

## **Insolvency Theories and Justice**

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### **ABSTRACT**

There is a notion of justice embedded in every theory of insolvency law. However, these notions of justice are neither fully articulated nor assessed. Whilst there are several theories of justice, this paper looks to engage with Nozik's theory, which defines justice as entitlement. This notion of justice underscores arguments relating to the creditors' bargain theory (CBT) and its variants. It serves as the basis for rejecting the idea of redistribution in insolvency. The paper compares this notion of justice with the Rawlsian approach, which defines justice as fairness and advocates two principles of justice. It argues that this approach to justice underscores the values-based theories of insolvency. Finally, it compares the two forgoing theories of justice to the communitarian approach, which underscores variants of communitarian theories in insolvency law. The latter two notions of justice inform arguments that accept or promote redistribution in insolvency law. The paper notes that by focusing on efficiency, CBT and its variants underplay or even overlook the approach to justice that is embedded in their theoretical frame. Thus, the debate that pitches efficiency against fairness omits a much more relevant debate as to what approach to fairness should be accepted or rejected. Moreover, by adopting the Rawlsian veil but rejecting the two principles which Rawls deemed an inevitable outcome of the application of the veil, the CBT has introduced a perplexing paradox into the insolvency sphere. This is further compounded by the failure of the values-based approach to properly situate itself squarely within the Rawlsian principles, which it espouses but fails to name. Ultimately, the paper will treat each approach to justice as a framework of utopia and examine them comparatively. It concludes with an argument supporting the Rawlsian, values-based approach to fairness as being fundamental to insolvency law. Its outcomes are particularly important as insolvency theorists seek new perspectives of insolvency law. Embedded in every proposal would be a framework of justice, which ought to be engaged with fully and evaluated instead of hidden within notions of unalloyed objectivity or efficiency.