



## Legal Feminism and Insolvency Theory: A Woman's Touch?

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### **Abstract**

*The impact of women's lives and experiences on the law forms an essential part of the feminist legal movement. This article evaluates the existence of feminist ideologies in a hitherto unexplored area of the law, namely insolvency law and more specifically insolvency theory.*

*Some main ideologies of the feminist movement are identified and contrasted with the views of the main insolvency theories.*

*It aims to establish whether insolvency theories may also be categorised in relation to ideologies expressed in feminist legal theory.*

### **Keywords**

Legal feminism, feminist jurisprudence, bankruptcy theory, insolvency theory.

### **I. INTRODUCTION**

This year we are celebrating a hundred years since the Sex Disqualification (Removal) Act of 1919 was passed in the United Kingdom.<sup>1</sup> The Act paved the way for women to finally practise law in the United Kingdom. Since then women, across the globe, have made progress in all spheres of life in leaps and bounds.

This progress was, of course, hard won and the struggle continues for women living and thriving in what many would still call "a man's world." The struggle for a world view of women "where they truly belong" continues, that is: in the kitchen, in the tearoom, in the courtroom, on the court bench, in the classroom, in the laboratory, in the space shuttle and/or on the moon! This world view recognises that women should be free to choose where they belong and that no obstacles should exist for actually doing so. Statements like these have, of

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<sup>1</sup> Sex Disqualification (Removal) Act 1919.

course, long been the subject of the feminist movement in law and can be seen as a catalyst for the development of feminism in general.<sup>2</sup>

Considering the impact that women and feminism might have on the law, an idea started to develop for the writing of this article. Have the feminist movement and ideologies<sup>3</sup> that have been expressed by the movement through its development, in any way influenced that revered area of the law that many call Insolvency Law? More specifically, have women influenced the development of the law relating to insolvency? This seemed too broad an issue to consider in an article. A specific area needed to be considered, one where epistemologies could more easily be evaluated. Consequently the area of insolvency theory or bankruptcy theory was chosen.

Insolvency theory asks the question about in whose interests insolvency law should be formulated. Stated more plainly, it considers who and what should be protected and recognised by insolvency law.

The aim of this article is to briefly evaluate whether there is any evidence of feminist ideology to be found in insolvency/bankruptcy theory. To ask whether insolvency theories may also be categorised in relation to ideologies expressed in the legal feminist movement. It aims to adopt a feminist enquiry, to consider a gendered perspective to legal and social arrangements.<sup>4</sup>

## II. LEGAL FEMINISM: A WOMAN'S PREROGATIVE

In a maiden attempt to write about the feminist movement in law, it became apparent that the old adage that "it is a woman's prerogative to change her mind" also played its part in the development of feminist jurisprudence. Hence, one of the first observations to be made is that this movement is by no means static or axiomatic.<sup>5</sup> Legal feminism has developed and evolved tremendously over the last four centuries<sup>6</sup> and what precisely is meant by the term is not easily pinned down.

It is mainly for this reason that the feminist theoretical project in law is understood as a dynamic process of engagement (a dynamic movement of ideas), rather than a fixed set of principles.<sup>7</sup> This is due to the fact that feminist legal theory engages with a wide range of diverse perspectives and is, therefore, not easily characterised by any essential or fundamental principles.<sup>8</sup> This article endeavours to work with this idea and not against it, that is to say, it will make use of all the relevant ideologies expressed at various points in time by the feminist movement and will not only utilise the most recent, generally accepted or popular ideologies of the movement.

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<sup>2</sup> Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Limited, first published in 1998) 3. Barnett explains that the question regarding the appropriate role of women in society dates back to the Ancient Greeks, with Plato and Aristotle attempting to answer it.

<sup>3</sup> For purposes of this article the use of the word "ideology/ideologies" refers to the ideas or ideals underpinning theory.

<sup>4</sup> J Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27(3) J Law Soc 351, 359.

<sup>5</sup> Conaghan (n4) 356.

<sup>6</sup> Barnett (n2) 3.

<sup>7</sup> Conaghan (n4) 356.

<sup>8</sup> Conaghan (n4) 358. See also Barnett (n2) 5 ("Feminist legal scholarship is frequently presented as having differing phases or waves, although none of these is totally distinct or isolated from other phases.")

a. *"The Other" - alike but different and connected*

De Beauvoir's pioneering work highlighted the perception of women being the "Other"<sup>9</sup> being, something which was also reflected in the law – law was a male construct and the subject of the law was male.<sup>10</sup> Women were for long at worst oppressed by the law, and at best ignored by it.<sup>11</sup> First phase feminism can be characterised by its concern with the male monopoly of law; the quest was for equality before the law.<sup>12</sup> The quest of the feminist movement means different things to different feminists, but it is all still feminism. The single characteristic shared by all feminist theories can be described as a woman-centred approach to issues.<sup>13</sup>

Moreover, many feminist legal theorists do not want to be categorised, as being defined/definition itself is patriarchal.<sup>14</sup> From this, the first ideology can be extrapolated, that is that classification and categorisation can be regarded as "masculist."<sup>15</sup> Other feminist scholars fall more easily into traditional categories such as liberal, radical, social feminists, "postfeminists" and post-modern feminists.<sup>16</sup>

Equality feminists wanted the law to stress the similarities and minimise the differences between men and women.<sup>17</sup> According to them, men and women differ in their approach to legal and moral issues.<sup>18</sup> It is here, however, that the sensitivity regarding the multiplicity of women's lives needs to be emphasised. Feminism itself does not purport to represent a unified female voice.<sup>19</sup> Post-modern feminism recognises that there is no "essential" woman and that women will differ in opinion and belief amongst themselves.<sup>20</sup> However, even if women might differ amongst themselves, their approaches will still differ from those of men.<sup>21</sup> Woman-centredness is a primary feature of feminist theory, particularly in its engagement with the law.<sup>22</sup> This approach places women's lives and experiences on centre stage and in doing so it (feminism) challenges and displaces our perceived understanding of the world around us; how have women's lives and experiences influenced

<sup>9</sup> This term was first coined by Simone de Beauvoir in her seminal book *The Second Sex* and forms the core theme of the work. It refers to the idea of women being the "Other" (sex). By this she means that everything (society, language, thought, religion, family) rests on the assumption that the world is male and that women are excluded from these constructions as women are the "Other." Barnett (n2) 4.

<sup>10</sup> Barnett (n2) 4.

<sup>11</sup> Barnett (n2) 4.

<sup>12</sup> Barnett (n2) 5. See also M Fineman, 'Feminist Theory and Law' (1995) 18 *Harv J L & Pub Pol'y* 349, 353.

<sup>13</sup> C Haddock Seigfried, 'Where Are All the Pragmatist Feminists?' (1991) 6(2) *Hypatia* 1, 7 ("The recovery of a history of feminist writings has also contributed to defining some common features of feminist thought, which is otherwise extremely diverse. These two features are (1) the identification and investigation of the oppressive structures that contribute to women's subordination in order to actively dismantle them and (2) the development of analyses of women's experiences that are not systematically distorted by sexist assumptions.")

<sup>14</sup> R Silberman, 'Ideas have consequences' (1995) 18 *Harv J L & Pub Pol'y* 409, 409 ("Definition is itself a patriarchal game, played by patriarchal rules, serving patriarchal ends.")

<sup>15</sup> This term was adopted by K Lahey and S Salter in their work 'Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism' (1985) 23 *Osgoode Hall L J* 543, to refer to work of a non-feminist nature. They state that although this term usually refers to work by men, it could also be used to refer to women who resist feminist analysis. This term will be used in this article to denote non-feminist work by male and female scholars as well as a non-feminist approach. The reasoning behind the use of "masculist" resounds with the reasons Lahey and Salter put forward – "masculist" can more easily be seen to refer to anyone who resist feminist analysis and remains committed to "malestream" ideas, including women. They argue that the use of "masculinist" could too readily be seen as referring only to men.

<sup>16</sup> Silberman (n14) 409; Conaghan (n4) 363.

<sup>17</sup> Silberman (n14) 410.

<sup>18</sup> Silberman (n14) 410.

<sup>19</sup> Conaghan (n4) 358.

<sup>20</sup> Barnett (n2) 158. Essentialism denotes that "woman" has a particular essence which defines woman as woman. See also Conaghan (n4) 358; and Silberman (n14) 410.

<sup>21</sup> Silberman (n14) 410, 412. See also Fineman (n12) 17; and R Paetzold, 'Feminism and Business Law: The essential interconnection' (1994) 31 *Am Bus LJ* 699, 704.

<sup>22</sup> Conaghan (n4) 363.

their opinions and beliefs?<sup>23</sup> Radical feminists believe that women approach problems from an ethic of care, compassion<sup>24</sup> and connection; men generally by rights and rules.<sup>25</sup> From this a second ideology can be found; an approach to problems that is more inclusive (connectedness – stressing the similarities) and compassionate would be regarded as feminist, one that disregards connection and compassion in favour of rules and rights can be regarded as “masculist.”

*b. Feminism and the corporate form – from hierarchy and fragmentation, to inclusion*

“Feminist theory generates challenging new perspectives for analysis of legal phenomena generally, even in the unlikely area of corporate law.”<sup>26</sup> Liberal, socialist and radical feminists have expressed opinions in critique of the patriarchal structure of the corporate form.

Liberal feminists’ critiques on corporations focus on the constraints and opportunities that organisational structures generate for individuals, especially women.<sup>27</sup> They question the hierarchical structure of the organisation that results in the fragmentation of groups, which in turn generates opposition, competition, blocked opportunities and non-productive behaviour.<sup>28</sup>

They advocate instead for decentralised decision-making processes, flattening hierarchies, distributing formal authority more widely, improved communication at all levels, and increased participation by all types of workers.<sup>29</sup> These changes are largely based on the feminist principles of empowerment, which “stress the importance of increased individual autonomy and discretion within the institution.”<sup>30</sup> More ideologies come to the fore here; hierarchy and fragmentation in the corporation are regarded as “masculist,” while increased participation of all stakeholders is feminist.

Whereas liberal feminism critiques the corporate structure and its effect on women (and men) that work there, the social feminist is more concerned with the effect of the corporate structure on the larger culture, and the role of women in that culture.<sup>31</sup> They developed the theory of capitalist patriarchy,<sup>32</sup> and also question the hierarchical structure of the corporation. They oppose this fragmentation and hierarchy, as “the very functions of human existence are split up between the home and the market, and ranked in a hierarchical manner that devalues and oppresses some people along both class and gender lines.”<sup>33</sup> Many feminist legal scholars in the 1970s and early 1980s were influenced by Marxist “unclassification”<sup>34</sup> theory and method, especially socialist feminists; who are likewise opposed to hierarchical constructs of corporations.<sup>35</sup> It is interesting then, yet not surprising, to note that the theme of fragmentation runs through all feminist critiques of the

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<sup>23</sup> Conaghan (n4) 363.

<sup>24</sup> It is important to note that not all the branches of feminism associate compassion with women. This is in line with the anti-essentialist approach of feminism.

<sup>25</sup> Silberman (n14) 410.

<sup>26</sup> Lahey and Salter (n15) 569.

<sup>27</sup> Lahey and Salter (n15) 544.

<sup>28</sup> Lahey and Salter (n15) 548. See also, Fineman (n12) 6.

<sup>29</sup> Lahey and Salter (n15) 548.

<sup>30</sup> Lahey and Salter (n15) 548.

<sup>31</sup> Cynthia Grant Bowman ‘Socialist feminist legal theory: a plea’ in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019). See also, Lahey and Salter (n15) 549.

<sup>32</sup> Grant Bowman (n31) 92.

<sup>33</sup> Lahey and Salter (n15) 549; Grant Bowman (n31) 110.

<sup>34</sup> Not arranged according to characteristics; not assigned to a class.

<sup>35</sup> Conaghan (n4) 357; Lahey and Salter (n15) 544. Most interestingly, Marxists ignored women’s subordinate status and regarded women merely as support in the struggle for a proletarian revolution; they were not supposed to raise their own issues as this was seen as distractions from the battle. See particularly in this regard Grant Bowman (n31) 92-93.

corporation.<sup>36</sup> Hence the abovementioned ideologies of increased participation and the flattening of hierarchies can be confirmed as feminist in nature.

Radical feminists focus on the problem of the universal dominance of men over women.<sup>37</sup> They challenge the core structure of society by focusing on its patriarchal ordering.<sup>38</sup> This challenge also extends to the patriarchal structure of the corporate form and how corporate structures oppress women. Radical feminists' views go beyond those expressed by social feminists; the entire culture of bureaucratic capitalism is questioned; the way in which certain social acts are created and upheld, how certain social objects are valued, how certain languages need to be spoken and how certain behaviours are required.<sup>39</sup> They view this culture as one that displays a distinctly male discourse of power.<sup>40</sup> There is a connection between this "distinctly male discourse of power" and the corporate form in that organisations operate through discipline and control. The bureaucratic control is dependent on separation, isolation and depersonalisation.<sup>41</sup> The alternative feminist discourse is founded upon women's sense of connection, and not through separation and fragmentation, and women's sense of justice as being achieved through an ethic of responsibility and not through an ethic of rules, rights and entitlements.<sup>42</sup> Herein the recurring feminist ideology of inclusion again raises its head.<sup>43</sup> Feminists wish to provide alternative principles for organisation based on the ethics of care, responsibility, connection and sharing.<sup>44</sup>

c. *A woman-centred epistemology*

Having a woman-centred epistemology means to engage in a manner that displaces and destabilises dominant understandings of social and legal phenomena.<sup>45</sup> Feminist scholarship in law tends to be fuelled by the idea that things ought not to be as they currently are and that feminist theory can play a part in envisioning how things might be.<sup>46</sup> Feminism is, therefore, concerned not only with interpreting legal concepts in a woman-centred way, but also with changing them and effecting transformation.<sup>47</sup> This transformation is to be informed, amongst other things by social justice.<sup>48</sup> Social justice is of course much broader in scope and concern than merely the plight of women in society. The Oxford dictionary defines social justice as: justice in terms of the distribution of wealth, opportunities and privileges within a

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<sup>36</sup> Lahey and Salter (n15) 553.

<sup>37</sup> Barnett (n2) 163.

<sup>38</sup> Barnett (n2) 164.

<sup>39</sup> Lahey and Salter (n15) 554.

<sup>40</sup> Lahey and Salter (n15) 554.

<sup>41</sup> Lahey and Salter (n15) 554.

<sup>42</sup> Lahey and Salter (n15) 556.

<sup>43</sup> It is a fair conclusion to reach that most feminist theories can be described as inclusive in nature. However, the liberal feminist movement was criticised for not being inclusive based on race. In this regard please see L Hilal, 'What is Critical Race Feminism?' (1998) 4 *Buff Hum Rts L Rev* 367, 368 ("The international rights of women are modeled on the norm of nondiscrimination and manifest similar dilemmas highlighted by critical race feminists. As their writings reveal, conventional nondiscrimination ideology forces women into narrow, rigid categories in order to realize rights that neither embrace the totality of their experience nor the discrimination they face. This leads to bifurcated identities and injuries, lower or irrelevant legal protections, and fragmented political movements. Critical race feminist scholarship effectively illustrates these conditions and negative outcomes. Critical race feminism is an informative legal discussion on race and gender that advances critique of liberal paradigms pertinent at both the national and international levels ["]").

<sup>44</sup> Lahey and Salter (n15) 556.

<sup>45</sup> Conaghan (n4) 346.

<sup>46</sup> Conaghan (n4) 375.

<sup>47</sup> Conaghan (n4) 375.

<sup>48</sup> Conaghan (n4) 375. Transformation ought also to be informed by sexual equality and individual self-development. See also, Fineman (n12) 358.

society.<sup>49</sup> This would mean that to some extent feminism is also concerned with transforming society for everyone.<sup>50</sup>

With the anti-essentialism view that postmodernist feminists advocate in mind,<sup>51</sup> it is an interesting notion to consider that women have a privileged vantage point on patriarchy and “masculist” views.<sup>52</sup> This is due to the fact that women’s lives are structurally different from men and are privileged, because their perspective is that of the oppressed group.<sup>53</sup> Because of this it is argued that women have different, perhaps “unique”<sup>54</sup> views and experiences that relate to the issues and circumstances regulated and controlled by law.<sup>55</sup> The argument is that women tend to understand the plight of the oppressed better than most, as they have suffered oppression themselves. This argument also clarifies some of the ideologies identified, such as inclusion, care and compassion.

### III. INSOLVENCY THEORY<sup>56</sup>

The insolvency theories can broadly be divided into two categories; firstly, theories that are centred around the creditors and secondly, theories that place an emphasis on the inclusivity of other stakeholders such as shareholders, employees, suppliers and even the community.

Having already identified certain “masculist” and feminist ideologies (general and with specific reference to the corporation), an attempt will now be made to determine whether they are present in the main insolvency theories and to categorise insolvency theories as either “masculist” or feminist.

#### a. “Masculist” theories on insolvency law?

The main ideologies the feminist movement associate with a “masculist” view or approach can be summarised as follows: “masculist” views often promote fragmentation, classification and hierarchy that isolate individuals, depersonalise them and place them in competition often resulting in oppression; “masculist” approaches to organisational issues rely on rules, rights, and entitlements, often turning a blind eye to compassion.

The first insolvency theory that displays some of these approaches is the Contractarian theory. This theory is generally based on wealth maximisation and the idea that the law should maximise the collective return to creditors to the exclusion of other stakeholders.<sup>57</sup> This theory, therefore fixates on fragmenting the stakeholders in insolvency, classifying them and placing creditors in a position of priority – at the top of the hierarchy. The theory is also in line with the Proceduralist Approach to insolvency, which contends that insolvency law should

<sup>49</sup> Oxford Dictionary Online, available: [https://www.lexico.com/en/definition/social\\_justice](https://www.lexico.com/en/definition/social_justice) (accessed 21 November 2019).

<sup>50</sup> Paetzold (n21) 704 “[t]he more global aspect of how *all* law (which would include all aspects of business law) is a feminist concern – i.e., of how our entire legal system is gendered, and what kinds of changes would be required to remove this gendering from legal doctrine and procedure.”)

<sup>51</sup> Barnett (n2) 158. Essentialism denotes that “woman” has a particular essence which defines woman as woman; anti-essentialists view women as unique individuals who cannot be pinned down as being a specific type of being with similar views and ideas. See also, Conaghan (n4) 410.

<sup>52</sup> Conaghan (n4) 379.

<sup>53</sup> Conaghan (n4) 379.

<sup>54</sup> “Unique” is often regarded with disdain by feminists as it suggests that the women’s view is again the “other” with the men’s view being the standard or norm. Uniqueness in this context is, however, meant to refer to a point of view that only women can have due to their shared history of oppression and is thus true to its meaning - unique.

<sup>55</sup> M Fineman, ‘Feminist Theory in Law: The Difference it makes’ (1992) 2 *Colum J Gender & L* 1, 11.

<sup>56</sup> This brief discussion does not do any real justice to the vast amount of literature on theories and the intricacy with which they have been articulated and argued but it does provide a sufficient overview that warrants consideration in the discussion to follow.

<sup>57</sup> P Walton, ‘When is Pre-packaged Administration appropriate? – A Theoretical Consideration’ (2011) 20 *Nottingham LJ* 1, 3-4.

address issues that only arise out of insolvency and believe that non-insolvency claims and entitlements should not be protected by the insolvency law unless this would result in a greater return for creditors.<sup>58</sup> Here, the heavy reliance on what should happen based on the entitlements of the stakeholders is indicative of a “masculist” approach. The lack of inclusivity of the interests of other stakeholders (apart from the creditors) in these theories is also indicative of the lack of compassion, or sympathy for the misfortune of the lower ranked stakeholders, e.g. employees. Compassion and inclusion as feminist ideologies are thus clearly ignored by these insolvency theories.

A recognised branch of the Contractarian theory is the Creditors’ Bargain Theory (CBT).<sup>59</sup> The CBT is based on the premise that creditors enter into a bargain with the debtor company during negotiations for credit and thereby establish their position and possible remedies upon default by the company, such as on insolvency.<sup>60</sup> Upon the debtor company’s insolvency the creditors with interest will try to recover their debt and will enter into a frenzied race with other creditors to enforce their private contractual agreements with the company. This could cause depreciation in value of the business assets creating uncertainty of returns for all creditors. The CBT proposes to solve this problem by replacing individual enforcement rights of creditors with a collective right to share in the proceeds of the insolvency proceeding, giving rise to the collectivist approach.<sup>61</sup> This insolvency theory is therefore premised on the creditors’ entitlement and rights in insolvency based on what they negotiated for, to the exclusion of the other stakeholders. Evidently, this theory exhibits a “masculist” approach to solving the problem of insolvency by consulting “rights and entitlements”, instead of turning to the feminist ideals of connection and compassion. The CBT does not support redistribution to other stakeholders in insolvency.<sup>62</sup> The theory argues that the main role and objective of insolvency law should be to maximise the collective return to creditors, it is not concerned with the interests of the debtor or the interests of the community.<sup>63</sup> All of the ideologies associated with a “masculist” approach are present in these theories; a hierarchy of stakeholders with the creditors at the top, fragmentation and classification of parties involved with only those with priority entitled to protection and the resulting oppression of the others.

#### *b. Insolvency theories with a woman’s touch?*

The main ideologies identified that can be associated with the feminist movement<sup>64</sup> include: an approach of inclusion and connectedness, not isolation and fragmentation – stressing similarities; sharing; compassion; a feminist approach to corporation advocates for increased

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<sup>58</sup> D Baird, ‘Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren’ (1987) 54 *U Chi L Rev* 815; H Nsubuga, ‘Corporate Insolvency and Employment protection: A Theoretical Perspective’ (2016) 4(1) *NIBLeJ* para 2; J Wood, ‘Corporate Rescue: A Critical Analysis of its Fundamentals and Existence’ (PhD thesis, University of Leeds, 2013) (“Contrary to proceduralists, traditionalists believe that insolvency law is not a tool solely reserved for the creditors in which they can pursue their own interests.”).

<sup>59</sup> The CBT was developed by Jackson in the early 1980s, Walton (n57) 4; Nsubuga (n58) para 58.

<sup>60</sup> Nsubuga (n58) para 58. Walton is of the opinion that one of the shortcomings of the CBT is the fact that it only considers “hypothetical contract creditors,” Walton (n57) 5.

<sup>61</sup> E Warren, ‘Bankruptcy Policy’ (1987) 54 *U Chi L Rev* 775, 797-799. The Collectivists believe the single justification for bankruptcy to be the enhancement of the collective return to the creditors. See also, Nsubuga (n58) para 61; Walton (n57) 5.

<sup>62</sup> L LoPucki, ‘A Team Production Theory of Bankruptcy Reorganization’ (2004) 57 *Vand L Rev* 741, 748 (“[] the Creditors’ Bargain was essentially a bargain that in the event of bankruptcy, the creditors would get everything.”).

<sup>63</sup> J Jackson and R Scott, ‘On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors’ Bargain’ (1989) 75 *Virginia LR* 160; Wood (n58) 91.

<sup>64</sup> The reader should be reminded that a feminist approach to insolvency does not necessitate the involvement of women only.

participation by all stakeholders; flattening of hierarchies; and some feminist views promotes wider social justice.

Many insolvency theories incorporate some of these ideals. The first of these can be found in the Team Production Theory (TPT) of Corporate Law (this theory is also contractarian in nature).<sup>65</sup> The TPT is based on a social contract and is much more inclusive in nature than the wealth maximisation ideals of the CBT. The theory developed by LoPucki builds on the ideology that shareholders are not the only parties that contribute to the production process of a company during solvency; other parties such as trade suppliers and the workforce all contribute in order to produce the end product.<sup>66</sup> By the same reasoning, creditors are not the only parties that stand to lose something should the company then fail. The TPT, therefore, promotes the inclusivity of all team members during insolvency proceedings and supports the idea of redistribution of some of the interest of one stakeholder (team member) to another.<sup>67</sup> This idea of redistribution on insolvency reflects the ideology of sharing present in some of the feminist theories. TPT further reflects the feminist ideology that similarities should be stressed *i.e.* that all members in the team contribute to the success of the company and all stand to lose something should the company enter insolvency proceedings. It also incorporates the feminist ideology of increased participation by all stakeholders and a flattening of hierarchies in that it does not place the creditors at the top with all other stakeholders oppressed. The traditional theorists agree with the TPT and are against the idea that insolvency law should exist only to serve creditors' interests and are, consequently, also inclusive in nature.<sup>68</sup>

Communitarianism looks to balance the interests of a wide range of different stakeholders in the insolvency of the debtor and even to consider the welfare of the community at large.<sup>69</sup> An element of social justice and connectedness as feminist ideals can be seen here. It "considers limiting the rights of high ranking creditors to give way to some extent to others including the community at large."<sup>70</sup> It also subscribes to the notion of redistribution *i.e.* to redistribute the consequences of the debtor's default.<sup>71</sup> Communitarian theorists seek to focus on the fact that those involved in, and dealing with, companies are humans and corporate law should not be depersonalised.<sup>72</sup> Approaches that rely on depersonalisation and isolation form part of the feminist movement's critique against the

<sup>65</sup> LoPucki (n62) 744; Nsubuga (n58) para 72.

<sup>66</sup> LoPucki (n62) 749 ("The team members include all who make firm-specific investments but are unable to protect those investments by direct contracting, personal trust or reputation. Team members may include stockholders, creditors, executives, other employees, suppliers, customers, local governments, regulatory agencies, and others"); Nsubuga (n58) para 73; M Blair and L Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Va L Rev* 247, 250 ("Executives, rank-and-file employees, and even creditors or the local community may also make essential contributions and have an interest in as enterprise's success.").

<sup>67</sup> Nsubuga (n58) para 77 ("The TPT being an inclusive theory, advocates honouring all team members' interests on the insolvency of the company, whether in terms of financial gain or losses."). The problem with the TPT might be that it is too wide and includes too many team members who cannot realistically nor economically always benefit from the insolvency proceeding. LoPucki contends that TPT entitlements are entitlements to "rents and surpluses" and it goes without saying much that there will not be a lot of surplus in the case of insolvency. This theory closely resembles some of the Traditionalist theories on insolvency.

<sup>68</sup> Wood (n58) 88 ("Contrary to proceduralists, traditionalists believe that insolvency law is not a tool solely reserved for the creditors in which they can pursue their own interests."); Nsubuga (n58) para 3.

<sup>69</sup> Walton (n57) 7; D Millon, 'New Directions In Corporate Law Communitarians, Contractarians, And The Crisis In Corporate Law' (1993) 50(4) *Wash & Lee L Rev* 1373, 1379 ("Communitarians also differ from contractarians in emphasizing the broad social effects of corporate activity.").

<sup>70</sup> Walton (n57) 7.

<sup>71</sup> Warren (n61) 777.

<sup>72</sup> A Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 29 *Sydney L Rev* 577, 586. The Cork Report also seemed to validate at least some aspects of the communitarian theory. Cork Report on Insolvency Law and Practice Cmnd 8558 [1982]: p 56 para 204 ("The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked."). The criticism levelled against this theory relates to the difficulty of defining the community and determining how far it may stretch is cumbersome. See in this regard Walton (n57) 7; Millon (n69) 1388.



corporate form and can therefore be regarded as “masculist” in nature. Due to its advocacy against depersonalisation, this theory is displaying feministic ideology. Moreover, the Communitarian theory reflects the feminist principles of empowerment, which “stress the importance of increased individual autonomy and discretion within the institution.”<sup>73</sup> This approach (of limiting creditors’ rights) also flattens hierarchical structures as stakeholders are placed on a more equal footing in the insolvency of a company.

The Communitarian theory has a lot in common with Warren’s Multi Value Approach or Eclectic Approach.<sup>74</sup> In a corporate insolvency context this approach requires recognition of those who are not directly “creditors.”<sup>75</sup> A clear correlation with this approach and the ideology of inclusion (not isolation) and social justice of the feminist movement can be made. Warren refers to the notion that it was intended that insolvency law address concerns that are broader than just the debtor’s immediate problems and that of its creditors.<sup>76</sup> It should involve considering other internal or external stakeholders such as employees, suppliers or tax authorities and in some instances to “protect interests that have no other protection.”<sup>77</sup> Here, a sense of the feminists’ compassion can be seen.

The feminist ideals of inclusion, connectedness, social justice and the flattening of hierarchies are to a greater or lesser extent visible in all the insolvency theories that tend to focus on more than just the interests of creditors.

#### IV. CONCLUSION

In this article the concept of insolvency theory (that informs our traditional understanding of insolvency law) was re-thought and re-evaluated through a feminist and women-centred lens.<sup>78</sup> There is some clear, preliminary evidence of feminist ideology (and lack thereof) to be found in recognised insolvency theory.

It was interesting to note that the insolvency theories that are focused on the creditors’ interests in insolvency display ideologies that the feminist movement have identified as being non-feminist or “masculist” in nature. These theories divide, exclude and create hierarchies amongst stakeholders in insolvency, leading to oppression of certain stakeholders who are left without much power in the insolvency proceedings due to their classification. Contrariwise, the theories in insolvency that follow a more inclusive approach to stakeholder’ interests seem to be more feminist in nature by displaying some feminist ideologies. These theories tend to flatten hierarchies and attempt to level the proverbial playing field by being more inclusive of all stakeholders. They also tend to display elements of compassion and social justice, which have at times been associated as ideologies of the feminist movement.

It seems based on this initial enquiry that insolvency theories may in fact be possible to categorise as either feminist or “masculist” in nature. This contribution is, however, merely the start of evaluating the role of feminism in insolvency law. A gendered perspective of all

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<sup>73</sup> Lahey and Salter (n15) 548.

<sup>74</sup> Walton (n57) 10.

<sup>75</sup> Warren (n61) 775; Walton (n57) 10.

<sup>76</sup> Warren (n61) 788.

<sup>77</sup> Warren (n61) 788; Walton (n57) 10-11. It is, however, criticised as “too widely expressed to be much specific assistance in developing a policy.” It also does not provide enough guidance as to the weight that has to be afforded to each of the interests and priorities that come into play in an insolvency context. “It is not clear which principles are to be seen as core and which are of peripheral relevance.”

<sup>78</sup> Paetzold (n21) 705.

stadias of the insolvency process and its consequences could possibly reveal further evidence of a patriarchal legal framework and identify areas for transformation.

From this re-reading of literature on corporate insolvency law, with a gendered perspective, I have hopefully made my own small contribution (a woman's touch) to the great task still ahead,<sup>79</sup> to re-think all legal principles and judicial concepts and add a non-patriarchal view of the law.

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<sup>79</sup> Lahey and Salter (n15) 556.