Introduction: Political Economy Foundations of International Sovereign Bankruptcy Law

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1. Introduction

The Covid-19 pandemic has had economic impacts threaten waves of sovereign debt crises in the global periphery.[1] The problem, however, is not new. Law has historically failed to address sovereign insolvency[2] in a systematic way despite the harmful socioeconomic effects of this issue.[3] A longstanding controversy exists on whether international law should tackle sovereign insolvency through a statutory regime or whether contractual technologies are sufficient to deal with this problem.[4] Yet in this debate, legal scholarship commonly conceives the various domestic and international legal infrastructures that respond to sovereign insolvency – such as statutes, contracts, judicial decisions, and International Monetary Fund (IMF) debt sustainability assessments (DSAs) and memorandums – as disconnected from each other. This prevents

[1] UNCTAD, *Trade and Development Report 2020: From Global Pandemic to Prosperity for All: Avoiding Another Last Decade* (United Nations 2020); K Patricio, 'Another Lost Decade?' (Phenomenal World, 15 August 2020) <https://phenomenalworld.org/analysis/crisis-in-the-periphery> accessed 15 August 2020; UNCTAD, 'From the Great Lockdown to the Great Meltdown: Developing Country Debt in the Time of Covid-19' (April 2020) <https://unctad.org/en/PublicationsLibrary/gdsinf2020d3_en.pdf> accessed 2 October 2020.
[2] See Section 4.1 on sovereign insolvency as a core premise of this thesis. For a discussion on the meaning of this concept, see Chapter 1.
[3] See K Rogoff and J Zettelmeyer, 'Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001' (2002) 49 IMF Staff Papers 3.
[4] See, eg, M Guzmán, JA Ocampo, and JE Stiglitz (eds), *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises* (Columbia University Press 2016); MR Lastra and L Buchheit (eds), *Sovereign Debt Management* (OUP 2014); L Buchheit and others, 'Revisiting Sovereign Bankruptcy' (Brookings 2013); C Espósito, Y Li and JP Bohoslavsky (eds), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (OUP 2013); International Law Association (ILA), 'State Insolvency: Options for the Way Forward', Report of the Sovereign Insolvency Study Group (ILA 2010); B Eichengreen, 'Assessing Contractual and Statutory Approaches: Policy Proposals for Restructuring Unsustainable Debt' in I Kaul and P Conceição, *The New Public Finance: Responding to Global Challenges* (OUP 2006).

a systematic understanding of their systemic interaction, as well as the distributive dynamics produced by it.

This thesis joins the broader discussion on the role of law in sovereign insolvency by constructing the political economy foundations of an international law on sovereign bankruptcy. It does so on three main original grounds. First, the solvency of sovereign States is critically determined by their monetary power, which makes sovereign bankruptcy rules a critical matter of global justice. Second, the main legal infrastructures that respond to sovereign insolvency – built upon core domestic jurisdictions on sovereign debt and the IMF – function as part of a unified system of governance that imposes rigidity in the law to the global periphery while being unable to solve background insolvency problems. Third, the distributive effect of this legal governance system should be conceived as a common pool problem where no collective procedure exists to allocate losses, costs, and risk among key stakeholders. In the absence of bankruptcy rules, the most powerful stakeholders are able to shift costs, losses, and risk to other stakeholders in the pool.

As this thesis aims to demonstrate, this sovereign insolvency governance system promotes a model of financial extractivism that rewards short-termism in the global periphery while reallocating risk to the population of the debtor State and long-term investments. Reversing this logic is crucial to address the most pressing challenges of the present: tackling inequality, achieving the United Nations' Sustainable Development Goals (SDGs), and mitigating climate change. To achieve these objectives, an international collective procedure is needed that redistributes sovereign insolvency costs, risk, and losses based on justifiable legal hierarchies.

2. Sovereign insolvency at the crossroads: framing the problem

The Covid-19 crisis has triggered a new round of sovereign debt crises in the global periphery, but this is not a new phenomenon.[5] Despite all the transformations in the international financial architecture in the last 70 years,[6] the resolution of sovereign debt

[5] JP Bohoslavsky and K Raffer, *Sovereign Debt Crises: What Have We Learned?* (CUP 2017).
[6] See JA Ocampo, *Resetting the International Monetary (Non)System* (OUP 2017); B Eichengreen, *Globalizing Capital, A History of the International Monetary System (*Princeton University Press 1996).

crises has remained one of the least regulated areas of global finance.[7] Sovereign insolvency is currently dealt with through debt restructuring processes governed by a purely transactional legal framework.[8] It relies on *ad hoc* arrangements between the debtor State and different groups of increasingly diversified creditors, governed by contractual technologies or competing codes of conduct.[9] Negotiations involve a multiplicity of agents, from debtor and creditor States to international organisations, international fora with no legal personality under international law, and firms.[10] In sum, the law does not offer any collective procedure to address the problem of sovereign insolvency.

The question of whether international law should tackle sovereign insolvency by establishing a sovereign bankruptcy mechanism[11] has been subject to a longstanding debate.[12] Controversy remains as to whether the coordination challenges of sovereign debt restructuring can be properly addressed without bankruptcy rules. On the one side, there are those who support contract-based arrangements for dealing with sovereign insolvency problems.[13] Over the last decades, this view has become known as the *contractual approach*, which assumes that it is possible to replicate the main features of a bankruptcy procedure through the insertion of majority clauses into sovereign debt contracts. These provisions, known as Collective Action Clauses (CACs), allow for a qualified majority of bondholders to approve an exchange offer in the event of a sovereign

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[7] See S Soedeberg, 'The Transnational Debt Architecture and Emerging Markets: The Politics of Paradoxes and Punishment' (2005) 26(6) Third World Quarterly 927-949; E Helleiner, 'The Mystery of the Missing Sovereign Debt Restructuring Mechanism' (2008) 27(1) Contributions to Political Economy 91-113.

[8] See Lastra and Buchheit (n 4); Guzmán, Ocampo, and Stiglitz (n 4).

[9] M Guzmán and JE Stiglitz, 'A Soft Law Mechanism for Sovereign Debt Restructuring Based on the UN Principles', International Policy Analysis Paper (Friedrich Ebert Stiftung 2016).

[10] A Gelpern, 'Sovereign Debt: Now What?' (2016) 41(2) Yale Journal of International Law 45-95.

[11] This thesis follows US practice in that the concept of 'insolvency' refers to the status of being insolvent, whereas 'bankruptcy' relates to the legal proceeding applicable to resolve insolvency.

[12] See, eg, Rogoff and Zettelmeyer (n 3); L Buchheit and others (n 4); ILA (n 4); Eichengreen (n 4).

[13] See, eg, International Capital Market Association, 'New York and English Law Standard CACs, Pari Passu and Creditor Engagement Provisions - May 2015' <https://www.icmagroup.org/assets/documents/Resources/ICMA-Standard-CACs-Pari-Passu-and-Creditor-Engagement-Provisions---May-2015.pdf> accessed 4 April 2020; INTERNATIONAL CAPITAL MARKET ASSOCIATION, 'Standard Aggregated Collective Action Clauses for the Terms and Conditions of Sovereign Notes' <https://www.icmagroup.org/assets/documents/Resources/ICMA-Standard-CACs-August-2014.pdf> accessed 4 April 2020; R Gray, 'Towards a Code of Conduct for Sovereign Debt Restructuring' (LMA News, July 2003); International Monetary Fund, 'Collective Action Clauses in Sovereign Bond Contracts – Encouraging Greater Use' (6 June 2002); PB Kenen, 'The International Financial Architecture: Old Issues and New Initiatives' (2002) 5(1) International Finance 23-45; JB Taylor, 'Grants and Sovereign Debt Restructuring: Two Key Elements of a Reform Agenda for the International Financial Institutions' (US Treasury 2002); JB Taylor, 'Sovereign Debt Restructuring: A US Perspective' (US Treasury 2002); Group of 10, 'The Resolution of Sovereign Liquidity Crises: A Report to the Ministers and Governors' (IMF 1996).

insolvency crisis that crams down dissenting minority bondholders.[14] On the other side, there are those who advocate a regulatory framework that would govern the conduct of sovereign bankruptcy when market-based solutions fail.[15] These proposals are synthesised in the concept of *statutory approach,* which contends that an international mechanism is needed for insolvent States to renegotiate their financial obligations.[16]

The latter approach has gained significant academic support in the aftermath of the GFC, with proposals often purporting to be incrementally built through soft law principles.[17] None of them, however, has yet succeeded.[18] So far, legal scholarship in the field has been mainly inspired by doctrinal constructivism,[19] which is interested in the search for principles of international law that can be applied to sovereign debt restructuring.[20] The objective of this approach is to make sense of international law's fragmentation and 'create a fairly consistent order by identifying and, where possible, codifying

[14] MC Weidemaier and M Gulati, 'A People's History of Collective Action Clauses' (2013) 54(1) Virginia Journal of International Law 51-95; S Häseler, 'Collective Action Clauses in Sovereign Bonds', Federal Reserve Bank of St Louis, IDEAS Working Paper Series (2011).

[15] See, eg, Rogoff and Zettelmeyer (n 3); US Das, MG Papaioannou, and C Trebesch, 'Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts', IMF Working Paper No WP/12/203 (IMF 2012); J Kaiser, 'Taking Stock of Proposals for More Ordered Workouts' in B Herman, JA Ocampo, and S Spiegel (eds), *Overcoming Developing Country Debt Crises* (OUP 2010); V Chensavasdijai and others, 'Sovereign Debt Restructuring: Recent Developments and Implications for the Fund's Legal and Policy Framework', IMF Policy Paper (26 April 2013); Helleiner (n 7); C Paulus and S Kargman, 'Reforming the Process of Sovereign Debt Restructuring: A Proposal for a Sovereign Debt Tribunal' (2008) UNDESA, 8-9 April; ILA (n 4); K Raffer, 'Odious, Illegitimate, Illegal, or Legal Debts: What Difference Does it Make for International Chapter 9 Debt Arbitration?' (2007) 70 Law and Contemporary Problems 221-248; C Paulus, 'A Resolvency Proceeding for Defaulting Sovereigns' (2012) 3(1) International Insolvency Law Review 1-20; SL Schwarcz, 'Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach' (2000) 85(4) Cornell Law Review 956-1034; K Raffer, 'What's Good for the United States Must Be Good for the World: Advocating an International Chapter 9 Insolvency' in B Kreisky (ed), *From Cancún to Vienna: International Development in a New World* (Bruno Kreisky Forum 1993); K Raffer, 'Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face' (1990) 18(2) World Development 301-313.

[16] ILA (n 4).

[17] JP Bohoslavsky and M Goldmann, 'An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability' (2016) 41(2) Yale Journal of International Law 16; Espósito, Li and Bohoslavsky (n 4).

[18] See UNCTAD (n 1) 132-33; S Brooks and D Lombardi, 'Private Creditor Power and the Politics of Sovereign Debt Governance', in Guzmán, Ocampo, and Stiglitz (n 4); E Helleiner, 'Filling a Hole in Global Financial Governance? The Politics of Regulating Sovereign Debt Restructuring' in W Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press 2009); Soederberg (n 7).

[19] A von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe' (2009) 7 International Journal of Constitutional Law 364. See also JP Bohoslavsky, 'Guiding Principles to Assess the Human Rights Impact of Economic Reforms? Yes' in I Bantekas and C Lumina, *Sovereign Debt and Human Rights* (OUP 2018).

[20] O Lienau, 'Legitimacy and Impartiality as Basic Principles for Sovereign Debt Restructuring' (2016) 41(2) Yale Journal of International Law 97-116.

principles'.[21] These have been promoted by the United Nations Conference on Trade and Development (UNCTAD) and culminated in UN Resolution 69/319,[22] which created a set of soft law principles for informing sovereign debt restructuring processes.[23]

In the last two decades, two other lines of enquiry have emerged with particular strength which interact with the discussions on the global governance of sovereign debt in different ways. The first of them, inspired by black letter approaches, focuses on the contractual problems posed by sovereign debt restructuring, particularly in New York and England & Wales, the jurisdictions that govern the majority of global foreign currency-denominated sovereign debt contracts.[24] Common lines of enquiry in this literature include contractual governance issues and the relevance of key precedents in sovereign debt litigation.[25] Legal scholarship in this field often acknowledges the limitations of private contractual technologies in dealing with sovereign insolvency.[26] However, this literature is mostly interested in specific improvements to contract-based arrangements,[27] and is not particularly concerned with any structural questions on the international governance of sovereign debt. The second line of enquiry deals with the law of the IMF and the World Bank, as well as sovereign debt crises management.[28] Common issues that

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[21] Bohoslavsky and Goldmann (n 17). See also Lienau (n 20); M Goldmann, 'Putting Your Faith in Good Faith: A Principled Strategy for Smoother Debt Workouts' (2016) 41(2) Yale Journal of International Law 117-40.

[22] UNGA Res 69/319, 'Basic Principles on Sovereign Debt Restructuring Processes' (10 September 2015), UN Doc A/RES/69/319.

[23] This resolution was inspired by UNCTAD's Project to Promote Responsible Sovereign Lending and Borrowing, which resulted in the Principles on Promoting Responsible Sovereign Lending and Borrowing in 2012. See UNCTAD, 'Sovereign Debt Workouts: Going Forward – Roadmap and Guide' (UN 2015); UNCTAD, 'Principles on Promoting Responsible Sovereign Lending and Borrowing' (UN 2012).

[24] See, eg, H Kupelyants, *Sovereign Defaults before Domestic Courts* (OUP 2018); M Megliani, *Sovereign Debt: Genesis, Restructuring, Litigation* (Springer 2015); L Mola, 'Sovereign Immunity, Insolvent States and Private Bondholders: Recent National and International Case Law' (2012) 11(3) The Law and Practice of International Courts and Tribunals 525-54; R Olivares-Caminal and others, *Debt Restructuring* (OUP 2011); R Olivares-Caminal, *Legal Aspects of Sovereign Debt Restructuring* (Sweet & Maxwell 2010); E Buljevich (ed), *Cross-Border Debt Restructurings: Innovative Approaches for Creditors, Corporates and Sovereigns* (Euromoney Books 2005).

[25] See, eg, Lastra and Buchheit (n 4) chs 3, 4, 8, 11, 22; C Proctor, 'Sovereign Debt Restructuring and the Courts: Some Recent Developments, Part 1' (2003) 18(9) Journal of International Banking and Financial Law 302; C Proctor, 'Sovereign Debt Restructuring and the Courts: Some Recent Developments, Part 2' (2003) 18(10) Journal of International Banking and Financial Law 351; C Proctor, 'Sovereign Debt Restructuring and the Courts: Some Recent Developments, Part 3' (2003) 18(11) Journal of International Banking and Financial Law 379.

[26] See, eg, A Gelpern, 'The Strained Marriage of Public Debts and Private Contracts' (2017) 117 Current History 22-28.

[27] See, eg, A Gelpern, B Heller, and B Setser, 'Count the Limbs: Designing Robust Aggregation Clauses in Sovereign Bonds', in Guzmán, Ocampo, and Stiglitz (n 4); Lastra and Buchheit (n 4) chs 1-2; M Megliani, 'For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries' (2018) 31(2) Leiden Journal of International Law 363.

[28] See, eg, B Eichengreen and N Woods, 'The IMF's Unmet Challenges' (2015) 30(1) Journal of Economic Perspectives 29-52; RM Lastra, 'The Role of the International Monetary Fund', in Lastra and Buchheit (n

emerge from this literature are, first, the legal implications of IMF conditionality;[29] and, second, the relationship between sovereign debt and human rights, in particular the fragmentation between the law of the IMF and international human rights law, as well as the legal initiatives required to meet the UN's Sustainable Development Goals (SDGs).[30] This body of literature is either not focused on any structural reforms in the international governance of sovereign debt or supports a statutory solution on the grounds of international human rights law.[31]

Despite the contributions of those lines of enquiry in advancing what we know about specific elements of sovereign insolvency governance, legal scholarship currently conceives those various domestic and international legal infrastructures as disconnected from each other. This prevents a systematic understanding of their role as part of a global system of governance, as well as the distributive dynamics produced by that system. At the same time, notwithstanding the advances brought by doctrinal constructivism towards a principled sovereign bankruptcy mechanism, the systemic effects of an international law in this area remain unexplored. In particular, a legal political economy approach that makes sense of the distributive role of sovereign bankruptcy rules in the legal governance of sovereign insolvency does not currently exist in the literature. Thus, this is an area in which the use of analogies drawn from bankruptcy law has an extraordinary potential for the development of international law.[32]

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4) 49-68; D Tarullo, 'The Role of the IMF in Sovereign Debt Restructuring' (2005) 6(1) Chicago Journal of International Law 287; F Gianviti, 'Evolving Role and Challenges for the International Monetary Fund' (2001) 35(4) The International Lawyer 1371-1403.

[29] T Stubbs and A Kentikelenis, 'Conditionality and Sovereign Debt: An Overview of Human Rights Implications', in Bantekas and Lumina (n 19) 359-80; A Kentikelenis, TH Stubbs, and LP King, 'IMF Conditionality and Development Policy Space, 1985-2014' (2016) 23(4) Review of International Political Economy 543; C Tan, 'The New Disciplinary Framework: Conditionality, New Aid Architecture and Global Economic Governance', in C Tan and J Faundez (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar 2010).

[30] See, eg, Bantekas and Lumina (n 19); UNGA 'Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of states on the Full Enjoyment of Human Rights, Particularly Economic, Social and Cultural Rights', 12 January 2016 (2016) UN Doc A/HRC/31/60; JP Bohoslavsky and JL Černič (eds), *Making Sovereign Financing and Human Rights Work* (Hart Publishing 2014).

[31] See, eg, DD Bradlow, 'Can Parallel Lines Ever Meet? The Strange Case of the International Standards on Sovereign Debt and Business and Human Rights' (2016) 41(2) Yale Journal of International Law 201-39; D Kampel, 'Sovereign Debt Restructuring and the Right to Development: Challenges from an Incomplete Framework' (2017) 1 Global Campus Human Rights Journal 1-16; C Tan, 'Life, Debt, and Human Rights', in KN Schefer, *Poverty and the International Economic Legal System: Duties to the World's Poor* (CUP 2013) 307-24.

[32] For a classic inspiration on the use of private law analogies in international law, see H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans Green 1927). See also PR Wood, 'Corporate Bankruptcy Law and State Insolvencies', in Lastra and Buchheit (n 4) 387-98.

This thesis joins the broader discussion on the role of law in sovereign insolvency by constructing the political economy foundations of an international law on sovereign bankruptcy. It makes three main contributions to knowledge. Firstly, it shows that the solvency of sovereign States is critically determined by their place in the global hierarchy of currencies. Second, it contends that the main legal infrastructures that respond to sovereign insolvency – built upon core domestic jurisdictions on sovereign debt and the IMF – function as part of a unified system of governance. This legal governance model systematically imposes rigidity in the law to the global periphery while (or precisely because of that) failing to resolve background problems of sovereign insolvency. Finally, it proposes approaching the distributive dynamics of this legal governance system as a common pool problem where no collective procedure exists to allocate losses, costs, and risk among key stakeholders. In doing so, this thesis unpacks the legal infrastructures through which, in the absence of bankruptcy rules, the law on sovereign insolvency creates and perpetuates inequality and asymmetries both within debtor States and globally. In addition, it reflects upon the potential of sovereign bankruptcy rules to achieve transformative changes in the way the law distributes losses, creates flexibility and asserts rigidity in the global governance of sovereign insolvency.

3. Theoretical framework

Central to the novelty of this thesis is that it adopts an interdisciplinary approach at the forefront of the LPE tradition, drawing on contributions from legal institutionalism, heterodox economics, and post-GFC critiques of money and finance. This makes this thesis the first piece of legal scholarship of its kind on sovereign insolvency or, more broadly, sovereign debt restructuring governance.

In the following subsections, I discuss the influence of those traditions in this thesis and its contribution to each one of them.

3.1. Law and Political Economy

This thesis embraces a LPE perspective.[33] Building on legal realism's understanding that economic conditions shape how law is interpreted and enforced,[34] as well as on the Critical Legal Studies (CLS) anti-formalist and critical legacy,[35] this scholarly tradition is essentially concerned with a political economy analysis of the law. It interrogates the role of law and institutions in shaping economic and political power, creating inequalities, and achieving social change.[36] Furthermore, it traces the determinative function of law in capitalism by studying the ways it secures capital's creation, endurance, and transformation into new asset forms.[37] To achieve these objectives, LPE is centrally focused on studying the constitutive power of law over political and economic entities, including capital, labour, money, and sovereignty.[38] In doing so, it explores law and political economy on national, regional and global levels.[39]

In addition to the legacy of legal realism's different variations, the scholarly field of LPE has substantially benefited from the input of contemporary developments in inequality studies, which have gained central prominence in the aftermath of the GFC,[40] including most influentially by Thomas Piketty.[41] By proposing an historical approach to

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[33] See J Britton-Purdy and others, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129(6) Yale Law Journal 1784-1835; MT McCluskey, 'Shifting the Frame: Foundational Concepts of Law and Political Economy' (2020) Journal of Law and Political Economy (forthcoming); D Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

[34] See B Leiter, 'American Legal Realism' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2005); A Sarat and others (eds), *Looking Back at Law's Century* (Cornell University Press 2002); RA Shiner, 'Legal Realism' in R Audi (ed), *The Cambridge Dictionary of Philosophy* (CUP 1995); RA Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987' (1987) 100(4) Harvard Law Review 761-780; OW Holmes Jr, 'The Path of the Law' (1897) 10 Harvard Law Review 467.

[35] See MV Tushnet, 'Critical Legal Theory', in MP Golding and WA Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd 2008) 80-89; MV Tushnet, 'Defending the Indeterminacy Thesis' (1996) 16 Quinnipiac Law Review 339-356; D Kennedy and KE Klare, 'A Bibliography of Critical Legal Studies' (1984) 94(2) The Yale Law Journal 461-490.

[36] K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

[37] ibid.

[38] See, eg, ibid; K Pistor, 'From Territorial to Monetary Sovereignty' (2017) 18(2) Theoretical Enquiries in Law 491-517; GM Hodgson, *Conceptualizing Capitalism: Institutions, Evolution, Future* (University of Chicago Press 2015).

[39] On the different levels of analysis of LPE, see M Wilkinson and H Lokdam, 'Law and Political Economy', LSE Law, Society and Economy Working Paper No 7/2018 (2018).

[40] See, eg, B Milanović, *Capitalism, Alone: The Future of the System That Rules the World* (Harvard University Press 2019); AB Atkinson, *Inequality: What Can be Done?* (Harvard University Press 2015); B Milanović, *The Haves and the Have-Nots: A Brief and Idiosyncratic History of Global Inequality* (Basic Books 2010).

[41] T Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014).

institutional change and the dynamics of inequality in a long-term perspective, Piketty's work raises many questions about the relationship between political economy and the law. This is because, in a nutshell, Piketty claims that the rate of return on capital has consistently outpaced the average growth of the economy as a whole. Therefore, all else being equal, capital holders will progressively capture most of society's output, thereby accelerating inequality.

This theory raises many questions for legal scholars, as it does not provide an account of the rules and institutional mechanisms through which such returns to capital outpace growth; nor does it discuss how to structurally change this otherwise irremediable wealth-concentrating trend. The cognitive challenges posed by such gaps have motivated the development of LPE in recent years,[42] bringing to the surface an analysis that investigates the legal mechanisms through which capital accumulates, with a spotlight on financial institutions.

This thesis is the first to draw on this scholarly tradition to investigate the legal governance of sovereign insolvency, with a focus on two key elements which are particularly relevant for LPE. Firstly, it examines the asymmetric ability of sovereign States to avoid insolvency, which is created and shaped by both domestic and international legal infrastructures of money and finance. Secondly, it unpacks how the legal infrastructures governing sovereign insolvency allocate risk, losses, and costs between key stakeholders. In doing so, it contributes towards filling the cognitive gap posed by contemporary inequality studies by highlighting the legal and institutional infrastructures that produce higher returns to capital, especially short- and medium-term private sovereign debt contracts.

3.2. Legal institutionalism

LPE's central focus on legal infrastructures, rules, and institutions builds upon legal institutionalism as a pioneering scholarly tradition devoted to exploring the relevance of law to economics.[43] In short, legal institutionalism is inspired by an enquiry on the

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[42] Wilkinson and Lokdam (n 39).

[43] See S Deakin and others, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45(1) Journal of Comparative Economics 188; WJ Samuels, 'The Legal-Economic Nexus' (1989) 57(6) George Washington Law Review 1556; R La Porta, FL Silanes, and A Shleifer, 'The Economic

institutional developments that make up the modern capitalist order or, putting it differently, on the constitutive role of law and the State within capitalism.[44]

Legal institutionalism has two essential features. First, it highlights that there is a qualitative difference between custom and law.[45] A line must be drawn between societies dominated principally by customary rules and those where a legal system with an institutionalised State that establishes a monopoly of force has also emerged. In this view, law requires a State as a precondition to exist and, conversely, the State is a necessary condition of law's existence. Second, it criticises the limitations of the various intellectual traditions which have neglected the role of law in their analysis of modern socioeconomic systems, from mainstream economics to Marxism.[46] In this regard, it argues that law is neither peripheral to the customary or private ordering nor just an epiphenomenal reflection of the relations of production, but rather an instrument of power in itself. Consequently, legal institutionalism criticises the limitations of such theoretical approaches in copying with core capitalist institutions such as property, money, markets, labour, capital, and firms. In other words, it postulates that while markets are central to capitalism, capitalism is not simply a market system. Instead, such institutions typically depend on, and are essentially constituted by, law and the State.[47] It follows from those premises that the role of law in capitalism is not simply to correct 'market failures', but rather to bring markets into being and sustain the existence of capitalism.[48]

Drawing on legal institutionalism, this thesis examines how the current legal governance of sovereign insolvency shapes sovereign debt markets and the structure of global wealth distribution. As the thesis will show, this system of governance produces unaccountable legal hierarchies which disproportionately disadvantage specific stakeholders in sovereign insolvency processes. In doing so, it contributes towards shaping sovereign

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Consequences of Legal Origin' (2008) 46(2) Journal of Economic Literature 285; R La Porta and others, 'Law and Finance' (1998) 106(6) Journal of Political Economy 1113; DC North, *Institutions, Institutional Change, and Economic Performance* (CUP 1990).

44 See Hodgson (n 38).

45 Deakin and others (n 43).

46 Deakin and others (n 43); Hodgson (n 38); GM Hodgson, 'Review of an Engine, Not a Camera: How Financial Models Shape Markets and Material Markets: How Economic Agents Are Constructed, by Donald MacKenzie' (2010) 8(2) Socio-Economic Review 399.

47 GM Hodgson, 'On the Institutional Foundations of Law: The Insufficiency of Custom and Private Ordering' (2009) 43(1) Journal of Economic Issues 143.

48 Hodgson (n 47).

debt markets in a manner that produces significant global developmental and ecological implications.

3.3. Heterodox economics

In addition to legal scholarly traditions, this thesis draws on the theoretical contributions of heterodox economics.

While there are multiple definitions of heterodox economics,[49] this thesis draws on Dysmki to define it as the set of economic theories that view capitalism as departure from a general equilibrium of market processes.[50] This means that for heterodox economics, capitalism should be defined by its destabilising, rather than stabilising tendencies. In particular, this thesis is inspired by Keynesian and post-Keynesian thought, in which the core source of destabilisation is fundamental uncertainty.[51] In addition, heterodox economics is centrally concerned with the production and distribution of the social surplus, which is determined by social and institutional conditions.[52] This thesis postulates that law has a central role in this determination by establishing not only how social surpluses, but also losses are distributed.

Another theoretical inspiration for this thesis is Latin American structuralism, which draws on Keynesian and post-Keynesian theory, as well as institutional economics and Marxism, to propose a set of theories about economic development.[53] This intellectual tradition was born in the aftermath of the Second World War, when structuralist

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[49] See, eg, J Kapeller and F Springholz, '100 Words on Heterodox Economics' (6th ed, Heterodox Economics Directory, March 2016) <http://heterodoxnews.com/directory/#entry-5> accessed 20 October 2020.

[50] GA Dymski, 'The Neoclassical Sink and the Heterodox Spiral: Political Divides and Lines of Communication in Economics' (2014) 2(1) Review of Keynesian Economics 1, 2-3.

[51] For a discussion on the concept of fundamental uncertainty and its contribution to legal theory, see Chapter 1.

[52] M Vernengo, 'The Meaning of Heterodox Economics, and Why It Matters' (Naked Keynesianism, 18 May 2011) <http://nakedkeynesianism.blogspot.com/2011/05/meaning-of-heterodox-economics-and-why.html?m=1> accessed 20 October 2020.

[53] See JA Ocampo and J Martin, *Globalization and Development: A Latin American and Caribbean Perspective* (Stanford University Press 2003); A DiFilippo, 'Latin American Structuralism and Economic Theory' (2009) 98 CEPAL Review 175; R Prebisch, *Towards a Dynamic Development Policy for Latin America* (United Nations 1963); O Sunkel, 'Institutionalism and Structuralism' (1989) 38 CEPAL Review 147; C Furtado, *Teoria e política do desenvolvimento econômico* (Companhia Editora Nacional 1967); C Furtado, *Dialética do desenvolvimento* (Fundo de Cultura Econômica 1964); C Furtado, *Development and Underdevelopment* (University of California Press 1964).

economists – especially those affiliated with the Commission for Latin America and the Caribbean (ECLAC) – proposed a theoretical framework focused on the centre-periphery dynamics of the global economy. The theoretical insights of Latin American structuralism, in particular the ideas of Prebisch,[54] were central to the movement for a New International Economic Order (NIEO),[55] an alliance of global periphery countries at the United Nations in the 1960 and 1970s aimed at bringing about a more equitable world order.[56]

Central to Latin American structuralism is the deterioration in the terms of trade between producers of commodities and manufactured goods, in contradiction to Ricardo's theory of comparative advantage;[57] as well as the asymmetries in their levels of productivity, labour income, and institutional structures of investment and technological progress.[58] Originally thought of as a relationship perpetuated through global free trade,[59] the same notion of core and periphery has been applied by Ocampo to describe international financial asymmetries between developing and developed countries.[60] This thesis draws heavily on Latin American structuralism's notions of 'core' and 'periphery' in global capitalism. In doing so, it focuses specifically on the monetary aspect of this dynamic, which is reflected in a global hierarchy of currencies.[61] Therefore, this thesis uses the terms 'periphery/core State' and 'periphery/core currency State' interchangeably.

A deficiency in the Latin American structuralist tradition is that is has not generated a corresponding reform-oriented legal school of thought in the region, where legal

[54] Prebisch was UNCTAD's first secretary-general (1964-1969), which was pivotal in forging the NIEO alliance in the 1970s. See UNCTAD, *The History of UNCTAD: 1964-1984* (UN 1985) <https://unctad.org/en/Docs/osg286_en.pdf> accessed 2 October 2020.
[55] Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (VI) (1 May 1974); Programme of Action on the Establishment of a New International Economic Order, UNGA Res 3202 (VI) (1 May 1974).
[56] See J Linarelli, M Salomon, and M Sornarajah, 'The End of Empire and the Search for Justice: NIEO and Beyond', in *The Misery of International Law* (OUP 2018) 78-109; M Bulajic, 'Indebtedness of Developing Countries and New International Economic Order' in DCHR Dicke (ed), *Foreign Debts in the Present and a New International Economic Order* (Routledge 1987).
[57] On Ricardo's theory of comparative advantage, see JE King, *David Ricardo* (Palgrave MacMillan 2013) 82-88.
[58] R Bielschowsky, 'Sixty Years of ECLAC: Structuralism and Neo-Structuralism' (2009) 97 CEPAL Review 171.
[59] R Prebisch, 'The Economic Development of Latin America and its Principal Problems' (1949) United Nations Department of Economic Affairs.
[60] JA Ocampo, 'International Asymmetries and the Design of the International Financial System', 15 Serie Temas de Coyuntura (ECLAC 2001).
[61] On which see Chapter 1.

scholarship has remained highly formalistic and idealistic.[62] These characters of legal analysis are not attributable to any specific political tradition in Latin America, being equally mainstream on both right and left. Consequently, this tradition has provided compelling insights on the core-periphery dynamics of the global economy, yet has often remained underdeveloped in unpacking how these asymmetries are coded in law or discussing how they may be reversed through law.

This thesis aims to contribute towards filling this gap in the specific areas of currency hierarchy and, most significantly, the global legal governance of sovereign insolvency. Crucial to the novelty of this thesis is that it lays the foundations for a radical reform in Latin American legal scholarship towards an innovative type of legal analysis informed by LPE and legal institutionalism that draws on the region's own economic, historical, and sociological critical traditions, including Latin American structuralism.

3.4. Post-GFC critiques of money and finance

This thesis considers the critical literature on money and finance which has emerged since the GFC.[63] In particular, it is inspired by Mehrling's *money view*, which stresses the centrality of liquidity in the political economy of finance,[64] and Pistor's Legal Theory of Finance (LTF), which explores the centrality of law to finance.[65] In essence, both of these frameworks contend that money and finance are inherently hybrid between States and

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[62] See MG Villegas, 'Constitucionalismo aspiracional: Derecho, democracia y cambio social en América Latina' (2012) 25(75) Análisis Político 89-110; FCST Dantas, 'A educação jurídica e a crise brasileira: Aula inaugural dos cursos da Faculdade Nacional de Direito, em 1955' (2009) 3 Cadernos FGV Direito Rio: Educação e Direito 9-38; J Falcão, 'Classe dirigente e ensino jurídico – Uma releitura de San Tiago Dantas' (2009) 3 Cadernos FGV Direito Rio: Educação e Direito 39-80.

[63] See, eg, D Gabor, 'Critical Macro-Finance: A Theoretical Lens' (2020) 6(1) Finance and Society 45-55; C Ban and D Gabor, 'The Political Economy of Shadow Banking' (2016) 23 (6) Review of International Political Economy 901-914; AJ Levitin, 'Safe Banking: Finance and Democracy' (2016) 83(1) University of Chicago Law Review 357-455; A Gelpern and EF Gerding, 'Inside Safe Assets' (2016) 33 Yale Journal on Regulation 363-421; C Goodhart and others (eds), *Central Banking at a Crossroads* (Anthem Press 2014).

[64] P Mehrling, 'Liquidity Changes Everything' (Blog, 12 March 2019) <https://www.perrymehrling.com/2019/03/liquidity-changes-everything/> accessed 4 April 2019; P Mehrling, 'The Inherent Hierarchy of Money' (2012) <https://ieor.columbia.edu/files/seasdepts/industrial-engineering-operations-research/pdf-files/Mehrling_P_FESeminar_Sp12-02.pdf> accessed 13 March 2019; P Mehrling, *The New Lombard Street: How the Fed Became the Dealer of Last Resort* (Princeton University Press 2010).

[65] See K Pistor, 'Money's Legal Hierarchy' in L Herzog (ed), *Just Financial Markets? Finance in a Just Society* (OUP 2017); K Pistor, 'A Legal Theory of Finance' (2013) 41(2) Journal of Comparative Economics 315-30; K Pistor, 'Law in Finance' (2013) 41(2) Journal of Comparative Economics 311; Pistor, 'From Territorial to Monetary Sovereignty' (n 38).

markets. The points at which the public and private dimensions of money and finance interact are contentious and, by definition, shaped by law. A central focus of conflict is the political economy dimension of *elasticity versus discipline*, in which agents will constantly strive for elasticity for themselves in the form of liquidity provision, while seeking to impose the losses on others in the form of austerity.[66]

In addition to its hybridity, both the *money view* and the LTF postulate that money is inherently hierarchical,[67] which means that holders of different types of moneys have unequal survival constraints.[68] Public money invariably occupies the apex of the hierarchy, as the State is able to manipulate its own survival constraint through money creation.[69] Unlike States, private entities cannot manipulate their own survival constraint, and thus the moneys they issue are not as safe as state money. However, the more access to credit lines a private agent can obtain in times of crises, the higher will be its position in the hierarchy. Conversely, the bottom is occupied by those with the most rigid survival constraints and no place to go to receive such lifelines.

As Pistor argues, the place occupied by each agent in the hierarchy is determined by how law is enforced in times of crises, and by extension, indicates what its survival constraint is.[70] Those at the top of the hierarchy are more likely to benefit from the relaxation or suspension of *ex ante* legal commitments, which is made possible by the strict enforcement of legal claims in the periphery.[71] Therefore, the position of each actor in the hierarchy is shaped by law, both in regard to its strict enforcement as well as its relaxation.

Most of the literature which inspires this thesis is devoted to the study of the ways through which flexibility is enabled in the apex of the system and focuses primarily on domestic

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[66] Mehrling, 'Liquidity Changes Everything' (n 64).
[67] This idea is reminiscent of earlier traditions on the hierarchical character of global capitalism, such as those affiliated with the world systems theory or Latin American structuralism. However, the former frameworks distinguish themselves from those macro-scale social science traditions in that their approach deals exclusively with micro-scale contemporary legal and economic aspects of money and finance. On hierarchy in global capitalism from a world systems perspective, see G Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (Verso 1994).
[68] Pistor, 'Money's Legal Hierarchy' (n 65); Pistor, 'A Legal Theory of Finance' (n 65); Mehrling, 'The Inherent Hierarchy of Money' (n 64).
[69] This framework, however, assumes a domestic system isolated from international circumstances. As I argue next, a State is in principle only exempt from solvency constraints in its own currency. Yet, as Chapter 2 discusses, peripheral currency States are more constrained in creating money without generating significant macroeconomic imbalances.
[70] Pistor, 'A Legal Theory of Finance' (n 65); Pistor, 'From Territorial to Monetary Sovereignty' (n 38).
[71] This thesis uses the terms 'periphery', 'bottom', 'emerging', and 'developing' interchangeably; as well as 'core', 'centre', 'apex', advanced', and 'developed'.

legal environments.[72] This thesis innovates in two points. First, it applies the premises of this literature to sovereign States in the international monetary system, where currencies are hierarchically organised based on their international liquidity levels.[73] Second, it expands what we know about the legal infrastructures that create rigidity in the periphery of global capitalism. In particular, it elaborates on how rigidity is asserted in the legal governance of sovereign insolvency, as well as whether any mechanisms in law can be designed that alleviate rigidity in the periphery in times of insolvency crises.

4. Method and methodology

This thesis is based on desk and library research. It engages with theoretical enquiries and also resorts to primary and secondary sources, including archives from central banks and the IMF. In particular, Chapter 6 investigates recent archives from Argentina's central bank (BCRA) which have not previously been explored in any English-language publication.

Drawing on Rahman's characterisation of LPE's methodology as the heir of legal realism's different legacies,[74] this thesis adopts an interdisciplinary approach between law and heterodox economics that aims to identify how law shapes the global economy. The type of legal analysis which it advances aims to identify the 'immiserating structural features of the global economy', as defined by Linarelli, Salomon, and Sornarajah.[75] For this purpose, I embrace a *structural* perspective centred in identifying the ways through which the legal governance of sovereign insolvency creates background social, economic, and political structures that allocate power and perpetrate inequality.[76]

Another pivotal methodological premise underpinning legal analysis in this thesis is its normative character, which means that it is inspired by the central normative concepts of

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[72] This point is explicitly brought into discussion in Pistor, 'From Territorial to Monetary Sovereignty' (n 38). An exception to this rule can be found in P Mehrling, 'Elasticity and Discipline in the Global Swap Network', INET Working Paper No 27 (2015).
[73] On which see Chapter 1.
[74] S Rahman, 'Law, Political Economy, and the Legal Realist Tradition Revisited' (Law and Political Economy Blog, 16 November 2017) <https://lpeblog.org/2017/11/16/legal-realist-tradition-revisited/> accessed 30 November 2018.
[75] Linarelli, Salomon, and Sornarajah (n 56) 26.
[76] DS Grewal, 'The Laws of Capitalism: Book Review of Thomas Piketty's Capital in the Twenty-First Century' (2014) 128 Harvard Law Review 652.

equality and welfare.[77] This normativity is reflected in my critique of the *status quo* in the legal governance of sovereign insolvency. It is precisely the normative character of the legal analysis advanced in this thesis which guides its orientation towards institutional innovation in the global economy for a type legal governance of sovereign insolvency that distributes risk between key stakeholders based on justifiable legal hierarchies, with a view on promoting socioeconomic development and environmental sustainability.

5. Core premises of this thesis

This section discusses the core premises upon which this thesis is built, which set the conceptual preconditions for the analysis developed in its substantial chapters.

5.1. Sovereign insolvency

This thesis builds upon the premise that sovereign States may become insolvent, in consonance with the heterodox approach which it embraces.[78] Orthodox theory denies this idea by arguing that States can only have problems of liquidity, not of insolvency.[79] This is because it argues that States are always able to settle their financial obligations, regardless of their amount, by raising taxes or reducing expenditure.[80]

The orthodox view, however, is inaccurate from the perspective of sovereign debt in both domestic and foreign currency.[81] On the one hand, a State does not need to collect taxes or cut expenditures to finance itself in its own currency. In rigour, money creation and public spending precede the collection of taxes.[82] Therefore, fiscal policy (at least in domestic currency) deals with issues of incentives and distribution in society, rather than

[77] Rahman (n 74).
[78] The concept of 'sovereign insolvency' is further discussed in Chapter 1.
[79] W Wriston, 'Banking against Disaster' (New York Times, 14 September 1982) ('Any country, however badly off, will "own" more than it "owes". The catch is cash flow and the cure is sound programs and time to let them work').
[80] See, eg, F Gianviti, 'The International Monetary Fund and External Debt' (1989) 215 Recueil des Cours 205, 239-41.
[81] For a different argumentation on the inadequacy of the orthodox view, see M Waibel, 'La faillite souveraine en droit: Un État peut-il faire faillite?', in M Audit (ed) *Insolvabilité des États et dettes souveraines* (LGDJ 2011) 48-50.
[82] S Bell, 'Do Taxes and Bonds Finance Government Spending?' (2016) 34(3) Journal of Economic Issues 603-20; N Tankus, 'The Federal Government Always Money-Finances Its Spending: A Restatement' (Notes on the Crises, 30 June 2020).

state funding.[83] On the other hand, whenever a State borrows in a foreign currency, it is subject to analogous solvency constraints as a private agent in the market.[84] There is always a chance that a State will run out of foreign currency to repay or rollover its debts because, unlike the State of the currency, it does not control the money supply.

Therefore, this thesis makes a clear distinction between sovereign debt in domestic and foreign currency, and builds upon the principle that sovereign insolvency is possible when the financial obligations of a sovereign State are denominated in a currency which it does not issue.

5.2. The core pillars of sovereign insolvency legal governance

This thesis is structured on the basis of what it identifies as the two core pillars of the legal governance of sovereign insolvency in our times (Figure 1). The first of them is the dominance of two domestic jurisdictions – the state of New York (typically the United States District Court for the Southern District of New York) and England & Wales (typically the Commercial Court, Queen's Bench Division of the High Court) – in the legal governance of sovereign debt contracts.[85] The second is the key roles performed by the IMF in sovereign debt crisis management.[86] These are, firstly, acting as an International Lender of Last Resort (ILOLR) to States that are unable to access liquidity through more flexible means and secondly, mandating conditional policies (IMF conditionality) to the borrowing State in exchange for most of its programmes.

[83] This does not mean that States can issue domestic currency without any limits. The limits to money creation are imposed by either real resources constraints or external constraints posed by shortages of core currency. On the former, see S Kelton, *The Deficit Myth* (John Murray Press 2020). On the latter, see M Diamand, *Doctrinas Económicas, Desarrollo e Independencia* (Paidós 1973); Furtado (n 53); R Prebisch, *El desarrollo de América Latina y sus principales problemas* (ECLAC 1949).
[84] Kelton (n 83). This is not to say that every State in the world issuing debt in its domestic currency is exempt from solvency constraints in practice. Its solvency constraints, however, are more diffuse and depend on the demand for its currency. As I discuss in Chapter 2, a peripheral State issuing sovereign debt in domestic currency has higher constraints in creating the money required to settle its financial obligations while preserving macroeconomic stability, and thereby is subject to higher solvency constraints in practice.
[85] See further on Part III of this thesis.
[86] See further on Part IV of this thesis.

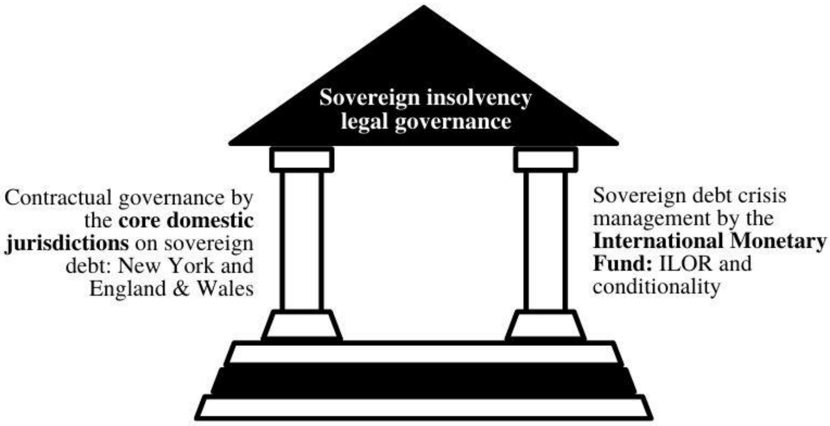

Figure 1: The core pillars of sovereign insolvency legal governance

Even though the legal infrastructures involved in each of those pillars are of a different nature, this thesis will show that they systemically interact in the legal governance of sovereign insolvency, creating a risk allocation dynamic in which certain types of claims are de-risked at the expense of reallocating risk to others.

6. What this thesis is not about

Despite their importance and close connection with this research, some topics fall beyond its scope. First, this research does not advance any specific sovereign bankruptcy regime proposal. Second, it does not deal with the specificities of sovereign debt crisis resolution within the European Monetary Union (EMU).

6.1. A specific sovereign bankruptcy regime proposal

This thesis does not seek to discuss the wide range of statutory proposals which have been presented to date on how to govern the sovereign debt restructuring mechanism for which it advocates, nor does it intend to propose any particular procedural rules for the creation of such framework. While a brief literature review of such proposals is presented in

Chapter 3, this is done in the context of a reflection on the applicability of the private bankruptcy analogy in dealing with the problem of sovereign insolvency.

Thus, this thesis centres in the legal political economy foundations of sovereign bankruptcy law, rather than discussing its specific features. This objective is guided by the understanding that current debates on the creation of an international law on sovereign bankruptcy are politically stagnated due to uncertainty as regards the necessity for such framework, rather than disagreement as to its specific regulatory features. In this sense, this research aims to innovate both the academic and broader public debate on the grounds for the adoption of an international sovereign bankruptcy mechanism. The procedural characteristics of the regulatory framework are, however, critical questions which should continue guiding academic and policy research on sovereign bankruptcy law.

6.2. A thesis on sovereign debt crisis resolution in the euro area

This thesis does not deal with the complexities of sovereign debt crisis resolution within the EMU.[87] The problems of sovereign insolvency and debt mutualisation in a monetary union – in particular the euro area, where no fiscal union exists – are beyond the scope of this thesis to consider, except for a few illustrative examples of wider points. Thus, in Chapter 2, some of the European Central Bank (ECB)'s policies are discussed as part of a broader discussion on the crucial role of monetary policy in sovereign debt de-risking. Similarly, in Chapter 6, Greece's sovereign debt crisis (2010) is examined as a significant recent illustration of how the IMF's frameworks on Exceptional Access Policy (EAP) and Debt Sustainability Analysis (DSA) may facilitate the approval of new lending irrespective of background insolvency problems.

That said, some of the insights provided in the thesis are of applicability in the context of the EMU. This is the case of the core-periphery dynamics underpinning its analysis, which have been also utilised to make sense of the relationship between different countries in the euro area.[88]

[87] On which, however, see Deutsche Bundesbank, 'Approaches to Resolving Sovereign Debt Crises in the Euro Area', Monthly Report No 41 (July 2016); F Gianviti and others, 'A European Mechanism for Sovereign Debt Crisis Resolution: A Proposal', Bruegel Blueprint Series Volume X (Bruegel 2010).
[88] See, eg, D Dinan, N Nugent, and WE Paterson, 'The Eurozone in Crisis: Core-Periphery Dynamics', in *The European Union in Crisis* (Macmillan Education UK 2017).

7. Thesis outline

This thesis comprises four main parts. **Part I** establishes the legal political economy foundations of international sovereign bankruptcy law from a money-centred perspective. Drawing on contemporary critiques at the forefront of the literature on money and finance, it argues that as long as the international monetary system is structured on the basis of a global hierarchy of currencies, the solvency of sovereign States is set to be critically determined by their monetary power. Thus, it contends that a sovereign bankruptcy mechanism should be conceived as a critical element of global justice. This part of the thesis is composed of two chapters. **Chapter 1** sets the theoretical foundations of this part of the thesis, which centres in the asymmetries facing the ability of sovereign States to avoid insolvency. It draws on various sources from law and heterodox economics to clarify the wide range of concepts on which Chapter 2 relies, as well as their underlying theories. In addition, it offers novel insights on the relationship between sovereign insolvency and monetary power.

Chapter 2 presents an innovative unified framework on the legal infrastructures that allow States to avoid insolvency. Drawing on the safe assets literature, the chapter suggests that the ability of States to avoid insolvency relates to their legal and institutional capacity to make sovereign debt a safe contract. The framework is organised around three parts: *safety as financial structure*; *safety as guaranteeing sovereign debt*; and *safety as reducing the relative risk of certain contracts*. To make sense of the asymmetric abilities of States to create sovereign debt safety, the framework proposes a key differentiation between *solid* and *fragile safety*. The chapter contends that while the existing legal governance of sovereign insolvency reinforces fragile safety for those States unable to offer solid safety, it does not provide any collective proceeding for dealing with background insolvency issues.

Part II focuses on the distributive effects of the current legal governance of sovereign insolvency. This part comprises **Chapter 3**, which presents a novel framework for a systematic understanding of how the existing legal governance of sovereign debt restructuring distributes risk, costs, and losses in sovereign insolvency crises. For this purpose, it proposes approaching sovereign insolvency through the lenses of bankruptcy law. While practical proposals to apply bankruptcy rules to sovereign debt restructuring are not new, the original contribution of this chapter to the field consists in advancing the foundations of sovereign bankruptcy theory. In particular, the theoretical framework I propose focuses on the distributive dynamics posed by the absence of a collective procedure to allocate losses among the various stakeholders of sovereign insolvency.

Part III examines the distributive impact of the first core pillar of sovereign insolvency legal governance – contractual governance under the jurisdictions of the state of New York and England & Wales – where no international bankruptcy mechanism exists to conduct sovereign debt restructurings. This part of the thesis consists of Chapters 4 and 5. **Chapter 4** focuses on the legal treatment of sovereign debt contracts under those core jurisdictions in sovereign insolvency scenarios, when debt restructuring is required. It contends that the contract-based restructuring model of the core jurisdictions produces a reallocation of risk from creditors whose claims are governed by the laws of the core jurisdictions towards other creditors in the sovereign insolvency pool. The legal underpinnings of this risk allocation pattern are associated with the commercial treatment of sovereign debt restructuring under the laws of the State of New York and England & Wales. The voluntary character of creditor participation in the restructuring enhances creditor leverage by allowing bondholders, particularly the most powerful ones, to rely on contractual and litigation holdout strategies as bargaining tools. However, in the absence of a legal mechanism that can provide necessary escape valves to promise enforcement in sovereign insolvency scenarios, this legal framework incentivises predatory strategies and poses collective action problems which often result in insufficient debt relief and delays. Furthermore, it engenders significant asymmetries in the distribution of risk among creditors in the sovereign insolvency pool without any justifiable, transparent, or accountable grounds.

Chapter 5 focuses on the legal treatment of sovereign insolvency by the laws and courts of the State of New York and England & Wales. It draws on legislation and case law to argue that in sovereign insolvency crises, rigidity in the law is asserted in those jurisdictions through the insulation of contractual claims, which pertain to the private realm of sovereign debt, from the background insolvency problem, which relates to its public character. Overall, these insulation mechanisms have the potential of causing asymmetries in the distribution of losses among stakeholders in the sovereign insolvency pool. This is because they deny the impossibility of performance caused by the insolvency problem, thereby shifting risk away from those contracts. At the same time, the domestic and commercial character of sovereign debt restructuring governance under the core jurisdictions is unable to deliver any solution to the background insolvency problem, which entails that costs and losses of insolvency are to be transferred to other stakeholders in the pool.

Part IV of this thesis examines the second core pillar of sovereign insolvency legal governance – the roles of the IMF in the management of sovereign debt crises. It comprises Chapters 6 and 7. **Chapter 6** focuses on the role of the IMF as an ILOLR for the global periphery that *guarantees* sovereign debt safety through the provision of external liquidity. It analyses the IMF's mandate, as well as its limits, in performing this function. The Fund has a structural bias towards lending in sovereign insolvency scenarios without any measures in place to restore sustainability, which in practice stretches its lending decisions beyond its mandate. The chapter draws on recent experiences to examine the legal infrastructures that enable IMF lending in the context of actual or imminent insolvency crises, as well as the risk allocation dynamics of this intervention.

Chapter 7 focuses on the other side of the coin of the IMF's role as an ILOLR – the conditionalities that borrowing States must agree to implement in exchange for the Fund's financial assistance. It examines the evolution of IMF conditionality, which has progressively taken the primary character of a legal technology of risk allocation since the collapse of the Bretton Woods system. Finally, the chapter analyses the role of conditionalities as a radical mechanism of risk reallocation in the sovereign insolvency system towards the borrowing State's population and long-term investors, particularly through structural adjustment policies.

A **Conclusion** closes this thesis with a summary of its main findings and final remarks on the potential of law to achieve transformative change in the global governance of sovereign insolvency.