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Searching for reasoning and meaning in insolvency case law: A critical analysis of Portuguese judicial practice

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Abstract

This paper examines Portuguese insolvency and pre-insolvency judicial proceedings through the lens of legal consciousness, drawing on qualitative analysis of 338 first-instance court decisions from 2007-2020. Through systematic coding and critical discourse analysis, we identify a paradoxical phenomenon we term "borrowed authority" – judicial decisions that voice the law's authority while simultaneously lacking authentic judicial voicing. This pattern manifests through mechanized

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jurisprudence, epistemic limitations, and moral evaluations that collectively contribute to the institutional marginalization of insolvency law. Our findings reveal how courts' discursive practices both reflect and reinforce broader patterns of institutional disengagement and social meaning-making around debt. The study advances theoretical understanding of how legal consciousness operates in insolvency contexts while offering practical insights into how procedural inertia and epistemic vulnerabilities systematically undermine the achievement of insolvency law's stated goals of economic rehabilitation and debtor relief.

Key words

Insolvency law; judicial discourse; legal consciousness; debt

Resumen

Este artículo examina los procedimientos judiciales portugueses de insolvencia y preinsolvencia desde la perspectiva de la conciencia jurídica, basándose en el análisis cualitativo de 338 sentencias de tribunales de primera instancia dictadas entre 2007 y 2020. Mediante una codificación sistemática y un análisis crítico del discurso, identificamos un fenómeno paradójico que denominamos «autoridad prestada»: sentencias judiciales que expresan la autoridad de la ley, pero que al mismo tiempo carecen de una auténtica expresión judicial. Este patrón se manifiesta a través de una jurisprudencia mecanizada, limitaciones epistémicas y evaluaciones morales que, en conjunto, contribuyen a la marginación institucional del derecho concursal. Nuestros hallazgos revelan cómo las prácticas discursivas de los tribunales reflejan y refuerzan patrones más amplios de desvinculación institucional y de creación de significado social en torno a la deuda. El estudio avanza en la comprensión teórica de cómo funciona la conciencia jurídica en contextos de insolvencia, al tiempo que ofrece una visión práctica de cómo la inercia procesal y las vulnerabilidades epistémicas socavan sistemáticamente el logro de los objetivos declarados del derecho concursal de rehabilitación económica y alivio del deudor.

Palabras clave

Derecho concursal; discurso judicial; conciencia jurídica; deuda

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1. Introduction

This paper presents the main findings and interpretative analysis from the qualitative component of the IN_SOLVENS research project, which examined Portuguese insolvency and pre-insolvency judicial proceedings from a socio-legal perspective and through the lens of legal consciousness. Our analysis shows a multifaceted composite of institutional disengagement, procedural inertia, and epistemic vulnerabilities which might be collectively contributing to a systemic underachievement of insolvency law's stated goals (see section 2.5.4).

Our qualitative analysis of Portuguese insolvency decisions reveals a paradoxical phenomenon: judicial decisions that voice the authority of law while simultaneously appearing to lack authentic judicial voicing. This is what we describe as *borrowed authority* – a phenomenon where courts uphold the appearance of law's authority while disinvesting from the interpretative responsibilities that give that authority substance. Indeed, we found significant instances of judicial reasoning becoming increasingly mechanized: formulas repeated across dozens of cases with the same expressions often copied verbatim, with no further elaboration or contextualization, as if the law could speak for itself, without further interpretation. This phenomenon also entails a certain naturalization of legal interpretation, as the courts maintain the appearance of legal authority not by articulating reasoned justifications, but by leaning on pre-existing templates, references to statutes and doctrinal references as if their meaning were self-evident. We might also speak of a kind of *argumentative indifference*. The observation of these patterns proves central to understanding how the institutional marginalization of insolvency law manifests in judicial practice and contributes to the field's broader devaluation. So, after the paper's first section, we are interspersing the various analytical and interpretative topics with the implications of this problem for each thematic unit.

1.1. The Portuguese insolvency framework: evolution, context and performance

Legal and institutional evolution

The Portuguese insolvency framework has undergone significant transformation since the enactment of the Insolvency and Corporate Recovery Code (*Código da Insolvência e da Recuperação de Empresas – CIRE*) in 2004. This reform marked a substantial shift from the previous regime under CPEREF (*Código dos Processos Especiais de Recuperação da Empresa e de Falência*), reflecting a change in policy orientation from a debtor-friendly approach focused on business recovery to a more creditor-oriented system prioritizing debt satisfaction (Carreira *et al.* 2021).

The financial support Portugal received from the "Troika" (European Commission, European Central Bank, International Monetary Fund) required the introduction of effective restructuring mechanisms and general principles concerning voluntary out-of-court restructuring. This led to a revision of CIRE in 2012, which modified existing liquidation and reorganization instruments and introduced new hybrid instruments, combining judicial monitoring with out-of-court negotiation between the parties.

Further reforms in 2017 imposed new requirements for pre-insolvency proceedings, changed the rules on consolidated insolvencies, and prevented certain companies (for

example, water and electricity) from interrupting the supply of essential services to the debtor. Additional reforms in 2018 introduced a restructuring mediator and a "silent" procedure ensuring confidentiality in some instances (Serra 2018).

The most recent development in the Portuguese insolvency landscape is the transposition of the European Directive 2019/1023 through Law 9/2022. This law introduced significant changes to the existing framework, particularly in preventive restructuring, the role of the courts and second chances for individual debtors (Serra 2022).

The institutional framework evolved to incorporate specialized commercial courts in central districts while maintaining the competence of regular civil courts in smaller jurisdictions. Nevertheless, while judges may attend specialized training, no mandatory training in economic/business matters exists for the judiciary (van Dijck *et al.* 2020).

Socioeconomic context

Portugal's economic trajectory since the early 2000s has significantly shaped the evolution of its insolvency framework, influenced profoundly by both global events and domestic vulnerabilities.

The robust growth Portugal experienced during the 1990s had already begun to slow long before the global financial crisis of 2008, contradicting narratives that blame the crisis solely on external shocks (Reis 2013). In 2001, Portugal became the first Eurozone member to breach the 3% budget deficit limit, signaling early fiscal stress (Alexandre *et al.* 2019), and from 2001-2007 real gross domestic product (GDP) just grew 1.2% annually (Carreira *et al.* 2021). The contrast with the 1990s convergence boom was stark. While GDP per capita grew 4% annually from 1996-2000 (Alexandre *et al.* 2019), driven by Euro adoption anticipation and declining interest rates, the subsequent period, described as *The Great Slowdown*, saw unemployment rise from 4.1% to 8.9% by 2007 (Eichenbaum *et al.* 2017).

The global financial crisis of 2008-2009 and the subsequent sovereign debt crisis from 2010 to 2012 had devastating impacts on Portugal and inflicted severe damage on the country's already vulnerable economy. Between 2008 and 2013, real GDP growth turned negative, averaging -1.3% annually and bottoming out at -4.1% in 2012, largely as a consequence of stringent austerity measures dictated by the IMF-ECB-EC Memorandum of Understanding (Carreira *et al.* 2021). Unemployment surged dramatically, peaking at 17% in 2013, with far-reaching socioeconomic consequences (Reis *et al.* 2023).

The banking sector required unprecedented intervention and the period from 2009-2017 saw severe credit restrictions that particularly affected small and medium enterprises.

In terms of insolvencies, the crises triggered a dramatic increase in both corporate and personal insolvency filings. While corporate insolvencies gradually reverted to pre-crisis levels by 2016, personal insolvencies continued to climb, indicating prolonged household financial distress even as broader economic indicators improved (Carreira *et al.* 2021). Indeed, the data reveal a striking transformation in debtor composition: legal persons represented 81.4% of declared insolvencies in the 4th trimester of 2007, declining to 56.3% by the corresponding period of 2010, before natural persons became the majority in the same period of 2011 (60.1%) and have remained predominant since,

reaching 77,7% in the last trimester of 2024 (Direção-Geral da Política de Justiça –DGPJ– 2012; 2025), reflecting the prolonged impact of the crises on household finances.

The economic recovery started modestly in 2014, the year Portugal was able to successfully exit the financial assistance program, and lasted up until 2019 when the GDP registered a rate of change of 2.2% in real terms and a growth of 3.9% in nominal terms; unemployment sat at a rate of 6.5%; investment increased by 6.6% in real terms; exports of goods increased by 3.5% compared to the previous year (Instituto Nacional de Estatística – INE – 2020). Although the most relevant statistical indicators fit with a recovery trajectory in 2019, some hints of deceleration were looming (INE 2020), which could point to recovery but not yet strong consolidation. Either way, then came Covid and with it the next big global crisis, which is already out of our research's timeframe.

Current framework structure and main procedural features

For the purposes of this paper, the Portuguese insolvency system currently encompasses three main types of proceedings, each serving distinct purposes and addressing different debtor situations. Insolvency proceedings (*Processo de Insolvência*) operate alongside two specialized pre-insolvency procedures: the Special Revitalization Process (*Processo Especial de Revitalização – PER*) and the Special Payment Agreement Process (*Processo Especial para Acordo de Pagamento – PEAP*).

Insolvency proceedings can be initiated either by the debtor or creditors. The law imposes an obligation on debtors to request the opening of insolvency proceedings within thirty days of becoming aware of their insolvency situation, reflecting a concern for timely intervention in situations of financial distress (van Dijck *et al.* 2020).

Court involvement varies significantly across these proceedings. In insolvency proceedings, judges mainly intervene in the insolvency decision, the homologation of insolvency plans, and the verification and ranking of claims. Judges are also responsible for determining whether insolvency is fraudulent or non-fraudulent and the consequences thereof. Regarding the insolvency practitioner, judges can appoint a professional and oversee its activities. The law establishes that the insolvency practitioner acts under judicial supervision, with judges being able to request information or reports on any matter at any time.

The Special Revitalization Process (PER), introduced in 2012, is a hybrid pre-insolvency mechanism intended to promote business reorganization. The process begins with judicial validation of basic requirements, followed by the appointment of a temporary insolvency practitioner. The court's role in PER is more limited, focusing primarily on appointing the temporary practitioner and deciding on the homologation of the approved restructuring plan.

Court performance and efficiency metrics

Portuguese courts' performance in handling insolvency cases has significantly evolved over time, with measurable improvements in processing efficiency despite persistent challenges. Between 2015 and 2020, the estimated time for insolvency to be declared decreased substantially: for individual debtors, the median duration fell from 17 days to 6 days, while for companies, it decreased from 40 to 17 days (Carreira *et al.* 2021).

Processing times vary significantly depending on whether the insolvency is voluntary or involuntary. In cases where debtors themselves file for insolvency, the law establishes a three-day timeframe for the court to issue the insolvency declaration. For creditor-initiated cases, this includes five days for service and a ten-day window for possible opposition. Despite the legal timeframes, empirical data collected within the IN_SOLVENS research project, considering a sample of closed cases between 2007 and 2020, shows that the general time required for insolvency declaration takes an average of 79 days, with the median being about 35 days. And according to Pereira and Wemans (2022), creditor-initiated cases take an even longer time, with the median duration being about 90 days, compared to 10 days for debtor-initiated proceedings.

The duration until case closure also presents significant variations. Data gathered within IN_SOLVENS points to an average duration of 693 days, with the median duration of about 322 days. But according to Pereira and Wemans (2022), corporate insolvencies, rather than personal insolvencies, are the ones that typically take longer to resolve, with the median duration pointing to 16 months between 2015 and 2020. This difference reflects the greater complexity involved in corporate cases, particularly regarding asset liquidation and creditor claims resolution.

Digital transformation and European integration

A notable feature of the system is its increasing digitalization. Since 2004, all declarations of insolvency have been required to be publicized on the court's website, initially as a complement to paper publication in the official Gazette. By 2007, declarations were published exclusively on the Citius portal, the official court system web page, and in 2016 insolvency practitioners were integrated into the digital platform. This digital transformation extended further in 2018, allowing creditors registered as interested parties to consult insolvency proceedings electronically without requiring court visits. The system now enables practitioners to automatically publish mandatory information, receive court notifications, and interact with various stakeholders electronically (Frade *et al.* 2020).

Nevertheless, the digitalization of insolvency proceedings is still seen as lagging and insufficient, since the Citius portal does not allow for effective communication between the parties, nor does it enable thorough review of information (Cotta *et al.* 2022).

Additionally, certain operations still require traditional methods, particularly when dealing with public entities requiring authenticated documents. The need for embossed seals in communications with registry offices, tax authorities, or the Bank of Portugal continues to necessitate manual intervention, highlighting the incomplete nature of digital transformation (Frade *et al.* 2020).

Integration with the European E-Justice Portal's insolvency registers system represents progress both toward digitalization and cross-border cooperation, though full functionality remains pending.

Portugal's insolvency framework's evolution increasingly reflects the dual influence of European harmonization efforts and digital modernization imperatives. The transposition of the European Directive 2019/1023 through Law 9/2022 represents a crucial step in this harmonization process: it aligns Portuguese law with European

preventive restructuring frameworks, introducing viability tests and reducing the *cessio bonorum* period, demonstrating commitment to early intervention, restructuring, and second chance principles (Serra 2022, Silva 2022, Conceição 2022).

1.2. IN_SOLVENS: a brief presentation of the research project

The "Insolvency Law in Portugal – A Multidisciplinary Analysis" research project (IN_SOLVENS) examined the causes of lengthy insolvency proceedings and the limited use of pre-insolvency mechanisms (PER and PEAP) in Portugal through combined legal, sociological, and economic perspectives.

The project's analytical dimension sought to understand duration causes and effects, while its prospective dimension aimed to present legislative and practice proposals based on preventive approaches and procedural efficiency.

Between April 2021 and December 2022, the research team processed closed proceedings through an electronic platform created by the Ministry of Justice specifically for the project, which allowed for the detailed quantitative analysis of 1772 proceedings. The project also conducted legal framework studies, economic analyses, surveys, and stakeholder interviews, providing empirical evidence to inform legislative reform by identifying challenges in judicial practice, their underlying causes and effects, and best practices for enhancing preventive restructuring and procedural efficiency.

Within this broader context, a component of qualitative analysis of judicial decisions sought to understand how procedural duration manifests in decisions, the court's argumentative strategies when facing blockages, and the assimilation of socioeconomic changes into judicial discourse.

2. Judicial discourse on insolvency and pre-insolvency adjudication

2.1. Methodological framework and research design

This study employs a socio-legal methodology to examine how Portuguese courts construct and navigate insolvency and pre-insolvency proceedings through written decisions. Combining qualitative content analysis with critical discourse analysis, our goal was to understand what courts say and how their discursive practices reflect and reinforce broader patterns of institutional behavior and social meaning-making around debt and financial distress.

Our research design evolved significantly during implementation, reflecting the "theoretical sensitivity" that often *guides* qualitative research (Strauss and Corbin 1990). Initial analytical clusters – procedural length, argumentative strategies, and socio-economic responses – expanded following preliminary findings suggesting the need for substantial methodological reorientation.

Sample construction and evolution

The qualitative sample was drawn from the larger quantitative case analysis of 1,772 proceedings spanning 2007-2020 and composed as follows:

TABLE 1

PER / 456 proceedings	**PEAP / 313 proceedings**	**PI / 1003 proceedings**
Initial decisions = 446 (339 admission / 107 rejection)	Initial decisions = 308 (283 admission / 25 rejection)	declarations of insolvency = 968 (937 granting / 31 rejecting)
decision about the plan = 230 (216 homologation / 14 non-homologation)	decision about the agreement = 202 (190 homologation / 12 non-homologation)	decision on challenges to creditor's list = 90
		Insolvency plan homologations = 14
		Insolvency qualification = 278 (253 non-fraudulent / 25 fraudulent)
		discharge decisions = 269 (235 admission / 34 rejection)

Table 1. Relevant elements of the quantitative baseline sample underlying the qualitative sample.

This quantitative sample was systematically constructed from a universe of 66 354 main proceedings and 151 441 ancillary proceedings provided by the Ministry of Justice and IGFEJ through a CITIUS mirror platform.

Our initial qualitative sample included 490 judicial decisions stratified across different proceeding types and decision categories. We employed theoretical saturation principles to refine our sample as the analysis progressed. The final analyzed corpus comprised 338 decisions, distributed as follows:

TABLE 2

Type of Proceeding	**Decision Category**	**Ruling**	**Number of Decisions**
PER	Initial decision	Admission	7
		Rejection	7
	Decision on the plan	Homologation	7
		Non-homologation	7
Sub-total			28
PEAP	Initial decision	Admission	5

		Rejection	5
	Decision on the agreement	Homologation	5
		Non-homologation	5
Sub-total			20
PI	Judgment on the application for a declaration of insolvency	Declaration of insolvency	20
		Rejection of the application for a declaration of insolvency	7
	Judgment on challenges to the list of creditors		90
	Judgment homologating the insolvency plan		14
	Judgment qualifying the insolvency	Non-fraudulent	50
		Fraudulent	25
	Judgment on the discharge request	Admission	50
		Rejection	34
Sub-total			290
Total			**338**

Table 2. Composition of the final qualitative sample.

Technical implementation and analysis

We used MAXQDA software for data processing and analysis, which enabled systematic coding while facilitating the identification of patterns and relationships across our analytical categories.

Our analytical approach combined several complementary methods:

1. Content analysis focused on identifying recurring themes, patterns, and absences in judicial reasoning
2. Critical discourse analysis examining how courts construct authority, legitimacy, and social meanings through their language choices
3. Argumentative analysis, particularly relevant for understanding how courts justify decisions and construct legal reasoning chains
4. Supplementary quantitative analysis of code co-occurrences and pattern frequencies

This methodological triangulation captured decisions' explicit content, implicit meanings, and institutional functions, and proved particularly valuable as our research focus evolved to encompass the questions of legal consciousness and institutional disengagement that emerged from our initial findings.

The evolution of analytical categories: from process to consciousness

As our engagement with the decisions deepened, the need for a more nuanced coding framework became apparent. While our initial analytical clusters focused primarily on procedural aspects and explicit judicial reasoning, emerging patterns in the data

suggested the presence of deeper institutional and cultural dynamics that required a more sophisticated theoretical apparatus.

The coding grid was then designed to capture the procedural aspects and the deeper socio-legal dynamics revealed in our preliminary findings. We opted for a hierarchical organization that allows for both broad pattern analysis and granular examination of specific phenomena, and the codes were designed to capture the *belittlement of insolvency law* phenomenon suggested by the project's quantitative analysis and our first readings of the case law. This would be identified through multiple lenses: a) information quality codes track procedural engagement; b) judicial perception codes reveal institutional attitudes; c) performative attitude codes document systemic disengagement; and d) vulnerability recognition codes address epistemic and social dimensions.

The resulting coding structure[6] evolved into four primary analytical dimensions, each capturing distinct but interrelated aspects of judicial discourse and practice:

Discourse profiling

Our first analytical dimension focused on the *infrastructure* of judicial decisions. This included the quality and comprehensiveness of information presented (ranging from comprehensive to minimal) and the structural patterns of judicial reasoning.

For example, when coding for "naturalized reasoning" (REAS_NAT), we identified instances where courts presented legal conclusions as self-evident without explicit interpretative steps, such as decisions that stated outcomes were "obvious" or "clearly established" without demonstrating the analytical process leading to that conclusion. When coding for "Missing Critical Information" (INFO_MISS), for instance, we identified cases where courts acknowledged gaps in available data yet proceeded with decisions – for instance, PER cases where courts noted the absence of updated financial statements or creditor positions but proceeded with plan homologation based solely on statements by the debtor.

Judicial perceptions and representations

The second dimension emerged from our recognition that courts' decisions contained implicit but consistent *theories* about debtors, creditors, and the insolvency system itself. These are manifested in four key sub-categories:

- Views on debtors (ranging from moral judgment to victimization narratives)
- Perspectives on insolvency law (from purely technical to socially oriented)
- System perception (rehabilitation vs. punitive orientations)
- Institutional self-image (active problem-solver vs. passive adjudicator)

The "Views on Debtors" sub-category (DEBT_MOR, DEBT_VICT, etc.) captured how courts implicitly or explicitly characterized debtors – for instance, coding DEBT_MOR when decisions emphasized debtor responsibility or moral failings, versus DEBT_VICT when courts framed debtors as victims of economic circumstances. Relating to the sub-category "System Perception", under "Creditor-Oriented" perception (SYS_CRED), we

[6] Available for consultation at the IN_SOLVENS Project website.

coded decisions that consistently prioritized creditor interests in procedural choices – for example, courts that interpreted ambiguous timing requirements strictly against debtors or that emphasized creditor protection as the primary system goal when explaining their reasoning. As for the sub-category "Institutional Self-Image", the "Limited Role Recognition" code (SELF_LIM), for instance, applied when courts explicitly constrained their interpretative function, such as decisions stating that judges must "simply apply the law as written" or expressing reluctance to engage with policy implications of their rulings.

Performative attitudes

This dimension intended to capture how courts positioned themselves in relation to their role and the broader institutional context. The emergence of a *mechanical application* pattern was of particular interest, with courts appearing to minimize their interpretative role through highly formalistic decision-making deliberately.

In this dimension, for example, "Traditional Approach" (TRAD) coding in the sub-category "Innovation vs. Tradition" captured instances where courts rejected novel legal arguments or procedural adaptations, explicitly preferring established practices even when facing unprecedented situations.

Contextual analysis

Our final analytical dimension examined courts' engagement with broader social and economic realities, particularly their recognition (or lack thereof) of various forms of vulnerability. This category especially reveals what we understand as systemic epistemic limitations in how courts process and respond to social complexity.

Under this category, "Economic Vulnerability" recognition (VULN_ECON), for example, was coded when courts acknowledged broader economic pressures affecting debtors, such as references to sector-specific crises, regional unemployment, or macroeconomic conditions, rather than treating financial distress as purely individual circumstances.

A crucial methodological innovation was the addition of a separate coding family specifically focused on Procedural Dynamics (Category F in our framework). This addition reflected our growing recognition that patterns of institutional disengagement manifested not just in judicial reasoning but in the broader procedural choreography involving all institutional actors – debtors, creditors, and court-appointed administrators.

Absence or silence might not be so evident to pinpoint, but we tried to design codes that could capture the interactive failures that emerge when multiple institutional actors disengage simultaneously. For instance, under the sub-category "Debtor Inertia", the "Failure to provide required information" code (INERT_DEBT_INFO) captured instances where debtors repeatedly failed to submit mandatory documentation despite court requests – for example, cases where debtors in PEAP proceedings never provided updated asset inventories or income statements, leading to procedural stagnation rather than case progression or formal rejection. As for the sub-category "Collective Inertia Patterns", "Procedural deadlocks" (INERT_COLL_DEAD) was applied when multiple

parties' simultaneous disengagement created system-wide stagnation – such as cases where creditors failed to participate in assemblies, debtors stopped responding to court orders, and administrators provided only minimal reporting, resulting in proceedings that remained formally open but practically inactive for extended periods.

2.2. Theoretical framework: reading legal consciousness through the lens of debt

Our theoretical framework evolved to address the interaction between legal consciousness, institutional practices, and moral economies of debt that emerged from our empirical analysis. Drawing on multiple theoretical traditions, we developed an integrated analytical approach that allows us to examine how courts' handling of insolvency cases reflects and reinforces broader social understandings of debt, institutional authority, and economic vulnerability. This integration is particularly crucial given the fundamental tension between economic and moral conceptions of debt (Graeber 2011) – a tension that manifests in our empirical findings.

Legal consciousness, institutional practice, and institutional stigma

The concept of legal consciousness is at the core of our framework, mainly as developed by Ewick and Silbey and later refined by Nelken and Hertogh. Rather than viewing legal consciousness merely as individual attitudes toward law, we employ it as an analytical lens to understand how institutional practices create and maintain particular forms of legal meaning. This approach proved particularly valuable in understanding the *paradox of dignification* in insolvency law – how attempts to technically perfect insolvency procedures often result in their institutional diminishment.

Additionally, as Sousa (2013) demonstrates in his empirical work on bankruptcy stigma, the social meanings attached to financial failure are both individual and deeply institutional. His finding that "the overwhelming majority of debtors experienced deep feelings of shame and embarrassment" about bankruptcy (2013, 463) helps explain the relationship between institutional practices and social identity that we observe in judicial decisions and pinpoints why courts' handling of insolvency cases cannot be understood purely through technical-legal analysis.

Moral economies of debt and deservingness

Our analytical insights are enriched by anthropological and sociological perspectives on debt and credit, particularly drawing on Graeber's historical analysis of debt's moral dimensions and Peebles' anthropological insights into credit-debt relationships. Featherstone's (2019) work on the empirical sociology of indebtedness helps us understand how courts' treatment of debtors reflects and reinforces broader social patterns of debt evaluation and moral judgment.

Our theoretical framework is also supplemented by Streinzer and Tošić's "deservingness frames" – the ways institutions assess and validate claims for debt relief. Their observation that deservingness "acts as a moral assessment of processes of distribution" (2022, 2) helps explain the moralization we observe in ostensibly technical judicial decisions.

This connects with what Coco (2014) identifies as the "cultural logics" of bankruptcy law, where "dominant cultural discourses of individualism and moral behavioralism" (2014, 712) shape institutional responses to financial distress. In many cases, the court's concern with debtors' motivations rather than their economic circumstances reflects the dominant cultural discourse supporting debt obligations through the ethos of meritocratic individualism.

Institutional cognition and decision-making

To understand the patterns of judicial reasoning we observed, we draw on cognitive decision-making theory, particularly Evans' and Kahneman's work on heuristics and biases. This helps explain how standardized case processing, while institutionally efficient, can reinforce existing biases and prevent meaningful engagement with the social complexity of insolvency situations.

Vulnerability and epistemic justice

Miranda Fricker's work on epistemic justice provides a crucial theoretical lens for understanding how courts' treatment of debtor narratives and evidence requirements can create or reinforce patterns of epistemic disadvantage. This connects with broader questions of vulnerability and institutional recognition, helping us understand how procedural mechanisms intended to protect creditor interests can systematically disadvantage certain types of debtors.

Economic sociology of insolvency

The work of Carlsson and Hoff (2000) or Platt (2023) on the intersection of law, economics, and morality in insolvency proceedings helps us understand how judicial decision-making reflects broader institutional tensions between economic efficiency, moral evaluation, and social welfare considerations. Their insights are particularly valuable in analyzing how courts navigate between competing institutional logics in insolvency cases.

These theoretical strands combine to form a *socio-legal ecology* of insolvency practice. This integrated framework allows us to examine how judicial reasoning and institutional practice patterns mirror and emphasize broader social understandings of debt, responsibility, and economic rehabilitation. It helps explain why, for instance, mechanized jurisprudence serves not only procedural efficiency but also masks more profound moral judgments about debt and debtors behind technical legal reasoning.

2.3. Main findings: selective illustration

Our analysis revealed distinct patterns in how Portuguese courts process and decide insolvency cases. These patterns manifest in what courts do and, perhaps more significantly, in what they fail to do.

Mechanized decision-making and information deficits

The most immediately striking pattern was the prevalence of what we term *mechanized jurisprudence.*[7] Consider this characteristic example from a PER (Special Revitalization Process) decision:

> In the case at hand, there is no violation of procedural rules or of rules applicable to its content that would determine the non-homologation of the approved plan.[8] (PER/7548.15.0T8VIS)

Repeated with minimal variation across multiple decisions, this formulaic assertion exemplifies how courts often reduce complex evaluations to standardized sentences. Consider this sequence of nearly identical formulations across different cases:

> There is no non-negligible violation of procedural rules or rules applicable to the content of the plan that would prevent its approval, and the plan does not provide for any suspensive conditions or any acts or measures that must precede homologation. (PER / 7459.17.5T8SNT)
>
> Looking at the recovery plan, there are no negligible violations of any rules. (PER/562.16.0T8PTL)
>
> There is no non-negligible violation of procedural rules or rules applicable to the content of the plan that would prevent its homologation. (PER / 4492.16.8T8VNF)
>
> Therefore, if we do not see any violation of mandatory rules that would lead to the production of a result that is not authorised by law, there is nothing to prevent the homologation of the submitted Plan. (PER / 160.13.0TBPRG)
>
> There is no non-negligible violation of procedural rules or rules applicable to the content of the plan that would prevent its approval, and the plan does not provide for any suspensive conditions or any acts or measures that must precede homologation. (PEAP / 4179.17.4T8BRR)

The repetitive nature of these (and similar) formulations reveals more than mere efficiency; it demonstrates a specific *jurisprudence of absence* – where judicial authority is maintained not through substantive reasoning but through ritualistic repetition of statutory language, amplifying an automated legal voice and a naturalized reasoning which suggests a dysfunctional discursive pattern grounded on simplified legal reality.

More troubling is how this mechanization frequently coincides with significant information deficits. For instance, in another PER case, the court acknowledged it but seemed unconcerned by substantial gaps in available information:

> The initial analysis that the judge can make when issuing the order referred to in Article 17-C(3)(a) of CIRE is limited, on one hand, to the formal aspects of the request, and on the other, to the declarations made by whoever presents themselves for revitalization, this being the only material control that can be made. (PER/1086.16.1T8STR)

Similarly, in a PEAP case, the court's limited role and its information deficit is acknowledged with a passive stance about adjudication:

[7] For the purpose of this paper, we use the term «jurisprudence», not as the theoretical study of law, but in the continental sense that refers to judicial decisions; this is why we sometimes use interchangeably the expression «case law».

[8] Portuguese originals of all judicial quotations are available at https://insolvens.novalaw.unl.pt/

> There is therefore no investigation into the truth or falsity of what is stated in the initial application: the legislator assumes that the judge has to trust what is presented to him and proceed with the case. (PEAP / 4758.18.2T8CBR)

The predominance of formalistic reasoning and the use of literal and authority-based arguments suggests a technical-procedural view of insolvency law and a formality-focused perception of the system that overrides notorious critical stances and substantive engagement.

Procedural inertia and collective disengagement

This mechanized approach often accompanies patterns of procedural inertia affecting all participants in the process. A particularly illustrative example comes from a case where multiple attempts to gather basic information failed:

> Specifically, by order of XX, the debtor was asked to attach to the case file a declaration attesting to the unavailability of access to the documents referred to – (...) – in order to assess the feasibility of continuing the present proceedings under the terms requested. However, so far it has not attached any document proving that the enquiry is pending or that the seizure took place. XX was notified again by order of XX to attach the documents to the case file, and given that the information does not show that the debtor did not submit them, the debtor only attached a letter signed by XX (...) and addressed to the Tax Office. This letter only states that there are declarations to be submitted, without mentioning which ones. (PER /1074.19.6T8AMT)

Such cases of inertia and disengagement often encompass the breakdown of procedural cooperation resulting in procedural deadlocks which may prevent recovery attempts, as this example illustrates:

> In the present situation, since the applicant has not submitted all the elements referred to in article 17-C of the Insolvency and Corporate Recovery Code, not even after being notified to do so – and has, in fact, submitted incomplete elements beyond the time limit granted to it – it follows that the formal requirements for declaring the start of the special revitalisation procedure have not been fully met, and I therefore reject the application outright. (PER /79.17.6T8FAL)

Most of the time, the court does not go beyond minimal to moderate engagement (e.g. only requesting mandatory information), but even this can result in a kind of failed institutional engagement and helplessness when facing repeated failure to gather basic information:

> The insolvent was notified to submit a) the declaration referred to in article 236, no. 3 of Cire; b) a criminal record certificate; c) an indication of his economic situation; after 10 days, he said nothing. He was notified again, in person, as well as his representative, to attach the documentation referred to in the previous order within 10 days, failing which the application for discharge would be rejected outright for failure to attach the elements necessary for its admission, as well as for failure to co-operate with the court, understood as a loss of interest in maintaining the application, and he was silent again. The defense lawyer informed the court that he had lost contact with the insolvent who had changed his address without informing him. Deciding: The insolvent's lack of interest in the assessment of the application for discharge is clear and, having been warned under the terms of Article 27(1)(b), it should be rejected outright, without further consideration. (PER /1086.16.1T8STR)

The moral economy of judicial assessment

Perhaps most revealing are instances where mechanized jurisprudence gives way to explicit moral judgment, particularly in discharge proceedings. Drawing on our theoretical framework's conceptualization of "moral economies of debt and deservingness," we identify moral framing in judicial discourse through several key markers: the transformation of economic relationships into questions of personal character and worthiness; the deployment of evaluative language that positions debtors along axes of responsibility and irresponsibility; and the construction of debt relief as contingent upon demonstrated virtue rather than economic necessity. Following Streinzer and Tošić's framework of deservingness frames, such moral discourse operates by subjecting debtors to a kind of moral assessment protocols that evaluate their claims for relief not primarily through economic criteria but through implicit judgments about their moral standing within the community. This moralization process transforms technical legal procedures into instances where broader cultural perceptions and anxieties about debt, responsibility, and social solidarity are institutionally negotiated and reproduced. Consider this striking and richly detailed expression of judicial frustration:

> This is why it is essential that the insolvent person who wishes to benefit from this institute (thereby harming creditors) has had an exemplary attitude in his past, whether at the time he incurred the debts, or when he fulfilled his obligations, or when he realised he was insolvent. This institute must never cease to be exceptional, otherwise it will be trivialised and serve merely welfare purposes or cover situations of pure economic irresponsibility, frustrating the functioning of institutions and the democratic rule of law itself, as well as living in a sustainable society for all (...). In practice, the truth is that what I have noticed is that this institute is being used by individuals as a way of getting out of debt, trying to justify their choice to file for insolvency, with a request for exoneration from the remaining liabilities, either by blaming the finance companies that offered them easy credit, or by arguing that they are in a State of Democratic Law and need to survive, thus verifying a growing and total lack of responsibility on their part with regard to the debt situation. And while in some cases, it is admitted, there has truly been an exceptional cause that led to the insolvency situation and which may even justify the operation of an exemption from the remaining liabilities, the truth is that, in most cases, the main objective of the individuals who have been filing for insolvency is to get rid of all the heavy liabilities that they have accumulated over time, most of the time in order to acquire assets that their income could not support. And, as a rule, these assets no longer exist, or those that do exist are no longer worth what they cost. It's even irresponsible to argue with the court, following a suggestion of a payment agreement that is feasible and acceptable to the debtor, that if this is the case, the debtor will have to pay the debt in full, which is not as favourable as a discharge of liabilities. (PI/7367.11.3T2SNT)

The moral framing becomes even more explicit in other discharge decisions, such as the following examples. They exemplify moral framing through their explicit construction of debt relief as contingent upon the debtor's "exemplary attitude" and the requirement of a conduct "without blemish [*sem mácula*], transparent, and without any hint of bad faith." The religious undertones are unmistakable: the Portuguese term *mácula* carries strong moral-theological connotations of spiritual stain or sin, while the reference to

potential "blessing [*dádiva*]" and "pardon of debts [*perdão de dívidas*]" directly evokes the Christian tradition of debt forgiveness as divine grace.

> The exoneration of the remaining liabilities is known to be aimed at the 'economic rehabilitation' of insolvency practitioners who have proven the seriousness and honesty of their previous behaviour. However, it is no less true that (...) 'the primary objective of any insolvency procedure is to satisfy the rights of creditors as efficiently as possible'. In the case of exoneration from the remaining liabilities, as the code outlines it, creditors' rights are still guaranteed (...). However, in this specific case, it is certain that the insolvent parties do not have any assets or income that would allow them to satisfy the claims of their creditors, so the exoneration would end up being a blessing, a pardon of debts to the insolvent parties, completely frustrating the legitimate expectations of the creditors. (PI/1681.10.2TBPFR)

Most tellingly, these decisions transform the legal question of discharge eligibility into an explicit moral evaluation where economic relief becomes conditional not upon demonstrable need or rehabilitation potential, but upon the debtor's ability to prove its moral worthiness through past conduct—a standard that effectively sacramentalizes insolvency law by requiring debtors to demonstrate their spiritual as well as financial rehabilitation.

> Special care and rigour is therefore needed in assessing the conduct of insolvents by 'tightening it up, weighing up objective data'. It must be unblemished, transparent and without any hint of bad faith, otherwise there will be a real laundering of debts, with the state imposing free damages on creditors who lose out and reap nothing. If this is not the case, the incident will end up being an opportunistic and skillful instrument used solely for the purpose of freeing debtors from huge debts, without any purpose whatsoever of achieving their return to economic activity, which is ultimately the social interest pursued. (PI / 2680.10.0TCLRS)

This framing of discharge as contingent on proven seriousness and honesty exemplifies the "dynamics of blaming and attributions of responsibility" (Sabaté Muriel 2022, 334) through which inequality becomes moralized in crisis contexts. The persistence of such moral framings suggests that courts serve not merely as technical-legal institutions but as sites where broader social attitudes about debt and responsibility are institutionally reproduced. In this regard, the moral deservingness framework is explicitly reinforced by a so-called legal deservingness:

> (…) the granting of this benefit is dependent on a merit clause on the part of the debtor and a sift, even if perfunctory, at the time of their preliminary admission, as to their previous life. (PI / 306.11.3TBTMR)

2.4. Discussion: institutional dynamics and the social life of debt

The patterns we have identified in Portuguese insolvency case law uncover connections between institutional practices and broader social understandings of debt, insolvency, and economic rehabilitation. Following Silbey's conceptualization of legal consciousness as a collective construction rather than merely individual attitudes, we can see how judicial practices both reflect and reproduce particular forms of institutional meaning-making around debt and economic failure.

As Chua and Engel (2019, 336) argue, legal consciousness comprises "both cognition and behavior, both the ideologies and the practices of people as they navigate their way

through situations in which law could play a role." Our analysis shows how these elements manifest in judicial practice.

Institutional reproduction of debt morality

Our analysis of the moral evaluation of debtors by the courts aligns with the temporal politics of credit and debt (Peebles 2010). Consider this revealing judicial assertion:

> The task at hand is, therefore, to assess whether the insolvent debtor deserves a new opportunity... (PI/306.11.3TBTMR)

This framing of debt discharge as a question of moral merit rather than economic efficiency exemplifies Graeber's "moral confusion" around debt in contemporary society. The persistence of moral judgment in ostensibly technical-legal proceedings suggests that courts serve as moral intermediaries translating broader social attitudes about debt into institutional practices.

The epistemic dimensions of economic vulnerability

Our findings regarding epistemic limitations and procedural inertia connect directly with Fricker's (2007) "epistemic injustice." The courts' frequent inability or unwillingness to gather adequate information about debtors' circumstances represents a form of testimonial injustice, where certain forms of knowledge and experience are systematically devalued. This is particularly evident in cases where courts acknowledge but seem unable to address information deficits, as we saw above.

Institutional legitimacy and technical rationality

The prevalence of *mechanized jurisprudence* can be understood through Bourdieu's (1987) deployment of the juridical effect as manifestation of symbolic power; legal authority is maintained by presenting legal conclusions as natural and inevitable rather than constructed. However, our findings suggest that this mechanization may undermine institutional legitimacy in ways that current work on legal consciousness helps us understand. When courts reduce complex social and economic realities to formulaic recitations, they risk "legal alienation" (Hertogh 2018) – a disconnect between legal institutions and lived social experience. This is particularly evident in how courts handle discharge periods:

> Creditors derive from the assignment period only a moral satisfaction in the passage of time. (Quote from IN_SOLVENS interviews with judges)

This acknowledgement of the purely symbolic function of certain legal procedures paradoxically expresses the performative dimensions of debt morality in contemporary institutions.

2.5. Interpretative analysis

2.5.1. The shadow of disengagement: institutional and individual patterns

Our qualitative analysis of judicial decisions reveals a pervasive pattern of disengagement that manifests across multiple levels of the insolvency system. This disengagement is particularly evident in judicial decisions' mechanical, formulaic

nature, which frequently lacks substantive analysis and rely heavily on standardized language and reasoning. This finding aligns with a "*total disinterest*" among judges (conveyed in IN_SOLVENS' interviews with legal actors), reflecting a more profound cultural bias within the judicial system that has historically regarded insolvency law as a lesser domain of legal practice.

The procedural inertia we observed extends beyond the judiciary to encompass all parties involved in insolvency proceedings. Creditors frequently exhibit strategic disengagement, using insolvency proceedings merely as leverage for debt collection or to secure privileged creditor status, only to abandon active participation once recovery prospects diminish. This pattern suggests a fundamental misalignment between the system's designed purposes and practical utilization.

The automation of legal consciousness and the naturalization of legal interpretation

The mechanical and formulaic nature of judicial decisions mentioned above not only entails institutional disengagement, but it also constitutes a broad marker of the type of case law produced by our courts, and most certainly one that is not particular to insolvency proceedings.

The most striking pattern emerging from our analysis is the already mentioned *juridical effect* in its most reductive form: judicial decisions that present legal interpretations not as reasoned constructions but as self-evident truths, courts lacking their own *voice* and just *mouthing* self-evident *truths*. This manifests through the mechanical reproduction of legislative language, the use of circular reasoning where the law justifies itself, the absence of interpretative bridges between law and facts, and also through the treatment of legal meaning as transparent and uncontested.

This pattern reveals an *automated jurisprudence* – a form of decision-making that paradoxically reinforces the law's authority through a kind of performative submission to the law's supposed self-evidence. The *automated* voice might be seen as a form of *authorized language* – but stripped of its interpretative authority and reduced to mere reproduction.

Institutional implications

The prevalence of automated jurisprudence in insolvency cases signals and strengthens the field's institutional marginalization. Following Ewick and Silbey's (1998) framework of legal consciousness, we observe a hegemonic form of legal consciousness that operates not through sophisticated legal reasoning but through the naturalization of legal authority – law's authority is maintained through its presentation as natural and inevitable rather than constructed and contingent. This naturalization obscures the constructive role of judicial interpretation and minimizes the complexity of insolvency situations, while reducing the judicial function to an apparent mechanical application and reinforcing the field's perceived lower status.

2.5.2. Epistemic deficits and the infrastructure of legal decision-making

A critical finding of our research concerns the severe epistemic limitations that characterize insolvency proceedings. Courts consistently operate with insufficient

information about debtors' circumstances, particularly in cases involving vulnerable subjects. This informational deficit is not merely incidental but appears structurally embedded in the system's operation. The courts' failure to collect adequate information about the subjective vulnerability of procedural subjects represents both a procedural shortcoming and an indicator of systemic disregard for substantive justice.

The quality of judicial decisions is further compromised by *epistemic vulnerabilities* — gaps in knowledge and understanding that affect both individual and corporate debtors. These vulnerabilities are compounded by limited access to legal expertise and low levels of legal literacy, creating a cycle in which procedural subjects lack the resources to effectively engage with the system meant to serve them.

The enhancement of vulnerabilities

The mechanistic and formulaic nature of judicial decision-making in insolvency cases creates epistemic vulnerabilities that undermine the system's capacity to meaningfully address financial distress. At the heart of this problem lies a persistent information deficit – courts operate with remarkably thin knowledge about debtors' circumstances, collecting only the most basic financial data while failing to probe deeper economic contexts or social conditions that might illuminate paths to rehabilitation. This superficial engagement with debtors' concrete circumstances reflect the mechanized jurisprudence that has come to dominate insolvency proceedings.

This information poverty feeds into broader failures in knowledge production within the system. Rather than developing nuanced frameworks for assessing business viability or establishing sophisticated criteria for rehabilitation, courts often default to standardized formulas and boilerplate language that fails to capture the complexities of financial distress. The judicial discourse becomes trapped in semantic meaning divorced from pragmatic context – focusing on formal requirements while missing opportunities to identify and analyze systemic patterns that could inform more effective interventions.

The result is a self-reinforcing cycle of epistemic vulnerability – limited information gathering leads to shallow analysis, which in turn fails to generate the knowledge needed to develop more sophisticated approaches. Breaking this cycle requires recognizing how automated judicial discourse actively constrains the system's capacity to understand and respond to the multifaceted challenges of insolvency.

2.5.3. Legal consciousness and the moral economy of debt

When addressed, the treatment of debtors, particularly in the context of discharge periods, reflects a punitive rather than rehabilitative approach. As noted before, the three-year cessation period serves no practical or significant economic purpose[9] but instead mostly fulfills what we mentioned as creditors' *moral satisfaction*. This finding suggests the persistence of traditional moral-religious conceptions of debt within ostensibly technical legal frameworks.

[9] According to IN_SOLVENS' findings, the debtor did not hand over any money to the trust in 174 cases (72% of cases); even when he did, almost 1/3 of the amount ended up being channeled into other expenses; the amount handed over to the trustee is close to €2,700, but this figure is heavily influenced by 38 cases in which the amount handed over exceeded €5,000.

Here, the court no longer operates like a mechanical robot but gains a voice of its own — the voice of the moral judge, not just the legal judge. The only case of a voice is a punitive and derogatory one, but it operates with the same epistemic shortcomings.

However, this moral framing cannot be attributed solely to judicial interpretation, despite courts' considerable power to address these dynamics. The Portuguese insolvency framework itself embeds what we might term "legal deservingness" – a normative apparatus that reflects and institutionally reinforces the moral depictions of debt described above. Unlike the American "fresh start" model, Portuguese insolvency law operates what doctrine explicitly terms an "earned fresh start" system, a designation that immediately reveals its moral-meritocratic foundations. The legal architecture of discharge proceedings (Articles 235º-248º of CIRE) structurally embeds moral evaluation into technical legal requirements: the law mandates assessment of the debtor's past conduct (Article 238º), establishes moral-behavioral grounds for exclusion including "grave negligence" in financial disclosure (Article 238.º) and requires demonstration of good faith throughout the three-year *cessio bonorum* period through a series of obligations imposed on the debtor during that period (Article 239.º). This legal framework transforms debt relief from a pragmatic economic mechanism into what the law itself constructs as a moral test of worthiness, creating institutional conditions that virtually compel courts to engage in the moral evaluation we observe.

This creates a self-reinforcing cycle where moral framings originate from legislative design, become amplified through judicial application, and are fed into both systems by scholarly doctrine (e.g. Cristas 2005). The three-year *cessio bonorum* period exemplifies this dynamic: legally mandated yet economically purposeless, it serves what courts explicitly acknowledge as providing creditors with "moral satisfaction" rather than material recovery. Courts operating within this framework are not merely imposing external moral judgments but are also implementing a legal structure that has already moralized the debt-relief process at its foundational level.

This embedding of moral evaluation within technical legal provisions suggests an instance of "co-constituted legal consciousness" (Kubal 2024) where law and broader social meanings become mutually constitutive rather than simply interactive. The Portuguese discharge framework demonstrates how legal consciousness operates not merely as individual or collective attitudes toward existing law, but as institutional participation in the ongoing construction of social meanings about debt, responsibility, and economic citizenship. When courts evaluate debtor "merit" or "worthiness," they are not departing from legal technicality into moral judgment but rather fulfilling legal requirements that have already incorporated moral frameworks into their operational logic. This reveals how legal consciousness can become institutionally embedded within legal structures themselves, creating a legislated moral consciousness that shapes judicial practice while simultaneously being reinforced by it.

2.5.4. Systemic underachievement and institutional legitimacy

We claim that the patterns found in and through the analyzed judicial discourse might be collectively contributing to a broad underachievement of insolvency law's stated goals, mainly creditors' satisfaction, debtors' rehabilitation, and its reproductive effects on the socioeconomic health of society in general. It's important, though, to briefly

indicate why we state that insolvency law is systematically failing to achieve its sociopolitical goals.

While robust longitudinal studies on insolvency outcomes in Portugal are unavailable, a widespread perception of systemic underperformance emerges clearly from our interviews with legal actors in the IN_SOLVENS project.

Proxy indicators offer some valuable insights. It is true that the ratio of non-performing loans (NPL), often linked to effective insolvency regimes, has notably decreased in Portugal, reaching 2.32% by the end of 2024 from previous double-digit levels (Constâncio 2017, Menezes *et al*. 2021). However, attributing this improvement directly to insolvency practices is challenging, as major reductions align primarily with European Central Bank supervisory measures rather than national judicial performance (OECD 2021, Heuer 2024).

Benchmark indicators such as the World Bank's Doing Business index also suggest Portugal performs strongly, ranked 15th in insolvency resolution effectiveness, with a creditor recovery rate of 64.8 cents on the dollar (World Bank Group 2020). Yet, the scenarized case study used by the WB Doing Business—focused on large companies—misrepresents the socioeconomic reality of Portugal, dominated by SMEs. Indeed, analysis of Portuguese insolvency proceedings from 2014-2020 (covering approximately 85% of all cases) reveals that micro-companies represented 76% of corporate insolvencies for which comprehensive financial data could be obtained from official databases (Pereira & Wemans 2022). In addition, sample data gathered by the Directorate-General for Justice Policy, the Portuguese authority in charge of judicial statistics, points to a very low average recovery rate (6.5% in the 4th trimester of 2024) (DGPJ 2025).

Other indicators like the OECD's composite insolvency index and similar EU indicators (Carcea *et al.* 2015, Gouveia and Osterhold 2018) predominantly assess de jure efficiency, reflecting theoretical legal frameworks rather than practical implementation, leaving a substantial gap between formal metrics and real-world efficacy.

Firm-level analyses offer further nuance. Carreira *et al.* (2022) identified substantial persistence of economically distressed "zombie" firms, highlighting significant barriers to restructuring or market exit. Subsequent research (Nieto-Carrillo *et al.* 2022) found improvements following post-2012 insolvency reforms, although distinguishing these reforms' precise impact from concurrent macroeconomic fluctuations remains complex, as the authors noted themselves: "There is also some weakness in our approach in the sense that despite our control for the business cycle, it is difficult to distinguish between the effect arising from the reforms and macroeconomic shocks that hit the Portuguese economy over our sample interval." (Nieto-Carrillo *et al.* 2022, 176).

Overall, while available indicators suggest some improvements and international recognition thereof, closer scrutiny reveals significant methodological limitations and misalignment with Portugal's economic context. Thus, we maintain that the collective experience and expert perceptions from insolvency professionals, supported by observed low creditor recovery rates (see also footnote 6) and limited debtor rehabilitation, more accurately reflect systemic underachievement.

This reinforces our argument linking judicial discourse patterns and practices identified in our analysis to the insolvency framework's diminished institutional legitimacy and practical inefficiency. This manifests in multiple ways.

On the one hand, in pre-insolvency proceedings, courts demonstrate limited proactive engagement in supporting debtor revitalization despite this being a key objective of the legal framework.

Additionally, the prevalence of extremely brief, poorly substantiated decisions undermines the system's legitimacy by failing to fulfil the basic requirements of legal justification and public scrutiny.

Finally, the mechanical application of legal provisions reflects an *idle law application*, further contributing to the field's diminished status.

2.6. Reconciling views on borrowed authority

The patterns we've identified must be understood within their broader institutional context. As noted by some participants in the discussion of a previous version of this paper at the December 2024 III IN_SOLVENS Conference, some of these patterns reflect conscious institutional choices rather than mere dysfunction. For instance, the limited information requirements in pre-insolvency proceedings represent a legislative strategy to encourage the use of these mechanisms rather than a simple oversight or judicial failure. Similarly, the prevalence of abbreviated reasoning patterns often reflects pragmatic responses to heavy caseloads rather than intellectual shortcuts.

This institutional perspective helps explain the observed mechanized case law. And, as discussed in the III IN_SOLVENS Conference, these patterns of judicial discourse are not unique to insolvency proceedings and might reflect a broader crisis in legal discourse across multiple domains of adjudication. The features we identify—naturalized reasoning, ventriloquial legal voice, and performative submission to legal sources—represent fundamental patterns of judicial communication that would be difficult to contain within insolvency law alone. Moreover, the institutional pressures that may contribute to borrowed authority—case processing demands, risk aversion encouraging standardized responses, and performance metrics prioritizing efficiency over substantive engagement—operate across all judicial domains. Professional culture changes, including the transformation of the judicial role's conception from interpreter to administrator and increasing technical complexity reducing judicial confidence in substantive engagement, similarly transcend the subject-matter boundaries. These observations suggest that insolvency law may serve as a particularly revealing lens through which to observe challenges facing contemporary courts more broadly, positioning our findings as potentially symptomatic of larger transformations in how courts communicate their decision-making in contemporary legal systems.

Several important qualifications must be noted regarding our analysis. First, our study focused exclusively on first-instance court decisions. Further research is needed to examine whether and how appellate courts might provide additional layers of scrutiny or potentially reinforce these patterns.

Moreover, it is crucial to emphasize that our analysis adopts a socio-legal perspective rather than a strictly legal one. We are not evaluating these decisions against formal legal

justification standards but examining how judicial writing practices reflect and reproduce particular understandings of debt, economic failure, and institutional authority. Following Coco's (2014) approach, we are concerned with how dominant cultural discourses manifest in institutional practice.

These findings suggest the need for a more "aretaic" approach to insolvency proceedings (Hurd and Brubaker forthcoming) — one that recognizes the moral complexity of debt relations while maintaining institutional integrity. This might require rethinking not just how courts process insolvency cases but also how they communicate their reasoning to various stakeholders and to society at large.

The patterns we have identified in judicial discourse take on particular significance when we consider that written decisions constitute courts' primary — often the only — means of communicating with their various addressees. While pragmatic constraints on judicial resources are real and legitimate concerns, the predominant pattern of courts speaking through *borrowed authority* — consistently defaulting to the voice of legislation, doctrine, and other courts' decisions as if these sources contained self-evident truths — risks undermining the very legitimacy cycle courts depend upon.

The relative absence of socioeconomic contextualization in the analyzed decisions is especially striking, given insolvency law's unique position at the intersection of individual financial distress and broader economic dynamics. While our initial analytical framework specifically sought to examine how courts integrated awareness of major economic shifts—particularly the 2008 financial crisis and its aftermath—into their reasoning, we found a notable silence on such macro-level considerations. This silence stands in marked contrast to superior courts' handling of crisis-related cases (André *et al*. 2019) and suggests a concerning disconnect between first-instance insolvency adjudication and its broader socioeconomic context and implications.

This institutional aphasia operates at both macro and micro levels. At the macro level, we observe a striking absence of explicit engagement with insolvency law's social and economic functions, its role in economic rehabilitation, and its broader impacts on market relations and social welfare. At the micro level, we find decisions frequently lacking sufficient engagement with the particular circumstances of individual cases, creating what we might term a "double silence" that spans from the individual to the institutional.

These silences are particularly problematic given the "interlocking payment obligations" (Coco 2014, 713) that characterize contemporary debt relations. When courts fail to engage explicitly with either the individual or systemic dimensions of insolvency, they risk naturalizing what are, in fact, complex social and economic choices about the distribution of risk and responsibility in modern market economies.

3. Conclusions and recommendations

The current system appears to reinforce rather than ameliorate existing vulnerabilities, creating a cycle of vulnerability enhancement through procedural inefficacy and systemic disregard.

The research points to the potential value of viewing insolvency proceedings through the lens of "collective misfortune" rather than individual failure. This perspective shift

could help address the stigma and moral judgment that permeates the system while promoting more effective responses to financial distress.

Beyond technical law

Our findings suggest the need to reconceptualize insolvency law's role through two main dimensions: enhanced legal consciousness and institutional reform.

Enhanced legal consciousness demands a deeper recognition of interpretative responsibility within the insolvency system. This requires meaningful engagement with the social context in which financial distress occurs, moving beyond purely technical analysis. Through this enhanced awareness, courts can work toward the development of more substantive case law that better reflects the complexities of insolvency situations.

The institutional reform dimension focuses on concrete changes needed to support this conceptual shift. This begins with a fundamental redefinition of the judicial role to enable more meaningful engagement with cases. Enhanced information gathering mechanisms must be implemented to ensure courts have access to relevant contextual details. For instance, the digitalization evolution described above should be effectively deployed to this end. Finally, institutional structures must be modified to support deeper engagement with the multifaceted challenges presented by insolvency cases.

Judicial quality reconsidered

Our analysis suggests a new framework for understanding and evaluating judicial quality in insolvency proceedings that extends well beyond traditional metrics of technical legal expertise. As noted above, this framework emphasizes the depth of judicial engagement with social reality. It also demands clear recognition of the system's rehabilitative goals, moving beyond mere debt collection to embrace the broader aims of debtor rehabilitation and social reintegration.

A key element of judicial quality involves the development of meaningful case law that can guide future decisions and contribute to the evolution of judicial decisions concerning insolvency proceedings. This includes careful attention to the collective implications of insolvency decisions, recognizing how individual cases both reflect and influence broader social and economic patterns.

The findings present a compelling case for reform in how insolvency law is conceptualized and practiced. The current system's operation reveals significant disconnects between its theoretical objectives and practical outcomes, suggesting the need for fundamental cultural shifts within the legal community.

In our view, a shift in judicial culture is needed – this shift might mobilize educational innovations, procedural reforms, and policy measures to address this set of shortcomings. To that end, we present a handful of recommendations and suggestions directly stemming from our findings and interpretation.

Shifting to a functional rehabilitation model in insolvency law

Enhancing judicial training & expertise

We recommend implementing mandatory specialized training programs for insolvency judges; such programs should focus on economic, financial, and behavioral sciences, incorporating business failure cycles, behavioral economics, social psychology, and macroeconomic risk factors. Comparative legal training—drawing best practices from rehabilitative jurisdictions such as Germany, the US (Chapter 11), and Nordic countries—should become a core component, with observation residencies by judges within the professional environments of insolvency practitioners, creditors, and counseling organizations. Continuous education programs should further evolve judicial understanding of financial complexities, thereby mitigating epistemic vulnerabilities highlighted in our analysis.

Reducing mechanized jurisprudence

To combat the systemic phenomenon of mechanized jurisprudence, the creation of judicial discussion forums is recommended. These forums, facilitating dialogue among judges and other insolvency stakeholders, would stimulate substantive judicial reasoning, reducing reliance on formulaic decisions. Additionally, we advocate developing comprehensive case law databases illustrating best-practice judicial reasoning, thereby reinforcing a culture of interpretative responsibility rather than automated judicial voicing.

Addressing epistemic limitations and procedural inefficiencies

To address persistent information deficits, we propose to establish preliminary case evaluation teams to streamline information gathering. Clear criteria and informational checklists for assessing debtor viability and rehabilitation potential should be explicitly articulated and enforced. Furthermore, a Centralized Digital Insolvency Management Platform should be established, enabling real-time data sharing between courts, creditors, debtors, tax authorities, and registries, streamlining procedures and significantly improving judicial informational resources.

Strengthening pre-insolvency mechanisms

Promoting early debtor engagement is critical, and for this, different types of incentives could be considered when designing a specific policy: e.g. streamlined restructuring plans, reduced regulatory burdens, and lower legal fees for timely engagement in revitalization processes, as well as public awareness campaigns to destigmatize early intervention. Judicial oversight should actively encourage constructive creditor participation, backed by state-supported mediation programs to mitigate adversarial creditor-debtor dynamics.

Reforming the discharge framework

Our findings demonstrate pronounced moralistic narratives about debt. To shift towards functional economic rehabilitation, judicial assessment standards must evolve from moral evaluations of debtor behavior towards an economic viability assessment. We propose eliminating the discharge period since it would accelerate the debtor's economic

recovery which feeds back into the general economy, while setting aside the punitive and moralizing function.

Increasing transparency and public awareness

Transparency in judicial performance must become a core institutional priority. Annual judicial performance reports focused explicitly on rehabilitation outcomes—beyond mere procedural speed—should be mandated. Public awareness campaigns, using media, consumer protection agencies, and business associations, can reduce the social stigma of insolvency, reframing debt restructuring as a responsible financial decision. Complementary debtor education programs enhancing financial literacy and psychological support are also necessary.

Evaluating reform impact through data-driven accountability

To ensure ongoing improvement, a comprehensive, longitudinal evaluation system tracking post-insolvency outcomes is essential. This evaluation should measure the real-world impacts of judicial decisions on debtor financial recovery, employment, and credit re-entry, continuously refining the insolvency framework.

In conclusion, shifting towards a functional rehabilitation model requires an integrated approach combining judicial education, procedural reform, policy innovation, and continuous evaluation. Such comprehensive reforms promise to significantly enhance the socio-economic functionality of insolvency law, aligning judicial practice with its foundational goals of debtor rehabilitation and economic revitalization. Given that judicial legal consciousness is co-constituted by various actors (Kubal 2024) its transformation must also operate across, through and with different actors and fields that intersect in the deep cultural background of the insolvency sociolegal system.

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