasion, Prentis J made use of team production and instrumental fairness concepts to reach an equitable decision on the dispute, even though that meant not ordering the just and equitable winding up of the business.

This does mean that there is space for alternative considerations in the exercise of the courts' discretion. As aptly stated by Cawson QC in *Celtic*:[101]

---

[90] *Re Walter L Jacob & Co Ltd* (1989) 5 BCC 244, [61].
[91] ibid.
[92] A first, affirmative answer was given by M Bruckner, 'The Virtue in Bankruptcy' (2013) 45(1) Loy U Chi LJ 233. See also E Vaccari, 'Broken Companies or Broken System? Charting the English Insolvency Valuation Framework in Search for Fairness' (2020) 35(4) JIBLR 135; E Vaccari, 'Promoting Fairness in English Insolvency Valuation Cases' (2020) 29(2) IIR 285.
[93] *Re PAG Management Services Ltd* [2015] EWHC 2404 (Ch).
[94] *Re Senator Hanseatische Verwaltungsgesellschaft GmbH* [1997] 1 WLR 515, 522(h).
[95] *Secretary of State for BEIS v Vanguard Insolvency* [2022] EWHC 1589 (Ch).
[96] *Secretary of State for BEIS v Celtic Consultancy & Enterprises Ltd* [2021] EWHC 1240 (Ch).
[97] *Re Forcesun Ltd* [2002] EWHC 443 (Ch); *Secretary of State for BUS v PGMRS Ltd* [2011] BCC 368; *Re Abacrombie & Co* [2008] EWHC 250 (Ch).
[98] *Il v Yesilkaya* [2021] EWHC 1695 (Ch). For a principled approach to the exercise of the court's discretion, see *Chu v Lau* [2020] UKPC 24.
[99] *Helden v Strathmore Ltd* [2010] EWHC 2012.
[100] *Yesilkaya* (n 98).
[101] *Celtic Consultancy* (n 96) [122(i)].

> [c]oncepts such as 'inherent objectionability' or 'want of commercial probity' are bound to have some moral content, though that content is not the subjective moral perception of the individual judge, but must be informed by any discernable policy of the law and guided by the view of other judges in other cases.

The balance between answering the moral questions inherent in the legislation and insolvency proceedings, and abusing one's discretionary power concerns English courts.[102] As such, the courts generally seek to employ their discretionary powers sparingly, cautiously and in exceptional and unusual circumstances.[103] In the next section, we utilise Fineman's vulnerability theory and BHR to address the 'common pool' question and suggest how courts might utilise the discretion given them without abusing their power.

## <a> Vulnerability and a human rights based approach to insolvency

The rights to equal protection and non-discrimination and the right to a fair trial are among the most obvious human rights implicated in corporate insolvency procedures. Additional human rights can include employees' rights to work, to just and favourable conditions of work, to an adequate standard of living, and to social security.[104] Less obvious implications can be seen in areas such as the analysis of the socio-economic impacts on employees, their families, and local communities.[105] This can include the interests of those owed damages in tort for a company's negligence,[106] or communities whose rights to a clean and healthy environment or an adequate standard of living[107] were damaged by a company's pre-insolvency conduct. These individuals and communities do not enjoy the status of preferred creditors.[108]

The law does recognise and protect some human rights as IA 1986 modified the common law position that treated employees as unsecured creditors.[109] Accrued holiday pay and unpaid contributions to state and occupational pension schemes are treated as preferential debts.[110] However, the protections found in the law[111] only partially address the disruption, hardship, and human rights impact that can be experienced by employees when they are stripped of employment through corporate insolvency. This reality raises questions about the suitability of the proceduralist approach when proceedings touch upon or impact human rights.

## <b> Fineman's vulnerability theory and the deconstruction of insolvency law

[102] *Lancefield v Lancefield* [2004] 4 WLUK 467; *Rendle v Panelform Ltd* [2020] EWHC 2810 (Ch).
[103] See *Rendle v Panelform Ltd* [2020] EWHC 2810 (Ch) [16].
[104] International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3, *entered into force* 1976, arts 6-7; 9; 11.
[105] JLL Gant, 'Vulnerability, Resilience, and Employees: Can a Higher Degree of Fairness be Achieved by Looking Beyond Traditional Insolvency Norms?' in J Harris (ed), *Insolvency: A Research Agenda* (EE Publishing 2023). For the impact on local communities, see (among others): E Vaccari, L N Coordes and Y Marique, 'Global Trends in the Treatment of Local Public Entities in Distress: A Principled Approach' (2023) 32(1) IIR 93.
[106] See (n 104) arts 11; 12.
[107] ibid; UN Human Rights Council resolution 48/13 (2021).
[108] IA 1986, Sch 6,
[109] *See Re Welfab Engineers Ltd* [1990] BCC 600.
[110] IA 1986, sch 6, Categories 3-5.
[111] See, among others: IA 1986, Sch 6, Category 5; Insolvency Proceedings (Monetary Limits) Order 1986; Insolvency Proceedings (Monetary Limits) Order 2021; Insolvency Proceedings (Monetary Limits) Order 2015; Insolvency Proceedings (Monetary Limits) Order 2009; Insolvency Proceedings (Monetary Limits) Order 2004. Employees can also make a claim under the National Insurance Fund.

## <c> *Understanding vulnerability theory*

Fineman's vulnerability theory challenges a narrow, formalistic construction of equality premised on the belief that people should be treated the same without discrimination on the basis of enumerated, protected characteristics such as race, gender, and nationality.[112] Fineman understands 'vulnerability' as a natural human condition, both as a consequence of enjoying a human body that is inherently fragile and as a consequence of social institutions ranging from the family to political institutions and legal, cultural, and religious structures.[113] While these social institutions are designed to shield individuals from the realities of their human vulnerability, they can create or institutionalise vulnerabilities through a distribution of costs and benefits.[114] Consequently, all people are vulnerable due to the human condition, but they experience vulnerability in different and unique ways.

Fineman's assertion that the state has substantive responsibilities for equality sits in contrast with a more traditional Western (and particularly, American) approach, in the vein of Locke's liberal individualism, to the state's role in securing rights.[115] A state focused on individual autonomy and non-discrimination, rather than substantive equality, is a 'restrained state', one that does not actively interfere in economic institutions or 'private' affairs.[116] Yet, these 'private' social institutions are codified and sometimes brought into existence by the state, whether discussing the protection of the family in law or the creation of corporations.[117]

The simultaneous universality and personal reality of human vulnerability requires addressing the role social institutions have in creating and combating substantive inequality.[118] Institutions distribute the necessary resources for combatting vulnerability.[119] Those resources should be distributed in a manner that reflects the universal and unequal vulnerability of actors through a focus on building resilience, meaning an individual's ability to withstand disruptions to their security.[120] Unlike non-discrimination principles, building resilience requires treating people differently based on individual sets of circumstances.[121] To do this, the state must develop, adapt, and monitor even 'quasi-private' social institutions to ensure they alleviate, rather than exacerbate, vulnerability.[122] These institutions serve not only the private interests of individuals but also the public good and need of building resilience.[123] By understanding, adapting, and utilising the broader social purpose of these institutions, states can focus on securing physical, financial, spiritual, or social resilience for individuals.[124]

---

[112] MA Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale JL & Feminism 1, 2 ('Fineman, 'Vulnerable Subject'). See also JLL Gant, 'Vulnerability Theory and Insolvency Law' in E Ghio, J Wood, and JLL Gant (eds), *Rethinking Insolvency Law Theories in a Changing World: Perspectives for the 21st Century* (EE Publishing 2023).
[113] ibid; MA Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) Olso L Rev 133, 142, 146 (Fineman, 'Inevitable Inequality').
[114] Fineman, 'Vulnerable Subject' (n 1122) 9-11.
[115] ibid 5.
[116] ibid.
[117] ibid 6.
[118] Fineman, 'Inevitable Inequality' (n 113) 146-8.
[119] ibid, 146.
[120] MA Fineman, 'Beyond Equality and Discrimination' (2020) 73 SMU Law Review Forum 51; 52-53; 56-58 (Fineman, 'Beyond Equality').
[121] Fineman, 'Inevitable Inequality' (n 113) 147; Fineman, 'Beyond Equality' (n 120) 52-53; 57-58.
[122] Fineman, 'Inevitable Inequality' (n 113) 147.
[123] ibid.
[124] ibid 146-148.

### *4.1.2. Deconstructing Insolvency Law*

Fineman's vulnerability theory—developed in family law contexts but subsequently applied to company law and corporate interests[125]—challenges the assumptions underpinning insolvency law's proceduralist approach. First, vulnerability theory challenges the claim that equal and autonomous parties make private, pre-insolvency arrangements that should be honoured.[126] Instead, both parties are vulnerable but perhaps not *equally* vulnerable. The inequality of parties extends beyond the direct participants and can require different considerations for non-creditors impacted by insolvency, such as affected community members, employees, or consumers.

Second, vulnerability theory calls for understanding insolvency law as both an instrument of the state and a public good that can facilitate substantive equality and resilience. This suggests that pre-insolvency entitlements should not be assumed sacrosanct but must be questioned and adjusted in light of their impact on individual resilience. As such, not all parties to an insolvency proceeding can be or should be treated equally, challenging the insolvency law's focus on efficiency and egality. Instead, vulnerability concerns should guide practitioners to construct a distribution of the debtor's assets or to devise a restructuring plan that does the greatest to ensure resilience for all affected parties and mitigates any exacerbation of inequality that would arise in implementing a purely proceduralist and egalitarian approach.

### *4.1.3. The Limits of Vulnerability Theory*

A common critique of Fineman's theory[127] is that it does not offer a clear pathway on *how* to prioritise and distribute limited resources. As Kohn notes, vulnerability theory makes prioritising amongst individuals 'more problematic by emphasising the universality of vulnerability.'[128] As such, and perhaps ironically, when Fineman applied vulnerability theory to the interests of elderly persons, she ended up stripping individuals of their individuality and developing paternalistic responses in the law (although Fineman forcefully rejects the critique of paternalism).[129] Fineman asserted that age inevitably increases vulnerability such that there should be a presumption 'that older persons may not be able to bargain, contract, and protect their interests as wisely as or as well as those who are younger are presumed to.'[130] She called for 'age-sensitive rules' that protect elderly persons from unequal bargaining.[131] As Kohn explains, Fineman's prioritisation of security over autonomy—based on the belief that autonomy cannot be exercised absent security[132]—would upset many elderly people who value

---

[125] R Donyets-Kedar, 'Rethinking Responsibility in Private Law' in MA Fineman et al, *Privatization, Vulnerability, and Social Responsibility* (Routledge 2016) 34.
[126] See also, JLL Gant, 'Editorial: Optimising Fairness in Insolvency and Restructuring: A Spotlight on Vulnerable Stakeholders' (2022) 31(1) Intl Insolv Rev. 3, 5.
[127] NA Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26(1) Yale JL & Feminism 1, 12-13; BP Davis and E Aldieri, 'Precarity and Resistance: A Critique of Martha Fineman's Vulnerability Theory' (2021) 36(2) Hypatia 321, 329.
[128] ibid.
[129] MA Fineman, '"Elderly" as Vulnerable: Rethinking the Nature of the Individual and Societal Responsibility' (2012) 20(1) Elder L Rev 71, 92-3.
[130] ibid 92-4.
[131] ibid.
[132] ibid 92.

their autonomy at least as much as their security.[133] The result is an approach that ignores the interests of those the law seeks to protect and undermines their dignity.[134]

Kohn's concerns are also relevant to the application of vulnerability theory to insolvency law: absent a vague continuum of vulnerability, there is no clear criteria by which to divide the limited assets or to assess the need for reorganisation of a business. Moreover, efforts to use vulnerability as a guiding principle can undermine the sense of agency needed to ensure smooth commercial transactions. The rules on honouring pre-insolvency entitlements are intended to ensure a functional economic structure that encourages investment and the flow of commerce to solvent companies.[135] Replacing that system with vague claims of vulnerability that are both universal and specific—absent clear rules for assessing vulnerability and prioritising resources—could, undermine practices necessary for building resilience within society and within affected individuals. As such, vulnerability theory fails to offer an alternative approach that simultaneously retains insolvency's purpose while ensuring resilience for affected individuals.

The shortcomings of vulnerability theory may reflect Fineman's expressed reluctance to engage with IHRL because, she asserts, human rights 'tends to assume an ideally restrained or necessarily aloof state that may provide some basic essential services but is fundamentally uninvolved in orchestrating the mundane aspects of individual lives.'[136] As we explain in the next section, Fineman's critique of human rights is only partially correct. While IHRL presumes the state should not overreach into mundane aspects of individual lives, it has evolved generally, and the field of BHR specifically, to call for exactly the kind of individualised assessment Fineman desires. As such, it is in IHRL and BHR that we find the tools and strategies for insolvency law to reconstruct itself.

## <b> BHR and the reconstruction of insolvency law

Under IHRL, states have negative obligations to refrain from interfering in the realisation of rights as well as positive obligations to 'protect' rights and stop third parties from interfering in their realisation.[137] This requires states, *inter alia*, regulate corporate activity to prevent harms to human rights.[138] Finally, states are obligated to 'fulfil' human rights by taking positive actions to facilitate the full realization and enjoyment of the right. [139] The 'protect' and 'fulfil' standards require active and interventionist state conduct aimed at ensuring people can enjoy the full range of human rights. Attaching to all state actors, the protect and fulfil obligations include upholding socio-economic rights,[140] such as the rights to health, education, and an adequate standard of living.[141] Similar to the concept of 'vulnerability', this obligation could

[133] Kohn (n 127) 14-15.
[134] ibid 15.
[135] I Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009) 112.
[136] MA Fineman, 'Rights, Resilience, and Responsibility' (2022) 71(7) Emory LJ 1435, 1446 (Fineman, 'Rights'); MA Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60(2) Emory LJ 251, 254-255.
[137] See generally, F Mégret, 'Nature of Obligations' in D Moeckli et al (eds), *International Human Rights Law* (OUP 2017) chapter 5.
[138] UN Guiding Principles on Business and Human Rights, UN Doc A/HRC/17/31 (2011) at Pillar 1; D Birchall, 'Reconstructing State Obligations to Protect and Fulfil Socio-Economic Rights in an Era of Marketization' (2021) 71(1) ICLQ 227; C Bettinger-López, 'Human Rights at Home: Domestic Violence as a Human Rights Violation' (2008) 40(1) Colum Hum Rts L Rev 19.
[139] Mégret (n 137) chapter 5.
[140] International Covenant on Economic, Social and Cultural Rights 1996, arts 2(1), 11, 12, 13.
[141] ibid, art 2(1).

be considered too vague to be actionable: how should a state distribute an insolvent company's limited resources when faced with the variety of competing needs?

The International Covenant on Economic, Social and Cultural Rights (ICESCR) answers some of these concerns by identifying, within the treaty's text, priorities for the state.[142] Additionally, the independent, expert body entrusted with overseeing the implementation of the Covenant has provided further guidance for the implementation of the 'protect' and 'fulfil' approach. First it has identified 'minimum core obligations'— the bare minimum the state must provide even when constrained economically—for certain rights.[143] Beyond the minimum priorities, the Committee's 'General Comments' identify what additional measures are needed to realise the right, and to measure progress towards their full implementation.[144] By articulating these priorities, the Committee identifies how states should think of their own limited resources. As explained below, these standards are not expected to guide business conduct as well.

Because ICESCR calls for 'progressively realizing' the rights,[145] the Committee has also recognised that measures that reduce the realisation of these rights constitute a breach of human rights.[146] Maintaining that *status quo* and building on it (or, in Fineman's words, building resilience through the further development of social institutions) is, therefore, part of the minimum expected conduct of states and a priority for the distribution of resources. If maintenance of the *status quo* is truly impossible, states can impair acquired rights only after a process that accounts for any impact on other human rights and the society's most vulnerable people.[147]

One might debate the particularities of a human rights' approach to the distribution of resources. Nevertheless, the treaty and its implementing guidance do offer a principled structure for measuring and evaluating a state's choice in the allocation of resources. One-hundred-seventy-one states, including the UK, have agreed to be bound by these standards.

The traditional, binary nature of human rights law placed the primary obligation on the state to realise these rights. As a result, other social institutions—notably corporations—traditionally enjoyed impunity for actions that had negatively impacted human rights.[148] This gives credence to Fineman's concerns that human rights law offers a 'restrained' approach to state responsibility and intervention. Yet, human rights law has evolved. For more than a decade, the UNGPs have established a minimum expectation for businesses in understanding and responding to human rights.

## *<c> The principles and pragmatics of BHR*

[142] ibid, art 11.
[143] See, eg, Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States' Parties Obligations (art 2(1) of the Covenant*, (1990) UN Doc E/1991/23 [10]; Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000) UN Doc E/C.12/2000/4 [43]-[5].
[144] See *General Comment No.* 14 (n 143).
[145] International Covenant on Economic, Social and Cultural Rights, art 2(1).
[146] *General Comment No. 3* (n 143) para [9]. This is absent a significant event that would truly preclude the ongoing realisation of the right.
[147] ibid.
[148] See generally, T Van Ho, '"Band-Aids Don't Fix Bullet Holes": In Defence of a Traditional State-Centric Approach' in J Letnar Cernic and N Carrillo-Santarelli (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018) 111.

Unlike Fineman's theory, the UNGPs offer very little that is serviceable for deconstructing the law. They offer a simple formulation for responsibility and accountability: the state remains responsible for 'protecting' human rights, but all businesses (regardless of size, structure, industry, or operational context) must 'respect' human rights by not interfering in the realisation of rights.[149] Finally, both states and businesses must ensure those harmed by a business can access an adequate and effective 'remedy' meaning one that is (*inter alia*) rights-compatible, legitimate, and accessible.[150] While theoretically limited, the UNGPs were born of 'principled pragmatism'—what can be reasonably expected of businesses—and focus on the means of implementing these three 'pillars' of responsibility.[151]

Within the UNGPs, the business 'responsibility to respect' offers the richest material for insolvency law. The definition and content of human rights are to be defined in accordance with international treaties and consequently with authoritative guidance from expert 'treaty bodies' entrusted with each treaty's interpretation and oversight.[152] To realise their responsibility to respect, businesses are expected to undertake 'human rights due diligence' with reference to internationally defined human rights.[153] That process involves identifying the actual or likely harms to human rights a business can cause or contribute to.[154] Once harms are identified, businesses are supposed to take measures to mitigate and remediate those harms.[155] This responsibility exists throughout the life cycle of the businesses, and state actors have an existing obligation to ensure businesses fulfil these responsibilities.[156] Throughout the due diligence process, businesses are to engage in 'meaningful consultation' with affected individuals and groups.[157] It is presumed that a business cannot have an accurate or appropriate accounting of its likely human rights impacts, or of developing appropriate mitigation techniques, without hearing from affected individuals.[158]

Ideally, businesses comply with all internationally recognized human rights at all times.[159] Where they face constraints, however, businesses can establish priorities by focusing on the 'most severe [impacts] or where delayed response would make them irremediable.'[160] Importantly, severity for BHR is not a static concept but is assessed within the context of the situation and 'relative to the other human rights impacts the business enterprise has identified.'[161] The severity of an impact can be understood both in terms of the nature of the right or in terms of the number of people it is likely to affect.[162] Because the nature of the right

---

[149] UN Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011) Pillar 1 and Pillar 2.
[150] ibid, Pillar 3.
[151] JG Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (IHBR Commentary 2014) 4 <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Treaty_Final.pdf> accessed 1 November 2022.
[152] ibid, Principle 12.
[153] UNGPs (n 149) Principle 15. See also J Bonnitcha and R McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) Eur J Int L 899; JG Ruggie and JF Sherman III, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28(3) Eur J Int L 921.
[154] UNGPs (n 149) Principle 18(b).
[155] ibid, Principle 15(b).
[156] ibid, Principle 11.
[157] UNGPs (n 149), Principle 18.
[158] ibid.
[159] ibid, Principle 24.
[160] ibid.
[161] ibid, Principle 24, Commentary.
[162] ibid.

matters when prioritising limited resources or capacity, the minimum core obligations for rights in ICESCR are expected to be priorities.

If vulnerability theory challenges insolvency's focus on 'efficiency,' BHR provides the principles and tools for revising the law so that it reflects on and responds to its impacts on those unprotected and harmed by the current system. The principles of BHR require rethinking corporate insolvency as part of the business's fuller life cycle. As such, insolvency would not be a crisis to be expediently resolved in favour of those who could, and thought to, control their entitlements.[163] Instead, it is a consequence of the business's previous conduct and relationships and a next step in addressing those relationships with attention to their human rights impacts.

Reconceiving the law in this way refines the collectivist position that expects all creditors to equally bear the burden of a common disaster by recognising that the nature of the burdens being borne are different: not all financial harms are equal and as such merely seeking Pareto efficiency should not be defined narrowly. Instead, the efficiency and appropriateness of insolvency should be defined by how it impacts internationally recognised human rights. This narrows the potential of impacts and harms that insolvency must account for and recognises other concerns as legitimate policy choices that a state, or business, can pursue after addressing human rights. This inverts the current approach of insolvency, which privileges those creditors with the greatest means of controlling their relationship with the company. Instead, it calls for a focus on those with potentially the least power but who can suffer impacts to, *inter alia*, their housing, education, or living conditions.

This new approach to the purpose of insolvency law would require changing its practices. In the next sub-section, we offer the culmination of the theories of law outlined thus far—of insolvency law and of Fineman's vulnerability theory—and the practicalities of centring human rights within insolvency law. We briefly explain what it would mean to use the UNGPs to reconstruct insolvency law from the ground up.

## *<c> Identifying a BHR approach to insolvency*

Through its principles and standards for due diligence, BHR embodies many of the same concerns as Fineman. However, rather than proscribing actions, it promotes dialogue with affected stakeholders to identify appropriate responses. With its 'principled pragmatism', BHR also has the potential to unlock a new approach to insolvency law.

First, insolvency law can retain a presumption in favour of upholding pre-insolvency entitlements and the arrangements reached between parties in solvent times. These 'quasi-private' institutions still offer a legitimate foundation for starting any process and inquiry. Yet, the party seeking insolvency could be expected, as part of the proceedings, to undertake human rights due diligence and prepare a human rights impact assessment. Relying on internationally defined rights would allow the court and affected parties to identify key affected rights and interests. Conducting human rights due diligence would require the insolvent party to engage in a dialogue with affected stakeholders to evidence the impact of the insolvency or restructuring procedure on fundamental and internationally recognised human rights. It may

[163] This language is borrowed from Dr Jennifer LL Gant's comments during the INSOL Talk <https://www.insol.org/Focus-Groups/Academic-Group/Events-and-Podcasts>.

also prompt new reflections on how best to approach the insolvency as stakeholders identify opportunities or impacts not previously considered. In affected procedures, this may result in additional complexities and delays. However, this would be justified by reconceiving how we define and measure Pareto efficiency.

Second, based on the reported human rights impacts, either the insolvent party, an independent expert, an affected party, or a court could make recommendations for alterations to pre-insolvency entitlements. A BHR approach to insolvency would not insist on the formalistic equality between parties but would allow flexibility to account for a proceeding's disparate impact on affected parties. Similarly, it would not treat all assets as of communal interest, to be distributed based on individual vulnerability. Instead, the presumption in favour of pre-insolvency entitlements would be upended only where necessary to redress impacts on internationally agreed upon and defined human rights. As such, the approach would primarily preserve the purpose of insolvency law and pre-insolvency entitlements while ensuring the insolvency proceedings respect, protect and fulfil human rights.

Finally, where an insolvency proceeding would trigger more human rights impacts than the court can address, BHR provides a means of prioritising the use of limited assets. Rather than utilising formalistic equality and 'sameness', the court would facilitate a modular approach based on the parties' vulnerability and the severity of to the impact of insolvency proceedings on other rights and interests. As the alternations would be undertaken in consultation with affected parties, the court would not paternalistically substitute its assessment of the parties' needs. Instead, the parties would enjoy an opportunity to participate in identifying priorities, mitigation strategies, and adequate remedies. In doing so, this modular process can enhance resilience and agency amongst the parties to the proceeding.

While these three changes to insolvency are more incremental than some might call for, they are still significant for the field. Rather than a focus on efficiency and egality, the revised framework would allow for additional flexibility to mandate a stronger understanding of the impacts of insolvency proceedings on vulnerable stakeholders. It would also broaden consideration of interests and allow parties to the proceedings to be active participants in their design. This may lead to more creative approaches to the distribution of assets while increasing a sense of agency within and through the law. Finally, it would identify alternative priorities for the court while relying on an internationally accepted legal framework. This would limit concerns about an abuse of the court's discretion.

## <a> Conclusion

This Chapter opens a new dialogue within the scholarly literature on the purpose and principles of insolvency law. It posits a means of using BHR to redress the limitations of modern insolvency law. This use of BHR would upend the mainstream proceduralist nature of insolvency law. As such, whether insolvency law *should* adopt a BHR-focused approach is a normative question that needs to be more thoroughly debated. By explaining what could be, we offer the opening salvo in that discussion.

After outlining the principles and assumptions underpinning modern insolvency, we make three contributions to the literature. First, we use Fineman's vulnerability to deconstruct insolvency law. Fineman's theory challenges the underpinning assumptions that pre-insolvency entitlements are arranged through equal and autonomous parties. Instead, all parties

to the proceedings (and perhaps some who are not party to it) are vulnerable and dependent on the social institutions in which they exist, including the economic arrangements at the heart of the proceeding. Additionally, the parties' dependence on the economic relation varies as does their vulnerability to the insolvency proceedings. Fineman's approach would identify insolvency law as only a 'quasi-private' endeavour that requires the distribution of assets, or the reorganization of an entity, in a manner that enhances resilience. As such, pre-insolvency entitlements are no longer sacrosanct.

The second contribution we make is to reflect on the limitations of Fineman's approach as a practical solution to insolvency law's debates. While vulnerability theory offers an important tool for deconstructing erroneous assumptions in insolvency law, its simultaneous claims of universal and individual vulnerability effectively limit the pragmatic value of the theory. This reflection sets the foundation for a more robust and pragmatic approach to reconstructing insolvency law.

Finally, we utilise the field of BHR to call for a reimagining of insolvency law based on 'principled pragmatism'. In doing so, we articulate a revolutionary approach that would call into question the central assumptions to modern insolvency law and answer some of the practical limitations of vulnerability theory. We identify three principal changes that would be caused by applying BHR while seeking to preserve the purpose of insolvency law. In doing so, we open up the possibility of a new set of priorities for the law that could utilise limited flexibility to limit the harms that can arise from the application of the current approach to insolvency.