

Introduction

JOHANNA NIEMI-KIESILÄINEN, IAIN RAMSAY,
WILLIAM C WHITFORD*

CONSUMER CREDIT HAS a long history,¹ but for most of the world consumer bankruptcy has not. Twenty years ago an academic book about consumer bankruptcy systems around the world would not have been possible. Most countries did not have a consumer bankruptcy system, and few if any legal academics or practitioners identified as a specialisation consumer bankruptcy and/or other remedies for over-indebtedness² by consumers.

Since then, however, there has been rapid growth in consumer credit, nearly everywhere, as well as in problems of over-indebtedness and consumer bankruptcy. This book is the first major effort in history to look at consumer bankruptcy in all parts of the world from a comparative perspective.³ The book grew out of a series of academic meetings that has illustrated growing interest in this topic. The first was a 1996 panel on comparative consumer bankruptcy held in Glasgow, Scotland, resulting in the publication of a symposium issue on the topic by the *Journal of Consumer Policy*.⁴ There was a subsequent 1998

* Except for this introduction, wherever in this book reference is made to another chapter in the book, the phrase 'in this volume' is added to the author's name. In the introduction that phrase has not been added; all references are made simply by the author's name, whether within a textual parenthesis or a footnote. The chapter can be located by use of the Table of Contents.

¹ See eg L Calder, *Financing the American Dream* (Princeton, Princeton University Press, 1999); RM Gelpi and F Julien-Labruyère, *The History of Consumer Credit: Doctrines and Practices* (translated by ML Gavin) (New York, St Martin's Press, 2000).

² We will use the term 'over-indebted' or 'over-indebtedness' repeatedly in this introduction, without offering a formal definition. The term is used repeatedly in the contributions in this book, with the different authors perhaps using slightly different meanings. The basic idea is that an individual's indebtedness is substantial enough in relation to income and other resources to cause some of the problems of indebtedness described subsequently in the text.

A recent study conducted for the European Commission concluded that, given the difficulties in determining objectively when a level of debt become critical for a consumer, a useful measure of over-indebtedness is when a consumer 'considers that he or she has difficulties in repaying debts . . . We consider that when consumers say that they are facing difficulties or serious difficulties in repaying loans, then this is generally the situation.' Based on this criterion, 18% of the total population over 18 in the European Union were over-indebted. See OCR Macro *Study of the Problem of Consumer Indebtedness: Statistical Aspects Final Report* (London, ORC Macro, 2001) at 2.

³ See also J Ziegel, *Comparative Consumer Insolvency Regimes—A Canadian Perspective* (Oxford, Hart Publishing, 2003).

⁴ See J Niemi-Kiesiläinen and I Ramsay (eds), 'Special Issue: Changing Directions in Consumer Bankruptcy Law and Practice in Europe and North America' (1997) 20 *Journal of Consumer Policy*

meeting in Toronto, leading to the publication of a symposium issue of the *Osgoode Hall Law Journal*.⁵ The papers in this book were first presented in five separate panels conducted as part of academic meetings in 2001 in Budapest, Hungary.⁶

In this introduction we first outline the context in which this developing interest occurred—the phenomenon of the democratisation of consumer credit. We then turn to the comparative study of consumer bankruptcy and over-indebtedness and sketch some emerging themes arising from the contributions included in this book and issues for future research. These are: prevention versus treatment of over-indebtedness; the role of payment plans, discharge and relief from enforcement as treatment modes; administrative versus judicialised systems for implementing laws; the role of the US as a model of consumer bankruptcy in this era of legal transplants.

I. THE DEMOCRATISATION OF CONSUMER CREDIT

During the past two decades there has been rapid growth in consumer credit, nearly everywhere.⁷ More importantly for our topic, the groups in society to whom unsecured credit is available has also expanded. Today in an increasing number of countries around the world unsecured credit is much more available to working class families, and we are surrounded by credit advertising that encourages them to take advantage of these opportunities. This development is sometimes called the democratisation of credit. These changes are reported upon in most of the studies included in this book.

There are many causes for this growth and expansion in credit availability. On the supply side the deregulation of consumer credit markets⁸ has included both a reduction in direct controls by central banks over levels of consumer credit and the abolition of interest rate ceilings in many countries. The growth of credit scoring technology and credit bureaux have facilitated the management of the risk of large numbers of small loans to consumers. These factors have fuelled the extensive marketing of credit cards in many countries in the

133–287 [Special Issue]. The panel was part of the joint meeting of the Law & Society Association and the Research Committee on the Sociology of Law of the International Sociological Association. Such joint meetings are held once every 5 years.

⁵ J Ziegel (ed), 'Symposium: Consumer Bankruptcies in a Comparative Context' (1999) 37(1&2) *Osgoode Hall Law Journal*. The contributions to this volume were mostly from the common law systems.

⁶ Once again, the occasion was the joint meeting of the Law & Society Association and the Research Committee on the Sociology of Law of the International Sociological Association.

⁷ Growth in credit requires not only availability but also a willingness to consume credit, and that willingness is not universal. Zhang's contribution to this book discusses the difficulties China has had in encouraging consumers to take loans in order to expand consumer spending, due in part to cultural traditions emphasising the virtue of saving.

⁸ Several chapters discuss deregulation and its relation to the growth of consumer credit. See eg Reifner, Lopes, Marques and Frade, Ramsay.

world.⁹ Credit cards have become an important centre for bank profits and have been marketed extensively to many segments of the consumer credit market, playing a leading role in the democratisation of consumer credit.

The second major cause of the growth in consumer credit has come from the demand side. With the contraction of the welfare state that is occurring across much of the world, consumers are expected to pay for more of their medical care and education. Income support when unemployment strikes is less available. When medical emergencies or unemployment arises, incurring debt is often the only practical course for consumers who would otherwise prefer a lesser debt burden.

As consumer credit has expanded over so much of the world, over-indebtedness has increased as well. Over-indebtedness may result from unforeseen causes or through miscalculations or mismanagement by a consumer. The increasingly influential literature on behavioural law and economics suggests that consumers might be more prone to accept risk than they should be, if they were acting 'rationally'. Saul Schwartz, in his contribution, draws out the implications of behavioural law and economics for a number of issues in consumer bankruptcy law.

The democratisation of credit has enhanced the incidence and persistence of over-indebtedness, since the riskiness of credit extension to working class families is generally greater, and such families are less likely to find ways quickly to resolve an over-indebtedness situation. The extent of over-indebtedness has also been aggravated by a switch in the form of consumer credit. Credit cards differ in important respects from the forms of consumer credit that formerly prevailed. Much credit historically, and still, is secured credit—especially the important forms of credit that enable consumers to purchase homes and motor vehicles. When secured credit is in default, the creditor normally has available reasonably efficient means to repossess or foreclose upon the collateral, and this action commonly marks the end of the creditor's effort to collect upon the debt. Credit card debt is unsecured and so unpaid indebtedness and the problems associated with it cannot be so easily resolved. Continued indebtedness is likely even after a creditor initiates a formal collection action, since it is not likely that the entire indebtedness will be resolved in a single legal action. Credit card debt is also open ended, meaning that there is not a proscribed repayment schedule and no fixed date when, barring default, the debt will be extinguished. In these respects credit card debt differs from instalment debt, the predominant form of consumer indebtedness before the introduction of credit cards and from many other forms of consumer credit, including mortgages over property. A lack of debtor discipline in paying debts is psychologically easier with open end credit, with its minimal required monthly payments. As a result creditors of open end credit are less likely to get an early warning when a debtor is becoming unable

⁹ Ramsay's chapter on the Consumer Credit Society in this book develops these points in greater depth.

to manage his indebtedness, an early warning that might enable these creditors to take steps to prevent the emerging problems from becoming more difficult.

The problems associated with consumer over-indebtedness are many and vary from country to country. But three kinds of problems are present in virtually all circumstances, with varying degrees of seriousness. One problem concerns the perverse incentives facing an over-indebted consumer. To the extent such a debtor cannot foresee solvency for a period of years, there is less incentive to earn extra income or to undertake entrepreneurial risk, for any gains will redound to the benefit of creditors without removing the burdens of indebtedness. Such a debtor has reduced incentives to remain a productive member of society and may resort to the underground economy to avoid her creditors.

A second problem is hardship. An over-indebted consumer may begin with enough income to satisfy the necessities of life, but as a consequence of the indebtedness, that consumer is unlikely to be able to devote all that income to such purposes. Creditors will seek to use the various legal powers open to them to seize assets, including income,¹⁰ and often to such an extent that the debtor becomes impoverished. Further, the frequent interactions between creditors seeking payment and debtors in default can be psychologically harassing and cause a dramatic decline in the quality of life.

A third problem concerns economic insecurity. The democratisation of credit has become a vehicle for the privatisation of social insurance, in the form of credit availability, in societies where the public insurance provided by the welfare state has been reduced. However, an over-indebted consumer has reduced, and perhaps no, access to additional credit. If an unforeseen eventuality occurs, such as illness or unemployment, hardship will result and the consumer may have no place to turn for help. Even if an unforeseen event does not occur, there is enhanced insecurity for the over-indebted, precisely because they know that they lack access to additional credit, and this insecurity lowers the quality of life.

When such social problems emerge in a society, law reform is not likely to be far behind. Predictably, following the democratisation of credit around the world, has come legislation dealing with the problems of over-indebtedness. That legislation has commonly, though not always, concerned consumer bankruptcy.

II. THE COMPARATIVE STUDY OF CONSUMER BANKRUPTCY

Consumer bankruptcy, and other legal responses to the problems created by consumer over-indebtedness, is fertile territory for comparative research. As described in the previous section of this Introduction, the expansion of

¹⁰ Sometimes the sanctions available to creditors are more extreme. Efrat discusses how, until recently, creditors in Israel routinely arranged for the imprisonment of over-indebted consumers until somebody, usually relatives, arranged for payment of some or all of their debts.

consumer credit is nearly universal, leading inevitably to increased over-indebtedness. This creates a commonality in different countries that make the differences that do emerge especially interesting. The problems associated with over-indebtedness vary somewhat from country to country—because the existence of problems is dependent in part on the kinds of social insurance systems in place, the kinds of remedies available to unpaid creditors and the like.

The even greater variety is in the types of legal responses to those problems. This provides a rich terrain for persons interested in comparative law. On the one hand, there is the possibility of insights into what produces differences in legal rules and institutions in different legal systems. Because legal change has either happened or is being debated in virtually all the legal systems discussed in this book, there is plenty of material available to study the reasons different problems and different legal approaches emerge in different countries. On the other hand, there is also an opportunity to explore the practical effects of different legal responses to common problems—perhaps making possible conclusions about which responses better serve particular goals.

In the same vein, a central topic in contemporary comparative law is the extent to which globalisation results in convergence or divergence in legal regimes. It is possible to explore in this area whether the different legal systems are gradually moving towards a common approach to common problems, or on the contrary, are continuing to maintain significant institutional and practical distinctions. Understanding the reasons for continuing differences is important given the increasing appeal to comparative models in the reform of consumer bankruptcy.¹¹

Only a few of the chapters in this volume are truly comparative, in the sense that they directly comment on the legal and/or commercial situations in several countries (Ramsay, *Consumer Credit Society*; Niemi-Kiesiläinen). One chapter is best described as exploring economic theory, but it is economic theory thought to be applicable in all market-based economies and thus has potential applicability to all systems (Schwartz). The vast majority of the chapters discuss the policy debate in different countries, with a considerable emphasis on the law as applied and the social problems to which it is addressed. These are not simple statements of the formal law of the countries concerned. Altogether 11 different legal systems are covered. From east to west, they are New Zealand (Telfer), China (Zhang), Hong Kong (Booth), Australia (Mason and Dun), Israel (Efrat), Germany (Reifner), The Netherlands (Huls, Jungmann, and Niemeijer), United Kingdom (Ramsay), Portugal (Marques and Frade), Brazil (Lopes), and the United States (four papers—Jacoby; Braucher; Gross; Sullivan, Warren, and Westbrook). We hope that this book will be the beginning of a fruitful conversation among scholars, law reformers and practitioners.

¹¹ For further discussion of these themes, see eg G Teubner, 'Legal Irritants: Good Faith in British law' (1998) 66 *Modern Law Review* 11.

A. Issues for Future Research

Change is occurring in virtually all the countries covered by this book. And there are many countries not explicitly covered in this book with consumer bankruptcy systems and/or having contemporary debates about how to deal with the problems of over-indebtedness. Therefore, conclusions drawn at this point may be premature or subject to revision upon further evidence. Nonetheless, based on our years of thinking about comparative consumer bankruptcy and the contributions to this book, we will now offer some tentative hypotheses, as well as suggest some issues for further comparative work. Our discussion will be organised under four headings: (1) Prevention versus treatment of over-indebtedness; (2) Payment plans, discharge and relief from enforcement as treatment modes; (3) Administrative versus judicialised systems for implementing law; and (4) Whether the United States will remain an outlier, or become a world model, with its approach to consumer bankruptcy.

1. *Prevention Versus Treatment of Over-indebtedness*

Borrowing on a medical metaphor, all systems can be analysed as struggling for an appropriate balance between prevention and treatment of consumer over-indebtedness, but systems also differ, sometimes very radically, in the balance they draw. By treatment, we mean amelioration of the problems that over-indebtedness creates for the consumer.

Discharge of indebtedness is generally understood as the most complete or radical form of treatment. But as Saul Schwartz in particular emphasises, with the theme repeated in many other chapters as well, there is what the economists call a moral hazard problem in making discharge available. If discharge is too readily available, there will not be sufficient incentive for consumers to take steps to avoid indebtedness in the first place. So one approach to prevention is simply not to treat the disease (here over-indebtedness), so that the problems created by the disease serve as a deterrence. As Rafi Efrat reports, Israel, until recently, went one step further and imprisoned the over-indebted, an approach that certainly emphasises deterrence and was once widely adopted in many legal systems, though now largely discarded.

Deterrence of debtors is not the only approach to prevention, however. A society can attempt to limit over-indebtedness by deterring credit granters from extending consumer credit improvidently. Historically many countries have regulated credit extension in the name of protecting the financial solidity of financial institutions, and this regulation has often had the effect of limiting the availability of unsecured consumer credit—widely seen as a riskier form of credit than business lending or consumer lending secured by real estate. In this era of deregulation, such regulations have been abandoned or relaxed in virtually all countries; but some efforts remain, often in the form of self-regulation (Huls, Jungmann, and Niemeijer; Marques and Frade). However, many schol-

ars think that the high level of consumer lending and lax controls in granting such credit are significant causes of over-indebtedness. Somewhat ironically, a liberal provision for bankruptcy discharge can also be seen as a prevention effort in this vein. By imposing costs back on creditors when they have granted credit to someone who is unable to pay, a discharge gives creditors an extra incentive to avoid improvident credit extensions.

Another preventive approach is to judge particular credit extensions invalid, perhaps under some generalised contract law principle, when the terms are deemed too one-sided—most likely, the interest rate is too high—or because the debtor is deemed particularly unsuitable for further indebtedness (Reifner; Lopes). There is always the question whether such judgments merely impact upon the particular case or set a standard to which creditors will later adapt their behaviour. Efforts to improve the effectiveness of systems designed to provide creditors with accurate information about the creditworthiness of prospective borrowers might also be seen as having a prevention goal, since the hope is to discourage further credit extension to those already overextended (Zhang).

Still another approach to prevention is debtor education and counselling, in an effort to persuade debtors that their self-interest is best served by exercising restraint when obtaining credit. Debtor education can take place at any time, and inclusion of this in the curriculum is commonly advocated. The three contributions to this book discussing debtor education and counselling focus, however, on efforts at the time of bankruptcy (Huls, Jungmann, and Niemeijer; Braucher; and Gross). Bankruptcy is normally a stressful moment in a debtor's life, and can provide an educational moment, when the consumer's interest in the subject matter is heightened (Gross). Furthermore, in most countries persons who have once filed for bankruptcy are more likely than the population as a whole to face future over-indebtedness, and perhaps a repeat bankruptcy, in their future. Seeking to help bankrupt debtors avoid this future is the preventive aspect to providing debtor education at the time of bankruptcy (Gross).

Debtor education and counselling can also have a treatment goal, however, by focusing on strategies for dealing with the debtor's particular circumstance. The goal can be to help debtors get through the bankruptcy process, in a manner that repays creditors either as much¹² or as little¹³ as is feasible. Many education and counselling programmes have treatment in this sense as essentially their sole focus, paying little attention to generalised financial education issues that might help prevent a subsequent over-indebtedness. The nature and scope of counselling remains controversial in common law countries where only Canada has taken the step of making counselling a mandatory part of the bankruptcy process. In continental Europe, debt counselling is an integral part of state welfare assistance to over-indebted persons as part of a process of social reintegration.

¹² See Braucher on debtor education in the US in the context of Chapter 13 proceedings.

¹³ See Huls, Jungmann, and Niemeijer on counselling and efforts to negotiate informal settlements with creditors in The Netherlands.

2. Payment Plans, Discharge, and Relief from Enforcement as Treatment Modes

Few scholars today think that prevention should be the only strategy for addressing the problems associated with over-indebtedness. There will always be bankruptcies resulting from unforeseen or unavoidable hardships. As the welfare state shrinks, the number of bankruptcies primarily caused by such hardships can be expected to increase, as there become fewer alternatives to bankruptcy for providing aid to the victims of hardship. In a number of countries there is already good evidence of significant increases in hardship bankruptcies (Mason & Duns on Australia; Jacoby on the United States). The need is for some way to relieve the problems associated with over-indebtedness in such situations, which is what we call treatment.

Not all legal systems have yet adopted a procedure labelled 'bankruptcy' to redress the hardships associated with over-indebtedness. Yet even the systems without a procedure called bankruptcy are likely to offer some protection to over-indebted consumers from ordinary collection procedures. At a minimum there will be exemption laws, protecting some necessities from judicial seizure at the initiative of the unsecured creditor.¹⁴ Many legal systems today also offer some legal procedure by which debtors can gain protection from all judicial seizure for a period of time, often upon some condition such as a commitment to make payments to creditors from future income.¹⁵ It is hard to overemphasise the importance of some scheme to protect over-indebted consumers from the hardships that can be wrought by creditor use of legal collection remedies. In virtually all societies with bankruptcy schemes, the desire for relief from these hardships is most often the immediate motive for debtors to initiate a bankruptcy procedure. To continue the medical metaphor, it is the presenting symptom.

Beyond immediate relief from enforcement measures by creditors, it is usual to divide consumer bankruptcy systems into two categories—payment plans and discharge of indebtedness. These are alternative strategies for dealing with the longer term problems presented by over-indebtedness, with the ultimate goal of returning the debtor to solvency.¹⁶ Payment plans generally provide for payment of the indebtedness according to a schedule, with the debtor protected from the rigours of legal collection procedures during the payment period, and perhaps restricted from taking on additional debt during the payment period. Discharge systems terminate legal liability on indebtedness existing at the time of filing, restoring solvency unconditionally in a relatively short period after

¹⁴ For example, Lopes describes the list of 'unattachable' property in Brazil, a country that has no procedure for consumers that would be labelled 'bankruptcy.'

¹⁵ Marques and Frade discuss competing proposals to implement some kind of payment plan in Portugal, another country without a legal procedure labelled 'bankruptcy.'

¹⁶ Restoration of solvency restores the debtor's incentive to be entrepreneurial, maximise income and the like.

initiation of bankruptcy. Discharge systems are ordinarily associated with common law countries, and payment plan systems with legal systems in the civil law tradition.

There is not, however, a simple dichotomy between payment plans and discharge systems. Most countries have some kind of hybrid system. Payment plans may offer discharge in the event of hardship, or after the debtor has made a good faith effort to repay over a fixed period of years.¹⁷ Discharge systems may be conditioned on payment of income in excess of an exempt amount that is received for some period after filing, rendering these systems essentially payment systems followed by discharge. There is a wide range of time periods utilised in these systems before discharge can be obtained, ranging from a few months to several years.¹⁸ Moreover, in all discharge systems some debts are excepted from discharge so that the 'fresh start' widely attributed to a discharge is not truly a wholly new start. These exceptions from discharge include all or virtually all secured debt, and in many systems, especially the United States, an increasing number of unsecured claims as well. The United States also allows debtors to 'reaffirm' debts after discharge, thereby renewing the legal validity of a debt that would otherwise be discharged, and such reaffirmations are quite common.¹⁹

Countries offering consumer debtors a discharge increasingly also offer debtors the choice of a payment plan as an alternative bankruptcy scheme. Perhaps the oldest of these is the English administration order introduced as the 'poor person's bankruptcy' in 1883. Since the 1930s the United States has had such a system, with a choice offered between 'Chapter 13'—a payment plan, followed by a discharge—and 'Chapter 7,' which offers a relatively quick discharge. In many systems that offer a choice, extra incentives or sometimes not so subtle pressures have been devised to induce debtors to select a payment plan, but in most countries these efforts have not been notably successful.²⁰

Because of the prevalence of what we have called hybrid systems, it is tempting to conclude that the world's consumer bankruptcy systems are converging to a common model. Before drawing such a conclusion, systems must be examined in context. There is an emphasis in each of the reports in this book on how each country's system operates in practice—on any difference between the law-in-the-books and the law-in-action. Viewed from this perspective, there may be much greater divergence in consumer bankruptcy systems than first appears.

¹⁷ Reifner describes both the French and German systems. The discharge at the end of a payment plan is discretionary with a court.

¹⁸ In Canada, discharge ordinarily occurs after 9 months. In Australia discharge can occur after 6 months (Mason and Duns), and in England after 12 months (Ramsay—England). In Hong Kong, discharge does not occur until 4 to 8 years after filing (Booth).

¹⁹ See W Whitford, *Changing Definitions of Fresh Start in U.S. Bankruptcy Law*, in Special Issue, above n 4, at 179.

²⁰ Sullivan, Warren, and Westbrook discuss these efforts in the United States, and their limited success, in considerable detail. Booth discusses the lack of success of a similar effort in Hong Kong. Telfer discusses the limited use of Part XVI plans in New Zealand.

Repayment plans, for example, function very differently depending on the institutional context and role of the professionals and officials administering them. In the United States the vast majority of Chapter 13 payment plans fail and the debtor is denied a discharge altogether. A case can be made that the poorly informed debtors are encouraged, sometimes even forced, to choose payment plans when the election of the Chapter 7 discharge option is much more in the debtor's interest.²¹ In Canada and Australia where repayment plans are administered by private sector professionals a substantial minority of plans fail. In other countries, however, there is better counselling and education available to the over-indebted consumer, and conclusion of a voluntary payment plan is seen as very much in the debtor's interest. Completion of the plan and a return to solvency is a likely outcome, during which time the debtor's reputation for creditworthiness may be restored and the debtor may acquire needed learning and good habits about personal financial management.²²

Johanna Niemi-Kiesiläinen, in her contribution to this book, finds these divergences when systems are examined in context so great that she refuses to call them by the same name. She refers to systems in common law countries as consumer bankruptcy, while using consumer debt adjustment to describe continental European systems. She goes on to suggest that the differences are greater than even an empirical description of the law-in-action can reveal. Underlying the differences is a politically dominant social construction of the relationship between citizen and state. One vision emphasises the role of the citizen as a market actor, who enhances collective welfare by acting energetically in an economically maximising way. Such a vision is attracted to the goal of restoration of a debtor to solvency (ie, a fresh start), so as to avoid the perverse economic incentives facing the over-indebted. Another vision emphasises both the state's obligation to enhance the quality of life of each citizen in all its aspects and each citizen's responsibility not to cause unnecessary harm to others. Such a vision seeks to avoid the discharge of debts irresponsibly incurred and to provide assurance that when a debtor does receive a discharge, it will be part of a bundle of efforts to insure that the debtor's life experiences will improve.²³

All of this counsels that, as treatment and prevention approaches to over-indebtedness are compared and contrasted, it is not sufficient simply to examine each system's formal characteristics. Examining how the law is applied in practice is important, but so is considering how consumer bankruptcy relates both to other legal rules and institutions and to deeper conceptions of the responsibilities of a legal system.

²¹ See W Whitford, 'The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy' (1994) 68 *American Bankruptcy Law Journal* 397.

²² See Huls, Jungmann, and Niemeijer on the advantages of involuntary settlement with creditors in The Netherlands.

²³ See also I Ramsay, *Models of Consumer Bankruptcy: Implications for Research and Policy*, in Special Issue, above n 4, at 269.

3. Administrative Versus Judicialised Systems for Implementing Law

Consumer bankruptcy is generally a small stakes game. While the amount of indebtedness in a particular bankruptcy may be substantial, the true measure of the stakes in any given proceeding is the difference between what the creditors could collect absent bankruptcy and what they are able to collect through bankruptcy, either under a payment plan or because of exceptions to discharge. The latter amount will always be smaller than total indebtedness, usually much smaller. As a consequence, it is often not economically sensible for either a debtor or the creditors to hire a lawyer to deal with the bankruptcy. No doubt largely for this reason most countries in the world have established a public office with substantial responsibilities for administering consumer bankruptcies. In many countries it is this public administrator, and not courts, who make virtually all the important decisions and establish the detailed interpretations of statutory rules.²⁴

The United States represents the other end of the continuum. The public administrator, the United States Trustee, plays an inconsequential role in virtually all Chapter 7 proceedings. Rather the debtor hires a lawyer to guide him or her through the process,²⁵ with judges making important decisions in the event of conflict. The important precedents that provide the detailed interpretations of statutory rules—that set the 'local legal culture', as it is called in the US literature²⁶—are usually made by the judge, and in the US there is a specialised system of bankruptcy courts for reaching such judgments.

There are a number of systems that lie somewhere between these extremes. The Chapter 13 system in the United States is one example. In these cases the standing Chapter 13 trustee plays an important role, one that is almost always far more important than the judge. The Chapter 13 trustee is for all practical purposes a publicly appointed administrative officer (though paid from fees paid in the bankruptcy proceeding, and not from the public purse). Very often his or her decisions are more important than judicial decisions in establishing local legal culture.²⁷ Another interesting hybrid system, not covered explicitly in this book, is Canada. There a private professional, called a trustee in bankruptcy, plays multiple roles, including acting as an adviser to the debtor and also impartial representative of the interests of creditors. The work of the trustee is monitored by a government agency, the Office of the Superintendent of Bankruptcy.²⁸ The counsellor in the Dutch system, described in the contribution

²⁴ See Efrat's description of the Israeli system for an excellent example of this model.

²⁵ Creditors are free to retain their own lawyers as well, and sometimes do so. In addition a lawyer, called a Chapter 7 panel trustee, is appointed to represent creditor interests.

²⁶ See Sullivan, Warren, and Westbrook.

²⁷ J Braucher, 'Lawyers and Consumer Protection: One Code, Many Cultures', (1993) 67 *American Bankruptcy Law Journal* 501–83.

²⁸ See I Ramsay, 'Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy' (2000) 74 *American Bankruptcy Law Journal* 399.

to this book by Nick Huls, Nadja Jungmann, and Bert Niemeijer, plays a role similar in some ways to the Canadian trustee. While ostensibly loyal to debtors, the counsellor must establish credibility with creditors with whom she or he regularly deals, in order to be able to broker voluntary settlements. So there is a dual loyalty of a key professional in both systems.

Future comparative research can both attempt to explain why different systems for implementing law have emerged in different countries, and try to draw judgements about whether an administrative or a judicialised system for making key decisions, or some hybrid, is most efficacious. Of course, consistent with admonitions made in the previous part of this introduction, such work must be based on a contextualised description of the systems for implementing consumer bankruptcy. No part of a justice system operates in isolation, and consideration must be given to other parts of each country's legal system.

Future work should also consider how the method chosen for implementing consumer bankruptcy law affects future law reform. The contributions to this book are replete with examples of how the professionals who implement the law play a prominent, and perhaps dominant role, in debates about change. These include Jean Braucher's discussion of the important role of Chapter 13 trustees in the US in initiating financial counselling and debtor education, Iain Ramsay's discussion of the role of the Citizens Advice Bureaux in recent legal reform in England and Wales, and the discussion by Huls, Jungmann and Niemeijer about the conflict between debt advice agencies and judges in The Netherlands. It should not be surprising that persons who come to depend for a living on implementing law should seek to influence future legal changes, if for no other reason than to protect their particular place in the world, but it is an aspect of legal change that is all too often ignored by analysts.²⁹

4. US Consumer Bankruptcy Law: Outlier, or Model for the Future?

We do not think that in any comparative research one should examine the influence of the United States, simply because it is the only remaining superpower. However, in the area of consumer credit and consumer bankruptcy the importance of the United States is clear. The US has probably led the world in the use of the credit card to democratise credit, and per capita credit card indebtedness remains higher in the US than virtually anywhere else. Furthermore, in the US discharge for individual debtors is more easily available than in almost any other country, and the volume of consumer bankruptcies in the US far surpasses that of any other system, both absolutely and on a per capita basis.³⁰

²⁹ See D Skeel, *Debt's Dominion* (Princeton, 2001), for an historical account of US bankruptcy law that emphasises the role of professionals in influencing legislative change.

³⁰ In 1999 the US bankruptcy rate was 4.8 per 1000 population. This compares with Canada (2.72), Australia (1.44), and England and Wales (0.55). See *International Consumer Insolvency Statistics* (Ottawa, Office of the Superintendent of Bankruptcy, 2001).

At first glance it may seem incongruous that a country whose commercial law is commonly considered accommodating of merchant interests should adopt a system premised on the availability of an unconditional discharge upon demand and then have that system widely used. But if one believes that the broad vision underlying commercial law in the US emphasises the benefits to society, in terms of economic wealth and growth, of unregulated market capitalism and risk taking, then it is not surprising that there is an emphasis on avoiding the perverse incentives on hard work and entrepreneurial activity that afflict an over-indebted consumer. And since the clear trend in other countries is to adopt consumer bankruptcy systems and to make the availability of a discharge part of that system, it is easy to see how one could characterise the US as a model for the world in this area.

We have already said enough above to indicate our caveat against any quick endorsement of such a conclusion, based as it would be on simplistic comparisons without considering all the contexts in which legal developments are embedded. For one thing, as implemented, the discharge in the US is not nearly as available or unconditional as it first appears. It is undeniable, however, that the US is the leader in consumer bankruptcy volume. We should ask why so many consumers seek this form of treatment for the problems associated with over-indebtedness. Since a majority of consumer bankruptcies in the US are caused in significant part by the financial stresses resulting from illness, unemployment, and other misfortunes,³¹ it may be that the US should be viewed as an outlier in having no system other than consumer bankruptcy for treating these problems. If the US is an outlier in this respect, it should probably not become a model for the rest of the world.

Another reason for the high incidence of consumer bankruptcy in the US is its system of access. Debtors normally initiate consumer bankruptcies in the US with the help of a lawyer, partly because successful initiation of a proceeding requires the filing of much detailed information on mandated forms. The volume of consumer bankruptcies is such that many attorneys specialise in representing debtors seeking bankruptcy relief and make an adequate living doing so. Few other countries can claim a specialised bar of this nature. One consequence of having these lawyer-specialists is that they compete for business, and in doing so they advertise to consumers the benefits of bankruptcy rather than continuing to endure the problems of over-indebtedness. Future researchers should consider whether this unique feature of the US system should serve as a model for other countries. There are certainly alternative ways to educate and inform consumers about the possibility of bankruptcy relief, and debtor attorneys are hardly disinterested educators as they are interested in being retained as a bankruptcy attorney, but some education may be better than

³¹ The contributions to this book by both Jacoby and Sullivan, Warren, and Westbrook offer documentation for this conclusion.

none at all. And there is little doubt today that in the US lawyers for debtors are the primary educators.³²

There is one additional topic to consider in this limited discussion of the outlier-model controversy with respect to the United States. As we write, an ongoing political struggle continues in the US about whether to significantly restrict debtor access to an unconditional discharge.³³ The struggle originated in concern that the rapid increase in consumer bankruptcy filings in the US evidenced debtor abuse of the system. Other countries have experienced similar political pressures,³⁴ yet many other countries are responding to increased over-indebtedness by making bankruptcy and discharge more available than it has been previously. It may be that in the future the US will be seen as an outlier because it will be the one country that restricts access to its primary method for treatment for the problems of indebtedness, in the face of a considerable increase in the existence of such problems. In that respect it may be that the US should remain an outlier and not serve as a model.

³² Both Braucher and Gross, in their contributions to this book, describe attempts in the US to provide, in other ways, education about bankruptcy and the use of consumer credit.

³³ Jacoby offers some description of this 8 year struggle in her contribution to this book.

³⁴ Both Telfer on New Zealand and Mason and Duns on Australia describe similar pressures to restrict access to bankruptcy, as a response to increased filings.