

## Comments on the Lecce Framework

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**by Avi Singh**

*(barrister, admitted to practice in California and India)*

Regulations and laws often reflect prevailing wisdoms, or ideologies, though the latter is a label often labeled on ideas and assumptions one opposes. The current crises has certainly called into question prevailing wisdoms, as crises are wont to, and any reform will have to address the failures of assumptions that have guided past policies and frameworks, and norms on international and national regulation of financial markets, capital flows, taxation, and financial globalization and integration. New assumptions will necessarily be contested, not merely from differing normative ideas on the “should” of the system, guided in part by differing emphasis on efficiency, equality, justice, and in part by historic experiences, but also by lingering habits and proponents. Any attempts at globalised norms or principles, essential to a globalised response to a globalised problem and a problem with a particular type of globalization, must address the question of normative assumptions that are no longer viable, and are merely ideologies which contribute to the crises in global financial capitalism rather than to making attempts such as the Lecce Framework constructive efforts.

There has indeed existed a normative assumption, unrestrained by factual evidence, that unfettered global financial markets, with their abstractions of efficiency, must be beyond municipal, multinational and international law because they not only contributed to, but were essential to, economic growth. A normative consensus had formed around such a principle that survived the arguments and questions posed by the East Asian crises of 1997, a crises whose causes lay, as they do, in the assumption of markets being efficiency, and thus, driving economic growth. Ironically, the response of international finance policy-makers was to prescribe a strengthened emphasis on unregulated and unfettered integration with global financial markets, with the hope that the rationality of markets would eventually lead to a growth equilibrium. National responses, understandably and rationally, did not necessarily concur, and in their varied responses all sought to hedge against the rationality of markets by carrying significant dollar reserves.

Thus, global financial capitalism, in general terms, was granted a zone of legal exclusion because of its role in encouraging economic growth. It was not to be heavily taxed, subject to restrictions on movement, disclosure, rules of ethical conduct, anti-monopolistic rules, protection for consumers and investors, transparency, rules derived from principles of

trust. Such rules were not necessary because the system was rationally positive, leading to paraphrase Reverend Martin Luther King, towards an arc of growth, bending towards prosperity. The difference of course was that Reverend King spoke as a man of hope with faith in the course of history, while the assumption for financial markets led to a framework of international principles that effectively sought to exclude global financial markets and global financial capitalism from meaningful regulation. Law and regulations, where applicable, were designed to facilitate the efficient functioning of the rational market, not ensure that it was consistent with public policy. The entitlement, not granted to the local butcher, was to ensure that it would lead to economic growth and prosperity.

Such an assumption seems topically naïve today, but its strength of endurance and elegance of proponents are not to be underestimated. Some have categorised the current crises as distortion brought about by bad actors rather than systematic issues. However, there is growing evidence to suggest that even in its hey day, global capitalism never, in itself, has tended towards causing economic prosperity, unless prosperity is measured solely as returns from capital. For instance, India achieved almost equal growth rates in the 1980s and 1990s, and while it may be argued that India has never been integrated into the financial markets, India changed its policy to attract capital flows in 1991 markedly, and did attract capital flows exponentially higher in the 1990s.

However, even from the narrow perspective on returns of capital, it is unclear that global financial markets maximize returns on capital. Interest rates in India, like in other developing countries, are approximately 10%, and capital is at a premium to businesses and individuals. Credit to farmers or those on the economic periphery is even more dear, and often informal at close to usury rates. The dearth of credit is unrelated to the risk to capital, as microcredit institutions have proven in practice. Financial markets invested in sub prime mortgages, and derivative products, backed by increasingly sophisticated mathematical models, whose abstractions of efficiency are necessary rhetoric for globalised, impersonal systems. The economics of efficiency of global financial markets require large economies of scale, rather than an efficient balancing between risk and reward for capital invested. Global financial markets as a vehicle for maximizing returns on capital is also an assumption that is no longer sustainable.

Indeed, as financial engineering has replaced real engineering, even growth has been abstracted to echo the assumptions that financial markets encourage growth. As real incomes

in most developed countries have stagnated, growth of financial transactions has continued unabated, with the pressure being somewhat eased by the availability, at least till recently, of cheap credit. Financial assets intermediated through banks reached an astonishing USD \$ 477 trillion (McKinsey) while the export of good and services totaled USD \$6.1 trillion.

The only other legal rational for offering capitalism unfettered international and transnational exclusion from meaningful regulation is an argument from classical legal thought that one has the right to invest private property, in this case, capital, without interference, and be allowed to earn returns from the capital. Such an argument, even further back in history, has never reflected the practice of global capitalism, which as often dependent on public enforcement of private property rights, sometimes with colonial armies and gunboats. Thus, the private property right of global capital is heavily dependent on public enforcement of such a right, even more heavily dependent on enforcement than the property rights recognized in immovable or movable property. Yet, the latter forms of property rights are heavily regulated, and subject to taxation, and other regulations to ensure that property rights are practiced consistent with public order and public policy of promoting moral, ethical, and values of justice. No man's home is his castle! Further, that the market benefits of monopoly warrant extreme regulation is an acceptable norm which applies to systematic players, the lead actors in global financial capitalism, who advantage from their systematic advantage in the system, and from the systematic risk that their failures would endanger.

Thus, economic efficiency or promotion of economic growth do not justify the entitlement, and even the right, to be excluded from public regulation. The Lecce Framework is an important beginning, along with other frameworks, to state the principles that will inform the setting of rules that will form the basis of what needs to be a formation of public international law. As in all exercises in establishing norms and rules in public international law, the articulation of principles without rules is a more realistic, albeit modest, goal, and there have been some principles that have already been articulated. Morality and ethics – the foundations of propriety and integrity – are necessary, but cannot be assumed as the norm, but one that rules must incentivise.

The principle that the principles of propriety, integrity and transparency require public regulation that effectuates public policy in a pluralistic, democratic manner is a principle that must be addressed. Without such a principle, the entitlement of legal exclusion will continue to exist, even without any foundation for the assumptions that justify it. Indeed,

such a principle is already the basis of numerous rules to regulate other forms of global flows of capital, which for numerous reasons, are considered as contrary to international public policy. The work of the Financial Action Task Force, the institutionalized information exchange between tax authorities to combat money laundering, terrorism financing, and increasingly tax evasion, are all examples of international rules that strictly regulate forms of global capital flows. There is no normative reason to draw the line short of regulating the citadels of global financial capitalism, for the cost to the international community from the formalised system is far greater than the cost from peripheral activities such as money laundering.