

# Troubled households: the early modern bankruptcy regime in Bern\*

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## Abstract

This analysis of the early modern Bernese bankruptcy regime focuses on the second half of the eighteenth century and highlights the surprisingly modern and liberal attributes of the so-called *Geldstag* procedure. The study is interested in disclosing the ways in which Bernese society dealt with economic failure rather than treating bankruptcy simply as an extension of or a reaction to regular credit and debt obligations. To establish what sets the Bernese bankruptcy procedure apart from other bankruptcy regimes in Europe at the time, an examination of fundamental laws is combined with a qualitative analysis of selected household bankruptcies as well as a quantitative analysis of 263 cases. The emerging bankruptcy procedure can be described as open-ended, egalitarian, and process-oriented without relying on debtors' prison. These aspects, typically described as achievements of the nineteenth century in the context of evolving nation-states and capitalism, differ from other contemporary bankruptcy regimes. This raises questions which might guide future research: To what degree does the case of Bern represent an inconsequential exception in an international context? Could a more differentiated empirical picture and a praxeological shift in analytical perspective lead to a new aggregate interpretation of disparate bankruptcy regimes in time and space?

Keywords: bankruptcy regimes; private households; liquidation procedures; history of capitalism

In the autumn of 1796, to his surprise and dismay, Rudolf Friedrich von Steiger (1757–1799), a member of the Bernese aristocracy and Grand Council, was asked to repay several debts he had guaranteed. Due to his uncertainty regarding the state of his finances, he asserted the only way to reach an accurate appraisal of his assets and liabilities was to officially request a so-called *Geldstag*.<sup>1</sup> Instead of unambiguously declaring bankruptcy, the *Geldstag* initiated an open-ended liquidation procedure.<sup>2</sup> The impending proceeding was announced in the news-

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<sup>1</sup> Geldstag Rudolf Friedrich von Steiger 1797, Bürgerbibliothek Bern (BBB), ZA Ober-Gerwern 909, p. 1–2. The *Geldstag* was perceived to be the only way to achieve a financial overview in other cases as well. See for example the case of the pharmacist Johann Georg Albrecht Höpfner: Geldstag Johann Georg Albrecht Höpfner 1800, Staatsarchiv Bern (StABE), *Sammlung von Geldstagsrödeln* (Serie 3), B IX 1494, Band H6 6, p. 8–9.

<sup>2</sup> As part of a *Geldstag* all assets of a debtor were inventoried and then redistributed among all creditors. In Bern the so-called *Gant*, a procedure in which only individual claims were met by asset

paper on September 19, 1796 and Steiger's creditors as well as debtors were urged to appear to make their claims and debts known on one of the four scheduled dates.<sup>3</sup> Only at the end of the liquidation process did it become clear that Steiger was unable to pay close to ninety percent of the debts he had guaranteed and that slightly over 35,000 *Kronen* of debt remained.<sup>4</sup> Despite this outcome, it is neither a coincidence nor an exception that secrecy, public shaming or debtors' prison – attributes often ascribed to other contemporary bankruptcy regimes<sup>5</sup> – were *not* part of this and other *Geldstag* procedures. On the contrary, Steiger's *Geldstag* of 1796 was, as contemporaries characterized it, the only way to achieve an accurate assessment of a household's finances. In this respect it was far more representative of the early modern bankruptcy regime in Bern<sup>6</sup> than other contemporary procedures which seem to have invariably resulted in social

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seizure, was of far less significance. *Erneuerte Gerichts-Satzung vor die Stadt Bern, und derselben teutische Städte und Landschaften*, Bern, Hoch Oberkeitliche Drukerey 1768, p. 245–261, 280–325.

<sup>3</sup> *Hoch-oberkeitlich privilegiertes Wochenblatt*, Numero XXXVIII, 17.09.1796. The *Geldstag* was announced in the newspaper a total of three times. In this Saturday issue of the newspaper, it was listed as one of four such events.

<sup>4</sup> *Geldstag Steiger 1797*, p. 329.

<sup>5</sup> *Imprisonment for debt* regularly takes center stage when bankruptcy regimes are characterized in historical analyses. Referring to Britain in the eighteenth century, Tawny Paul ascertains the «ubiquity of imprisonment for debt»: Tawny Paul, *The Poverty of Disaster. Debt and Insecurity in Eighteenth-Century Britain*, Cambridge, Cambridge University Press, 2019, p. 9. Drawing «primarily, though not exclusively, from the abolition discussion in England, in order to show how pamphleteers on both sides of the debate viewed the reigning practice of imprisonment for debt» as a form of *barbarism*, Gustav Peebles describes the loss of significance of debtors' prison, superficially borrowing Foucauldian terms, as a *civilizing* act with historical dimensions. He argues that the eradication of debtors' prison in the nineteenth century was a consequence of developing nation-states and their increasing capability of controlling borders as well as categorizing, overseeing and disciplining citizens paired with the economic necessities of evolving capitalism. Gustav Peebles, «Washing Away the Sins of Debt. The Nineteenth-Century Eradication of the Debtors' Prison», *Comparative Studies in Society and History* 55, 2013, p. 702, 706, 720 f.

<sup>6</sup> The *Geldstag* has its roots in the fifteenth century. Hermann Rennefahrt, *Grundzüge der bernischen Rechtsgeschichte. III. Teil*, Bern, Stämpfli & Cie., 1933, p. 302. It was the dominant institution for the resolution of uncertain debt and credit relations in Bern until the end of the nineteenth century. To illustrate this dominance in quantitative terms: In 1867 and 1868, 439 *Geldstag* procedures were conducted in response to debt claims of around 1.25 million Swiss francs in the *Amtsbezirk* Bern. Over the same time period, a *Gant* only occurred nine times and debts of 13,000 Swiss francs were claimed. Kantonales Statistisches Bureau (ed.), *Statistisches Jahrbuch für den Kanton Bern*, Bern, K. J. Wyss, 1869, p. 248–251; Kantonales Statistisches Bureau (ed.), *Statistisches Jahrbuch für den Kanton Bern*, Bern, K. J. Wyss, 1870, p. 312–315.

death<sup>7</sup>, humiliation<sup>8</sup> or dire punishments including imprisonment<sup>9</sup>. Steiger's case was no exception. He was merely one of several members of the Bernese aristocracy who underwent the liquidation procedure of the *Geldstag*.<sup>10</sup> In fact, the range of Bernese society affected included the poor, the middling classes and the wealthy. All creditors and debtors had the right to request a *Geldstag*. The use of the procedure was not confined to a designated group, for example merchants.<sup>11</sup> Remarkably, in the aftermath of the South Sea Bubble of 1720 and during the so-called *Malacrida* crisis a separate bankruptcy law for merchants was intensively discussed until 1728 – but *not* enacted.<sup>12</sup>

The case of Christina Liechti in the spring of 1765 is indicative of a different type of *Geldstag*. She and her ailing son were abandoned by husband and father, the master weaver Abraham Lefevre. Liechti tried to continue the family business. Although she received payment for her work and sold several weaving looms with the assistance of a legal guardian she had to request a *Geldstag* in the summer of 1765. At that point, it was not known which assets existed nor whether they would be sufficient to cover all liabilities and keep the household afloat. Over the course of a laborious eleven-week procedure, it was determined

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7 See for example the oft-cited study of Gottfried Winckler's bankruptcy in Leipzig 1723: Robert Beachy, «Bankruptcy and Social Death. The Influence of Credit-Based Commerce on Cultural and Political Values», *Zeitsprünge. Forschungen zur Frühen Neuzeit* 4, 2000, p. 329–343.

8 In 1776, Adam Smith famously described bankruptcy as the «greatest and most humiliating calamity which can befall an innocent man» and compared its deterrent effect with that of the gallows. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, in: The Glasgow Edition of the Works and Correspondence of Adam Smith. 2nd ed., Oxford 2014 (1776), p. 342. According to Emily Kadens capital punishment was an important deterrence yet between 1706 and 1820 only four Englishmen were hung for the crime of fraudulent bankruptcy (out of a total of 30 bankruptcy trials over the same time period): Emily Kadens, «The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law», *Duke Law Journal* 59, 2010, p. 1231, 1288.

9 For St. Gallen, Dorothee Guggenheimer observes a shift towards more lenient sanctions against debtors towards the end of the eighteenth century: Dorothee Guggenheimer, *Kredite, Krisen und Konkurse. Wirtschaftliches Scheitern in der Stadt St. Gallen im 17. und 18. Jahrhundert*, Zürich, Chronos, 2014, p. 249. Most European countries only outlawed debtors' prison in the 1870s: Jérôme Sgard, «Do Legal Origins Matter? The Case of Bankruptcy Laws in Europe 1808–1914», *European Review of Economic History* 10, 2006, p. 400 f. See for a description of the eradication of debtors' prison as a «widespread and rapid abolition of imprisonment for debt» in the nineteenth century: G. Peebles, *Washing Away the Sins of Debt*, p. 706.

10 See the cases mentioned below as part of the quantitative analysis.

11 In this respect Bern differs from the bankruptcy regime in St. Gallen where merchants were sanctioned more severely than other members of society: D. Guggenheimer, *Kredite, Krisen und Konkurse*, p. 248.

12 Nikolaus Linder, *Die Berner Bankenkrise von 1720 und das Recht. Eine Studie zur Rechts-, Banken- und Finanzgeschichte der Alten Schweiz*, Zürich, Schulthess, 2004, p. 170–182. The republic of Bern became one of the biggest individual shareholders of the *South Sea Company* in 1719. The subsequent bankruptcy of the *Bankhaus Malacrida & Cie.*, one of two banks administering the republic's foreign investments, had a massive political impact since the Bernese state and large parts of its aristocracy were among the creditors. Stefan Altorfer-Ong, «State Investment in Eighteenth-Century Berne», *History of European Ideas* 33, 2007, p. 440–462.

that Liechti's assets outweighed her debts. She was entitled to receive half of her dowry (*Weibergut*)<sup>13</sup> valued at 150 *Kronen* in the form of household goods seized as well as around 20 *Kronen* in cash. In addition, she recovered further debt claims which were acknowledged at about 145 *Kronen*.<sup>14</sup>

As the cases of Steiger and Liechti show, a *Geldstag* procedure could result in bankruptcy or unearth a surplus. Therefore, the procedure's result could potentially be beneficial to the affected household. In any event, debtors were protected from imprisonment by entering into a *Geldstag* as early as the seventeenth century.<sup>15</sup> A high degree of transparency and publicity characterized the procedure.<sup>16</sup> For example, in the second half of the eighteenth century a public auction – announced widely to attract as many bidders as possible – was enacted in eighty percent of cases<sup>17</sup> and hundreds of people could participate in any given *Geldstag*.<sup>18</sup> Overall, its institutional purpose was not one of exclusion, punishment and extracting maximal repayment of debts but centered much more on maintaining Bernese households that had slipped into economic hardship and faced a very uncertain future – a stark contrast to the widespread pre-occupation of bankruptcy history to recognize male debtors as alleged head of household in addition to bankrupt merchants.<sup>19</sup>

13 For more details on the social role and importance of the dowry see: Claudia Ravazzolo, «Bis aufs letzte Hemd? Berner Schuldnerinnen und ihr materieller Besitz (1660–1798)», *xviii.ch. Schweizerische Zeitschrift für die Erforschung des 18. Jahrhunderts* 10, 2019, p. 35 f.

14 *Geldstag-Rodel über das Vermögen und Schulden des von hier aussgetretenen Strumpf-Webers Abraham Le Fevre gebürtig von Chardonay*, StABE, *Geldstagsrödel für Stadt und Stadtgericht Bern* (Serie 2), B IX 1450, Band 1765–1767 13, p. 1–3, 6 f., 29 f. and Lefebvre, Abraham, *Strumpfwieber*, StABE, *Akten zu einzelnen Geldstagsrödeln* (Serie 4), B IX 2153, Band L. This *Geldstag* is a telling example of many cases where the title suggests the primary focus rested on the male head of household. Yet he had long left Bern and was not part of the procedure. Instead, the *Geldstag* clearly focused on the remaining household and its members. This is an aspect that Claudia Ravazzolo did not consider in her study of material possessions of female debtors. Therefore, in her sample of *Geldstag* procedures the proportion of female bankrupts calculated at 11.6% most likely does not represent the *de facto* practice. C. Ravazzolo, *Bis aufs letzte Hemd*, p. 33.

15 *Der Staat Bern vernüwerte Grichts Satzung. Gedruckt zu Bern. Im Jar 1615*, Bern 1615, p. 96.

16 For further details see the author's forthcoming article: «Generating Social Acceptance Through Publicity. The Bernese *Geldstag* as a Legitimate Bankruptcy Proceeding in the Long Nineteenth Century», in: Natacha Coquery, Jürgen Finger, Mark Sven Hengerer (eds.): *Contextualizing Bankruptcy: Publicity, Space and Time (Europe, 17th-19th c.)*, Stuttgart, Franz Steiner (VSWG Beihefte).

17 In the nineteenth century, a public auction was part of 65 percent of the cases with existing assets.

18 For example, 160 people were involved in the *Geldstag* of the aristocrat Gottlieb Sinner and all people eager to bid on his assets («Kauflustigen», p. 9) were invited to join the auction: *Geldstag Gottlieb Sinner 1799*, StABE, *Sammlung von Geldstagsrödeln* (Serie 3), B IX 1523, Mappe S 2: Siegenthaler-Si 6. See more detailed information on the number of people involved in the quantitative analysis below.

19 See for example Margrit Schulte Beerbühl's remarks regarding a supposed rise of bankruptcy cases across Europe between the sixteenth and nineteenth centuries substantiated by the number of business failures in Antwerp, Augsburg and Nuremberg (sixteenth century), England (sixteenth to

In regional, national, and international comparison, this surprisingly modern and liberal<sup>20</sup> way of dealing with economic failure stands out. This is brought into focus by the starting point of the analysis, namely the eighteenth century. Notably the legal framework that established the specific Bernese way of dealing with economic failure originated in 1761 and the corresponding bankruptcy regime remained effective until the end of the nineteenth century. This constellation supported by the availability of serial archival sources enables an analysis of the *Geldstag* with a temporally extended perspective of a history of capitalism which does not fall into the trap of hindsight bias and avoids a straightforward narrative of nineteenth century modernization culminating in the twentieth century.

Outlining specific bankruptcy cases paves the way for the next steps.<sup>21</sup> To illustrate the historically specific attributes of the Bernese bankruptcy regime in the second half of the eighteenth century, the legal foundation of the *Geldstag* procedure will be described by analyzing two fundamental laws from 1614 and 1761.<sup>22</sup> Then, going beyond individual cases, the quantitative analysis of 263 cases will show how early modern Bernese society dealt with economic failure as a nearly everyday occurrence. To conclude, the case study of Bern will be contrasted with other findings from bankruptcy history in Switzerland and beyond. Is the case of Bern merely an inconsequential exception in an international context? Or rather might a more differentiated empirical picture emerge, not least caused by a praxeological shift in analytical perspective, and lead to a new aggre-

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eighteenth centuries), Amsterdam (1633–1838), and Stockholm (late nineteenth century). Margrit Schulte Beerbühl, «Introduction», in: Albrecht Cordes, Margrit Schulte Beerbühl (eds.): *Dealing with Economic Failure: Between Norm and Practice (15th to 21st century)*, Frankfurt am Main, Peter Lang Edition, 2016, p. 12f.

<sup>20</sup> In this article *modern* and *liberal* are used in connection with two observations: First, through the multifaceted analysis of the *Geldstag*, the early modern bankruptcy regime in Bern emerges as open-ended, unprejudiced, egalitarian, tolerant, forbearing, transparent and process-oriented. Second, the *Geldstag*'s ability to differentiate between economic debt and immoral or fraudulent behavior as well as the absence of moral condemnation and punishment through humiliation or imprisonment are often described as characteristics and achievements of modern and liberal bankruptcy regimes towards the end of the nineteenth century. The descriptors *modern* and *liberal* are used despite the potential proximity to teleological thinking to situate the Bernese case study within the overarching narrative of international bankruptcy history. To further illustrate the intent: For Peebles the *civilizing* consequences of abolishing debtors' prison in the nineteenth century are characterized by a distinction between money-value and body-value and malfeasance versus misfortune, among other factors. Using his concepts and words, the eighteenth century Bernese bankruptcy regime as embodied by the *Geldstag* procedure represents *civilization* rather than *barbarism*: G. Peebles, *Washing Away the Sins of Debt*, p. 703.

<sup>21</sup> Further insights gained through the qualitative analysis of specific cases will be referenced throughout this article.

<sup>22</sup> *Der Staat Bern vernüwerete Grichts Satzung 1615; Erneüerte Gerichts-Satzung 1768.*

gate interpretation – or *reassembly*<sup>23</sup> – of disparate bankruptcy regimes in the longue durée and in various regions?

## Early Modern Bankruptcy Law in Bern

The history of bankruptcy is often presented as a linear modernization characterized by the increasing influence of rational arguments over the course of the nineteenth century, arguments based strictly on economic logic.<sup>24</sup> Reportedly, over the course of the early modern period, «private executions and draconian methods yielded slowly to the fundamental elements of modern due process, including public settlements, creditor equality and monitored negotiations.»<sup>25</sup> This juxtaposition between a so-called early modern and a modern way of dealing with economic failure is too simplistic especially once the plethora of regional differences in bankruptcy regimes is accounted for.<sup>26</sup> Before addressing the challenging question of how to adequately aggregate or abstract diverse bankruptcy regimes,<sup>27</sup> the Bernese case needs to be described in greater detail, beginning with its legal foundations.

How did lawmakers in Bern envisage bankruptcy proceedings and which rules as well as goals were proposed? For the period under investigation in this article, two laws are essential. They are the so-called *Gerichtssatzung* from

<sup>23</sup> This metaphor is inspired by Kenneth Lipartito's article *Reassembling the Economic*, in which he offers innovative ways to write histories of capitalism focused on historical specificity instead of conceptual abstractions: Kenneth Lipartito, «Reassembling the Economic: New Departures in Historical Materialism», *The American Historical Review* 121, 2016, p. 101–139.

<sup>24</sup> Interestingly, Erika Vause mentions the influential French legal scholar Raymond-Theodore Troplong (1795–1869) as already putting forward a similar opinion in the middle of the nineteenth century: «the more civilized the society, the more it relied on the debtor's property, rather than his body, as collateral for his debt.» Erika Vause, «Disciplining the Market. Debt Imprisonment, Public Credit, and the Construction of Commercial Personhood in Revolutionary France», *Law and History Review* 32, 2014, p. 648.

<sup>25</sup> Thomas Max Safley: «Introduction: A History of Bankruptcy and Bankruptcy in History», in: Thomas Max Safley (ed.): *The History of Bankruptcy. Economic, Social and Cultural Implications in Early Modern Europe*, New York, Routledge, 2013, p. 12. Kadens describes the problem of obtaining debtor cooperation as a «process that involved moving from a purely punitive to a modern, increasingly remedial bankruptcy system», finally reaching «a functioning equilibrium between creditors and debtors». Kadens, *Last Bankrupt Hanged*, p. 1234, 1301.

<sup>26</sup> This perspective of approaching historical developments beyond alleged epochal boundaries is inspired by Joachim Eibach's critical assessment of the *Sattelzeit*: Joachim Eibach: «Die Sattelzeit. Epoche des Übergangs und Gründungsgeschichte der Moderne», in: Robert Charlier; Sven Trakulhun; Brunhilde Wehinger (eds.): *Europa und die Welt. Studien zur Frühen Neuzeit*. In memoriam Günther Lottes, Hannover, Wehrhahn, 2019, p. 145 f.

<sup>27</sup> For numerous studies of various bankruptcy regimes see: T. M. Safley, *The History of Bankruptcy*; A. Cordes, M. Schulte Beerbühl, *Dealing with Economic Failure*.

1614<sup>28</sup>, mentioned above, and the renewed and extended version from 1761. The latter law was decisive until the middle of the nineteenth century and many of its principles remained pertinent until the first Swiss federal bankruptcy law came into effect in 1892.<sup>29</sup> Remarkably, neither the end of the Ancien Régime, the Napoleonic *Code de commerce* from 1807 with its highly influential and restrictive bankruptcy provisions,<sup>30</sup> nor the introduction of a Bernese Civil Code in the 1820s led to any significant alteration to the *Geldstag* procedure.<sup>31</sup>

From the outset, in 1614, the *Gerichtssatzung* presented a fairly differentiated, non-judgmental and patient way to handle failed credit and debt relationships. *Prima facie* the legislation treated *deliberate and fraudulent* bankrupts as dishonorable swindlers who were expelled and had to leave Bern until they could repay their debts. Significantly, some important limitations to this potentially draconian punishment were introduced. Those who could not adequately respond to their liabilities due to accidental occurrences (not described in further detail) or inherited or pledged debts were exempt from any further punishment aside from their assets being seized. In addition, once all debts were paid, any punishment associated with a *Geldstag* was lifted.<sup>32</sup> This meant that already in the early seventeenth century, the bankruptcy regime in Bern did *not* aim to irrevocably and automatically punish or dishonor debtors.<sup>33</sup>

While some 30 paragraphs of the 1614 *Gerichtssatzung* were devoted to the *Geldstag*, a century and a half later this grew to about 135 paragraphs on bankruptcy regulations. Due to the further refinement and consolidation of the *Geldstag* procedure, the 1764 *Gerichtssatzung* represents a milestone in the legal history of the Bernese bankruptcy regime. Those who fell into economic crisis due to inherited or pledged debts or due to misfortune were still protected from

28 In this instance, the *Geldstag* was mentioned as a legal term for the first time: Friedrich Ernst Meyer, *Über das Schuldrecht der deutschen Schweiz in der Zeit des XIII. bis XVII. Jahrhunderts*, M. & H. Marcus, Breslau, 1913, p. 48.

29 «Bundesgesetz über Schuldbetreibung und Konkurs. (Vom 11. April 1889.)», in: *Schweizerisches Bundesblatt* 41, Band 2, 19, 04.05.1889, p. 445–537. In Switzerland, the legal and practical distinction between different debt enforcement procedures for individuals and companies was only established at this late stage (with the exception of regions influenced by French bankruptcy law). Mischa Suter, *Rechtstrieb. Schulden und Vollstreckung im liberalen Kapitalismus 1800–1900*, Konstanz, Konstanz University Press, 2016, p. 239, 279. Cf. the English translation: Mischa Suter, *Bankruptcy and Debt Collection in Liberal Capitalism: Switzerland, 1800–1900*, Ann Arbor, Michigan University Press, 2021.

30 J. Sgard, *Do Legal Origins Matter?*, p. 400 f.

31 Armand Chatelanat, «Statistik der Konkurse (Geldstage) im Kanton Bern in juristischer und volkswirtschaftlicher Beziehung. Mit spezieller Berücksichtigung der Stimmrechtsfrage», *Zeitschrift für schweizerische Statistik* 11, 1875, p. 68.

32 *Der Staat Bern vernüwert Grichts Satzung 1615*, p. 96.

33 For more details on public shaming as an early modern form of punishment see: Arno Halde- mann, «Das gerügte Haus: Rüteritiale am Haus in der Ehrgesellschaft der Frühen Neuzeit», in: Joachim Eibach, Inken Schmidt-Voges (eds.): *Das Haus in der Geschichte Europas. Ein Handbuch*, Berlin/Boston, De Gruyter Oldenbourg, 2015, p. 433–448.



additional punishment. Intent and fraudulent behavior had to be explicitly established – an issue dealt with only at the end of any *Geldstag* – before criminal prosecution was pursued. Fittingly, it still applied that the repayment of debts at any point in time lifted the bankruptcy.<sup>34</sup> The most remarkable legal provision concerned the absence of imprisonment as punishment. One of the foundational principles of the *Geldstag* was the maxim which forbid the option of locking up debtors:

Es ist gemeinen Rechts, dass das Gut den Leib schirme; und kann folglich ein Schuldner, er sitze in der Gefangenschaft oder nicht, sich derselben durch anrufung des Geld-tags jederzeit frey und ledig machen.<sup>35</sup>

Consequently, a debtor's liability ended with their property, not their person. *De facto* this meant that bankrupts who requested a *Geldstag* were not put into debtors' prison in Bern. This stands in clear contrast to other contemporary bankruptcy regimes in Switzerland which only outlawed debtors' prison due to new provisions in the Swiss constitution of 1874. It also differs from the results of a comparative study of 15 European countries (including Switzerland) and the legal framework of those bankruptcy regimes according to which it took until the 1880s for a new liberal bankruptcy model to be established.<sup>36</sup> It is not false to cite the Swiss case as an example of this phenomenon, using 1874 to mark the abolishment of debtors' prison in Switzerland. But it disregards several centuries of Bernese tradition of dealing with economic failure without bodily punishment. This suggests that influential modernization narratives need to be reexamined otherwise underlying causes of historical developments might be misattributed.<sup>37</sup>

Many bankruptcy procedures from the second half of the eighteenth century record cases of debtors requesting a *Geldstag* explicitly to obtain protection from debtors' prison. In 1768, for example, Niclaus Maurer declared that he saw no better way to protect himself – his body – from his creditors and their

<sup>34</sup> *Erneüerte Gerichts-Satzung 1768*, p. 242, 323–325. This could also occur once it became apparent that assets clearly outweighed debts during a procedure. See these cases as examples: StABE, *Geltstagsrödel für Stadt und Stadtgericht Bern (Serie 2)*, B IX 1458, Band 1787–1790 16, p. 17 and B IX 1458, Band 1787–1790 17, p. 29f.

<sup>35</sup> Translation by the author: «It is common law that property shields the body, therefore any debtor can, be he already imprisoned or not, free and spare himself from prison at any time by requesting a *Geldstag*.» *Erneüerte Gerichts-Satzung 1768*, p. 268.

<sup>36</sup> J. Sgard, *Do Legal Origins Matter?*, p. 411.

<sup>37</sup> This is not meant as an exercise in labeling or in accurate historical periodization. Yet, maintaining historical specificity and offering an explanation of underlying developmental processes should be part of historiography. Therefore, it can be true that Bern only entered modernity around 1900. Yet, this does not necessarily apply to the Bernese way of dealing with economic failure. See for an account of Bern reaching modernity at the turn of the twentieth century: Maurice Cottier, *Fatale Gewalt: Ehre, Subjekt und Kriminalität am Übergang zur Moderne: Das Beispiel Bern 1868–1941*, Konstanz/München, UVK Verlagsgesellschaft, 2017.



demands than requesting the initiation of a *Geldstag*.<sup>38</sup> A year later, the small shopkeeper Johannes Marti Braun reacted similarly to debt collection efforts mentioning the protection from imprisonment as the reason for his request.<sup>39</sup> Jean Daniel Gex even requested a *Geldstag* to get out of debtors' prison in 1786.<sup>40</sup> The potential threat of imprisonment as way to ensure the compliance of disobedient debtors cannot be ignored. But, in practice, punishment via debtors' prison was *not* an integral part of the *Geldstag*'s institutional purpose. It was rather one of several regulations which incentivized debtors to participate in or even request the all-encompassing liquidation procedure of the *Geldstag*. In comparison to the much less prevalent enforcement the demands of specific creditors through limited seizures, the so-called *Gant*, household assets could only be auctioned at or above their estimated value (otherwise creditors received objects at their assessed value).<sup>41</sup> Consequently debtors could always request a *Geldstag* and often did so, sometimes citing the all-encompassing nature of accounting for all debts and assets at once as beneficial to their interests.<sup>42</sup>

Overall, creditors *and* debtors were meant to be treated equally, as the *Gerichtssatzung* from 1761 demanded that neither party ought to come up short or be given reason to complain.<sup>43</sup> The intent was to compare both the assets and the liabilities of affected households carefully and meticulously.<sup>44</sup> The *Ger-*

38 Geldstag Niclaus Maurer 1768, StABE, *Geltstagsrödel für Stadt und Stadtgericht Bern (Serie 2)*, B IX 1451, Band 1768–1770 5, p. 3: «[D]ass auf vielfältige rechtlich geschehene Betreibungen seiner Schuld Gläubigeren Er zu Schätzung seines Leibs kein besseres Mittel mehr vor sich sehe, als sich das Beneficy des Geltstags zu bedienen».

39 Geldstag Johann Marti Braun 1769, StABE, *Geltstagsrödel für Stadt und Stadtgericht Bern (Serie 2)*, B IX 1451, Band 1768–1770 12, p. 4. He used the following phrase in describing his reasoning: «Schützung und Schirmung seines Leibs». For further cases from the same series see: B IX 1450, Band 1765–1767 17, p. 3; B IX 1457, Band 1784–1787 22, p. 2; B IX 1458, Band 1787–1790 4, p. 2.

40 Geldstag Jean Daniel Gex 1786, StABE, *Geltstagsrödel für Stadt und Stadtgericht Bern (Serie 2)*, B IX 1457, Band 1784–1787 26, p. 2. His request was noted as follows: «welcher zufolge eines auf ihn erhaltenen Leibhafts allhier gefänglich eingetragen worden, den von ihm zu Schirmung seines Leibs, selbst angerufenen Gelstag».

41 *Erneuerte Gerichts-Satzung* 1768, p. 253.

42 Geldstag Rudolf Steiner 1846, StABE, *Geltstagsprotokolle (1830–1892)*, Bez Bern B 3630 Box 1846–1847, Nr. 2430, p. 2. This matches the characterization of the *Geldstag* by the author of the Bernese civil code Samuel Ludwig Schnell, who highlighted its differences from the *Gant*. Samuel Ludwig Schnell, *Handbuch des Civil Processes, mit besonderer Hinsicht auf die positiven Gesetze des Kantons Bern*, Bern, in der L.R. Walther'schen Buchhandlung, 1810, p. 335.

43 The procedure was meant to be conducted in a way so that «weder die Gläubiger zu kurz kommen, noch auch der Vergelt's-Tager sich zu beklagen habe». *Erneuerte Gerichts-Satzung* 1768, p. 290. The painstaking enforcement of creditors' *and* debtors' demands and the rejection of two percent of creditors' demands attest to this.

44 The purpose stated in the *Gerichtssatzung* from 1761 was: «Vermögen und Schulden sorgfältig gegen einander halten». *Erneuerte Gerichts-Satzung* 1768, p. 294. To fulfill this purpose every *Geldstag* procedure underwent a laborious and elaborate process, incurring costs of about three percent of assets assessed in the second half of the eighteenth century. Niklas Luhmann's definition of procedure strongly influenced this analysis of the *Geldstag* and the outstanding sources resulting from the meti-

*ichtssatzungen* from 1614 and especially 1761 formed the legal basis for a remarkably modern and liberal bankruptcy regime that remained in effect until 1892. Its rules and goals were not geared towards shaming and punishing debtors or keeping economic failure out of public sight. The inclusive, non-judgmental and open nature of the procedure is noteworthy. The eventual outcome of a *Geldstag* was not known beforehand or predetermined and cases could end with a surplus of assets and no bankruptcy. Thus, the *Geldstag* has much more in common with a modern civil procedure than with a criminal procedure or an early modern ritual.<sup>45</sup>

## Economic Failure as an Everyday Occurrence

Insights from a qualitative analysis of a number of *Geldstag* cases and an account of the legal framework reveal a modern and liberal Bernese bankruptcy regime in the second half of the eighteenth century that fulfilled its purpose for creditors and debtors alike. To better grasp the social role of the *Geldstag* as an institution, to more clearly understand who in Bernese society actually relied on it and to show what outcomes it produced, a quantitative analysis is required.

This perspective reveals that dealing with potential economic failure was far more commonplace than extraordinary. The inventory of the State Archive of Bern has cataloged a total of 859 *Geldstag* procedures for the years from 1750 to 1803, an average of 16 per year.<sup>46</sup> For this detailed quantitative analysis, a wide spectrum of 263 cases has been compiled from three samples.<sup>47</sup> The 1760s (133 cases) and the 1780s (95 cases) are representative of the Ancien Régime and respectively the so-called «Golden Age»<sup>48</sup> of Bern. As a third sample, the years

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culous contemporary record keeping made it possible to go beyond viewing the concrete historical bankruptcy procedure as a black box. Luhmann, *Legitimation durch Verfahren*, Frankfurt am Main, Suhrkamp, 2013 (1969).

<sup>45</sup> For Luhmann it is precisely the uncertainty of outcome that is characteristic of procedures in contrast to the inevitable outcome of rituals: N. Luhmann, *Legitimation durch Verfahren*, p. 40. For a more detailed distinction between criminal and civil procedures in the early modern period see: Karl Härter, *Strafrechts- und Kriminalitätsgeschichte der Frühen Neuzeit*, Berlin/Boston, De Gruyter Oldenburg, 2018. Barbara Stollberg-Rilinger, who edited several highly regarded volumes on procedural history, rejects any dichotomous juxtapositions between supposedly early modern rituals and modern procedures: Barbara Stollberg-Rilinger: «Einleitung», in: Barbara Stollberg-Rilinger (ed.): *Vormoderne politische Verfahren*, Berlin, Duncker & Humblot, 2001, p. 10 f.

<sup>46</sup> Register über die Geldstage vor 1831, StABE, *Hilfsmittel E II Register und Repertorien zur Hauptabteilung B: Verwaltungsarchive* 39.

<sup>47</sup> For more details on the sources and the data collected see the upcoming publication of the author's PhD thesis in which a total of 567 bankruptcy cases from the eighteenth and nineteenth centuries were analyzed.

<sup>48</sup> André Holenstein «Goldene Zeit» im «Alten Bern». Entstehung und Gehalt eines erklärenden Blicks auf das bernische 18. Jahrhundert», in: André Holenstein (ed.) *Berns goldene Zeit. Das 18. Jahrhundert neu entdeckt*, Bern, Stämpfli, 2018, p. 16–25.

from 1799 to 1803 (35 cases) have been included to cover almost all years of the Helvetic Republic.<sup>49</sup> The aim of this approach – and added benefit of the quantitative analysis – is to study the *Geldstag* as a multivalent institution and to avoid any kind of selection bias,<sup>50</sup> for example, by accentuating contentious cases.<sup>51</sup> Official statistical data is not available for the eighteenth century. Further investigating the 263 cases, along with the members of the affected households, a manual count identifies roughly 6,000 directly involved creditors and also circa 2,500 debtors (of the households affected). In addition, officials, scribes, appraisers, participants in the public auction, etc. experienced each *Geldstag* and were more or less directly involved. In comparison to the slightly more than 25,000 inhabitants of Bern in 1798 these are remarkable numbers.<sup>52</sup>

Who entered into a *Geldstag*? In roughly half the cases their occupation is recorded. Of the 263 cases analyzed only ten percent (26) were conducted on behalf of a female debtor. Among them were, for example, peasant women, printers, small shopkeepers, maids, merchants, officials, the widow of a goldsmith and the widow of a carpenter. As illustrated by the example of Christina Liechti's *Geldstag* in 1765, a closer look at the actual proceedings reveals that women were much more decisively involved than the initial estimate limited to the designated bankrupt suggests. 72 additional cases were undertaken because the male head of household had left Bern without settling his household's finances. In addition, a *Geldstag* was initiated in reaction to economic uncertainty in the aftermath of the death of the head of household in 70 cases (in two more the absence was noted without further remarks). Taking these diverse reasons for bankruptcy into account corresponds to the actual extensive institutional tasks and shifts the gender ratio: 168 (26 female debtors, 73 heads of household who had left Bern, 70 deceased heads of household, 2 absent heads of household) of 263 *Geldstag* procedures were conducted in the absence of the assumed male head of household. This does not mean that almost 65 percent of cases involved a female debtor. However, it highlights the fact that the identity of the responsible party was only determined over the course of the *Geldstag* procedure and

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49 Remarkably and as mentioned above, the end of the Ancien Régime did not result in any changes in bankruptcy law and the Bernese bankruptcy regime remained the same during the Helvetic Republic. Therefore these 35 cases have been included. Any monetary values from the third sample in *Franken* were converted to *Kronen*.

50 Concerning the 25 years taken into account here, sixty percent (263 out of 435) of the available cases have been considered.

51 In her study of debt and bankruptcy in France between the French Revolution and the Second French Empire, including the analysis of actual bankruptcy cases, Vause explicitly claims that «rare but controversial cases» are useful as «symptomatic» sources for the study of «ordinary practice». Erika Vause, *In the Red and in the Black. Debt, Dishonor, and the Law in France between Revolutions*, Charlottesville, University of Virginia Press, 2018, p. 20–21.

52 This number concerns the population of the so-called *Amtsbezirk Bern*. <https://www.bernhist.ch/query/location/19/topic/990/1700-1990/> (01.06.2021).

was not necessarily equated with the stereotypical male bankrupt. The degree to which the *Geldstag* was geared towards the survival of economically threatened households is underscored by the fact that the dowry was acknowledged in sixty percent of cases and constituted ten percent of all demands in terms of value thus providing assets which played an important role in the survival of the household.

In eighty percent of the cases analyzed the occupation of household members involved is known. The largest group (40 %) consisted of craftsmen (printer, tailor, coppersmith, shoemaker, clockmaker, carpenter, etc.), followed by (each at 15 %) members of the Bernese administration (*Allmosner*, bailiff, *Quartieraufseher*, public prosecutor, *Salzdirektor*, *Schultheiss*, etc.) and merchants (bookseller, glass merchant, cheese merchant, specialist merchant of pharmaceuticals, etc.), between five and nine percent earned a living through food production (baker, brewer, etc.), transportation (*Lehenkutscher*), the military (soldier, officer), as well as in medicine, the sciences and the arts (pharmacist, doctor, organist). Only three percent worked in agriculture. As mentioned in connection with the *Geldstag* of Rudolf Friedrich von Steiger in 1796, all parts of Bernese society were involved in *Geldstag* procedures. As many as one third of the bankrupts were members of Bern's leading families.<sup>53</sup>

In the second half of the eighteenth century the broader reasons for initiating a *Geldstag* were diverse and the procedure accordingly served a multitude of functions.<sup>54</sup> Death-related bankruptcies accounted for 35 percent of *Geldstag* cases and thus dealt with inheritance proceedings. Additionally, debtors who left Bern without settling their debts accounted for thirty percent of the instances.<sup>55</sup> Strikingly, 24 percent of cases were initiated at the request of debtors themselves. Furthermore, six percent were requested by a legal guardian, local communities or family members, four percent by creditors and two percent were so-called *Nachgeldstage* (a further procedure in which bankrupts who came into money settled outstanding debts from an earlier *Geldstag*) concerned missing persons or resulted from the aftermath of criminal acts (one case of manslaughter).

<sup>53</sup> Further examples of this in the second half of the eighteenth and very beginning of the nineteenth century are Daniel von Werdt (1733–1784) in 1761, Schultheissin Maria Elisabeth Ougspurger-Brugger (1707–1779) in 1762, Johann Karl von Werdt (1740–?) in 1784, Niklaus von Diesbach (1747–1831) in 1800 and Friedrich Wild (1737–1807) in 1802. Also see the following cases selected from the relevant inventory of the State Archive of Bern (*Register über die Geltstage vor 1831*): Niklaus Gatschet (1736–1817) in 1798, Bernhard von Graffenried (1759–1815) in 1798, Sigmund Emanuel von Graffenried (1737–1818) in 1798, Niklaus Gottlieb von Diesbach (1747–1814) in 1800, Georg Franz Ludwig von Tavel (1757–1816) in 1800.

<sup>54</sup> The reasons are known for 253 out of the total 263 cases analyzed.

<sup>55</sup> This obviously does not justify any assumption that there was a causal relationship. None of the regularly very detailed bankruptcy files mentions that those concerned left Bern *because* of a looming *Geldstag*. In the aforementioned case of Christina Liechti, for example, about six months passed after her husband abandoned her and she saw herself forced to request a *Geldstag*. Geldstag Lefevre 1765, p. 3

The outcome of the *Geldstag* depended on evaluating the assets and determining the liabilities of the bankrupt household.<sup>56</sup> Property clearly constituted the largest portion of assets comprising forty percent of all assets. The value of outstanding claims totaled 24 percent, household belongings and cash amounted to twenty percent, and the remaining eleven percent were interest earning investments. Bankrupt households' assets presented a broad spectrum from no assets at all (one case) to 28,218 *Kronen*.<sup>57</sup> Eight of the ten *Geldstag* procedures with the highest assets ended with a negative balance and in bankruptcy. Altogether, ten percent of the cases (26) collected from all three samples ended with an asset surplus.<sup>58</sup> In these cases, the *Geldstag* and all its consequences were subsequently lifted. Sometimes years passed until creditors were satisfied and the *Geldstag* revoked.<sup>59</sup> Another interesting metric is the proportion of indebtedness. The highest amount was reached by the *Schultheiss* of Murten Michael Ougspurger (1684–1763) whose liabilities were ninety times higher than his assets in 1764<sup>60</sup> and 27 further bankrupts leveraged their assets more than tenfold. All in all, through the *Geldstag* procedures around 55 percent of creditor demands were met while two percent were rejected by the designated officials.<sup>61</sup>

Summing up the findings of the quantitative analysis of cases in the second half of the eighteenth century in Bern, a clear result surfaced: no single stereotypical bankrupt emerged. Neither in regard to gender nor occupation nor social status. In addition, many different reasons led to *Geldstag* procedures and the institution thus carried out various functions. This most likely meant that in the public eye, a clear profile of bankrupts did not exist<sup>62</sup> and neither debtors nor creditors knew exactly what to expect apart from an unprejudiced process. The essential characteristics of the Bernese bankruptcy regime dealt with these uncer-

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56 The evaluation of assets through public auction played a decisive role in the assessment of a bankrupt household's financial status and the amount of credible creditor demands was not predictable from the outset. For a helpful conceptualization of valuation as a social process see: Charles W. Smith, *Auctions. The Social Construction of Value*, Berkeley, University of California Press, 1989.

57 The pharmacist and army officer Johann Rudolf Knecht was the wealthiest and his *Geldstag*, which was conducted in his absence in 1789, ended in a surplus of more than 20,000 *Kronen*. His assets of slightly more than 48,000 *Kronen* clearly exceeded his debts of around 27,500 *Kronen*. *Geldstag Johann Rudolf Knecht 1789*, StABE, *Geldstagsrödel für Stadt und Stadtgericht Bern (Serie 2)*, B IX 1459, Band 1789–1790 2.

58 In the nineteenth century five percent of *Geldstag* procedures ended with a surplus.

59 For example, the *Geldstag* of the printer Rudolf Bögeli took place in 1780 and was revoked in 1785. It took twelve years until coachman Samuel Wehrli's *Geldstag* was revoked in 1782. *Geldstag Rudolf Bögeli 1780*, StABE, *Geldstagsrödel für Stadt und Stadtgericht Bern (Serie 2)*, B IX 1455, Band 1779–1782 11, p. 14; *Geldstag Samuel Wehrli 1782*, B IX 1456, Band 1782–1784 3.

60 *Geldstag Michael Ougspurger 1764*, StABE, *Geldstagsrödel für Stadt und Stadtgericht Bern (Serie 2)*, B IX 1438, Band 1762–1764 19.

61 In the nineteenth century 52 percent of demands were met.

62 This did not change with the development of increasingly more detailed bankruptcy statistics in the nineteenth century. See for example: A. Chatelanat, *Statistik der Konkurse (Geldstage)*.

tainties and transformed them into socially acceptable decisions regarding the future of the troubled households over the course of each *Geldstag* procedure.

## Conclusion: Reassembling the History of Bankruptcy

This article argues that the Bernese *Geldstag* with its origins in the fifteenth century, its codification in the seventeenth century and its definitive establishment as a law-based procedure through the *Gerichtssatzung* of 1761 can be adequately characterized as remarkably modern and liberal. As mentioned, this specific bankruptcy regime, which remained in effect almost until the end of the nineteenth century, stands out in contrast to many aspects of the *status quo* in bankruptcy history.

Once again citing the Swiss example, based on an analysis of Zurich and Basel, the imprisonment of debtors has been described as «cases that were common, albeit precarious» in Switzerland in the nineteenth century, «where the body served as collateral».<sup>63</sup> Yet, as shown, refraining from the use of debtors' prison was not a modern achievement of nineteenth century liberalism but an integral part of the Bernese bankruptcy regime from the seventeenth century onwards. In addition, the first federal bankruptcy law that went into effect in Switzerland in 1892 instituted an all-encompassing bankruptcy process as a prerogative of registered merchants, as opposed to a limited seizure of assets.<sup>64</sup> This was deemed a necessary reaction to the ever-increasing financial demands of the modern business world.<sup>65</sup> Yet in Bern, the laborious process of the *Geldstag* as an all-encompassing bankruptcy procedure was the dominant way of dealing with economic failure from the seventeenth century onwards, in contrast to the *Gant*. When comparing the Bernese case with other interpretations of Swiss bankruptcy history, significant differences emerge which raise serious questions and apparently call for new interpretations: Did the Bernese *Geldstag* represent an inconsequential exception in an international context or could a more differentiated empirical picture and a praxeological shift in analytical perspective lead to a new aggregate interpretation of disparate bankruptcy regimes in time and across geographies?

For a more accurate understanding of Swiss bankruptcy history, a constructive approach should first and foremost take into account the historical specificities of different regional bankruptcy regimes over the longer term and then

<sup>63</sup> Mischa Suter, «Debt and Its Attachments: Collateral as an Object of Knowledge in Nineteenth-Century Liberalism», *Comparative Studies in Society and History* 59, 2017, p. 718.

<sup>64</sup> The law barely passed the popular vote with less than 53 percent of approval across Switzerland. «Botschaft des Bundesrates an die Bundesversammlung, betreffend die Volksabstimmung vom 17. November 1889. (Vom 7. Dezember 1889)», in: *Schweizerisches Bundesblatt* 41, Band 4, 53, 21.12.1889, p. 1098.

<sup>65</sup> M. Suter, *Rechtstrieb*, p. 56f.

integrate them into a newly aggregated narrative.<sup>66</sup> As far as the international history of bankruptcy is concerned, the same questions and similar conceptual thoughts which arise regarding the interpretation of the various bankruptcy regimes apply.

The significance of the argument here is not primarily that Bern managed to deal with economic failure in an exceptional way perhaps even ahead of time. Rather the theoretical implications derived from comparing the Bernese case study to other studies of bankruptcy regimes in Switzerland, England, France, and other regions is that a change in perspective would most likely uncover similar contemporary approaches to those in Bern in the second half of the eighteenth century. Adapting research questions to consider everyday economic failure by including troubled private households along with business failures and cases where economic uncertainty was dealt with institutionally but did not result in bankruptcy helps to illustrate the role failure plays in the history of capitalism – beyond being an exception to the rule. Shifting the focus to the analysis of practices instead of discourses will aid this undergoing.<sup>67</sup> Augmenting the qualitative analysis with quantitative data will help to better gauge the contemporary importance and meaning of various aspects of specific historical bankruptcy regimes. Utilizing a wide variety of sources will provide a keener analysis of everyday practices concerning managing economic failure. Expanding the temporal perspective and critically revisiting narratives of modernization, rationalization and economization is necessary. Inspired by Kenneth Lipartito, this two-step-movement of dismantling international bankruptcy historiography and then reconstructing it can be described as *reassembly*.<sup>68</sup> This does not mean pushing aside the multitude of insightful and detailed studies and their results. But it allows us to achieve historical specificity, making it possible to aggregate the disparate and diverse empirical findings anew to provide a better and more detailed picture of the role failure plays in economic history.

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<sup>66</sup> Next to the analysis of the Bernese bankruptcy regime, this should at least also include the differing regime in regions under the influence of French bankruptcy law (Bernese Jura, Geneva), the so-called *Falliment* in St. Gallen and the *Rechtstrib* in Zurich and Basel. For an historical analysis of the *Falliment* as well as the *Rechtstrib* see: D. Guggenheimer, *Kredite, Krisen und Konkurse*; M. Suter, *Rechtstrib*.

<sup>67</sup> Cf. Thomas Welskopp, «Zukunft bewirtschaften: Überlegungen zu einer praxistheoretisch informierten Historisierung des Kapitalismus», *Mittelweg* 36 26, 2017, p. 81–97.

<sup>68</sup> K. Lipartito, *Reassembling the Economic*, p. 137.