

# Twenty-five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark

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## Abstract

This paper explores the problems and processes that led to the birth of consumer bankruptcy in continental Europe, a process that began in Denmark in January 1972 and culminated with the adoption of the Danish consumer debt adjustment act, Gældssaneringslov, on 9 May 1984. While this law is often described in primarily humanitarian terms, in the sense of offering a respite to “hopelessly indebted” individuals, both the motivation for the law and its intended scope were not simply accretions on an already multi-layered welfare system. Instead, the law was designed primarily as a pragmatic response to economically wasteful collections activities that imposed negative externalities on debtors, creditors, and especially Danish society and state coffers; the law was intended to force creditors to internalize (or eliminate) these externalities with respect to all debtors unable to pay their debts within a reasonable period of 5 years. The paper also examines the growing pains of this new system. The law originally left significant administrative discretion to judges, which produced vast disparities in treatment of cases in different regions of the country. Ultimately, a reform implemented in October 2005 made the system more accessible, more unitary throughout the country, and more humane. The effects of this reform are already visible in statistical observations of the system, though significant regional variations persist. Given the striking coincidence in timing, this paper also offers brief comparative comments on the parallel design—but very different effect—of the most significant reform of the US consumer bankruptcy law, also effective in October 2005. Copyright © 2009 John Wiley & Sons, Ltd.

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## I. Introduction

Of all the wonderful places to live in the world, which country hosts the happiest residents? Many might suggest the land of opportunity in the United States, but while the US may be the most patriotic country,<sup>1</sup> it is far from the world's *happiest*. The title of world's happiest—or at least most satisfied—goes to Denmark.<sup>2</sup> Why Denmark? Perhaps its because Danes are the world's biggest consumers of sugar and confectionary products.<sup>3</sup> Or maybe the answer is a bit darker: perhaps it's because Danes have “consistently low (and indubitably realistic) expectations for the year to come,” so these low expectations are easily met or exceeded, producing a warm sense of satisfaction.<sup>4</sup> The true reason for such an elusive concept as “happiness” is likely to remain a mystery.

In addition to this happiness ranking, however, Denmark has one more somewhat surprising top ranking that is easier to explain: Denmark was the first continental European country to adopt a specific legal regime aimed at treating the ills associated with consumer overindebtedness. Could this consumer insolvency law have contributed to overall Danish happiness? A direct link seems unlikely, but Denmark's trend-setting consumer insolvency system offers valuable lessons for the many other countries that have followed in its footsteps. To mine these lessons and make them more widely available in English, this paper explores in detail the problems, thought processes, and desire for solutions behind the birth of consumer bankruptcy in Denmark, beginning in January 1972 and culminating with the adoption of the Danish consumer debt adjustment act, *Gældssaneringslov*, on 9 May 1984. While this law is most often described in primarily humanitarian or social support terms, the intentions and operation of this law were in fact motivated largely by broad-based economic concerns. In classic Scandinavian fashion, the Danish law was grounded in an intensely pragmatic desire to avoid the costly excesses and negative externalities of form-

1. Sara Pardys, *Worlds Most and Least Patriotic Countries*, Forbes (2 July 2008), online at <http://www.forbes.com/2008/07/02/world-national-pride-oped-cx.sp.0701.patriot.html>

2. See Adrian White, *A Global Projection of Subjective Well-being: A Challenge to Positive Psychology?*, 56 *Psychtalk*, 17–20 (2007), online at <http://www.le.ac.uk/users/aw57/world/sample.html> (University of Leicester study introducing the first ever “world map of happiness,” with Denmark in first place, and the US in a 10-way tie for 16th with such countries as Malaysia, the United Arab Emirates, and Venezuela); see also Happy Danes are here again (17 April 2007), online at <http://www.admin.cam.ac.uk/news/press/dpp/2007041601> (describing the initial findings of the European Social Survey into well-being, begun in 2002 by Luisa Corrado at Cambridge University, with Denmark in the first place).

3. See, e.g., Michala Hegermann-Lindencrone, *Sugar Consumption in Denmark* (2005), online at <http://www.europhamili.org/protect/media/128.pdf> (noting UN estimates of per capita sugar consumption in 2004 of 21 kg/year worldwide, 35 kg for “developed countries,” and in Denmark, 40 kg for adults and

60 kg for children); *Danes are biggest consumers in growing confectionery market*, Confectionary news.com (26 April 2002), <http://www.confectionarynews.com/Formulation/Danes-are-biggest-consumers-in-growing-confectionery-market> (noting a global average annual per capita consumption of confections of 2.1 kg, a Western European average just over four times as high, and an “amazing” Danish rate of nearly twice the European average, 16.8 kg per year).

4. See Kaare Christensen, Anne Maria Herskind and James W. Vaupel, *Why Danes are smug: comparative study of life satisfaction in the European Union*, 333 *BMJ* [f.k.a., *British Medical Journal*], 1289–1291 (December 2006), online at <http://www.bmj.com/cgi/content/full/333/7582/1289> (noting that Eurobarometer data since 1980 indicate that Danes' expectations for the coming year rank among the bottom half among European nations, and these low expectations are thus “[t]he key factor that explains [top ranking Danish satisfaction] and that differentiates Danes from Swedes and Finns . . . Year after year they are pleasantly surprised to find that not everything is getting more rotten in the state of Denmark.”).

alism in the debt collection process—a cost–benefit imbalance that is certainly not unique to Denmark.

Denmark would chart new and dangerous territory with this revolutionary departure from a long tradition of strict enforcements of obligations. Much discretion was thus left to the courts to develop the rules along the way, and the radical new relief had to be shielded from misuse by imposing strict demands for both entry and the process of earning relief. This groundbreaking system thus offers its primary lessons in terms of the changes it made after more than 20 years of experience—longer than most other European consumer insolvency systems have been in existence even today. Judicial discretion turned out to be both a blessing and a curse, leading to vast disparities in treatment of cases in different regions of the country, so the main thrust of the reform implemented in October 2005 aimed at making the system more uniform, as well as mildly more accessible and more humane. At the same time, a parallel process was underway in the United States, also with the intent to bring more uniformity to the consumer bankruptcy system, though also to make it *less* accessible and, for some, *less* humane. Perhaps this explains the lower US ranking on the happiness scale. Whatever the comparison reveals about happiness in Denmark and the United States, this paper concludes with some comparative observations on the most significant reform of the US consumer bankruptcy law, which remarkably also became effective at the same time as the Danish reform, in October 2005.

## II. From Genesis to Germination: 1972–1984

The story of the birth of consumer bankruptcy in continental Europe is a testament to the power of inspired individuals to make far-reaching and deeply significant change. Not government functionaries, but private individuals pushed the first stones over the cliff, leading to a landslide of legislative change all over Europe. Indeed, one man is largely to thank for starting the movement toward consumer bankruptcy and discharge across the continent.<sup>5</sup> Many others had been battling in the trenches of debt counseling and social medicine, and many participated in the movement to relieve hopeless debtors, but this man was the first to put his arguments and proposal into a form and forum that would finally give traction to the idea of an official, structured response to a growing problem of consumer overindebtedness.

5. I say “continent” here specifically, as consumer debt relief developed quite differently in the United Kingdom, in part, influencing later developments on the continent, as discussed below. Other proposals had been floated earlier, including one in Denmark as early as 1941. See, e.g., *Udkast til lovgivning om gældsordning, udarbejdet af den ved Kgl. resolution af 8. august 1930 nedsatte kommission*, (1941) [Draft law on debt regulation, developed by the commission established by royal order of 8 August 1930]. This early proposal, like many others, met with powerful criticism and thus did not lead to legislative action. See Lars Lindencrone Peter-

sen, *Gældsansæring i Norden*, Proceedings of the 35th Annual Meeting of Nordic Jurists, Oslo, 18–20 August 1999, pt. I, 272, 274 (1999), online at <http://www.jur.ku.dk/njm/35/35.16.pdf>. Indeed, Danish law had since 1623 offered a debt relief procedure called “*opbud*” (noble respite), a close equivalent to the civil law “*cessio bonorum*,” but this law was repealed with the adoption of the Bankruptcy Law of 1858 (*Fallitloven*, later *Konkursloven*). *Betænkning om Gældsansæring* [Commission Report on Debt Adjustment], Betænkning nr. 957/1982, at 17 n. 2 [*hereinafter*, Bet. 957/1982].

### A. The first call for “social justice,” January 1972

The barrister known simply as “Fr. Bang Olsen”<sup>6</sup> from Nyborg deserves the undying gratitude of the thousands of desperate debtors whose mental health has been saved by the system Bang Olsen helped to create. Bang Olsen’s paper in the very first pages of the 1972 volume of a Danish law periodical served as the catalyst for the first continental legislative action on consumer debt relief. In that paper,<sup>7</sup> Bang Olsen recounted that a conversation with a Danish Medical Association officer had prompted him to consider the close connection between social medicine and the legal system, especially the negative impact that the latter was having on the former.<sup>8</sup>

He observed that social medical problems were predominantly a function of economic difficulties facilitated (indeed, arguably *caused*) by the public enforcement authority’s mindless implementation of the system of forced collections.<sup>9</sup> Bang Olsen called for a modern reevaluation of this system, with special attention to the question whether the ills it created and exacerbated were unavoidable or should instead be subject to guaranties against unjustifiably expansive (negative) effects. He took direct issue with a continuing blind adherence to the age-old notion, memorialized in the Danish Law of 1683, that everyone is responsible for fulfilling his duly contracted obligations (the Danish equivalent of the even older Latin maxim, *pacta sunt servanda*). Unobjectionable in most cases, this principle seemed problematic in cases in which the debtor could establish immediately that he could not pay the judgment without socially unacceptable consequences for himself and his family.

Bang Olsen lamented that the law provided no judicial authority to modify the creditor’s claim “out of social considerations” in light of the debtor’s patent inability to pay.<sup>10</sup> Indeed, he argued that this situation was, particularly, unjust in light of the fact that enforcement actions against the debtor’s meager property often produced insufficient proceeds even to pay the enforcement costs—would it not be better to leave the debtor’s property alone rather than transferring its depressed value to the enforcement organs? While creditors have rights, too, and they deserve to have their claims fulfilled, Bang Olsen posited that society had moved beyond a willingness to impose unreasonably punitive and counterproductive effects on impecunious debtors.

Bang Olsen proposed that judges be allowed, subject to evidence of the debtor’s (in)ability to pay, to reduce judgments and claims to a level considered “reasonable

6. More in-depth research revealed that “Fr.” stood for “Frederik,” the late father (deceased 24 September 2006) of Peter Bang-Olsen. Peter revealed the identity of his father “Fr.” and offered more detail on the history of the January 1972 article (he also explained that Frederik had the hyphen added to his family’s name later, to advance its position in the telephone directory from “O” to “B!”). E-mail from Peter Bang-Olsen to Ulrik Rammeskov Bang-Pedersen, 2 March 2009, forwarded to and on file with the author.

7. Fr. Bang Olsen, *Social-retspleje*, *Advokatbladet*, nr. 1, at 4 (1972).

8. The conversation appears to have occurred during an honors ceremony for one of Frederik’s many broth-

ers-in-law, Peter Skytte, a practicing physician mentioned in the opening of the paper. During a family deer hunt in the early 1970s in Bøvlingbjerg, Skytte apparently had reported seeing more and more people in his medical practice with serious and mounting problems with unserviceable debt, which robbed otherwise able-bodied workers of initiative and caused needless psychological trauma for debtors and their families. Skytte thus planted the seed in Frederik’s mind as to the close and negative connection between law and social medicine. E-mail, *supra* note 6.

9. Bang Olsen, *supra* note 7, at 4–5.

10. *Id.* at 5.

from a societal perspective” in light not only of the substantive law, but also of the potentially inordinate social costs of enforcement on the debtor and his family.<sup>11</sup> The *quid pro quo* for reducing creditors’ claims to a “reasonable and realistic” level would be a payment plan, pursuant to which the debtor would use a specifically reserved portion of future income to satisfy those claims.

The pragmatic cost–benefit foundation of this proposal is most clearly expressed in the closing sentence of the paper. It is illogical and counterproductive, Bang Olsen observed, that courts and public collection authorities on one day facilitate collections actions in support of claims on which creditors will ultimately not receive (full) payment, while social support authorities the next day consequently have to support the debtor and his family in the most costly way, including with medical and hospital assistance to treat economically based maladies.<sup>12</sup> Thus, Bang Olsen argued for a new judicial authority to reduce negative externalities (especially on the social support system) caused by blind enforcement of practically uncollectable judgments for creditors who would receive little or nothing beyond the debtor’s suffering.

This point was quickly taken up, and the idea modified, a few months later in the same periodical. A county administrator, H. Andrup, also criticized the illogical internal battle in a society that with one-hand funds collections that cause such significant hardship to citizens that the other hand is obliged to fund social support systems at much greater expense than what the enforcement system either collected or indeed had attempted to collect.<sup>13</sup> Going beyond Bang Olsen’s proposal, however, Andrup advocated a true insolvency response: a *collective* system for adjusting debts to a reasonable and realistic level. Rather than proceeding case by case, Andrup suggested, courts should reduce *all* of a hopelessly overburdened debtor’s obligations to a level that would offer a reasonable chance for the debtor to service and eventually retire his debt. Andrup acknowledged the need for careful controls against abuse of this revolutionary global relief mechanism. Nonetheless, he again emphasized the obvious benefits for society of allowing for the elimination of “unrealistic debt” and allowing debtors in unfortunate economic conditions to reestablish themselves as “decent citizens,” and get “back in the game,” where “the game” is dignified and equal existence itself.<sup>14</sup>

## B. Organization and reform momentum: Gældssaneringsrapporten, 1974–1975

Unwilling to allow their vision to be relegated to the yellowing pages of a law journal, in the fall of 1972, Bang Olsen and Andrup organized a private group of 16 legal and medical professionals to study this problem and consider solutions.<sup>15</sup> The group was

11. *Id.* at 6.

12. *Id.* This type of problem persists even today. See, e.g., *Frelsens Her fjerner fattiges gæld*, Jyllands Posten (4 July 2008), online at <http://jp.dk/jindland/article1384342.ece> (reporting on one single mother who was 5 months from completing her training as a teacher and who barely avoided eviction when the Salvation Army paid her 12000 crown debt, avoiding the state’s

being “shot in the knee” with substantial expenses for her care in a crisis center).

13. See H. Andrup, *Social gældssanering—ikke social-retspleje!*, Advokatbladet, nr. 6, at 78 (1972).

14. *Id.* at 79. Andrup thus seems to have been the first to coin the new term for debt adjustment, *gældssanering*.

15. See E-mail, *supra* note 6.

supported by the University Association for Southern and Western Jutland, with Jens Anker Andersen of Århus University taking a leading role. The members of this study circle included academics, judges and other court personnel, tax and duty inspectors, lawyers, and doctors and other medical and social support professionals. Two of the lawyers had experience in debt collection cases including more than one as collector. In their final report, however, these reformers emphasized that they had gathered as private citizens, *not* as representatives of their offices/institutions.<sup>16</sup> This was grass-roots advocacy at its best, as well as a testament to the power of interdisciplinary collaboration.

The study group's final report, known as the *Gældssaneringsrapport*, sets forth what would remain the essential structure, driving purpose, and foundations of a new approach to "rationalizing and humanizing the claims enforcement system with special attention to the adjustment of hopeless debts."<sup>17</sup> Based on a payment proposal worked up by a court-appointed assistant in light of the debtor's entire social and economic situation, courts already in charge of bankruptcy cases would be empowered in addition to write down or eliminate realistically uncollectible debts, excepting only fines, penalties, and criminal restitution orders.<sup>18</sup> The *Gældssaneringsrapport* was careful to point out repeatedly that the new system offered not a *right* to relief, but an *opportunity*, which debtors needed to show they were ready and willing to work to achieve.<sup>19</sup> Allowing debts to fall away in full immediately might invite abuse, so offering relief under clear conditions was seen as "the furthest one can go."<sup>20</sup> In exchange for imposing this extraordinary new form of relief on creditors without asking for their vote, the new system would demand willingness by debtors to exert themselves, cooperate in a collective compromise, and turn over part of their future disposable income.<sup>21</sup>

The income turnover aspect of this proposal is of considerable importance in light of the unique aspect of Danish law, both then and now, that prohibits wage garnishment for most private claims.<sup>22</sup> Consequently, converting uncollectible claims against low-value personal property into promised payment of valuable future money would represent a serious advantage for private unsecured creditors. Indeed,

16. See *Gældssanering: Et Begrundet Forslag: En rapport fra en tværfaglig gruppe forskere og praktikere 4–5* (May 1975) (*hereinafter, Gældssaneringsrapport*) (manuscript on file with author).

17. *Id.* at 4–7; Jens Anker Andersen, *Ændring af kreditorforfølgningssystemet*, *Juristen* 1973/145, at 145 and note 1.

18. *Gældssaneringsrapport*, *supra* note 16, at 16, 17. The system was designed with an eye toward the US approach in Chapter XIII of the Bankruptcy Act, *id.* at 105 and 110, which had been reviewed by another barrister in another Danish publication, apparently based on his experience in LLM studies in the United States. See Feodor Nielsen, *Kreditorforfølgning i social belysning*, *Juristen* 1973/193.

19. *Gældssaneringsrapport*, *supra* note 16, at 17, 69, 70, 117.

20. *Id.* at 17.

21. *Id.* at 12, 60–61, 107, 118, 120–122. The original proposal would have restricted the payment plan to a maxi-

mum of two years and 20% of the debtor's after-tax income per year. See *id.* at 20–22, 120–122, 135. The group acknowledged that some debtors would have no anticipated disposable income over the plan period, and so would receive an immediate and essentially unconditional discharge. *Id.* at 134–135, 139 (warning against overly optimistic payment plans and encouraging plans shorter than 2 years to ensure viability).

22. See *id.* at 12, 86; Retsplejeloven [Administration of Justice Act] §§ 508, 511 (2009), online at <http://www.themis.dk/synopsis/docs/Lovsamling/Retsplejelovens.kapitel.47.html>; see also *Kan lønnen røres?*, § 1, online at <http://www.familieadvokaten.dk/Emner/644.html>. Before 2005, *public* debts could be enforced by wage garnishment only up to 20% of net unpaid wages, but this restriction was removed and replaced by the same budgetary allocation rules as in debt adjustment cases as of 1 November 2005. See *id.* § 2.

the *Gældssaneringsrapport* expressed some doubt that this significant incursion into debtor wage-protection was warranted in exchange for creditors' simply writing down "dubious debts to their factual value."<sup>23</sup> A rising incidence of public and private collections actions, however, added urgency to the group's proposal.<sup>24</sup>

Like Bang Olsen's and Andrup's papers, the *Gældssaneringsrapport* appealed initially to humanitarian concerns for fellow citizens laboring under unbearable psychological and economic burdens.<sup>25</sup> It observed that even debt collectors themselves ("as a rule the younger ones") found the current collections system "both irrational and inhuman."<sup>26</sup> But it quickly moved beyond this. Acknowledging that the notion of respect for contracts produced weighty benefits for both individuals and society, the report admitted that compassion for one's fellow man was insufficient alone to support a new system of forced abandonment of valid claims.<sup>27</sup>

It thus quickly shifted focus to pragmatic, economic, almost utilitarian concerns, identifying several groups of principal beneficiaries of the proposed law. First, children of overburdened debtors could escape growing up in an environment of pressure and harassment that would hinder them from joining society later with a loyal and positive attitude toward society. Otherwise, these children faced a danger of developing a negative attitude toward work and paying taxes, as well as an over-reliance on social assistance. Second, on a related and broader level, society, in general, would benefit in at least two additional ways. First, when debts are enforced without regard to reasonable ability to pay, debtors understandably fall prey to an "immoral but well understood and accepted notion of 'going on strike'... an inordinately costly phenomenon" as society faces lost productivity and tax revenue, as well as rising public assistance expenditures.<sup>28</sup> Second, public collections authorities had expressed a desire for greater authority than the law current gave them to avoid the administrative work and expense associated with pursuing obviously uncollectible debts. Such collections often cost more than what could be collected, though the law offered authorities precious little discretion to abandon such debts.<sup>29</sup> Finally, private creditors paradoxically stood the most to gain from a collective debt adjustment system. Individual creditors were motivated to press debtors to the law's extreme, not taking into account the interests of the collective of all creditors, thus increasing collections costs, depressing the value of available assets, and expanding losses for all.<sup>30</sup> Experience had shown that successful collection depended upon

23. *Gældssaneringsrapport*, *supra* note 16, at 120, 121. This point was hotly debated during earlier discussions in the 1970s of allowing private creditors general access to wage garnishment. See, e.g., Mogens Munch, *Fokus på debitor*, Ugeskrift for Retsvæsen 1974/B.88, 89; Nielsen, *supra* note 18, at 200 (noting that some had likened required payment plans to a reintroduction of indentured servitude, but arguing that this was a mere slogan).

24. The report noted that the principal problem had always existed, but "[i]t can hardly be doubted that the problem... has become many times larger within recent years," later noting a 16% increase in collections cases from 1973 to 1974 alone (from 464 000 to 538 000). *Gældssaneringsrapport*, *supra* note 16, at 81, 105.

25. See, e.g., *Gældssaneringsrapport*, *supra* note 16, at 62.

26. *Id.* at 96.

27. *Id.* at 62, 63.

28. *Id.* at 64, 90.

29. *Id.* at 67, 68. The official policy of full enforcement led to pointless pursuit of tax debts, in particular, to the frustration of tax authorities. See *id.* at 86, 87, 89, 90–96.

30. This line of argumentation stands at the very foundation of insolvency law generally. See, e.g., Bob Wessels *et al.*, International Cooperation in Bankruptcy and Insolvency Matters: On the Origins, Development and Future of Communication and Cooperation in Cross-border Insolvency Cases 14–15 (2009).

cooperation among creditors and debtors on reasonable payment plans, and this law would provide the platform for formulating the best available such compromises.<sup>31</sup>

In sum, the *Gældssaneringsrapport* sought to use the bankruptcy courts as a neutral intermediary to steer unreasonable creditors into embracing reasonable consensual workouts and halting collections pressure that externalized significant harm onto debtors, their families, other creditors, and society—harm that far outweighed whatever meager advantages such actions brought to individual creditors.<sup>32</sup> This would both produce and spare real value, especially in the form of tax receipts and avoided social assistance and medical costs: “Transforming even a modest number of social assistance recipients into taxpayers might well mean a gain of many millions of crowns.”<sup>33</sup> Moreover, it would impose no real cost to put a rational end to “this fiasco” of endless and counterproductive collections actions.<sup>34</sup> Indeed, forcing creditors formally to write-off claims established to be worthless would simply acknowledge already existing factual losses, not produce any real loss, other than a reduction of the “moralizing effect” that the continued pursuit of such claims “might be considered to have.”<sup>35</sup>

Of course, this approach places a great burden on the courts to establish claims as worthless by identifying “can’t pay” as opposed to “won’t pay” debtors. Because the group could not agree on a clear list of criteria, the *Gældssaneringsrapport* left this new challenge almost entirely unregulated, leaving the development of standards to practice in the courts and the appellate review authority of the Supreme Court.<sup>36</sup> The group anticipated overly cautious judicial application of the new law in its initial years, hopefully expanding as time wore on.<sup>37</sup>

### C. Official debt adjustment commission report: *Betænkning*, 1982

Grass-roots initiative only goes so far, so the group wisely reached out to both government and legislature. A first draft of the *Gældssaneringsrapport* was circulated to interested parties and discussed at a meeting in Christiansborg on 23 September 1974, with several members of the Danish legislature (*folketing*) and the Justice Ministry. Based on this discussion and later follow-up comments, a final revised and supplemented report was issued in May 1975.<sup>38</sup>

31. *Gældssaneringsrapport*, *supra* note 16, at 65, 66.

32. *Id.* at 43, 59, 82, 90, 106.

33. *Id.* at 104.

34. *Id.* at 83.

35. *Id.* at 84, 115, 116, 131.

36. *Id.* at 59, 84, 103, 108; see also *Bet. 957/1982*, at 80–82 (noting the same uncertainty and danger of non-uniform development of the open-ended law, but relying on the appeals process and the legislative history to provide unifying guidance). Indeed, this uncertainty and the need for a stable and expert foundation was one of the primary reasons why Denmark chose to locate the new system within its existing bankruptcy court system, as opposed to a free-standing procedure run by the debt collectors, as the Swedish system would do 10 years later. See *Gældssaneringsrapport*, *supra* note

16, at 84 at 108; *Bet. 957/1982*, at 82, 83; cf. Jason Kilborn, *Out with the New, in with the Old: As Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?*, 80 *AM. Bankr. L.J.* 435 (2007). Despite the connection to the bankruptcy courts, the official government commission decided not to require a bankruptcy filing and asset liquidation before debtors sought a discharge of remaining debt, because the stigma of a bankruptcy filing would dissuade many debtors from seeking relief, and courts could require liquidation of individual assets—or, indeed, a bankruptcy filing—for the few exceptional debtors with significant valuable assets. See *Bet. 957/1982*, at 95, 6.

37. *Gældssaneringsrapport*, *supra* note 16, at 105.

38. See *id.* at 6, 11, 143; *Bet. 957/1982*, at 4–7.

Though the wheels of government grind slowly, they had been decisively set in motion. The Justice Ministry immediately sent the *Gældssaneringsrapport* on for hearings in a number of government agencies and legal organizations. A general sentiment emerged from these hearings that there was, indeed, a need for a formal means of authorizing—and mandating—a write-down of uncollectible debts, especially tax and supports debts owed to the public sector.<sup>39</sup> On 20 January 1977, based explicitly on the overwhelming support that the *Gældssaneringsrapport* had received in these hearings, the Justice Ministry convened a special commission made up of representatives of tax, justice, and social authorities to further investigate the need for and optimal structure of the sort of system proposed in the *Gældssaneringsrapport*.<sup>40</sup>

The official commission's August 1982 report became the basis (and most compelling interpretive source of legislative history, consistent with Scandinavian legal practice<sup>41</sup>) for the first consumer debt adjustment and discharge law in continental Europe. It proposed a system to allow debtors "to be put in a position and motivated to retire debts over the course of a foreseeable period [of 5 years]" by reducing obligations to "the realistic portion of debts falling on overburdened debtors."<sup>42</sup> The official explanation of the need for debt adjustment closely tracked the reasoning in Bang Olsen's and Andrup's papers and the *Gældssaneringsrapport*. The core aim was still to overcome "purposeless, expense- and resource-intensive misuse of the collections apparatus" that serves only to exert undue economic and psychological pressure on hapless debtors.<sup>43</sup> The commission report again emphasized a desire for a structure to compel individual creditors to consider their place in the *collective* of claims and find a reasonable, workable compromise in the light of all relevant interests, including not only the debtor's and creditors', but also society's.<sup>44</sup>

Unlike earlier commentaries, the commission report contained very little appeal to human dignity and solidarity with one's "fellow man."<sup>45</sup> Instead, it carried forward

39. Bet. 957/1982, at 7, 15. The report from the debt adjustment commission contains a detailed analysis of the large and growing volume of unpaid tax debts, many determined to be realistically uncollectible, that had mounted in Denmark between 1970 and 1982, especially in the last 5 years of that period. See *id.* at 40–56.

40. See *id.* at 4, 5, 9.

41. See, e.g., Konkursrådets Betænkning nr. 1449/2004, at 31, 82 and *passim*, online at <http://jm.schultzboghandel.dk/upload/microsites/jm/ebooks/bet1449/index.html> (*hereinafter*, Bet. 1449/2004) (identifying the report as "the starting point" for the law); see also Skat, *Inddrivelsesvejledning*, § H.6.1, online at <http://www.skat.dk/SKAT.aspx?oId=72620&vId=202187&i=969&action=open#i72620> (noting that the reform law "rests on report no. 1449/2004" and relying on the commission report for interpretive guidance on the new law).

42. Bet. 957/1982, at 5, 6, 89, 90, 96.

43. *Id.* at 7–10 (quoting passages from the *Gældssaneringsrapport* regarding debtors' "going on strike" and the harm to productivity, tax receipts, and social support benefits, in addition to the harm to private creditors). Confirming the views expressed in the *Gældssanerings-*

*rapport*, the commission report contains detailed discussions of the relatively limited debt-forgiveness practices of the tax and customs authorities, including opinions by representatives of such authorities that formal write-offs of many of these debts would pose no significant loss—and would save the authorities substantial expenditures of time and resources—as continuing collections pressures resulted in broken and passive debtors and wasted effort, not successful collections, but current law allowed them too little discretion to abandon such claims. The commission report also focused on the rising problem of practically uncollectible student loans, small business loans, and obligations to repay social assistance benefits that had been retroactively recalculated. See *id.* at 56–66.

44. *Id.* at 9, 79, 80, 85, 86.

45. See, e.g., Françoise Domont-Naert, *Letraitementsurendettement dans un pays du nord de l'Europe: l'exemple danois*, in *Le Surendettement des Particuliers* 89, 96, 97 (Michel Gardaz ed., 1997) (noting that economic arguments were "at the heart" of the new law, with social justices supporting the economic perspective). But see, e.g., Bet. 957/1982, at 74 (noting "a heavy-weighting perspective" of humane treatment of debtors and families).

the *Gældssaneringsrapport's* economic focus and detailed critique of the undesirable effects on paralyzed debtors, their dependent families, and greater society (especially social support budgets and tax collections) flowing from an unchecked collections system. The status quo robbed debtors of productive incentive and motivating hope by threatening<sup>46</sup> to channel all earnings above a low threshold to creditors.<sup>47</sup> The commission report also echoed the *Gældssaneringsrapport's* earlier observation that forcing creditors to acknowledge the real value of claims and recognize already existing factual losses would impose no real cost on creditors and would likely increase the amount and equality of payment to the creditor collective.<sup>48</sup> It added an important point about the intermediating role of the bankruptcy court for creditors who otherwise lack the motivation or ability to collect sufficient information to establish the extent to which further collections actions are unreasonable.<sup>49</sup> The dangers of “a possible weakening of general payment morality” and “a substantial tightening of credit extension” were acknowledged,<sup>50</sup> but the commission believed that the strict requirements of the law would serve as safeguards against abuse, guaranteeing that creditors would suffer no real economic loss.<sup>51</sup>

Thus, the principal foundation of the new law, from its inception through the legislative process, was a pragmatism characteristic of Scandinavian legal thought. No wonder, then, that the first continental European consumer insolvency law appeared in Denmark, whose “realist” legal tradition is noted for a skepticism toward continental legal formalism, emphasizing instead a grass-roots practical approach to solving real-world problems.<sup>52</sup> Though compassion for one’s fellow citizen, social solidarity, and a welfare-state desire to alleviate suffering were certainly motivating factors, these sentiments did not constitute the principal driving force behind the pioneering movement for debt adjustment in Denmark.

As in most European law reform discussions, the commission report includes a detailed evaluation of foreign law,<sup>53</sup> particularly, the laws in the UK and US that allowed for discharge of unpaid consumer debt. The report undertook a particularly detailed analysis of the development since 1705 of the Anglo-American law of

46. The report admits, on the one hand, that pursuit of hopeless debts seemed not to be a widespread phenomenon, but nonetheless, on the other hand, the “mere existence” of these debts created the negative consequences described. Bet. 957/1982, at 83, 84.

47. *Id.* at 73–75.

48. *Id.* at 74, 90–93.

49. *Id.* at 86, 92, 104 (noting that the information required to facilitate desired consensual workouts will most often not be available outside the formal process, where a trusted public official can vouch for and intermediate in the process by which the payment proposal is developed).

50. *Id.* at 75, 91. When this system was reviewed two decades later, the review commission expressly concluded that these “dangers . . . had not materialized.” Bet. 1449/2004, at 52.

51. Bet. 957/1982, at 91, 92, 122. Indeed, the commission remarked that a bit more resistance to extending credit

to already indebted consumers would not necessarily be an undesirable consequence of the new law. See *id.* at 93.

52. See generally Heikki Pihlajamäki, *Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared*, 52 *Am J Comp L* 469 (2004); Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki, *Nordic Law—Between Tradition and Dynamism*, Tilburg Institute of Comparative and Transactional Law Working Paper No. 2008/10, online at <http://ssrn.com/abstract=1287088>

53. The Foreign Ministry surveyed and reported on the law of Australia, Belgium, Canada, England, France, the Netherlands, Ireland, Italy, New Zealand, Norway, Sweden, the US, and West Germany, though only the “Commonwealth” countries (UK, Ireland, US, Canada, Australia, and New Zealand) had relevant comparable laws at this time. See Bet. 957/1982, at 25.

discharge, including the legislative history and early empirical results of the new “automatic discharge” after 5 years in the UK Insolvency Act of 1976 and the 1978 amendments to the system of 3- to 5-year wage-earner payment plans in Chapter 13 of the new US Bankruptcy Code.<sup>54</sup> The report quotes at length from the 1977 US House of Representatives Judiciary Committee report on the need for reforms to Chapter 13 payment plans, focusing on the suggestion that overly formal procedures had inhibited the development of payment plans.<sup>55</sup> The committee described in quite complementary terms the US practice of allowing debtors to pay off “the realistic portion of their debts through payment of a portion of their future income,” which ultimately offered creditors better returns than a liquidation bankruptcy.<sup>56</sup> Nonetheless, the commission acknowledged that, while the notion of discharge had a long and continuous history in Anglo-American law, it represented a thoroughgoing break with Danish legal tradition, so the commission explicitly found that UK and US laws “should not serve as models for Danish rules on debt adjustment.”<sup>57</sup>

Instead, the commission sought further support for its proposal by reaching far back into Danish history. During the debates on the first Danish bankruptcy act in 1858, a proposal had been advanced to allow bankrupts to be freed from personal liability on debts remaining after bankruptcy proceedings after 5 years on condition that they could document good economic behavior and had paid unsecured creditors at least 50% of their claims.<sup>58</sup> This proposal was ultimately rejected on the grounds that it was opposed by “general opinion,” but the commission noted that it had been supported by very modern-sounding arguments to the effect that “it does not help to press [an insolvent debtor] immediately, but time must be given him to earn something.”<sup>59</sup> By the early-1980s, the commission observed, public opinion had turned in favor of protecting debtors and avoiding unjustified enforcement costs, as evidenced by recent legal restrictions on debt collection and bankruptcy that sought to “change the legal-political situation, which to a higher degree emphasizes the need for flexibility. . . [and] should be provided with a ‘safety valve.’”<sup>60</sup> The law had not yet gone so far as to allow debtors to make their way out of hopeless economic situations without the consent of at least a majority of their creditors,<sup>61</sup> so the commission strongly supported the final step of implementing a system for court-mandated adjustment, orderly payoff, and discharge of debt, at least on certain rigorous preconditions.

54. *Id.* at 25–35, Appxs. 3 and 4.

55. *Id.* at 31, 32 (quoting from H.R. Rep. 95–597, House of Representatives, Committee on the Judiciary, Bankruptcy Law Revision 116, 117 (1977)).

56. *Id.* at 32.

57. *Id.* at 80.

58. *Id.* at 18.

59. *Id.* at 19 (quoting from the debates on the 1858 law, RT 1858 FF sp. 3139).

60. *Id.* at 72, 75, 77–79. The word “safety value” (*sikkerhedsværdi*) is used repeatedly to describe the intended effect of the new system. See, e.g., *id.*, at 5, 77, 85.

61. The history of the parallel notion of forced compromise (*tvangsakkord*), pursuant to which a payment and discharge plan can be imposed on a dissenting minority of creditors by majority creditor vote, was discussed by the committee at length, noting that this relief was limited to merchants, manufacturers and shippers until 1905, and even after that, one large creditor or a few non-participating creditors could rob a compromise agreement of its force, and after the unified Bankruptcy Law of 1977 (*Konkursloven*), a 25% minimum dividend was required. *Id.* at 18–24, 133. The 25% minimum was reduced to 10% in the 2005 reform.

#### D. Law nr. 187 of 9 May 1984, Gældssaneringslov

The Danish legislature enacted the commission's proposal on 9 May 1984, with an effective date of 1 July 1984.<sup>62</sup> It thus put in place the first continental statute on general debt relief, adding a new Part IV to the Bankruptcy Act (*Konkurslov*), chapters 25–29.<sup>63</sup> The Danish legislature's embrace of this law is particularly noteworthy in that most of the law's downside would fall on the state. First, the costs for this system<sup>64</sup> would be borne by public coffers except in the most exceptional circumstances.<sup>65</sup> Second, and more important, private debts were already often written off, as they could not (and still cannot) be collected through wage garnishment, so public debts were and are the “dominating, by far largest creditor in most [collections] cases.”<sup>66</sup> Thus, the main forfeiture in these cases would be the *state's* right to enforce claims, a more impressive legislative sacrifice than simply depriving private creditors of their prerogative to harass debtors and foist negative externalities on the state and other citizens.

### III. The First System: Entrance Requirements, Payment Plans, and Broad Discretion

The specifics of the system as ultimately proposed and adopted tracked the *Gældssaneringsrapport* quite closely. Indeed, the basic structure of the Danish debt adjustment system has remained quite stable over its now 25-year lifetime. While some important details have been reformed in recent years, as discussed below, the fundamentals have stood the test of time. This section will offer an overview of its most salient aspects.

#### A. Restrictive entry requirements to curb abuse

To prevent the possible negative consequences of discharging technically valid debt, the official commission proposed two types of strict entry requirements to identify “hopelessly indebted” debtors. Generally, previous debt adjustment cases are not an insurmountable impediment to repeat relief, as no “serial filing” prohibition was proposed. Though the expectation was that the system would represent once-in-a-lifetime relief for most debtors, the commission suggested that exceptional cases of repeat relief would be acceptable if the debtor could establish the following criteria in a later case.<sup>67</sup>

62. Prop. 1993/94:123, *Skuldsaneringslag*, § 3.2, online at <http://www.riksdagen.se/webbnav/index.aspx?nid=37&dokid=GH03123>

63. The current Bankruptcy Act, including Part IV, is available online at <https://www.retsinformation.dk/Forms/R0710.aspx?id=2832>

64. Expenses for court costs, publication and notice costs, and trustee fees generally amounted to 12–15 000 crowns (€ 1500/US\$ 2000) per case during the late 1990s. Dommerfuldmægtigforeningen & Advokatrådet, *Redegørelse Vedrørende Ændringer i Konkurslovens Bestemmelser om Gældssanering* 61 (29 April 1999) (*hereinafter*, D&A Report), online at <http://www.advokatsamfundet.dk/Admin/Public/DWSDownload.aspx?File=Files%2FFiler%2F%20Publikationer%2FRapporter%2FGaeldssaneringsrapport.doc>

65. Konkurslov § 203; Bet. 957/1982, at 105, 150, 160, 161. The official commissions in both 1982 and 2004

suggested that fees might be assigned to a debtor if a distribution of more than 25% were expected or if a second case were filed after an earlier case had been dismissed based on the debtor's fault, see *id.*; Bet. 1449/2004, at 26, 285–290, 297, 298, but this has been an extraordinary exception in practice. A proposal to impose a 1500 crown application fee on debtors was rejected by the legislature. *Id.* at 290, 291.

66. See *Gældssaneringsrapport*, *supra* note 16, at 86, 105.

67. Bet. 957/1982, at 128, 129. The *Gældssaneringsrapport* had proposed a rule permitting repeat filings after 5 years after the entry of a discharge order. See *id.* at 172. The commission rejected a specific provision, but it agreed that “a certain period” should have passed between cases, noting that 5 years seemed reasonable. See *id.* at 128, 129.

The first, “objective” criterion allows relief only for debtors suffering from “qualified insolvency;” that is, the debtor is not able and has no prospect of being able to pay off debts in full<sup>68</sup> in the near future (generally 5 years).<sup>69</sup> While this test envisions a relative and individualized disconnect between disposable income and debt, so no minimum debt burden was established in the statute, practice soon developed to require at least 250 000 crowns (€ 25 500/US\$ 29 400)<sup>70</sup> of debt for able-bodied debtors and 100 000 (€ 10 200/US\$ 11 750) for retirees and disabled people to establish this factor.<sup>71</sup> This test invites courts to undertake an immediate evaluation of the debtor’s way of life and his or her attempts to modify it in response to financial hardship. Relief can be rejected at the outset for debtors who dedicate more than a “reasonable” amount of their income to living expenses (especially housing and cars).<sup>72</sup> The method for identifying “reasonable” living expenses was left to discretionary case-by-case development through individual court judgments (and supervision by appellate courts).<sup>73</sup>

Another significant aspect of this first “objective” test bars the door to debt adjustment for debtors whose economic situation is “unclear.”<sup>74</sup> Thus, *temporarily* unemployed able-bodied debtors should not expect relief, because it is not certain that their insolvency will persist for 5 years.<sup>75</sup> Similarly, debtors continuing to operate small businesses generally do not qualify for relief, as business receipts and expenses vary too significantly in most cases.<sup>76</sup> Indeed, some courts have also excluded cases on the grounds that an anticipated inheritance in the reasonably near future renders the debtor’s financial circumstances “unclear.”<sup>77</sup>

68. The “in full” part is somewhat unclear on the face of the law, but the commission report definitely envisions insolvency as being a function of inability to “fulfill” (*opfylde*) debts; that is, pay “in full” (*fuldt ud*). See, e.g., Bet. 957/1982, at 87, 89, 121 (using these phrases to describe qualifying debtors).

69. Konkurslov § 197; Bet. 957/1982, at 91, 108, 121. The phrase “in the near future” was added in 1987 to confirm the already clear intention that five years would be the guiding period. See Bet. 1449/2004, at 58.

70. All currency conversions in this paper are rounded for ease of reading and are based on a rate of 8.50 Danish crowns to 1.00 US dollar to 0.867 Euro (9.80 Danish crowns per Euro), based on the average of OECD figures for purchasing power parity (“PPP”) for actual individual consumption and GDP from 2000 to 2008, online at <http://stats.oecd.org/wbos/Index.aspx?datasetcode=SNA.TABLE4>. As the OECD table illustrates, the market exchange rate for these currencies has fluctuated substantially over the years, falling significantly through the 2000s, while PPP figures have not fluctuated so widely. Using the PPP conversion eliminates the artificial skewing effect of time and market exchange rates as well as price differences in the two areas, as the PPP exchange rate is based on how much of each currency a debtor in each region would need “to buy the same representative basket of consumer goods and services.” OECD, *Purchasing Power Parities: Comparative Price Levels*, Main Economic Indicators (February 2009), online at <http://www.oecd.org/dataoecd/61/54/18598754.pdf>

71. Domont-Naert, *supra* note 45, at 89, 91

72. Bet. 957/1982, at 122–23; Bet. 1449/2004, at 74 (citing a rejection for excessive housing and car expenses).

73. Bet. 957/1982, at 80.

74. Konkurslov § 197(2); Bet. 1449/2004, at 70–72; Petersen, *supra* note 5, at 278.

75. Bet. 957/1982, at 92, 125; Bet. 1449/2004, at 72 (noting that “a series of decisions” had rejected applications by temporarily unemployed debtors); see also Domont-Naert, *supra* note 45, at 92.

76. Bet. 957/1982, at 154; Bet. 1449/2004, at 72–76; Petersen, *supra* note 5, at 276. The 2005 reform was motivated in significant part by a desire to support small business people, however, so debt adjustment following a small business bankruptcy is now allowed, but the conditions differ somewhat for these specific cases. See, e.g., Peter Lunding Smith, *Nye regler om gældssanering træder i kraft den 1. oktober 2005*, ForumAdvokater, online at <http://www.forumadvokater.dk/Lovorientering/Erhverv/Inkasso/Arkiv%20Article/Nye%20regler%20om%20gældssanering%20traeder%20i%20kraft.aspx> (noting that the “uncertainty” factor can be set aside in such cases, and the plan period is 3 rather than 5 years, but it remains to be seen how these cases will unfold in practice).

77. See Bet. 957/1982, at 131; Bet. 1449/2004, at 69, 70 (describing a case where the creditor argued that the statistical lifespan of an 85-year-old man, like the debtor’s father, was only 4.7 years; thus, the debtor’s inability to pay off debts within 5 years was unclear in light of the potential inheritance).

The second, “subjective” set of criteria originally required the court to evaluate each individual case to overcome a negative presumption that relief would not generally be appropriate. That is, the court had to overcome this presumption by being convinced that the debtor’s “behavior and circumstances otherwise speak in favor” of debt adjustment.<sup>78</sup> This judgment was to be based on a holistic evaluation of the debtor’s circumstances, but with particular regard for a series of enumerated items:<sup>79</sup> (1) the likelihood that a discharge will help the debtor to regain social and economic equilibrium, and not return to a perpetual state of indebtedness going forward<sup>80</sup>; (2) debts of an age that demonstrate long-term struggles with an unmanageable debt burden; (3) respectable circumstances of the majority of the debts’ having arisen (not mostly fines, penalties, and “irresponsible” debts<sup>81</sup>), though “bad” debts were not strictly prohibitive, especially if substantial time had passed since such debts were incurred<sup>82</sup>; (4) the debtor’s responsible efforts to service and otherwise manage debts;<sup>83</sup> and (5) the debtor’s conduct during the case, especially with respect to full disclosure of financial information.<sup>84</sup>

The court makes these determinations at an initial hearing based on the debtor’s written application and oral responses to questions posed at the hearing, where debtors are generally unrepresented.<sup>85</sup> Debtors seek relief by filing a sworn application with their local court that handles estates and bankruptcy cases (*skifteret*). The form application contains detailed information about the debtor’s personal and financial situation, including a list of creditors.<sup>86</sup>

One extremely common requirement in other consumer insolvency regimes is conspicuously absent in the Danish system. Unlike virtually every other system that would follow, no debt counseling or out-of-court negotiation with creditors is required before seeking formal coercive relief.<sup>87</sup> The commission concluded that anything like the forced compromise system (*tvangsakkord*), which was designed for businesspeople seeking to avoid bankruptcy, was unsuitable for consumer debtors who could not offer a significant and relatively quick dividend to creditors.<sup>88</sup> Indeed, as a fundamental policy matter, the commission explained that the debt adjustment system was designed to rehabilitate consumers struggling with hopeless debt by

78. Bet. 957/1982, at 94, 108, 122, 126.

79. The current, post-2005 version of this list is shorter, as discussed below. See Konkurslov § 197(1)–(2).

80. Bet. 957/1982, at 128; Bet. 1449/2004, at 61, 62.

81. Debtors whose primary debts were long-term tax arrears, speculative investment debts, large consumer debts contracted within the recent past (3–5 years), or other debts that were clearly not payable from the outset, have often seen their applications rejected. Bet. 1449/2004, at 64–67; Prop. 1993/1994:123, *supra* note 62, § 3.2.

82. See Bet. 1449/2004, at 63 (describing a case in which a debtor with primarily “speculative” debts was granted relief, but only because many years had passed, and the debtor had not undertaken new debts in the past 4 years).

83. Bet. 957/1982, at 129–31; Bet. 1449/2004, at 67–69.

84. Bet. 957/1982, at 6, 94, 108, 122; Bet. 1449/2004, at 69.

85. This hearing is thus quite similar to those conducted in England and as described in one of the first

empirical works on European consumer bankruptcy. See Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U Pa L Rev, 69, 75–112 (1982).

86. Konkurslov § 202; Bet. 957/1982, at 109. The form application appears at the end of the following page: <http://www.themis.dk/synopsis/index.asp?hovedramme=/synopsis/docs/lovsamling/gaeldssaneringsbekendtgoerelsen.html>

87. See Jason J. Kilborn, *Comparative Consumer Bankruptcy* 20–48 (2007) (discussing the requirement of credit counseling and/or negotiation with creditors in several other systems, including the abandonment of that requirement in Sweden as of 1 January 2007).

88. Bet. 957/1982, at 86–89, 140, 141. This conclusion has been borne out in practice in other countries, as the consensual, out-of-court workout process has produced very limited success. See KILBORN, *supra* note 87, at 20–48.

imposing reasonable and realistic write-downs on creditors, not to facilitate consensual workouts. Another, more practical explanation for the absence of a counseling and negotiation requirement is that, unlike most other European nations, Denmark did not in 1984 and still today does not have a broad, state-supported system of consumer debt counseling to support such negotiations.<sup>89</sup>

These stringent entry requirements have led to an astoundingly high application rejection rate. From 2002 to 2004, for example, of an average of about 4700 debt adjustment applications per year, the courts immediately rejected 55–60% every year.<sup>90</sup> Statistics on earlier years are not readily publicly available, but extrapolations from secondary studies suggest that this rejection rate has remained steady throughout the life of the law.<sup>91</sup> Striking as these results may be to outside observers, they are a bit less troubling in light of the unique Danish prohibition on wage garnishment by private creditors. The ramifications of a rejected debt adjustment application are not nearly as severe given the limitations on debt collection outside this system. Indeed, despite the absence of a consensual negotiation requirement, one might interpret these Danish results as being broadly consistent with trends elsewhere in Europe: more than half of all debtors are relegated to out-of-court negotiations with creditors to work something out in light of the debtor's ability to pay and the leverage provided by the otherwise quite debtor-protective Danish debt collection regime.

Moreover, the high rejection rate has at least two compelling explanations.<sup>92</sup> First, unemployment is overwhelmingly the most common factor in overindebtedness in Europe and elsewhere, and in Denmark, many applications are likely rejected because, as mentioned above, a temporarily unemployed debtor's future economic situation is "unclear." As counterproductive as this might seem, on second glance, it probably approximates the result even in more liberal systems such as the US. It is a truism among the US bankruptcy lawyers that one should seek relief only after

89. In contrast, when Sweden adopted its first consumer debt adjustment system, it also imposed a requirement on municipalities to support budget- and debt-counseling. See Jason J. Kilborn, *Out with the New, in with the Old: As Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?*, 80 Am Bankr L J, 435, 441 and n. 36 (2007). The Danish commission predicted that the rules on public support for debt advice would eventually need to be revised to offer public payment to lawyers and other professionals for debt advice and the development of consensual workouts, Bet. 957/1982, at 104, 105, 132, 156, 157, but this has not happened on a large scale in Denmark as of this writing, 25 years later. See *Flere bliver fanget i håbløs gæld*, EPN.DK, 8 (March 2008), <http://epn.dk/okonomi2/dk/article1291055.ece> (noting a new initiative calling for banks to offer free debt counseling in larger cities); *Gældsrådgivning til kontanthjælpsmodtagere*, <http://socialminister.social.dk/Indlaeg/artikler.kroniker/Gaeldsraadgivning.html> (statement from Welfare Ministry, describing the initiative, but noting its narrow application and slow progress). Smaller initiatives in certain areas, however, have been undertaken with some success in recent years. See Tea Krogh Søren-

sen, *Hjælp til håbløst gældsplagede*, FPN.DK (25 January 2008), <http://fpn.dk/penge/article1243850.ece> (describing a new debt counseling initiative as of May 2007 in Århus, the debt division of Den Sociale Rets Hjælp, supported by Experian, to support debtors in negotiating compromise proposals with creditors with support from Experian RKI, Denmark's largest credit reporting system, and noting that the service had been "stormed" by far more clients than it could handle).

90. These figures are based on data from the court administration's statistics for newly undertaken debt adjustment cases, online at <http://www.domstol.dk/om/talogfakta/statistik/Pages/skiftesager.aspx>

91. See, e.g., Prop. 1993/1994:123, *supra* note 62, § 3.2 (reporting broadly similar figures for 1984–1991); Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?*, 37 Osgoode Hall L J, 473, 490 (1999) (noting the great majority of applications were dismissed through the 1990s).

92. Unfortunately, no empirical studies indicate which sorts of debtors are consistently accepted into or rejected from this system, but both the commission report and anecdotal evidence strongly support the suppositions here.

having reached the nadir of distress, established some stability, and begun a return to financial health. Seeking debt relief midway through an unemployment stint will likely result in more distress after relief has been granted, and one can seek relief again only after a waiting period of several years. Thus, the Danish system has a built-in formal requirement that debtors heed the sort of advice that good lawyers would offer them in the United States.

A second and related reason for the high rejection rate is that Denmark lacks a government-supported system of debt counseling, and legal aid is not available for debt cases.<sup>93</sup> Thus, debtors generally complete and file their debt adjustment applications with little or no guidance<sup>94</sup> other than pamphlets distributed by the courts<sup>95</sup> and information gleaned from the internet.<sup>96</sup> Without dedicated expert guidance, as well as support for the arduous task of collecting and reporting the complex financial information needed to complete the application,<sup>97</sup> many debtors likely fail to fill out the application completely or correctly and/or respond to questions to the satisfaction of the court, or they simply abandon the process, perhaps at the point when they receive the order calling them to appear in court with supporting documentation, alone, to confront a judge at the initial hearing.<sup>98</sup> For debtors who make it to the hearing, the court is required to offer guidance to debtors in seeking relief, so many rejected applications are likely filed a second or third time, perhaps successfully.<sup>99</sup> As mentioned above, just as the US bankruptcy lawyers advise many potential clients to wait to file until after hitting “rock bottom,” the Danish courts likely advise (require) many debtors to abandon their cases until they regain some financial stability, so as to avoid more trouble after having entered the relief system.<sup>100</sup>

## B. Payment plan proposal and immediate discharge

For the few debtors who make it through this narrow entryway, a guide awaits them inside, as the debt adjustment process beyond is fraught with obstacles, as well. Just as the *Gældssaneringsrapport* had emphasized, the explicit *quid pro quo* for relief remains the debtor’s readiness to propose payment to creditors from several years of future

93. See, e.g., Gældssanering: Ansøgning om gældssanering, <http://www.aeldresagen.dk/Medlemmer/raadgivning/vaerdatvide/gaeld/gaeldssanering/Sider/Default.aspx>

94. See *Statens Offentliga Utredningar* 2004:81, at 84 *Ett steg mot ett enklare och snabbare skuldsaneringsförfarande* (Swed.), online at <http://www.regeringen.se/sb/d/108/a/28107> (hereinafter, SOU 2004:81) (noting the admission hearing was necessary to allow debtors orally to supplement written applications completed without assistance).

95. Konkurslov § 202(4) requires courts to provide this guidance. See, e.g., *Vejledning om gældssanering*, <http://www.domstol.dk/soehandelsretten/Documents/gaeldssanering/vejledning.tilgaeldssaner.pdf> (the Copenhagen Sea and Commercial Court’s three-page “guidance” brochure for the debt adjustment process).

96. See, e.g., 6461 *Hvad er en gældssanering?*, <http://www.familieadvokaten.dk/Emner/6461.html>. Luckily, Denmark has among the highest rates of broadband access and internet usage of any EU nation. See Anna

Lööf, *Internet usage in 2008—Households and Individuals* Tbl. 1 (2008) online at <http://epp.eurostat.ec.europa.eu/cache/ITY.OFFPUB/KS-QA-08-046/EN/KS-QA-08-046-EN.PDF>

97. Debtors must submit the last three years’ income tax returns, tax withholding registrations for the past two years, and documentation of the immediate past three month’s income. See *Vejledning om gældssanering*, *supra* note 95.

98. See Bet. 1449/2004, at 157 (noting that many debtors abandon the process at the first hearing when they learn of the austerity demands the system will place on them); Konkurslov § 204(3).

99. See, e.g., Bet. 1449/2004, at 61 (noting that rejection decisions were generally phrased in terms of “for now,” allowing the debtor to seek relief after more time had passed); see also *infra* note 165.

100. See *infra* note 151 and accompanying text (noting the court in Copenhagen rejects many cases for “uncertainty”).

disposable income.<sup>101</sup> Upon issuing an order opening a debt adjustment case, the court appoints a neutral trustee (*medhjælper*)<sup>102</sup> to collect the necessary information on the debtor's economic and personal situation for the further development of the case.<sup>103</sup> The trustee also assists the debtor in developing a proposal to explain the circumstances calling for relief and offering a payment plan for the "realistic" portion of the debt.<sup>104</sup>

After a delay to allow the trustee to collect information,<sup>105</sup> the debtor (that is, trustee) presents the proposal at a second court hearing, at which creditors are allowed to opine on the case and pose questions to the debtor.<sup>106</sup> Creditors generally have little to say, however (and thus most often do not appear at the meeting<sup>107</sup>), as the essential terms of the proposed order are quite limited. The debtor's proposal simply sets out the amount and general nature of the total debt burden and an equal *percentage* to which all unsecured<sup>108</sup> debt will be written down,<sup>109</sup> along with a period of years over which that (small) percentage of surviving debt (if any<sup>110</sup>) will be paid.<sup>111</sup> The

101. Bet. 957/1982, at 97, 98 (noting that any doubt as to the debtor's willingness to uphold this plan would justify rejection/dismissal of a case, though past default on debts would not, by itself, indicate unwillingness).

102. *Id.* at 152, 153, 157, 158 (drawing the notion and title of this "trustee" from estates administration); SOU 2004:81, *supra* note 94, at 84 (noting that a trustee is appointed "almost without exception," though responsibility for case and plan development technically lies with the court itself). Just as the commission had suggested, see Bet. 957/1982, at 152, courts generally appoint trustees from among a panel of lawyers working with each court as dedicated experts on debt adjustment cases. See, e.g., SOU 2004:81, *supra* note 94, at 86 (mentioning six lawyer-trustees in the court in Copenhagen, each constantly handling 15–20 cases); Skifterettens medhjælper, <http://www.domstol.dk/soehandelsretten/skifteafdelingen/medhjaelper/Pages/default.aspx> (listing contact information for 25 lawyer-trustees working with the Sea and Commercial Court in Copenhagen); Gældssanering, <http://www.domstol.dk/Aalborg/Advokater/skifteretsmedhjaelpersadvokater/Pages/Skifterettensmedhjaelperigældssaneringsager.aspx> (same for 21 lawyer-trustees working with the court in Aalborg); Gældssanering, <http://www.domstol.dk/aarhus/rådgivning/advokater/Pages/Gældssanering.aspx> (same for nine lawyers in Århus).

103. Trustees have no power over the debtor's assets, however, as debtors in these cases, as opposed to bankruptcy, do not give up control over their property. Bet. 957/1982, at 152, 153.

104. Konkurslov § 219; see also SOU 2004:81, *supra* note 94, at 85 (noting that, in practice, it is the trustee who drafts and presents the plan, though the law assigns this responsibility to the debtor).

105. Remarkably, the Danish system has no procedure for creditors' "proving" claims—they simply submit written claims with documentary support, and the trustee treats them as payable unless the debtor disputes them. See Bet. 957/1982, at 155. The process of holding a special meeting of creditors and requiring them to establish their claims was reconsidered in the reform effort and again rejected as an unnecessary waste of

resources here (as opposed to the business bankruptcy system, where creditors must prove claims). See generally Bet. 1449/2004, at 247, 248, 259.

106. Konkurslov § 215; Bet. 957/1982, at 113, 147.

107. Prop. 1993/1994:123, *supra* note 62, § 3.2.

108. Secured debts are not affected by the plan, and the unsecured portion of such claims can be covered only after the collateral is sold and a deficiency is revealed, though this creates problems for the debtor. See *infra* note 171.

109. Konkurslov §§ 213, 216; Bet. 957/1982, at 97, 98, 112–113, 157–159. The commission foresaw for the "presumably rather few" cases in which the debtor has assets of considerable value (including home equity), the plan can provide for—and the court might require—a liquidation by the debtor of these assets and distribution of the value to creditors. Konkurslov § 216(5); Bet. 957/1982, at 123–125, 136 (noting also that significant assets of unclear value might prevent entry to the system altogether). Also, the court can call upon the local social support agencies to assist the debtor in making these payments and living within the imposed budget. Konkurslov § 210(3).

110. The commission speculated that cases in which the entire debt would be wiped out in exchange for no payment would be "relatively few." Bet. 957/1982, at 90, 96, 134 (noting that pensioners whose sole income is state pension benefits might qualify for full and unconditional discharge). In the first years of practice, however, such cases turned out to represent nearly one-third of all confirmed cases. Prop. 1993/1994:123, *supra* note 62, § 3.2.

111. An example of a simple order can be found online. See *Kendelse om gældssanering* 10. April 2007, <http://www.domstol.dk/esbjerg/nyheder/domsresumeer/Pages/Kendelseomgældssanering10april2007.aspx> (announcing simply that the court had entered a confirmation order for the described debtor reducing the stated debt of "no less than" 101 140 682.42 crowns to 0.206766% of that sum, to be paid in equal monthly installments over 5 years, and explaining that the debt had arisen from a small business failure in the 1980s).

payment percentage is calculated simply by multiplying the debtor's monthly disposable income by the number of months in the plan, and dividing that figure by the total debt burden. If the court is satisfied that the debtor has the means and willingness to abide by the plan, the proposal is accepted by court order, and the discharge takes place immediately.<sup>112</sup>

Disposable income and plan length are thus the key issues, and the law originally left both questions open to individual case-by-case and court-by-court discretion. Unlike the *Gældssaneringsrapport*,<sup>113</sup> the commission report resisted establishing clear guidelines on the amount of anticipated income to be left to debtors, and thus the per cent by which debts that cannot be paid from excess income should be written down.<sup>114</sup> The commission report left it to the courts to establish acceptable write-down percentages based on the court's discretionary evaluation of each individual debtor's anticipated future income and expense allowances to support a "modest lifestyle"<sup>115</sup> and to give debtors a "realistic ability to pay [remaining debts]."<sup>116</sup> In the early years, most plans called for monthly payments of 500–3000 crowns (€ 50–300/US\$ 60–350), though these amounts varied significantly from case to case.<sup>117</sup>

As to plan length, though a specific period was not laid down in the law itself, the very influential commission report suggested an increase from the two years proposed by the *Gældssaneringsrapport* to 5 years.<sup>118</sup> The choice of 5 years was made based on a number of comparables:<sup>119</sup> (1) the 5-year period of forgiveness for social assistance repayment debts in the Danish Support Law,<sup>120</sup> (2) general offer-in-compromise practice by Danish tax authorities, involving payment plans of up to 5 years,<sup>121</sup> (3) the provisions of sections 7 and 8 of the new UK Insolvency Act on automatic discharge after 5 years,<sup>122</sup> and (4) the maximum 5-year payment plan under the new Chapter 13 of the US Bankruptcy Code.<sup>123</sup> While the commission report left open the possibility of shorter or even longer plans based on the debtor's individual circumstances,<sup>124</sup> the 5-year plan quickly became the norm in practice, with very few exceptions.

A powerful policy of finality upon issuance of the discharge order prevents either the court or the trustee from guiding the debtor in making the payments called for by the plan.<sup>125</sup> To help debtors to manage the payments by themselves, the trustee's very first step is generally to open a dedicated bank account in which the debtor immediately begins depositing disposable income (thus immediately starting the

112. In an exceptional aspect of Danish law, the discharge occurs without regard to the debtor's completion of the plan. See Petersen, *supra* note 5, at 277; see also *infra* Part III.B.

113. See *supra* note 21 and Bet. 957/1982, at 172 (2-year maximum period, 20% max after-tax income payments).

114. The commission suggested that a standard budget scheme be developed and officially adopted "as soon as possible," and it proposed a model scheme used by the Odense tax authorities with expense categories, but no proposed amounts. See Bet. 957/1982, at 157 and App. 5.

115. *Id.* at 6, 90 ("beskeden levefod"). The commission also considered and rejected the notion of requiring a minimum dividend to creditors. Bet. 957/1982, at 133.

116. *Id.* at 133.

117. Prop. 1993/1994:123, *supra* note 62, § 3.2.

118. Bet. 957/1982, at 90, 133.

119. *Id.* at 90.

120. See *id.* at 62 (noting that even this period had been extended from 3 to 5 years in 1981).

121. See *id.* at 45–48 and App. 5 at 193 (noting that the "reasonable period" for payment plans generally ranged from 2 to 3 years, but up to 5).

122. See *id.* at 26, 27.

123. See *id.* at 33.

124. *Id.* at 90, 133, 134.

125. Konkurslov § 218; D&A Report, *supra* note 64, at 66; Prop. 1993/1994:123, *supra* note 62, § 3.2.

5-year payment plan clock).<sup>126</sup> If the plan is ultimately approved, the trustee generally forwards to the bank a list of creditors, their account numbers,<sup>127</sup> and the percentages of the debtor's accumulated monthly deposits to be divided once each year among creditor accounts electronically.<sup>128</sup> In light of the recently reconfirmed Danish prohibition on wage cession/garnishment by private creditors,<sup>129</sup> the commission rejected an earlier recommendation for imposing mandatory wage-transfer orders to further secure payments to creditors. The commission suggested that debtors should be encouraged to make the required deposits and payments through automatic bank transfers,<sup>130</sup> but debtors generally retain free disposition of their wages and are responsible for making the monthly deposits themselves.<sup>131</sup>

About 70% of cases admitted into the system result in a confirmed plan.<sup>132</sup> Though reliable statistical figures on the rate of plan *non*-confirmation are not available, one suspects that nearly *all* plans submitted to hearing by the trustees are confirmed by the courts.<sup>133</sup> The dedicated court-appointed trustees doubtless know the court's unwritten rules on expenses and write-down percentages, and they are not beholden to debtors to propose plans that are unlikely to be confirmed. The low carry-through rate is likely attributable to cases being abandoned by debtors before the confirmation hearing once they see the real demands of the payment plan,<sup>134</sup> or dismissed by the courts upon complaints from the trustee concerning debtor non-cooperation.

#### IV. Trial, Error, and Reform: 1999–2005 and Beyond

The dangers foreseen in the *Gældssaneringsrapport* and the commission report began to materialize almost immediately. A gradual development of this new law based on the specific circumstances of Danish practice was intended, especially with respect to the delicate balance between offering relief and avoiding abuse. Leaving critical details open to judicial discretion, however, quickly produced vast non-uniformity in treatment of debtors across the country, running contrary to a strong desire for reasonably equal treatment.<sup>135</sup> In addition to the problem of regional variation, again as anticipated,<sup>136</sup>

126. See Bet. 1449/2004, at 483, 484 (noting that this ensures that the total payment period will not exceed 5 years).

127. Proofs of claim must include a bank account to which future payments will be directed. Konkurslov § 208a (1).

128. See D & A Report, *supra* note 64, at 67 (noting that banks generally charge 25–50 crowns per creditor payment, an amount that often exceeds the payment sent to smaller claims); SOU 2004:81, *supra* note 94, at 85, 86 (noting that banks often waive charges for making the annual transfers in exchange for the debtor's foregoing accrued interest, though because only small amounts of interest would accrue, an administrative charge of 500 crowns per year is often charged as one of the debtor's listed "reasonable expenses"); Bet. 1449/2004, at 306 (noting a dispute in the literature as to whether these payment processing charges are includable as a separate fixed expense in the debtor's budget, and noting that debtors generally pay the processing fees themselves from disposable income).

129. Bet. 957/1982, at 99, 102.

130. *Id.* at 160.

131. See SOU 2004:81, *supra* note 94, at 86 (noting that, despite the debtor's freedom and creditor's lack of ability to monitor monthly deposits, this arrangement had functioned quite well in practice).

132. This figure is based on data from the court administration's statistics for closed *skiftesager*, online at <http://www.domstol.dk/om/talogfakta/statistik/Pages/skiftesager.aspx> (as updated on 15 April 2009).

133. This supposition is supported by the very little publicly available empirical data on the system. See, e.g., Prop. 1993/1994:123, *supra* note 62, § 3.2 (noting that case dismissals at the plan confirmation stage are extremely rare).

134. See Bet. 1449/2004, at 157.

135. The commission had brushed aside this danger, concluding that uncertainty was "the price that must be paid when one wishes to introduce rules that allow for practice to develop in the light of experienced development and at the same time to ensure that the institution of debt adjustment is not applied inconsistently with its intended purpose." Bet. 957/1982, at 80, 81.

136. See *supra* note 37 and accompanying text.

the tightly drafted entry requirements led to very restrained judicial acceptance of applications. Moreover, the open-ended nature of the most critical determinations in this system—which debtor living expenses were “reasonable” and thus how much debt could be paid over a “realistic” 5-year plan—produced very substantial and undesirable regional variations in the level of austerity imposed on the few debtors who managed to confirm a plan. These problems rose to such a level that some counselors advised debtors living in certain areas to move to nearby areas where relief was available on better terms.<sup>137</sup>

In light of these and other problems, almost exactly 15 years after the new law had been adopted, representative organizations of court administrators and lawyers initiated the process that would result in the most substantial reform of the system. Like the *Gældssaneringsrapport* before it, a report and proposal from these private groups<sup>138</sup> spurred government action that led to another official commission investigation, report, and proposed reform,<sup>139</sup> as well as ultimate legislative implementation of most of the recommended changes, though only after a period of several years. The reform bill was adopted by unanimous vote on 24 May 2005 and became Law no. 365, effective 1 October 2005.<sup>140</sup> The stated goal of this reform was to make the system more uniform, primarily, but also to make it simpler and more effective in providing meaningful relief.<sup>141</sup>

## A. “Local legal culture” and regional non-uniformity

The primary concern motivating the reform effort was a substantial regional variation in two related areas: the ratio of applications to confirmed plans, and the income and expense allowances used by courts in arriving at confirmable plans and debt write-down percentages. In a split victory, the former was left largely unchanged, while the latter was subjected, at least in part, to formal unifying guidelines.

### 1. Admission and “success” rates

The vast differences in the “success rate” of applications seeking relief drew the harshest criticisms. The variations were, indeed, striking and persistent from year to year. While earlier data are not publicly available,<sup>142</sup> the consistent trend persisted into the 2000s. In

137. See, e.g., Eve Andersen, *Flere søger om gældssanering*, Jyllands Posten, 15 September 2006, online at <http://jp.dk/arkiv/privatkonomi/article110780.ece> (reporting that one private debt advisor had counseled debtors to move house to Fåborg, “where the chance for a debt adjustment are five times higher than in, e.g., Aabenraa”).

138. See Dommerfuldmægtigforeningen & Advokatrådet, *Redegørelse Vedrørende Ændringer i Konkurslovens Bestemmelser om Gældssanering* (29 April 1999) (*hereinafter*, D&A Report), online at <http://www.advokatsamfundet.dk/Admin/Public/DWSDownload.aspx?File=Files%2FFiles%2FPublikationer%2FRapporter%2Fgaeldssaneringsrapport.doc>; Henrik Denman, *Jurister vil ændre i gældssanering*, ErhvervsBladet (25 June 1999), online at <http://www.erhvervsbladet.dk/article/19990625/arkiv05/106250023/>

139. Konkursrådets Betænkning nr. 1449/2004, online at <http://jm.schultzboghandel.dk/upload/microsites/jm/ebooks/bet1449/index.html> (*hereinafter*, Bet. 1449/2004). This reform commission was convened on 12 January 2001, it began its work in April 2003, and it released its report on 14 June 2004. See *id.* at 11, 18, 19.

140. L10, Forslag til lov om ændring af konkursloven og konkurskatteloven. (Revision af reglerne om gældssanering), online at <http://www.folketinget.dk/samling/20042/lovforslag/l10/index.htm>; see also Law no. 365 of 24 May 2005, §3, online at <https://www.retsinformation.dk/Forms/R0710.aspx?id=2074>

141. Bet. 1449/2004, at 12, 21, 23, 24, 50.

142. *Id.* at 41, 42 (noting similar rates for 1999, 2000, and 2001, and suggesting that older figures were available in appendix 2, which was at the time of this writing no longer accessible).

2002, for example, the average rate of acceptance of debt adjustment applications was 41% (1971 of 4777 total), but the range of acceptance rates among various courts was vast.<sup>143</sup> While the court in Odense admitted two-thirds of the 161 applications for relief it received, the court in Roskilde admitted only 39% of its 139 applicants, and the court in Copenhagen admitted a mere 25% of the 828 applications from the capital region.<sup>144</sup> Admission did not guarantee relief. The real lightning rod for criticism was the low ratio of successful plan confirmation orders to total closed cases and the wide variations in this ratio among districts. In 2002, the average “success rate” was 29%; that is, of 4780 total cases closed that year, 1376 closed with a confirmed plan (all others were closed unfavorably, either by an unfavorable ruling from the court rejecting the application or the plan or by withdrawal by the debtor). But while the court in Århus closed 41% of its 244 cases successfully, the courts in Ålborg and Randers confirmed plans in only 19 and 15%, respectively, of the 136 cases closed by each of those two courts. As in most years, the Copenhagen court had a miserly success rate of only 13% of its 8689 closed cases.<sup>145</sup> These disparities were so striking that they even caught the attention of the press and the legislature.<sup>146</sup>

The reform commission largely dismissed these criticisms and proposed only mild revisions. It concluded that variations in admissions and plan confirmation rates were likely to persist in any event in light of regional variations in economic conditions and for other sound reasons.<sup>147</sup> The extreme and relatively consistent variations among admission and confirmation rates in various courts are hard to explain in terms of objective characteristics, so one might take issue with the commission’s glib rejection of this problem. Nonetheless, no empirical data were (or are) available to challenge its conclusion and support more thoroughgoing reform.<sup>148</sup> Ultimately, an incremental increase in uniformity in the admissions process was accomplished by refocusing the court’s inquiry on the specific characteristics that in practice had *excluded* relief and reversing the original presumption against admission; that

143. All of the statistics from which these percentages are calculated are available at the court administration’s site, <http://www.domstol.dk/om/talogfakta/statistik/Pages/skiftesager.aspx>.

144. The range increases if one considers the smaller districts, though the small numbers reduce the validity of these statistics: the court in Søby admitted 86% of its 28 applications, while the court in Ringsted admitted only 15% of its 47 applications.

145. Again, the disparities are more striking in the smaller districts, though the small numbers skew the statistics. While the success rate for the court in Nykøbing Mors was a spectacular 80% of 15 total closed cases, and 74% of 46 cases closed in Fåborg, the courts in Skanderborg and Esbjerg brought to a happy conclusion only about 12% of their 51 and 93 total closed cases, respectively.

146. See, e.g., Mads Kronborg, *Store forskelle på gældssættelse*, *ErhvervsBladet* (22 June 2005), online at <http://www.erhvervsbladet.dk/article/20050622/arkiv01/10622013/> (noting similar disparities in 2004); Bet.

1449/2004, at 42, 43 (describing the Justice Ministry’s April 2003 responses to questions from the legislature regarding these disparities).

147. The commission thus adopted the Justice Ministry’s explanation of the regional variations. See Bet. 1449/2004, at 43–46, 84. Ultimately, the commission concluded that, even if variations were undesirable, it simply would not be possible to impose greater uniformity by tighter formulation of the entry requirements. *Id.* at 87, 88.

148. The reform commission noted, in discounting the effect of regional variations in admissions rates, that it had no empirical data suggesting the characteristics of debtors whose applications were accepted or rejected, so it could not conclude that the regional variations were *not* based on objective variations among cases. Indeed, it explicitly refused to undertake such studies itself because “the need for the changes in the current law, which the commission recommends, to a significant degree are independent of quantitative considerations.” Bet. 1449/2004, at 46.

is, insolvent debtors now should be allowed into the system unless these specific circumstances exist or some other circumstance “suggests decisively against.”<sup>149</sup>

This mild reform, however, was designed largely to reflect what had already developed in practice. The reform commission noted with some displeasure that relief had been granted to a greater extent than originally intended as a result of the judicial erosion of the second, “subjective” evaluation of the appropriateness of relief in light of all of the debtor’s circumstances, such that a finding of insolvency was most often the end of the inquiry.<sup>150</sup> Consequently, the reform did little more than confirm current practice and clarify some specific examples of subjective elements that might “weight decisively against” relief. Moreover, the very demanding and still subjective appraisal of the debtor’s “qualified insolvency,” including the requirement that the debtor’s financial situation be free from significant uncertainty, remains a significant entry hurdle. A rare and informal empirical survey within the main court in Copenhagen in 2001 indicated that its high application rejection rate was explained in large part as a function of this “uncertainty” provision (32% of rejections on this basis).<sup>151</sup> This and other common rejection determinations are largely unaffected by the reform.

Thus, this aspect of the reform should not be expected to have produced a substantial change in either the low level or the disparities in admission rates among courts. Immediately following the October 2005 effective date, the percentages of accepted filings and granted debt adjustments rose noticeably, but they had fallen back to historical levels already by 2008. While the original commission in 1982 expected 10 000 annual applications for debt relief, and about 5000 admissions,<sup>152</sup> actual figures have never reached this level. System statistics for many years have remained fairly steady at about 5000 applications per year, with only about 40–45% (2000–2250) admitted.<sup>153</sup>

## 2. Budget and payment plan variations

The most significant reform addressed non-uniformities in budgetary guidelines imposed on debtor payment plans. Leaving this question completely open to court discretion has worked poorly in other countries, as well,<sup>154</sup> and Denmark finally joined a number of other countries in setting down a more structured, uniform, and predictable approach to debtor budgeting.

149. Konkurslov § 197 (“*taler afgørende imod*”); Bet. 1449/2004, at 23, 24, 88–90 (noting that this also “tones down the moralistic aspect” and observing that debt adjustment had become generally accepted by creditors and society).

150. Bet. 1449/2004, at 50–52.

151. See *id.* at 44, 45 (using total cases as the divisor, not rejected cases). The other bases for rejection were also largely unaffected by the reform or were identified as specific circumstances that weigh against relief: (1) subjective judgments as to the “irresponsible” nature of the debt (31% rejections based on the predominance of tax or recent and expansive consumer debts), (2) withdrawal by debtors after the first meeting or failure to appear (16%), and (3) a variety of miscellaneous other causes (20.5%). *Id.*

152. *Id.* at 41.

153. These figures are based on data from the court administration’s statistics for newly undertaken skiftesager, online at <http://www.domstol.dk/om/talogfakta/statistik/Pages/skiftesager.aspx> (as updated on April 15, 2009).

154. See, e.g., Jason Kilborn, *Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice*, in Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives (Johanna Niemi, Iain Ramsay & William Whitford (eds), *forthcoming* Hart Publishing, 2009).

As anticipated, the courts had developed generally similar budgeting practices allowing for debtors' actual "reasonable" costs for a list of fixed expenses and a standard basic budget for variable and miscellaneous expenses. An empirical survey in 1998, however, revealed wide differences in the types and amounts of specific expenses allowed by various courts, as well as in the amount of the standard basic budget allowance. Some courts had accepted separate allowances for such things as life insurance, rental of televisions and other household hardware, dental and eye care, and extraordinary expenses for child visitation for separated parents, while other courts had required debtors to cover such expenses from their basic budget allowance (called the *rådighedsbeløb*). Further, the amount of this basic budget was generally (though not always) set out in local court rules, and it varied widely. For example, the range of basic monthly budgetary allowances for singles varied from 2500 to 3500 crowns, for couples from 4000 to 6000 crowns, and for children from 500 to 1500 crowns.<sup>155</sup> In 2004, the basic monthly budget allowance in the main court in Copenhagen stood at 3500 crowns (€350/US\$ 400) for singles, 6000 (€600/US\$ 700) for couples, and 1100 (€110/US\$ 130) for each child.<sup>156</sup>

The principal innovation in the reform proposal was thus to unify the list of generally accepted fixed expenses and to eliminate the significant variations in the basic budget for food, clothing, and miscellaneous expenses. The reform commission adopted the recommendation of the court administrator and lawyer associations, which in turn essentially revived the original 1982 commission's proposal to have the Justice Ministry set down uniform allowances in an official order.<sup>157</sup> Rather than trying to micromanage a long list of expense types, the commission proposed that the courts continue to allow "reasonable" actual expenditures on a narrower list of a few types of expenses shared by most debtors (housing, childcare, child visitation for separated parents, and support obligations<sup>158</sup>) as well as extraordinary expenses for such things as medical care for chronic conditions and extraordinary required transport costs. The variety of "other" expenses different households might bear would be relegated to a standard basic budget allocation of 4180 crowns (€425/US\$ 490) per month for singles and 7080 (€725/US\$ 835) for couples. These figures were established by averaging detailed household consumption survey data for "reasonable consumption" for various age groups and genders.<sup>159</sup>

In addition to harmonizing practice, the reform humanized the process, as well, by lightening the burden on many debtors. Though the commission expressly disavowed any intention to make the budget allowances more generous than under the original law and previous practice,<sup>160</sup> the basic budget allowance it proposed was nearly 20% higher

155. Bet. 1449/2004, at 24, 137–139, 143, 144; D&A Report, *supra* note 64, at 32–36.

156. Bet. 1449/2004, at 144 n. 76 (noting that the child allowance was increased to 1300 for single parents).

157. See *supra* n. 114; Konkurslov § 216(6); Bet. 1449/2004, at 155–58 & n. 87 (noting that this would bring Danish practice into line with that in Sweden and Norway, and suggesting that it might also reduce the volume of filings if the significant burdens required

for obtaining relief are made clear to debtors in advance).

158. The prevalence of expenses associated with broken families is a striking statement about Danish society!

159. Bet. 1449/2004, at 160–170 (also describing a sliding budget allowance for children depending upon their age, from 1150 crowns per month for 0–2-year-olds, to 1450 for 3–6-year-olds, to 2100 for 7–17-year-olds).

160. *Id.* at 170, 480.

than the upper range of allowances then applied by most courts.<sup>161</sup> In addition to supporting more livable budgetary expenses, the reform also enhanced the income side of the ledger for many debtors. Most importantly, transfer payments for children (a significant portion of the income of many low-income Danish debtors) are now explicitly set aside for children, so any excess remaining after covering actual childcare expenses is no longer included in the debtor's income otherwise subject to distribution to creditors.<sup>162</sup> Thus, families with children are among the primary beneficiaries of the reform, shielding more income and receiving greater expense allowances than before.

The Justice Ministry adopted the commission's proposed order virtually verbatim.<sup>163</sup> The annual order still allows substantial leeway for variations from region to region and court to court in determining "reasonable" housing and other fixed expenses, but all courts are now bound to a unified budgetary baseline for miscellaneous expenses. With annual indexing, the basic budget for 2009, for example, is 5170 crowns (€525/US\$ 600) per month for singles and 8770 (€895/US\$ 1030) for couples, with a sliding scale for children of various ages, from 1410 to 2600 crowns (€144–265/US\$ 165–300) per month for younger and older children, respectively.<sup>164</sup> The new guidelines are thus simpler, more uniform, and generally more "livable" than many courts had allowed before, especially for families with children.

After a temporary spike in "success" rates immediately following the reform, more manageable budgetary guidelines have done little to affect filing or plan confirmation rates. While the reform commission speculated that clearer budget guidelines might dissuade some from filing, the filing rate has held quite steady, except for a temporary bump in 2005 and 2006. Filings in 2005 ticked up 15%, though many of these were likely repeat filings, as many courts advised debtors to abandon cases filed earlier in 2005 and refile after the new rules went into effect on 1 October 2005, leaving more money to debtors and requiring less payment.<sup>165</sup> As a result, the per-

161. See *supra* note 156 and accompanying text; see also Smith, *supra* note 76 (noting that the new budget amounts were "a nice increase in relation to the amount that had until that point been applied in practice").

162. Bet. 1449/2004, at 24, 139–140, 185–189 (speculating that child transfer payments will exceed actual child expenses only in rare cases). Certain income from hazard and health insurance, as well as transfer payments for victims of such hazards, were also explicitly excluded from income. See Bet. 1449/2004, at 141, 142, 158–160.

163. Gældssaneringsbekendtgørelsen, online at <http://www.themis.dk/synopsis/index.asp?hoveddramme=/synopsis/docs/lovsamling/gaeldssaneringsbekendtgørelsen.html>

164. See *id.* §§ 6, 11 (2009).

165. See, e.g., Smith, *supra* note 76; Gældssaneringsstatistik, online at <http://www.domstol.dk/Bornholm/>

[talogfakta/Pages/gaeldssaneringsstatistik.aspx](http://www.domstol.dk/Bornholm/talogfakta/Pages/gaeldssaneringsstatistik.aspx) (explaining the lower percentage of accepted applications in 2005 by noting that courts advised debtors to withdraw applications filed before 1 October and refile later to take advantage of the "more attractive provisions" of the reform law); Jonas Schröder, *Lettere at slippe af med bundles gæld*, *Berlingske Tidende* (5 October 2005), online at <http://www.berlingske.dk/popup:print=637304?&> (Remarking that courts had advised debtors to refile after October 1, when debtors would "not have to live so Spartan [a life] as earlier" during the repayment period); Andersen, *supra* note 137 (quoting two lawyer-trustees as opining that many debtors, especially families with children, had waited to file after 1 October 2005, to take advantage of the new and more generous budget guidelines).

centage of cases concluding with a confirmed plan fell slightly in 2005 (down to 23 from 30% in 2004), only to rebound in 2006 to nearly 34% —the highest rate since 1999. The confirmation rate has since fallen back to historical (low) levels, in 2008 registering a record low of only 27.4%.<sup>166</sup> Consistently fewer than a third of all cases successfully navigate between the Scylla of the first, application hearing and the Charybdis of the second, plan confirmation hearing.

## B. Modification of plans post-confirmation

Another reform of note concerned the common problem of post-confirmation changes in circumstances. The Danish rules on modification of plans after confirmation are unique, and they caused problems in their original form. If a debtor fails to pay according to the plan, creditors can enforce the payment obligation,<sup>167</sup> but the immediate discharge upon confirmation remains unless the debtor has *grossly* neglected his duties under the plan, in which case the court can revoke the plan and reinstate the discharged debt.<sup>168</sup> Post-confirmation modification of the plan is allowed, but both modifications and revocations have been extremely rare in practice.<sup>169</sup>

The paucity of modifications was due in large part to a pair of restrictions in the original law. First, modifications still today can be made only in debtor's "most exceptional interest"<sup>170</sup>; therefore, creditors cannot request modifications to *increase* payments to them if the debtor's situation improves. Second, originally, if the debtor suffered adverse economic changes, the plan could be modified, but only to a limited extent. If the debtor missed several payments, for example, the plan might be modified to lengthen the repayment period (beyond 5 years) to allow time for the debtor to

166. These figures are based on data from the court administration's statistics for completed *skiftesager*, online at <http://www.domstol.dk/om/talogfakta/statistik/Pages/skiftesager.aspx> (as updated on 15 April 2009).

167. The plan is treated like a contract, with a 20-year prescriptive period (statute of limitations). Konkurslov § 226(1); see also Skat, *supra* note 41, § H.6.5.2.

168. Konkurslov § 229 ("*groft tilsidesætter sine pligter*"); Bet. 957/1982, at 6, 98, 99, 115, 135; Bet. 1449/2004, at 315, 316, 320–323.

169. See, e.g., Domont-Naert, *supra* note 45, at 95; Bet. 1449/2004, at 321–323 (noting that much more than simply failing to pay was required, such as the debtor's intentionally spending the collected annual savings on something other than distribution to creditors); Skat, *supra* note 41, § H.6.5.4 (noting that revocation of the plan requires "a *very* gross neglect" of the law's requirements, emphasis in the original).

170. Konkurslov § 228 ("*ganske særlige hensyn*"); Bet. 957/1982, at 115.

catch up on the arrears.<sup>171</sup> But the plan could not be modified to *reduce* the “write-down percentage” and decrease the total payments due to creditors.<sup>172</sup> Often in serious cases, debtors were encouraged to simply dismiss their cases and refile a new case in light of their newly depressed financial circumstances.<sup>173</sup>

While the reform reiterated and confirmed that plans could not be modified to increase the amount to be paid to creditors,<sup>174</sup> the amended language clarified that not just the length, but *any* aspect of the plan, could be modified, including a reduction in the required payout, perhaps calling for no further payment at all.<sup>175</sup> The commission suggested, however, that such modifications should be a last resort, to be applied only if a reasonable extension of the payment term will not put the debtor back on track to making the payments called for in the plan.<sup>176</sup>

171. This had occurred far more frequently in practice than had been anticipated. Bet. 1449/2004, at 317–318 (citing a case where the plan term had been extended to 13.5 years). The debtor might also need more time to pay if a secured deficiency arose after a secured creditor sold the collateral after confirmation of the plan. While secured claims are not affected by a plan, unsecured deficiency claims are, Konkurslov § 199(2), but the debtor has to pay the same percentage on the deficiency as promised to other unsecured creditors. If a deficiency arises after a creditor forecloses on a mortgage after plan confirmation, this might vastly increase the debtor’s payment obligations, as no amount could be set aside in the plan to cover such claims that might arise after plan confirmation. Bet. 957/1982, at 6, 108, 139–140, 165 (suggesting that such later-arising deficiency claims would seldom pose a problem, as the plan is designed to put the debtor in a position to service reasonable remaining secured debts). Indeed, for distressed mortgages on homes with suddenly depressed values, continuing to service inflated mortgage payments might be deemed “unreasonable” and prevent a debtor from seeking relief while remaining in the now-overvalued home. The reform movement immediately included a proposal to rectify these problems. D&A Report, *supra* note 64, at 48, 49 (noting that most practitioners agreed that this situation was not acceptable). The reform commission agreed and made a detailed and novel proposal to modify claims secured by principal residences by (1) reducing mortgage claims secured by principal residences to the value of the home plus a buffer of 10% and (2) paying (a small percent of) the unsecured deficiency in the plan. Bet. 1449/2004, at 25, 205, 206, 211–229. Unlike the great majority of the commission’s other recommendations, however, this proposal did not even make it into the bill. At a Justice Ministry hearing on the commission’s report, finance and mortgage credit representatives objected that this measure failed to take sufficient account of lenders’ interests and concentrated on them the risk of price deflation based on macro-economic forces beyond anyone’s control. The Justice Ministry hesitated to embrace this proposal without a closer empirical examination of the problem, so the provision was removed in light of the fundamen-

tal position of secured creditors and the proper balance between debtors and creditors that lies at the base of the consumer insolvency system. Moreover, the ministry concluded that no evidence suggested that undersecured mortgage claims had caused significant problems for debtors seeking or receiving relief. Justitsministeriet, Lovavdeling, *Kommenteret oversigt over høringsvar vedrørende Konkursrådets betænkning nr. 1449/2004 om gældssanering*, L128-Bilag 1, dok. JER21460, at 31–34 (30 November 2004), online at <http://www.folketinget.dk/doc.aspx?samling/20042/menu/00000002.htm>. Before 2005, a similar problem arose when claims were filed by previously unknown creditors after the plan confirmation order had been entered. These pre-confirmation claims were also encompassed by the plan, but the debtor had to pay them the same percentage as other creditors, throwing the debtor’s budget off balance just as described above. This problem was solved in 2005 by precluding late-filed claims from seeking payment. See Konkurslov § 208b; Bet. 1449/2004, at 26, 231–233, 238–246. A preclusive claims-bar date had been originally proposed in the *Gældssaneringsrapport*, but it was rejected in the 1982 commission report to avoid the debtor’s ability to “speculate” on creditors’ passivity by failing to mention them and hoping they would not make later claims. Bet. 957/1982, at 11, 14, 164. This problem was criticized immediately, see, e.g., D&A Report, *supra* note 64, at 37–39, and the reform commission ultimately had to admit that there was no real risk of debtor manipulation here, Bet. 1449/2004, at 243, so the claims period was increased to 8 weeks, after which unannounced claims are discharged. See also Skat, *supra* note 41, § H.6.4.1 (positing that this rule applies to later-arising mortgage deficiency claims, as well, and advising secured creditors to file proofs of *possible* deficiency claims to preserve their right to payment later, even though they will not be paid in the plan).

172. Bet. 957/1982, at 165; Bet. 1449/2004, at 233, 316, 317.

173. Bet. 1449/2004, at 318, 319 (citing cases, including U 2002.2275 H from the *Højesteret* (Supreme Court)); D&A Report, *supra* note 64, at 71, 72.

174. Konkurslov § 228; Bet. 1449/2004, at 334, 491.

175. Konkurslov § 228; Bet. 1449/2004, at 25, 333–334.

176. Bet. 1449/2004, at 333.

### C. Other reforms

A number of other smaller but significant changes were made in 2005, as well. Some were discussed in the notes above,<sup>177</sup> but among the other notable changes were the following three: first, claims disputed by the debtor are now discharged in full unless the creditor files a suit on the claim within 3 months and establishes the claim in an ordinary civil suit.<sup>178</sup> One suspects few creditors will do this, as creditors will be loath to seek Pyrrhic victories by financing this litigation up front, knowing that even if they successfully defend their claims, they will collect only a small fraction of the court costs and principal claim in the debtor's plan. Second, in a pragmatic effort to reduce the administrative burden of paying on *de minimis* claims (including bank payment processing costs that often exceed the annual payments due on such claims), claims on which the total expected distribution falls below 500 crowns (€51/US\$ 60) will be discharged immediately.<sup>179</sup> Finally, debtors who have recently made irregular and unreasonably large pension deposits may have to pay out at least a portion of this shielded income to creditors to get a confirmed plan. Similarly, debtors who receive lump-sum distributions of pensions and other retirement savings might have to include a limited amount—10% per year—as income to be distributed to creditors in the plan.<sup>180</sup>

As for the very few proposals that failed to make their way into the reform law, in addition to an ill-fated home mortgage lien-stripping proposal,<sup>181</sup> lawmakers refused to impose a stay on wage garnishment for tax and other public debt collections in the “gap period” between admission of a debt adjustment case and a confirmed plan. Other enforcement efforts are stayed upon the court's accepting an application, but as before, the stay applies to garnishment in pursuit of public claims only upon confirmation of a plan.<sup>182</sup> The state had to collect its last few drops of blood before forfeiting most of its remaining claim in a debt adjustment plan!

## V. Comparison with the US BAPCPA

In an amazing coincidence of timing, both Denmark and the United States implemented a major consumer debt adjustment reform in October 2005. In the US, the so-called “Bankruptcy Abuse Prevention and Consumer Protection Act” became effective on 17 October 2005. Its legislative intent, design, and effect compare in interesting ways with those of the Danish reform. This is not the place for a detailed examination of the complex new US law, but a few passing observations offer food for thought.

177. See *supra* nn. 61, 76, 79, 171.

178. Konkurslov § 209; Bet. 1449/2004, at 26, 248–253, 259–265.

179. Gældssaneringsbekendtgørelsen, *supra* note 163, § 14; Bet. 1449/2004, at 26, 301, 310–313, 476 (noting that this idea is drawn from a parallel provision in the bankruptcy law); D&A Report, *supra* note 64, at 67 (noting that banks generally charge 25–50 crowns per creditor payment, an amount that often exceeds the payment sent to smaller claims, and creditors often write off such

claims, only to have to declare small amounts of taxable income when the small annual payments arrive later, inconveniencing creditors).

180. Konkurslov § 222a; Bet. 1449/2004, at 24, 85, 86, 94–112, 121–136; D&A Report, *supra* note 64, at 18–21.

181. See *supra* note 171.

182. The Supreme Court held the stay provisions, Konkurslov §§ 72, 74, *not* to apply to wage garnishment, UfR 1987, 755 HD; see also Skat, *supra* note 41, §§ H.6.4.1 and I.3.6.6.4; Bet. 1449/2004, at 25, 268–272, 277–283.

### A. Monthly budgets and payment plans

The most prominent aspect of the October 2005 reforms in both countries addressed a lack of uniformity by imposing clear guidelines on assessing debtors' budgets. The US Internal Revenue Service's collection standards (also based on consumption data<sup>183</sup>) are now used as expense allowances to assess whether above-median-income debtors have the "means" to afford a Chapter 13 payment plan, and these budgetary guidelines specify the allowances in a payment plan for such debtors.<sup>184</sup> But while Danish lawmakers were motivated by a desire to make the system clearer and more fair for debtors, the US lawmakers were motivated by a desire to stamp out perceived abuse of a system that demanded too little of debtors and so disadvantaged creditors. Both chose a bi-partite approach to expenses, with specific expense categories for "fixed" costs and a lump-sum allocation for food, clothing, out-of-pocket health care expenses (such as dental and eye care), and other basic budgetary items.

While it is impossible to compare the still subjective allowances for housing and other fixed expenses offered by the Danish courts with the complex rules applied in the US to such expenses, one can gain some insight into the tenor of the two reforms by comparing the basic budget allocations. Recall that the Danish reform generally increased the basic budget allowances for debtors, and it reserved all child-related public assistance payments for debtors.<sup>185</sup> Using a PPP conversion rate<sup>186</sup> and averaging the allowances for children of various ages, the Danish and US basic budget guidelines currently (as of mid-March 2009) compare as follows:

Number in household	Denmark	United States
1	\$ 608	\$ 577
2	\$ 1032	\$ 1045
3	\$ 1267	\$ 1212
4	\$ 1502	\$ 1430

The US figures can be increased by \$ 20–\$ 50 per month for extra food and clothing expenses, but only upon the debtor's special request based on documented need, but anecdote suggests that this is happening quite rarely. Especially without this discretionary increase, the US allowances are remarkably lower than the Danish equivalents (except for childless couples), especially for families with children. Indeed, the disparity is even greater for families with children, as their disposable income is supplemented by generous child allowances in Denmark, but not in the US. Even a few dollars of shortfall makes a big difference to families struggling to survive on these tight budgets. Note that the fact that the cost of living is much higher in

183. See Collection Financial Standards, <http://www.irs.gov/individuals/article/0,,id=96543,00.html> (noting that the basic budget standards are derived from the Bureau of Labor Statistics Consumer Expenditure Survey, based on survey data on household and family buying habits, income and household characteristics).

184. See 11 U.S.C. §§ 707(b)(2) 1325(b)(3). The basic budgetary guideline is updated every few months and is avail-

able online at <http://www.usdoj.gov/ust/eo/bapcpa/20090315/bci.data/national.expensestandards.htm> (food, clothing, etc.) and <http://www.usdoj.gov/ust/eo/bapcpa/20090315/bci.data/national.loop.healthcare.htm> (out-of-pocket health care expenses).

185. See *supra* note 161, 162 and accompanying text.

186. See *supra* note 70.

Denmark does not offer an explanation, as the conversion is based on purchasing power parity for actual individual consumption (a conversion using the market exchange rate of Danish crowns to US dollars would produce a dramatic but misleading 50% increase in the Danish allowances). While few US debtors are actually forced to live within these guidelines, as their income is so low as to exempt them from forced payment plans,<sup>187</sup> the miserly spirit of the BAPCPA reform is vividly illustrated by comparing the US and Danish budget allocations.

## B. Treatment of secured debts

Like in Denmark, secured claims in the United States have always been treated as virtually sacrosanct and effectively immune from forced adjustment. In the first US “wage earner reorganization” law, developed in the 1930s, secured creditors had an absolute veto over any modification of their rights in a Chapter XIII payment plan.<sup>188</sup> The new Bankruptcy Code, effective in 1979, took a more critical view of ostensibly “secured” claims, allowing debtors in plans under a new Chapter 13 to “cram down” a payment plan on dissenting secured creditors by paying only the “stripped down” current value of the property securing the claim. The remaining unsecured amount could be paid out in a 3- to 5-year payment plan.<sup>189</sup> This rule has always been subject to an important exception: the rights of creditors secured by a mortgage on the debtor’s principal residence were not subject to modification.<sup>190</sup>

The US and Danish law and their reforms thus contrast in at least three interesting ways in the context of secured claims. First, the 2005 reform of the US law brought it closer into line with Danish law in one narrow respect: “Lien stripping” was further eroded to prohibit modification of purchase-money security interests in personal motor vehicles purchased within 910 days of a bankruptcy filing and other collateral purchased within 1 year of the filing.<sup>191</sup> Second, the 2005 reform of Danish law attempted to move toward the US approach of allowing modification of secured claims, but somewhat surprisingly, only in the one context where modification has never been allowed under US law.<sup>192</sup> Not surprisingly, this effort failed. Third, ironically, the US Congress is now wrestling with a reform effort like the one proposed in Denmark to allow modification of home mortgage claims, subject to complex limitations.<sup>193</sup> Events on both sides

187. Only debtors whose income is above the median for households of their size within their state are subject to these guidelines, and the overwhelming majority of debtors have below-median income. The current table of median incomes is available online at <http://www.usdoj.gov/ust/eo/bapcpa/20090315/bci.data/medianincome.table.htm>

188. 11 U.S.C. § 652 (repealed 1979) (requiring acceptance in writing by secured creditors “whose claims are dealt with by the plan”).

189. 11 U.S.C. §§ 506(a), 1322(b)(2) and (5), and 1325(a)(5).

190. 11 U.S.C. § 1322(b)(2).

191. 11 U.S.C. § 1325(a)(5) and paragraph following (9) (commonly called the “hanging paragraph”). This reform had been discussed for nearly a decade before it was passed. See William C. Whitford, *Secured Creditors*

and *Consumer Bankruptcy in the United States*, 37 Osgoode Hall LJ 339, 361–362 (1999).

192. Apparently, the only country in the world whose consumer debt adjustment law allows modification of mortgages pre-foreclosure is Norway. See Petersen, *supra* note 5, at 279; *Gjeldssanering i Norden—status, perspektiv og gjensidig anerkjennelse—seksjonsmøte*, Proceedings of the 35th Annual Meeting of Nordic Jurists, Oslo, 18–20 August 1999, pt. I, 281, 281 (1999), online at <http://jura.ku.dk/njm/35/35.17.pdf> (explaining that this provision was adopted on the grounds of a dramatic fall in Norwegian home prices in the early 1990s along with the fact that about 90% of Norwegian households own their own home).

193. See, e.g., H.R. 1106, 111th Cong., 1st Sess. (passed by the House on 5 March 2009, but stalled in the Senate), online at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111.cong.bills&docid=f:h1106h.txt.pdf>

of the Atlantic illustrate the exceptional power that secured claimants wield in our commercial law and debt relief systems, as well as the difficulty in attempting to wrest these special rights from them.

### C. Filing rates

Finally, filings levels in both countries demonstrate two things: first, debtors react to anticipated legislative changes. Both countries experienced a noticeable swing in filings in 2005. The US saw an enormous spike in filings immediately preceding the October 15 effective date of the BAPCPA, as lawyers advised clients to seek relief before more restrictive laws were implemented. Contrarily, Denmark saw a jump in filings (many of them repeat filings) immediately following the October 1 reform, as many courts had advised debtors to abandon earlier filed cases and refile after the new rules went into effect on 1 October 2005, leaving more money to debtors and requiring less payment.<sup>194</sup>

Second, despite prominent reform, filing rates will tend back toward the historical trend line so long as the fundamentals of the system structure and debtor economics remain the same. In both countries, filings are returning to historical levels very shortly after the implementation of reform. Indeed, the filing rate in Denmark has not remained elevated even as wide availability of “quick loans” and other high-cost non-bank consumer loans has doubled since 2004 (to nearly 10 billion crowns) and the number of new negative cases registered in the credit reporting system rose a record 18% in 2007.<sup>195</sup> Perhaps a large unmet need will lead to a rise in Danish filings in the years to come, as the effects of the worldwide economic instability reaches these borrowers, though the Danish system will offer them relief only after their own situations regain the stability that the rest of the world is desperately seeking. Filing rates in the US are vastly higher overall and rising rapidly back to their pre-2005 levels, but not because of US profligacy; rather, the elevated US filing rate is most likely due to increasing income volatility and risk,<sup>196</sup> especially from unemployment, child birth, and health shocks, all of which the general Danish social support system lavishly protects against. One has to wonder whether the Danish approach of dealing with these risks on the front end through a more supportive social safety net is better than the US approach to relegating the victims of volatility to the bankruptcy courts.

## VI. Lessons to be Learned in Conclusion

Denmark's move in 1984 turned out to be only the first step in a long journey of consumer debt adjustment law reform across Europe over the next quarter century. This process continues today, as countries such as Poland and Hungary consider adopting their own first consumer insolvency laws. The driving force behind

194. See *supra* note 165.

195. See *Flere bliver fanget i håbløs gæld*, EPN.dk (8 March 2008), <http://epn.dk/okonomi2/dk/article1291055.ece>

196. See Ethan Cohen-Cole, *The Option Value of Consumer Bankruptcy*, Federal Reserve Bank of Boston Working Paper No. QAU09-1 (23 February 2009), online at <http://ssrn.com/abstract=1332768>

this movement continues to be not empathy and altruism for the financially overburdened, but the same practical concerns that motivated Danish lawyers and officials to put an end to what they called “the fiasco” of an outdated collections system that not only failed to return claims to creditors, but also imposed negative and costly burdens on society.

Most new adopters are ignoring the first important lesson of the Danish process: forcing debtors to negotiate with creditors before or even after seeking formal relief is a wasteful and counterproductive charade. The private negotiation process simply does not afford the collective perspective or the full and reliable information basis on which a reasonable workout proposal depends. A disinterested intermediary, such as the bankruptcy court, is needed to subjugate individual interests to the benefit of the creditor collective, to force creditors to admit the factual losses they already have sustained, and to ensure both sides that a compromise is indeed the best way to minimize losses for all interested parties, including society as a whole. A properly designed system should mandate maximum returns to creditors and place real but reasonable demands on debtors to fulfill the realistic portion of their obligations.

The second lesson of the Danish system was a long time in coming, and law reformers in many countries are learning this lesson the hard way: leaving the courts to develop discretionary standards for the requirements and demands of relief, especially an acceptable debtor budget, is a recipe for failure. The costs of such an approach, especially the “unfairness” cost of vast regional disparities in treatment by different courts, far outweigh whatever benefit might be gained from flexible case administration. Reasonable standards can be set down, and Denmark offers a prime example of how that process is unfolding in a number of European debt adjustment systems.

The Danish experience also illustrates one final important point: forced debt adjustment is no longer a radical break with legal tradition, and it does not reduce the availability of credit or general payment morality. It is an accepted, effective, and dare say *necessary* safety valve to maximize the effectiveness of the Western laws of obligations. After a quarter century of experience, we can leave behind the tired arguments about constricting the flow of credit and instead focus on how best to structure modern approaches to balancing the interests of creditors, debtors, and the societies that depend upon their effective interaction.

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