# The New Poor Person's Bankruptcy: Comparative Perspectives

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## 1. Introduction

Policy ideas circulate in an increasingly interconnected world. Bankruptcy law is no exception and a global proliferation of national personal insolvency reforms has occurred during the past three decades.[2] A significant policy issue unearthed by these reforms concerns the debtor with little income and few assets who may be unable to afford bankruptcy in those jurisdictions which require payment to access the individual bankruptcy system. These "Low-Income- Low Asset" debtors (LILAs)" or "No-Income-No Asset debtors" ("NINAs) may represent millions of debtors worldwide and the World Bank identifies this group as a policy challenge[3]. The NINA phenomenon is not however novel. In Canada, the Tassé Committee noted in 1970 that almost all consumer bankruptcies are no asset or nominal asset cases and that in the great majority of cases bankruptcy is financially beyond the reach of those who most need it.[4] The challenge of addressing the situation of the NINA debtor is one experienced by both long-standing personal insolvency systems, such as Canada, the US and England and Wales, the newer systems of continental Europe, such as Germany, and emerging markets, for example South Africa.

This special issue of the International Insolvency Review examines distinct responses to the phenomenon of the NINA debtor. The stimulus for the issue originated in discussions at the Household Finance Collaborative Research Network at the 2018 Law & Society meeting in Toronto, where the need for further comparative research on this under-researched topic was identified. The papers in the issue include both civil and common law jurisdictions (Germany, Portugal, US, England and Wales, Canada), and a mixed jurisdiction (South Africa). Many civilian European jurisdictions had, until recently, no specific procedure for consumer insolvency which permitted a a discharge of debt, and were initially cautious in introducing procedures which might allow individuals to write down debt. Although a swift discharge is possible in common law jurisdictions such as the US and Canada, some individuals may be unable to afford the costs of filing for bankruptcy. The problem of access to debt relief for the NINA debtor is therefore international in scope and is likely to continue as jurisdictions such as India, with large numbers of poor debtors, introduces modernised personal insolvency procedures[5].

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[2] J Niemi, I Ramsay and W Whitford (eds) *Consumer Bankruptcy in Global Perspective* (Oxford, Hart, 2003); J Niemi, I Ramsay & W Whitford, *Consumer Credit, Debt and Bankruptcy* (Oxford, Hart, 2009). Most recently India has introduced personal insolvency reforms and China is experimenting with reform. See H.Yin, 'Consumer Credit and Over-Indebtedness in China' (2018) 27 (1) *Int Insolv Rev* 58.

[3] See World Bank, Report on the Treatment of the Insolvency of Natural Persons (J Kilborn, C Booth, J Niemi, I Ramsay and J Garrido, 2013) para 439: The second edition of the Insol International Report on Consumer Debt discusses the more general topic of the consumer debtor and argues for extra-judicial and delegalized approaches to address the problems of the consumer debtor. See INSOL, Consumer Debt Report II: Report of Findings and Recommendations (2011) http://insol-techlibrary.s3.amazonaws.com/21a21de5-0733-480a-8f1a-ecdc577e13f4.pdf?AWSAccessKeyId=AKIAJA2C2IGD2CIW7KIA&Expires=1566980639&Signature=rNfy9lUOMNXj3weLivPSTfJDhaI%3D

[4] *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Tassé Committee) (1970) paras 3.1.01, 2.1.13.

[5] See in India The Insolvency and Bankruptcy Code 2016 Part III Chapter II Fresh Start Process

This introduction has two parts. First, it outlines the background to the introduction of the English Debt Relief Order, and discusses salient issues raised by its implementation. It then outlines general research themes and questions raised by the existence of the NINA debtor including the structure and financing of the bankruptcy system, the contribution of NINA procedures to access to justice, the role of professionals, and the political economy of bankruptcy reform.

## 2. The English Debt Relief Order

The idea of a special procedure for NINA debtors was foregrounded when England and Wales[6], picking up an idea from New Zealand, enacted the Debt Relief Order (DRO) in 2007[7] (implemented in 2009) a low cost (£90), means and asset tested (see Annexe 1), online administrative procedure operated by the Insolvency Service, for individuals with unsecured debts under £20,000. The procedure provides a discharge of most unsecured debts after a 12-month moratorium. Debtors are screened for access by "approved intermediaries" of competent authorities,[8] generally non-profit debt advice agencies. During the 12 month moratorium period debtors must report on any change of circumstances which may disentitle them from the programme. Certain debts are excluded from discharge. Access to a DRO is barred to individuals who have entered into a transaction at an undervalue or given a preference within the previous two years.[9] Debtor behavior such as running up debts with no reasonable prospect of repayment may be sanctioned through a Debt Restriction Order.[10]

This alternative to traditional bankruptcy is intended to provide relief to the most vulnerable debtors trapped in debt who cannot afford the English bankruptcy fees (currently £680) and for whom bankruptcy would be disproportionate.[11] Figure 1

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[6] Scotland has a separate system of personal insolvency. Scotland introduced a 'Low Income Low Asset' bankruptcy procedure in 2007, subsequently replacing it with a Minimal Asset procedure in 2015. See now Bankruptcy (Scotland) Act 2016 s 2(2) and Schedule 1.

[7] Part V Tribunals, Courts and Enforcement Act 2007 now Part 7A Insolvency Act 1986.

[8] See Debt Relief Orders (Designation of Competent Authorities) Regulations 2009.Citizens Advice is the major intermediary (See Table 1).

[9] S 251 (c) (5) and Part 1 Schedule 4ZC 9,10. The explanatory notes indicate that the rationale for this prohibition is 'to avoid a situation where the debtor has disposed of his assets in order to meet the permitted criterion for obtaining a debt relief order and to protect the position of creditors'.

[10] A restriction order may be made either by the court or an undertaking by the debtor to the Insolvency Service. It will continue the bankruptcy restrictions on a debtor such as the requirement that an individual must declare her status if making an application for a loan, as well as statutory disabilities attached to bankruptcy. A broad discretion exists to make such an order where it is appropriate structured by a list of factors such as 'incurring, before the date of the determination of the application for the debt relief order, a debt which the debtor had no reasonable expectation of being able to pay' See Schedule 4ZB (2)(h).

[11] "…. Part 5 (Tribunals and Courts Enforcement Bill) affords greater protection to those who should be able to pay but are unable to deal with their financial problems or require temporary protection to enable them to get back on their feet. It also deals with those who cannot pay their debts and are unable to access current procedures of debt relief. Part 5 introduces a package of targeted measures that improve and extend the range of solutions available to assist debtors with relatively low income and debts. Those solutions seek to promote financial inclusion and are targeted, in particular, at those who are disproportionately affected by debt and are generally least able to deal with a range of creditor demands." (Hansard, H L Vol.687, col.766

indicates the relative role of the DRO within the landscape of personal insolvency alternatives in England and Wales. The IVA is the primary alternative with the DRO now more popular than bankruptcy, notwithstanding the ceiling on its application. Within the contemporary ideology of "can pay should pay" , the DRO is for the poor who 'can't pay'.

### 2.1. The New Zealand source

The DRO is a transplant of the New Zealand "No Asset" procedure, proposed in in the early 2000s. The NZ procedure was designed for the lower income 'consumer debtor', against a background of substantial growth in consumer debt, caused by deregulation of credit in the mid 1980s, and a bankruptcy law providing a relatively onerous three year discharge process for bankrupts.[12] Figure 2 indicates the substantial rise in household debt in the 1990s in the context of "Anglo" economies. Empirical evidence indicated that the vast majority of bankruptcy estates yielded no dividend for creditors, that substantial numbers were receiving income support, and loss of income or unemployment were the principal reasons for bankruptcy. [13] Originally mooted in a 2001 discussion paper, the 'no-asset' procedure was introduced in 2006 in the following terms:

> since the 1960s there has been a change from individuals' insolvency being caused by business failure to a situation of it being caused by overspending on consumer items. The movement towards a consumer society has meant that those who want to live a certain lifestyle but who do not have the means, have had to sustain that lifestyle through borrowing, and this has led to insolvency in some cases. Secondly, there has been a realisation that many of the processes involved are too restrictive and difficult to progress. Much of this relates to administrative processes and the need to align those with a much more efficient and effective system.[14]

The No Asset procedure would be (italics mine):

> less punitive on individuals and will carry less social stigma. It would apply to *first-time debtors* who cannot repay their debts. Those are people who, generally through overspending on consumer debts, have become unable to meet their commitments. Those people are not adequately dealt with under the current law, and *many of them are just living life on the edge*. Sometimes they are unable to manage the difficult balancing act in the situation they get themselves into. Essentially, for those debtors who have found that they are unable to meet their commitments, *bankruptcy was often onerous*, and it sometimes had an overly restrictive effect on their ability to function in our

(November 29, 2006). "DROs …are designed to provide a fresh start for the most vulnerable people trapped in debt." Edward Davey, HC Deb 9 November 2010 c7-8WS.

[12] For useful discussion of the background to the New Zealand procedure see T. Telfer, "New Zealand Bankruptcy Law Reform: The New Role of the Official Assignee and the Prospects for a No-Asset Regime" in J Niemi, I Ramsay & W Whitford, *Consumer Bankruptcy in Global Perspective* n1 ch12.

[13] Telfer ibid at 263.

[14] https://www.parliament.nz/en/pb/hansard-debates/rhr/document/48HansD_20060221_00001017/insolvency-law-reform-bill-first-reading

society. Under the no-asset procedure, there will be *a one-off opportunity* for individuals with no assets to be subject to a 12-month—rather than the current 3-year—period. There will be an automatic discharge from the no-asset procedure 12 months after the date of admission.

Under the NZ legislation individuals apply to the public sector Official Assignee, which has a monopoly of bankruptcy administration in New Zealand. An application may be done online[15]. No requirement exists to consult an insolvency practitioner or debt adviser before making an application and no fee is charged for the procedure. In practice the majority are facilitated by intermediary budget advisors.[16] The criteria for entry are that a debtor has no realisable assets[17], has not previously been admitted to the no-asset procedure or adjudicated bankrupt, has total unsecured debts between $NZ1000 and $NZ47000, and, under a prescribed means test, does not have the means of repaying any amount towards those debts.[18] Debts are discharged after 12 months, subject to a limited number of exceptions. Moral hazard concerns are addressed by barring repeat use of the procedure and disqualification of individuals who have, for example, concealed assets or incurred debts knowing that they did not have the means to repay them[19]. A public register of individuals using the procedure is maintained. The introduction of the No Asset procedure was not uncontroversial. The conservative National Party argued that a 12-month discharge period would erode personal responsibility,[20] and subsequent amendments in 2009 increased the period during which the No Asset Procedure remained on the public register from one to five years.

Experience of the New Zealand programme indicates that the users are often individuals receiving social support and the unemployed. These groups are most likely to fit the means test requirements. A 2011 Review suggested different sub-groups, based on comments from budget advisers who identified the following types of debtor: those in their 20s with little budgeting skills and problems with credit; individuals in their 30s and 40s with accumulated debts through poor budgeting and overspending. Older debtors often suffered from a marriage breakdown or redundancy.[21] The review concluded that real social and economic benefits from the programme accrued in the short term, but budget advisors thought that it did not address the need for greater budget advice and financial literacy for debtors. The procedure only addressed the immediate debt situation.[22] The most commonly reported negative consequence reported by debtors was that of obtaining credit after exiting the procedure[23]. The

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15 See https://www.insolvency.govt.nz/personal-debt/personal-insolvency-options/no-asset-procedures/

16 Information provided by New Zealand ITS to author (on file with author).

17 Certain assets are exempt so that a debtor may retain a motor vehicle up to $NZ6000 and $NZ1200 in a bank account.

18 New Zealand Insolvency Act 2006, s362.

19 Ibid. s363.

20 See references in T Keeper, "New Zealand's No Asset Procedure: A Fresh Start at No Cost?' (2014) 14 (3) *QUT L Rev* 79, 93.

21 See Ministry of Economic Development, *Evaluation of the No-Asset Procedure---Final Report* (Ministry of Economic Development, NZ,2011) 15.

22 "The benefits from NAP may tend to be short-term, especially where debtors are focussed primarily on dealing with the immediate debt problem, rather than, where relevant, the wider matters of how they manage money and the choices that led to their indebtedness." Ibid 3.

23 Ibid 18-19.

report proposed that budgeting skills or financial counselling should be introduced as part of the scheme, but this has not been implemented.

### 2.2. The migration of The New Zealand Transplant: The Introduction of the Debt Relief Order[24]

The New Zealand scheme was introduced in a bankruptcy system with a three year discharge period for individuals. It might be compared initially therefore with the English 2002 bankruptcy amendments which reduced the discharge period to one year and swept away many bankruptcy restrictions. However, notwithstanding lobbying by debt advice groups, no alteration was made in the requirement of an upfront bankruptcy fee which it was claimed prevented low income individuals from being able to file for bankruptcy. The reduction in the discharge period in England and Wales was not aimed at the consumer debtor, but was part of New Labour's policy of promoting entrepreneurialism through reducing the risks of failure. The government did not view bankruptcy as a consumer right and envisaged measures such as the administration order and repayment plans as the solution for consumer debtors.[25]

At that time the primary remedies for overindebted consumers were bankruptcy, administration orders in the County court, and the growing use of Individual Voluntary Arrangements, where individuals paid a portion of their debts, usually over five years (See Figure 1). This last alternative represented a conversion by private accountants of a remedy for business persons into a mass-produced consumer remedy.

Debt Advice Agencies and in particular Citizens Advice[26], the primary source of legal advice for lower income groups, had lobbied during the 1990s for the removal of the substantial upfront bankruptcy fee for those of limited means. They supported a test case[27] which challenged the requirement to pay the bankruptcy fee as resulting

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[24] This section draws on I Ramsay, '"Bankruptcy Light?" The English Debt Relief Order, Bankruptcy Simplification and Legal Change" (2018) 5 *Norton Journal of Bankruptcy Law and Practice* 27.

[25] See e.g. the comments of the relevant Minister , extracted in I Ramsay, "Bankruptcy in Transition: The Case of England and Wales" in J Niemi, I Ramsay & W Whitford, *Consumer Bankruptcy in Global Perspective* (Oxford, Hart, 2003) 221.

[26] Citizens Advice, established during the second world war to assist citizens with gaining knowledge of their rights, is now the primary source of legal advice to consumers on modest incomes and represents the largest independent network of free advice centres in Europe. It is a national charity which is funded by a number of government departments with a core grant and grants for specific purposes, such as money advice. Its services are delivered through approximately 600 sites by 300 independent local bureaux, independent charities funded through local authorities, charitable donations and grants from CA. The national central office provides expertise but trained volunteers comprise the largest percentage of workers in the local bureaux. The top five issues for advice are social benefits and tax credits, debt, consumer, housing and employment. Citizens Advice performs a dual advice and campaigning role. For a recent overview see S Kirwan, M McDermot and J Clarke,
'Imagining and practising citizenship in austere times: the work of Citizens Advice' (2016) 20 *Citizenship Studies* 764-778.

[27] *R v. Lord Chancellor ex parte Lightfoot* [2000] QB 597. This case was brought by the Public Law Project, with support and information provided by the Money Advice Association, the Law Centres Federation, the Federation of Independent Advice Centres and the National Association of Citizens' Advice Bureaux. The debtor in this case was a casualty of the economic recession of the early 1990s, and had also experienced marriage breakdown. Her primary debt was the negative equity of £40,000 owing to the mortgagee. The European Court of Human Rights rejected an appeal from this decision.

in a contravention of a common law right to access to courts and article 6(1) of the European Convention on Human Rights. Although the challenge was unsuccessful, the judges expressed concern about the plight of an individual denied access to debt relief because of costs. MPs, briefed by Citizens Advice, also lobbied unsuccessfully for the removal of the fee for low income individuals, during the passage of the 2002 bankruptcy law amendments which reduced the discharge period to one year.

The two relevant government departments concerned with bankruptcy, the Ministry of Justice and the Department of Trade and Industry, within which sits the Insolvency Service, played influential roles in developing reforms. The Ministry of Justice is responsible for the courts and judicial administration which includes the administration order (the original poor man's bankruptcy) which permits individuals to pay all or a portion of their unsecured debts over a period determined by the court. This remedy, with appropriate reforms, had been viewed by several committees from the late 1960s as the solution for the consumer debtor. However, studies of the implementation of the administration order indicated high levels of default in repayment and inconsistent application by the courts of the power to compose debts.[28]

Ministry of Justice officials were aware of the New Zealand No-Asset proposals which seemed to provide a solution to their problems. The introduction of the NINA would divert both a proportion of administration order cases from the courts to the new procedure and also some bankruptcy cases, then processed through the courts. The Ministry of Justice rejected administration of the NINA procedure through the courts since this would be costly and, in their view, fell outside the central role of the courts in dispute settlement[29]. The Insolvency Service, which administers those bankruptcy cases which are not profitable for private sector trustees (the vast majority of cases) would administer the DRO. This agency, under a Treasury obligation to cover its costs, was willing to administer the DROs, but was concerned about the costs of checking eligibility. It therefore proposed that this be done by 'approved intermediaries' in 'competent authorities' (see Table 1)[30], primarily the non-profit debt advice agencies funded through a combination of creditor levies[31], fair share financing and public or charitable funding[32]. This role was sold to the debt advice agencies as a method of reducing the latter's costs through a reduction in the need for continuing

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[28] Debtors were primarily female, unemployed, lone parents See E Kempson & S Collard, Managing Multiple Debts: Experiences of County Court Administration Orders among Debtors, Creditors and Advisors (London, Department of Constitutional Affairs, 2004)

[29] See generally, Department of Constitutional Affairs, (2004) 'A Choice of Paths: Better Options to manage over-indebtedness' CP23/04 para 35.

[30] See now Debt Relief Orders (Designation of Competent Authorities) Regulations 2009. Citizens Advice is the major intermediary (See Table 1).

[31] Specialist Debt Advice is funded through a levy on creditors by the Financial Conduct Authority. The levy is related to the amount of credit extended. See CP17/38: Regulatory fees and levies: policy proposals for 2018/19. This money is disbursed through the Money Advice Service, established under the Financial Services and Markets Act Markets Act 2000 which since amendments in 2012 is responsible for co-ordinating debt advice in England and Wales. See Financial Services and Markets Act 2000 (as amended) s3S. See <https://www.moneyadviceservice.org.uk/en/corporate/money-advice-service-andfunding-of-debt-advice-services>

[32] Local authorities, for example, may fund specialist debt advice provided by Citizens Advice. One intermediary, Christians against Poverty, is financed through donations which may be made through churches. See Christians against Poverty, Annual Report, 2016 available at <https://capuk.org/downloads/finance/accounts_2016.pdf>

negotiations with creditors to write-off debts or make token payments. Of the £90 fee, £10 would go to the competent authority.

The development of the English DRO was primarily through working groups comprised of the debt advice agencies and relevant Ministries. Within this policy making community civil servants played a central role in setting the agenda, framing the policy options and drafting the legislation. The framing of the debate marginalized the alternative of abolition of the bankruptcy fee for low income debtors. Both a fresh start and financial inclusion –the ability to participate again in the economy and society---were cited as objectives of the DRO during Parliamentary debates. The provisions [deal] "with those who cannot pay their debts and are unable to access current procedures of debt relief [it seeks] to promote financial inclusion."[33] They are "a new and simplified way of wiping the slate clean for debtors who are too poor to go bankrupt."[34]

The English approach, in contrast to New Zealand was clearer in targeting a sub-group of "vulnerable debtors", perhaps those in persistent poverty.

**Table 1: Main Competent Authorities and approved intermediaries 2013-14**

| Competent Authority | No of intermediaries | No of DRO apps |
|---|---|---|
| Citizens Advice | 1337 (72%) | 14520 (53%) |
| Institute of Money Advisers | 287 (16%) | 3703(14%) |
| National Debtline | 12 (1%) | 1227 (4%) |
| Payplan | 12(1%) | 269 (1%) |
| Stepchange Debt Charity | 31(2%) | 4962 (18%) |
| Christians against Poverty | 7 (0.4) | 1097 (4%) |
| Other | 165 (9%) | 1547 (6%) |
| Total | 1851 | 27329 |

### 2.3 **Experience of the English DRO**

Limited socio-legal research has been conducted on the implementation of the Debt Relief Order or the experience of debtors.

The majority of debtors are under 45 and almost 50 percent are unemployed. They owe debts to local and central state creditors as well as financial institutions. Women represent almost two-thirds of applicants for a DRO and many are sole parents.[35] The Insolvency Service does not have reliable data on the nature of creditors but an early survey by the Service indicated that over 53 percent of DRO debt was owed to banks, building societies and credit card companies.[36] Thus although those using DROs are

[33] Hansard, HL vol 687, col 766 (November 29,2006).

[34] Lady Justice Hale, *Secretary of State v. Payne* [2011] UKSC 60,63.

[35] Insolvency Service statistics for 2015 indicate that females comprise 64 percent of DROs. Of debtors classified as housewife/househusband/caring for dependents, 89 percent are female. (Statistics on file with author, FOI request to Insolvency Service). New social risks related to socio-economic transformations in society and the economy are associated with being young, possessing low skills and being a woman. See G Bonoli, 'The Politics of the New Social Policies: Providing Coverage against New Social Risks in Mature Welfare States" (2005) 33 (3)*Policy and Politics* 431

[36] Insolvency Service, *DROs Initial Evaluation Report* (London, Insolvency Service, 2010).

often drawn from lower income groups, they may still carry significant consumer credit obligations.[37] This finding is supported by the Institute of Fiscal Studies which found in 2018 that 35 percent of those in the lowest income decile have debts of greater value than their financial assets, and have the highest debt-income servicing ratio of all deciles: being in arrears on debt is concentrated among the lowest income households.[38] The fact that these individuals may be judgment-proof because of an absence of assets does not prevent continuing pressure from creditors or the physical and mental stresses associated with debt.

The causes of individuals seeking a DRO in 2015 (Table 2) indicate the significance of reductions in income and increases in expenditure. [39] Only 15.5 percent are classified as "living beyond means", suggesting that the overspending consumer, identified as a target for the New Zealand procedure, does not represent a large percentage of those using the DRO.

**Table 2: Causes of DRO: 2015**

| | | |
|---|---|---|
| Business failure | 180 | 0.74 |
| Illness /Accident | 5540 | 22.9 |
| Increase in expense | 2885 | 11.9 |
| Living Beyond Means | 3760 | 15.5 |
| Loss of employment | 2795 | 11.5 |
| Relationship Breakdown | 3430 | 14.8 |
| Reduction in household income | 8080 | 33.3 |
| Other | 1595 | 6.5 |
| Unknown | 225 | 0.9 |

N cases =24175, multiple causes cited in some cases. Source: Insolvency Service.

The experience of the DRO in England and Wales highlights several relevant issues.

First, a DRO may be paradoxically no less onerous a process than bankruptcy. The DRO involves a rigorous screening process and investigation of a debtor's finances. Debt advice agencies, the gatekeepers to the remedy, must check credit reference data, ensure that the debtor has minimum assets and a budget with less than £50 disposable income. In addition, if an individual has made a preferential payment then this may bar entry to a DRO, whereas this does not occur with a bankruptcy. An individual may now apply for bankruptcy online without using an approved intermediary and in many cases the scrutiny of her conduct by the Insolvency Service after filing for bankruptcy will be relatively light touch. DROs remain on a credit file for six years, the same period as a bankruptcy.

[37] A point noted by Ben-Ishai and Schwartz in their article on Canada.

[38] A Hood, R Joyce & D Sturrock, Problem debt and low-income households (Institute for Fiscal Studies, 2018) 5-6. https://www.ifs.org.uk/uploads/publications/comms/R138%20-%20Problem%20debt.pdf

Second, although the DRO is intended to be a simplified online procedure, its implementation has thrown up many legal issues[40], and the scheme continues to throw up complex issues.[41]

Third, the use of approved intermediaries who screen debtors and prepare the online application gives credibility and legitimacy to the system and debt advisors play a crucial role in the system. Indeed, by transferring the bulk of work on DROs to the approved intermediaries, the Insolvency Service is able to meet the Treasury requirements of cost-recovery for the agency. However, although the government promised cost-savings for debt advice agencies, the average costs of processing DROs are £300, of which the agencies only receive £10 from the £90 DRO fee[42]. The debtor does not bear these costs but access through a limited number of approved intermediaries may increase access costs. In addition, the debt advice agencies as gatekeepers are in 'partnership' with the government Insolvency Service, a role which may conflict with that of rights advocate for a debtor.

The DRO has never reached the potential uptake (43,000) predicted by the government on its introduction[43]. Many reasons may account for this phenomenon. One possibility is that individuals are being diverted into low-value Individual Voluntary Agreements by private sector intermediaries.[44] Another is that individuals remain concerned about the impact of a debt relief order on their future ability to obtain credit and fear the stigma. Although the media dubbed the DRO "bankruptcy light", a stigma may continue to exist, which may be a further factor in individuals choosing to attempt an alternative partial repayment option such as an IVA.

Finally, little systematic information exists on the longitudinal effect of the DRO in providing a fresh start and financial inclusion for debtors. A government review in 2014–15 did gather information on its operation primarily from data from approved intermediaries. Clients of intermediaries indicated that the DRO had improved their mental and physical health. However, little evidence exists as to the long term financial and economic impact of DROs.

A longitudinal study of low-income individuals who had obtained debt advice in 2007 and 2011 (a group which would overlap with those qualifying for a DRO) found that by 2015 only one-third were 'debt free' (i.e. not being pursued for arrears). Some had achieved this through bankruptcy but the bankruptcy was a temporary change in

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[40] For example, the scope of the moratorium, *R. (on the application of Payne) v. Secretary of State for Work and Pensions* [2011] UKSC 60 (application of moratorium to government attempts to recover overpayment of welfare benefits); *Places for People Homes Ltd v. Sharples* [2011] EWCA Civ 813 (CA) (moratorium will not prevent a landlord evicting the debtor); *R(Howard) v. Official Receiver* (QBD) [2013] EWHC 1839 (In adjudicating on DRO applications is the Official Receiver acting in a judicial or administrative manner); *Islington LBC v. C* [2012] BPIR 363; *Kaye v South Oxfordshire District Council* [2013] EWHC 4165. See J Spooner, 'Seeking Shelter in Personal Insolvency Law: Recession, Eviction, and Bankruptcy's Social Safety net' (2017) 44 (3) *Journal of Law and Society* 374.

[41] See L Charlton, (2016/17) 43 *Quarterly Account* 25. "For a scheme that was intended to provide a cheap and simple alternative to bankruptcy the DRO scheme continues to throw up many complex issues for advisers and intermediaries".

[42] See P Wyman, 'Independent Review of the Funding of Debt Advice in England, Wales, Scotland and Northern Ireland' (2018) 26. The basis for this calculation is not clear.

[43] See Tribunals Courts and Enforcement Act 2007 Legislative Impact Analysis.

[44] For a critique see K Möser, "Making Sense of the Numbers: The Shift from Nonconsensual to Consensual Debt Relief and the Construction of the Consumer Debtor" (2019) Journal of Law and Society <https://onlinelibrary.wiley.com/doi/abs/10.1111/jols.12151>

a long-term experience of problems where income did not meet outgoings. The authors concluded that debt advice was of some value but that greater priority should be given to addressing structural problems of low wages, limited social security and health issues.[45]

The absence of information on the experience of debtors means that current English policy lacks a systematic evidence base to determine whether the DRO achieves its objectives, could be profitably reformed, or is primarily a band-aid, meeting the needs of government departments to reduce costs, in an economy where finance capital exploits low–income workers through the credit system, and the 'democratisation of credit' substitutes for secure jobs[46]. The DRO is premised on providing relief while protecting against moral hazard through the screening process and the possibility of a Debt Restriction Order. However, it does not attempt to address issues of irresponsible lending which may have caused an individual's problems.

## 3. Themes in the comparative study of NINA debtors and debt procedures.

The experience of transplanting the DRO from New Zealand to England and Wales invites reflection on whether the DRO provides a potential international policy model for addressing the problems of the NINA in other countries. It has been adopted in slightly modified forms in Ireland and Scotland (see annexe 1); the IMF has recommended the introduction of special procedures similar to the DRO in its structural adjustment work in Europe;[47] and it has been transplanted to India as a "fresh start process" in its recent insolvency reforms[48]. Influential documents in the Indian reforms refer to the innovative nature of the DRO as relevant to the Indian context where there are many poor debtors.[49] In contrast, other influential jurisdictions, such as Germany, have rejected any special procedure for this group. Although individuals in Germany may obtain relief from paying court costs for bankruptcy, a mandatory repayment plan of several years remains a condition of discharge for individual debtors, notwithstanding the fact that many individuals have no repayment capacity.

### 3.1. Structure and financing of NINA systems

NINA cases raise questions about the structure and financing of the bankruptcy system. The small amounts at stake underline the importance of cost-effective targeting of relief based on relatively clear rules that can be applied in a straightforward manner. Bright line rules can appear to provide this certainty but will be inevitably under and over inclusive. Although the general intention of a NINA procedure might seem relatively clear, devising criteria for access is not as simple as it might seem. Existing definitions include individuals with no significant realisable assets and no

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[45] G Atfield, R Lindley & M Orton, 'Living with Debt after Advice: A Longitudinal Study of People on Low Incomes (Friends Provident, 2016).

[46] See S Soederberg, *Debtfare States and the Poverty Industry* (London, Routledge, 2014).

[47] For example, in relation to Cyprus. See discussion in I Ramsay, *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe* (Hart, Bloomsbury, 2017) 168.

[48] See The Insolvency and Bankruptcy Code 2016 Part III Chapter II Fresh Start Process.

[49] See S Ramann, R Sane & S Thomas, 'Reforming personal insolvency law in India' 20. (Indira Gandhi Institute of Development Research, Mumbai, December 2015) https://ifrogs.org/PDF/WP-2015-035.pdf For a general background to the Indian reforms see A Feibelman, 'Anticipating the Function and Impact India's New Personal Insolvency and Bankruptcy Regime' ssrn https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3092042

disposable income to repay debts,[50] or with income below a certain level.[51] These criteria capture the vast majority of existing individual bankruptcies in England and Wales, Canada and the US. Angela Littwin notes that 90 percent of Chapter 7 cases are no asset cases, and in England and Wales 94 percent of bankruptcy cases have assets of less than £5,000[52]. As Catarina Frade points out in her contribution, the NINA debtor has been "hiding in plain sight". Ben-Ishai and Schwartz define the 'poor debtor' more narrowly as an individual in persistent poverty[53] who cannot pay the fees associated with filing.[54]

The English definition of the DRO may be intended to capture such debtors through income and asset restrictions as well as a ceiling on qualifying debt levels, but it is over-inclusive since it will also include those in short term poverty. The debt ceilings may act as a proxy for the potential complexity of cases, the need for investigation, and the deterrence of moral hazard, notwithstanding the relative absence of any widespread existence of this phenomenon in the existing bankruptcy system.[55] However, the English bright-line rule excludes significant numbers of debtors from low cost relief, and Coetzee and Roestoff make similar criticisms of the South African proposals. A more appropriate criterion limiting access might be therefore whether any dividend is likely to be paid to unsecured creditors although such a rule may have higher administration costs.

A further question is whether sole proprietors should be included within a simplified Debt Relief Order procedure. England and Wales does not exclude individual traders from the DRO although statistics (Table 2) suggest that this group rarely have resort to this mechanism. Several continental European systems such as France and Sweden do distinguish between consumer and trader bankruptcy and the EU in its recent Directive restricts the fresh start procedure to honest entrepreneurs[56]. However, such a distinction increases access costs since an initial distinction must be made between business and consumer bankrupts. Moreover there may often be an intermingling of business and household debt in sole proprietorships, so that there does not seem to be a strong reason in principle to exclude sole proprietors from access to a simplified NINA procedure.

If a bankruptcy discharge serves important public economic and social objectives then public subsidy may be desirable where individuals have difficulty in paying for bankruptcy. The primary purposes of bankruptcy are sometimes stated to be those of equitable distribution of a debtor's property and the provision of a fresh start.[57] But in reality individual bankruptcy is primarily about debt relief for the majority of debtors.

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[50] See e.g. New Zealand Insolvency Act 2006 s263; England and Wales, Insolvency Act 1986 Schedule 4ZA; Scotland, Bankruptcy Act 2016 s2(2). Ireland, Personal Insolvency Act 2012 as amended Part 3. See Appendix 1.

[51] See Coetzee and Roestoff, South Africa.

[52] See I Ramsay & J Spooner, "Submission to Consultation on Debt Relief Orders and Bankruptcy Petition Limit" (2014) 8.

[53] For a discussion of persistent poverty see N Smith & S Middleton, "A Review of Poverty Dynamics Research in the UK" (York, Joseph Rowntree, 2007) 3.

[54] See S Ben-Ishai & S Schwartz, "Bankruptcy for the Poor" (2007) 45 *Osgoode Hall L J* 471.

[55] For a useful critique of moral hazard and bankruptcy abuse prevention see Spooner above n0 ch7.

[56] See current status of Directive at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en

[57] See discussion in J Spooner, *Bankruptcy: The Case for Relief in an Economy of Debt* (Cambridge, CUP, 2018) 66-73.

Since the Great Recession of 2008 much scholarship has underlined the general economic and social benefits of providing a swift discharge of debts for individuals who are overindebted.[58] These benefits such as increased productivity, and reduced physical and mental stress, may not only be valuable for an individual but assist in general economic recovery. A discharge of debts may be particularly important for lower income individuals who have, to use the language of economics, a greater propensity to consume than higher income groups. Facilitating their re-entry to the credit market may therefore have a beneficial macro-economic effect. At the same time the powerful narrative that 'one pays one's debts', and the issue of moral hazard (that individuals might engage in more risky behaviour knowing that they can easily discharge their obligations) mean that policy making often attempts to draw a balance between the values of a fresh start and controlling for moral hazard.

The World Bank identifies five approaches to the financing of personal insolvency systems:

> state funding of the process (including both creditor and debtor costs) (2) cross subsidization of low value insolvencies by higher values estates; (3) state subsidies to professionals involved in the process and writing off court costs where there is an inability to repay (4) levies on creditors, such as taxation of distressed debt to fund these cases where individuals have no ability to pay and (5) no state support beyond any general public good funding of the court system.[59]

The DRO responds to the limits of a user pay model. Although the DRO process still requires some payment by a debtor, the use of public debt advice agencies provides a subsidy by the public and creditors. The comparative studies indicate that option 3 has been a response in Germany and Portugal but individuals must still wait for a significant period before obtaining a discharge. Jan Heuer views the German system as a paradigm of the failure of several European systems to adapt to the challenge of the NINA debtor. This failure can lead as in Sweden to the existence of 'eternity debtors', registered for many years by the state enforcement office, but who have no possibility of repaying their debts and are unwilling to apply for the long debt restructuring process.[60]

The private financing model of bankruptcy adopted in North America may exclude low income individuals from access, unless a professional is willing to waive fees and file pro-bono. Ben-Ishai and Schwartz criticise this "charity" model of financing bankruptcy as applied in Canada. In the US, the higher costs of processing Chapter 7 bankruptcies since the 2005 amendments to the Bankruptcy Act has resulted in individuals waiting longer before filing for bankruptcy, increased levels of *pro se* filings and the use of petition preparers who may face the sanction of unauthorised legal practice[61]. Some bankruptcy lawyers have adopted the approach of filing the partial repayment Chapter 13 rather than chapter 7 since fees can be recovered from the

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[58] See e.g. IMF, *World Economic Outlook* (Washington, DC, 2012). A Mian and A Sufi, *House of Debt: How They(and You) Caused the Great Recession and How we Can Prevent it from Happening Again* (Chicago, University of Chicago Press, 2015).

[59] World Bank (n2) para. 182

[60] See the Swedish Statens offentliga utredningar (State Public Report) 2008 "The Road Back for the Overindebted" and sources cited in Ramsay*, Personal Insolvency* above at 140-141.

[61] See M Sousa, 'Legitimizing Bankruptcy Petition Preparers: A Sociolegal Prescription for Change' (2015) 89 Am. Bankr. L.J. 269.

payments made under Chapter 13.[62] However NINA debtors who choose this route are, not surprisingly, also much more likely to have their case dismissed for failure to maintain payments under Chapter 13. These avoidance techniques bring the law into disrepute and suggest the need for reform. Ronald Mann and Katherine Porter have called for the introduction of a low cost administrative procedure to address these NINA debtors in the US.[63]

### 3.2 Bankruptcy relief, the DRO and access to justice

The access to justice movement exposed the gap between the liberal ideal of equality before the law and the reality of unequal access to justice for many in society.[64] The DRO recognises that poor individuals should have equal access to debt relief compared with middle class consumers[65] and not suffer unfair discrimination on the basis of their socio-economic status. Similar access to justice concerns are identified in the articles on South Africa, Canada, and Portugal.[66] Hermie Coetzee and Melanie Roestoff argue that the current South African bankruptcy law contravenes article 9 of the South African constitution by denying equal protection of the law. The English court of Appeal in *Lightfoot* decided that the requirement of the bankruptcy administration fee as a condition of bankruptcy access did not contravene human rights law or a common law right of access to justice since the fee was simply a fee charged for administering the bankruptcy. However this finding seemed to be contradicted in a later case when it concluded that the Insolvency Service was exercising a judicial function in administering Debt Relief Orders[67]. In the recent

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[62] P Foohey, R Lawless, K Porter, D Thorne, " 'No Money Down' Bankruptcy" (2017) 90 (5) *Southern California L Rev* 1055.

[63] See K Porter & R Mann, 'Saving Up for Bankruptcy' (2010) 98 *Geo* LJ 289,338. And see R Mann, 'Making Sense of Nation-Level Bankruptcy Filing Rates' in J Niemi, I Ramsay & W Whitford, (eds) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Oxford, Hart, 2009) 243-244, 'The evidence points to bankruptcy simplification. The time has come to abandon the complicated structures laden with bureaucratic hurdles…At least for the desperately insolvent, with no substantial income or assets, the best process is one that is stripped down to its most central elements…the system should function as an administrative process designed to provide a service at the lowest possible transaction cost…the system should provide complete and unconditional relief as quickly as practicable. This should occur within days or weeks after the filing…Finally the system should impose stern criminal sanctions for fraud…A simple and expedient process will collapse if it is tainted by fraud.'

Angela Littwin in discussing the impact of BAPCPA on bankruptcy costs notes: 'To make matters worse, clients who had particularly low incomes, were elderly, spoke little English or were otherwise not technologically savvy required additional resources to shepherd them through post-BAPCPA bankruptcy. This is a particular problem because disadvantaged clients are less able to afford these costs than others, and most of the attorneys who discussed this issue appeared to serve mainly this type of client.' A Littwin, 'Adapting to BAPCPA' (2016) 90 American Bankruptcy Law Journal 183, 223. See also A Littwin, 'The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success' (2011) 53 Wm & Mary L Rev 1933.

[64] The concept of access to justice is associated with the large project on this topic in the 1970s. See M Cappelletti & B Garth (eds) *Access to Justice: A World Survey* (milan, A Giuffre, 1978)

[65] See discussion of this issue in the articles on Canada and South Africa.

[66] See below Coetzee and Roestoff who note that the current South African system of personal insolvency conflicts with article 9 of the South African constitution.

[67] See *R (Howard) v. Official Receiver* [2013] EWHC 1839 (Admin).

*Unison* case[68] the Supreme Court held that the level of employment tribunal fees were unlawful under both English and EU law as they prevented access to justice and were discriminatory. *Unison* suggests that given the private and public benefits of debt relief, any fee for bankruptcy should be reasonably affordable by a debtor.

The introduction in England and Wales in 1883 of the administration order, the original 'poor persons bankruptcy', responded to emerging concerns about class discrimination in access to debt relief. Joseph Chamberlain, then a progressive Liberal, stated on the introduction of the relevant provisions that if the administration order became law then 'it could be no longer said that any inequality existed in the law as between rich and poor"[69]. The administration order however had only modest success over the next hundred years, partly through a failure to properly fund its implementation by the courts.

Access to justice in contemporary society is limited by the desire of many governments to limit public expenditure on the justice system[70]. The UK for example reduced substantially the availability of legal aid in 2012 alongside austerity measures and Jan Heuer notes pressures from the German *länder* (who are responsible for court administration) to cut court costs as a factor in reform. Certainly the political development of the DRO underlines the tension between extending access for individuals and its role in reducing the costs of government agencies and diverting individuals from courts.

**3.3. Bankruptcy, social insurance and social policy**

Bankruptcy is often analogised to social insurance or to social welfare programmes. The World Bank distinguishes bankruptcy from social welfare programmes, arguing that most debtors will rely only temporarily on social assistance and that while lack of resources to meet basic needs might result in debt problems, 'these two problems do not always appear together'.[71]

Traditional social policy is identified with income transfer programmes. However, given transformations in the economy at the end of the twentieth century it has been argued that programmes need to address new social risks emanating from "precarious employment, labour market dualisation, youth unemployment, difficulties of reconciling work and family life, and single-parenthood"[72]. One writer identifies the demographics of those most by the new social risks as 'being young, possessing low skills and being a woman."[73] These phenomena have underpinned a re-orientation of the welfare state in many countries to a social investment perspective which promotes an increase in an individual's capabilities rather than reliance on the passivity of existing forms of income transfer.

The DRO may be related to these new social risks---the large percentage of women, many single parents, accessing the DRO might suggest this--- so the question

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[68] See *R (on the application of UNISON) (Appellant) v. Lord Chancellor (Respondent)* [2017] UKSC 51.

[69] 277 Parl Deb HC (3d series) (1883) 834 and discussion in I Ramsay, *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe* (Hart, 2017) 78.

[70] See e.g. discussion of Germany by Heuer below.

[71] World Bank above para 35.

[72] Marius R. Busemeyera Caroline de la Porteb Julian L. Garritzmanna, and Emmanuele Pavolini, "The future of the social investment state: politics, policies, and outcomes" (2017) 25 *Journal of European Public Policy* 801-802

[73] G Bonoli, "The Politics of the new Social Policies: Providing Coverage against New Social Risks in Mature Welfare States (2005) 33 (3) *Policy and Politics* 431.

arises whether the DRO process might be a site for increasing capability. South Africa proposes the inclusion of financial literacy as part of its NINA provisions. Trish Keeper proposes the introduction of financial literacy requirements for individuals accessing the New Zealand no asset procedure on the basis that this would underline that the procedure is an "earned fresh start", while increasing the credibility of the programme.[74] This approach seems to be based on a model that individuals should pay a price for debt relief, just as individuals seeking welfare must prove that they are seeking employment. The danger exists that these measures which focus on changing individual behaviour and may draw attention away from regulation of more general issues such as employment protections, minimum wages or the regulation of financial practices, all of which may have a significant effect on overindebtedness .[75] A recurring comment by debt advisers in England and Wales is the limitation of money advice for many of those struggling in debt:

"For many it is easy to get rid of past debt but more difficult to make ends meet and move forward without incurring further debt. We talk about financial literacy and emphasise budgeting but for many, no matter how hard they budget, they cannot make ends meet and we see this every day."[76]

"Debt advice is a process with tools which we have all been trained in and developed over time…However, increasingly these tools are becoming more and more outmoded…what use is a financial statement for a client on zero hours contract and universal credit and no stable income?"[77].

The DRO focuses on the needs of those subject to new social risks, who may suffer from precarious employment, be more likely to live in deprived areas, and be subject to external buffeting. Bankruptcy law traditionally promised a 'fresh start' for debtors but empirical studies in the US have questioned whether this is achieved for a significant tranche of debtors who may be suffering from continuing income problems.[78] These studies raise the question of how the goals of a fresh start and financial inclusion mesh with existing housing and welfare policy and administration. Thus in England and Wales the existence of a DRO and its accompanying stay on enforcement does not prevent an individual being evicted from social housing.[79]

### 3.4. The role of professional intermediaries

Professionalism assumes a complex body of knowledge requiring 'considerable discretion', an occupationally controlled labour market and training programme and a public interest ideology.[80] Comparative analysis indicates the distinct professions involved in advising debtors, with lawyers predominant in the US, accountants in

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[74] Keeper above n0.

[75] See C Crouch & M Keune, "The Governance of Economic Uncertainty: Beyond the 'New Social Risks' Analysis" in G Bonoli & D Natali (eds) *The Politics of the New Welfare State* (Oxford, OUP, 2012)

[76] Jane Clack, Chair Institute of Money Advisers, (2017) 45*Quarterly Account* 3.

[77] Simon Bolton, (2017) *Quarterly Account* 00.

[78] See K Porter & D Thorne, 'The Failure of Bankruptcy's Fresh Start" (2006) 92 *Cornell L Rev* 67: L Lupica & J Zagorsky, "A Study of Consumers' Post Discharge Finances: Struggle, Stasis or Fresh Start?" (2008) 16 *American Bankruptcy Institute L Rev* 283: S Han & G Li," Household Borrowing after Personal Bankruptcy" (2011) 43 *Journal of Money Credit and Banking* 491.

[79] See *Places for People Homes Ltd v. Sharples; A2 Dominion Homes Ltd v Godfrey* [2011] EWCA Civ 813 (holding that a DRO order did not act as a stay on a social landlord evicting a tenant). See all J Spooner, "Seeking Shelter in Personal Insolvency Law: Recession, Eviction and Bankruptcy's Social Safety Net" [2017] 44(3) Journal of Law and Society 374.

[80] See E Freidson, *Professionalism: The Third Logic* (Chicago, U Chicago Press, 2001).

Canada, and debt counsellors in England, other European jurisdictions, and South Africa. A study of NINAs raises the question of the extent to which simplification reduces the need for professionals or creates markets for new professionals.

Experience of the DRO indicates that although it is a simplified procedure, individuals may benefit from the support of a professional intermediary to make applications and navigate the system. Online technology reduces costs but vulnerable debtors may still require face-to-face assistance in completing the DRO process, and this is likely to be the case in other jurisdictions. Angela Littwin has highlighted the difficulties vulnerable debtors face in accessing bankruptcy in the US.[81] The requirement of access through approved intermediaries in England and Wales may account for the very low level of rejection of applications compared with New Zealand where approximately 20 percent of applications are initially rejected, with a primary reason being an incomplete verification form.[82]

Existing research on bankruptcy has demonstrated the important role of professional intermediaries in the implementation and political development of bankruptcy systems. Intermediaries facilitate access, as well as acting as gatekeepers. In the latter role they give credibility to the bankruptcy system by ensuring that only deserving debtors gain access. In systems with multiple alternatives for debtors they may also exercise significant discretion in steering individuals to particular solutions[83]. North American individual bankruptcy administration relies heavily on private for-profit actors---in the US lawyers, in Canada, accountants-- to administer individual bankruptcy cases. Jean Braucher's important study indicated how lawyers' values and interests shaped their approach to consumer debtors, and the advice provided.[84]

Intermediaries play also a political role in shaping the development of the law. David Skeel argues that groups of lawyers have been central 'change agents' in US bankruptcy law since the early development of bankruptcy law in the twentieth century[85]. Bankruptcy lawyers have generally opposed reforms which might reduce their role and substitute government processing of individual bankruptcy cases. In Canada private trustees played a similar role in influencing the development of consumer bankruptcy law and administration.[86] Angela Littwin argues however that the presence of lawyers in the US system has maintained an effective and credible consumer bankruptcy system and she contrasts it with the low credibility of other US redistributive systems such as social security. Lawyers act as consumer advocates,

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[81] Littwin, "Adapting to BAPCPA" above n 65.

[82] Information provided by New Zealand Insolvency and Trustee Office (on file with author).

[83] See in the US, J Braucher, "Lawyers and Consumer Bankruptcy: One Code, Many Cultures" (1993) 67 *Am. Bankr L J.* 501: in Canada, I Ramsay, "Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy" (2000) 74 *Am. Bankr. L. J.* 399.

[84] Recent research suggests possible racial bias in lawyers' advice to debtors on the choice between Chapters 7 and 13 of the Bankruptcy code See J Braucher, D J Cohen and R Lawless, 'Race, Attorney Influence, and Bankruptcy Chapter Choice' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989039.

[85] See D Skeel, *Debt's Dominion A History of Bankruptcy Law in America* (Princeton, Princeton U Press, 2003).

[86] See I Ramsay, 'Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada' (2003) 53 *University of Toronto Law Journal* 379.

lobbyists for the system and provide a professional corps which sustains the bankruptcy system.[87]

### 3.5. NINAs and the Political Economy of bankruptcy law reform

Policy making in individual bankruptcy is often constructed as a question of balancing debtor and creditor interests. Debtors targeted by the DRO are unlikely however to represent a well-organised political group so that other groups, such as debt counsellors or NGOs may often claim to speak for them. In doing so these groups may be influenced by their own values and interests. David Skeel argues that lawyers have influenced the expansion of bankruptcy in the US partly as a method of expanding the market for their services.

In England and Wales, the objectives of government departments in removing debt cases from the courts, and the imperatives of the new public management in ensuring cost recovery, were key influences in shaping the institutional structure of the DRO. Heuer draws attention to similar cost concerns in Germany and also the institutional context of reform. Thus, the Federal structure of the German political system,[88] with a large number of veto points, limited the possibilities of radical reform.

If there is a functional need for a NINA procedure then the lack of unity among systems suggests that interest groups, including government agencies, and ideas may be important explanatory variables for change. These groups appeal to a limited set of narratives, for example, the concept of a second chance and the prevention of social exclusion balanced with concerns about personal responsibility and moral hazard. Groups may also be united by a common narrative.[89] Jan Heuer argues that financial institutions and debt counsellors share a narrative of individual responsibility for debt which shaped the long period of rehabilitation in German bankruptcy law.[90]

Finally, the DRO has served as an international model for reforms in emerging economies, including India, South Africa, and Kenya [91]. During the height of British imperialism, the British transplanted legal codes with little concern for the colonial context in which they would operate. The contemporary transplants of the DRO-style procedure to India raises questions about its likely success within a very different institutional, social and economic frameworks. For example, the functioning of the English DRO depends heavily on the large public debt advice industry which ensures the credibility of the process with creditors. Without a similar group in the transplanted jurisdiction, the debt relief mechanism may not function effectively.

Figure 1: Bankruptcy, IVAs, (1999-2017), Debt Relief Orders (2009-2017)

[87] See Littwin, below.

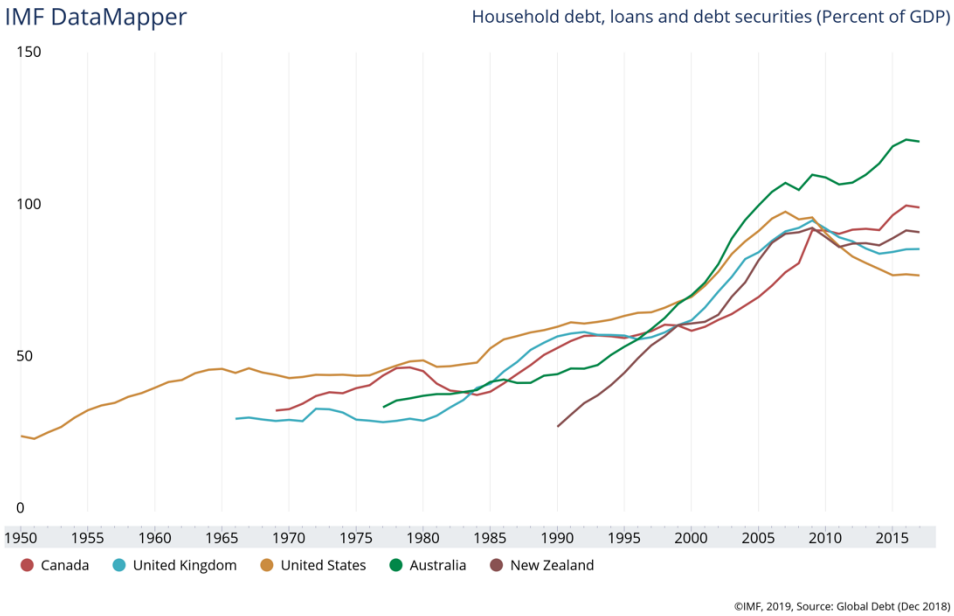
[88] Heuer ibid.

[89] For a discussion of the importance of common narratives see G. Trumbull, *Strength in Numbers The Political Power of Weak Interests* (Cambridge, Harvard, 2012).

[90] See Heuer, below at 000.

[91] See I Ramsay, 'Bankruptcy Light"---The English Debt Relief Order, Bankruptcy Simplification and Legal Change" (2018) 75 *Norton Journal of Bankruptcy Law and Practice* 617,618.


Household Debt as percentage of GDP 1950-2015



**ANNEXE 1: Requirements of NINA procedures**

New Zealand: Insolvency Act 2006 Part V Sub Part 4
England and Wales: Insolvency Act 1986 Part 7 A, Schedules 4ZA, B.
Scotland: Bankruptcy (Scotland) Act 2016 s2(2), Schedule 1.
Ireland: Personal Insolvency Act 2012, Part 3 as amended.

| | Access | Asset/Liability requirement | Discharge period | Exceptions to discharge | Process |
|---|---|---|---|---|---|
| New Zealand | Only available once and not previously adjudicated bankrupt; must not have incurred debt or debts knowing that did not have means to repay them. Under prescribed means test unable to repay debts | No realizable nonexempt assets. Can retain NZ$1,200 in bank account + a motor vehicle to NZ$6,000.; * No more than NZ$47000 in debts(secured debts must be included in calculation of total debt). | 12 months | Child support and maintenance. Student loans. Court fines and reparation | Either online or paper to Official Assignee |
| England and Wales DRO | Inability to pay debts as they fall due: Once every 6 years; no transaction at undervalue or preference within 2 years; fee of £90 (payable in instalments); online through approved intermediary | No more than £1000 nonexempt assets + car to £1000: no more than £50 in surplus income (determined by Common Financial Statement): limit of £20000 in liabilities. | 12 Months | Social fund loans; student loans; fines; damages for personal injury; family maintenance; confiscation order under Drug Trafficking; debt incurred through fraud; guarantor remains liable | Online through approved intermediary only. |

| | | | | | |
|---|---|---|---|---|---|
| Scotland (Sequestration where debtor has few assets) | Inability to pay debts as they fall due; once every 10 years or five years if previous bankruptcy; must consult money advisor before application | No more than £2000 in non-exempt assets + no single asset worth more than £1000: vehicle up to £3000: £17000 In liabilities: either in receipt of benefits for 6 months or assessed by common financial tool as not required to make a contribution: | 6 months: but remains liable to certain bankruptcy restrictions for further 6 months. | Fines: penalties; criminal compensation orders; aliment; student loans; fraud. | Online or paper |
| Ireland | Through approved intermediary. No likelihood of becoming solvent within three years; only available once; no previous bankruptcy, debt settlement arrangement etc. within previous 5 years; not eligible if 25% of debts incurred within 6 months of application; must not have entered a transaction at an undervalue that has materially | Liabilities under €35000; max non-exempt assets €400; under €60 in surplus income. | Three years | Family maintenance; fines; liabilities for personal injury or wrongful death; fraud; student loans. Following debts may be discharged with consent of creditor-taxes: local state charges, rates. | Online or paper |

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|---|---|---|---|---|---|
| | contributed to the debtor's inability to pay; must disclose efforts made to reach an alternative repayment arrangement | | | | |
| S Africa (proposed) | Only available once | No realizable non-exempt assets: gross income less than R 7500 monthly (£420approx): no more than R50000 in 'unsecured credit agreements' | 24 months. May be subject to financial literacy/education requirements | Only covers "unsecured credit agreements". | Application to National Credit Regulator. It must provide applicant with counselling on financial literacy. |