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12/24, Muthurangan Muthali St, West Tambaram, Chennai - 600045

https://www.evastaliniasacademy.in/

Contact Number - +91-8678969915, +91-9940332851

The problem with the '70 hours a week' line

Biswajit Dhar

is a retired professor from Jawaharlal Nehru University and is now Distinguished Professor, Council for Social Development, New Delhi

The startling comment by Infosys co-founder N.R. Narayana Murthy that youngsters in India must say, "This is my country. I want to work 70 hours a week", in order to make the country competitive, and the support he received from several members of India Inc., is undoubtedly an example of how captains of industry can adroitly hide their lust for profits by preaching virtue. More importantly, it is an argument that fails the litmus test on three counts.

First, Mr. Narayana Murthy made a factually incorrect statement that extended working hours helped advanced countries such as Germany and Japan to succeed. Second, he placed the burden of increasing productivity on the shoulders of workers, when the reality is that they have underinvested in innovation, the critical factor for raising productivity. Third, Mr. Narayana Murthy's 70-hour week proposal violates international labour standards (ILS), the International Labour Organization's (ILO) Decent Work Agenda and its Fundamental Conventions that lay down the working hours in order to ensure that women and men get decent and productive work. The ILS is increasingly becoming the prerequisite for gaining market access in advanced countries and for companies to participate in supply chains. Non-adherence to ILS could, therefore, seriously affect the aspirations of Indian industry to expand their presence in global markets.

Working hours in the advanced world

Contrary to Mr. Narayana Murthy's argument, advanced countries have witnessed a continuous decline in working hours per worker during the past 150 years. In Germany, weekly working hours have reduced by about 59%, from 68 hours in 1870 to less than 28 hours in 2017. Japan had a 44-hour working week in 1961, the highest ever since 1950, which steadily decreased to less than 35 hours in 2017 (https://bit.ly/3MyRPsJ; https://bit.ly/3u4HkH6). Working hours tend to decrease when incomes rise and people can afford more things that they enjoy, including more leisure. In fact, in more productive economies, workers work less, while in the less productive poorer economies, workers have to work more to compensate for lower productivity.

In this context, the ILO has reminded us ("Working Time and Work-Life Balance Around the World") that "working hours and the organization of work and rest periods can have a profound influence on the physical and mental health and well-being of workers" and that "decisions on working time issues can also have repercussions for the broader health of the economy" (https://bit.ly/46ZnpYO). In a country, i.e., India, which considers its large young workforce as its most significant asset for future development, Mr. Narayana Murthy's pitch for a 70-hour working week is nothing but a recipe for their early burn-out.

The leading lights of India Inc. who have triggered this controversy need also to be reminded that the level of productivity of a country depends on the strength of its innovation system. India's reality in this regard was elaborated in the India Innovation Index 2021, produced by NITI Aayog. This report showed that in 2018, India's gross expenditure on research and development (GERD) as a percentage of GDP was 0.65%, one of the lowest in the world (https://bit.ly/47hBm43). This figure dipped further to 0.64% in 2020-21 (https://bit.ly/40rbi4f), according to the Department of Science and Technology (DST).

The DST also informed that the private sector's share in the country's R&D spending was 41% in 2020-21, a decline from 45% in 2012-13. It may be noted that in countries which have stronger innovation systems as compared to that of India's, private sectors have much higher shares. For instance, in 2020, the private sector's share was 79% in Japan and Korea, 75% in the United States, and 67% in Germany and the UK. Even in China, the private sector's share was 77%. These figures cogently explain why, in general, Indian enterprises lack the competitive edge in global markets due to lower levels of productivity.

> There are sound reasons why a section of India Inc. that backs the idea ought not to support a weakening of labour rights

The importance of the ILS

Ironically, a section of India Inc. has supported a 70-hour working week despite being aware that if it is implemented, this would be out of step with the ILO's Convention No. 1, the Hours of Work (Industry) Convention, 1919, which had benchmarked an eight hour average working day (https://bit.ly/47qtX2x). Together with the ILO's Decent Work Agenda which deals with "decent working time", the ILS is increasingly figuring in global trade rules. Advanced countries are insisting on the inclusion of the ILS in bilateral free trade agreements (FTAs). Thus, the FTAs India is currently negotiating with the European Union (EU) and the United Kingdom, both include the ILS.

The negotiating text unveiled by the EU last year includes a chapter on Trade and Sustainable Development which says that as members of this bilateral FTA, India and the EU shall promote "decent working conditions for all, with regard to, *inter alia*, wages and earnings, working hours, other conditions of work and social protection" (https://bit.ly/3slszzb).

The ILS is also central to the implementation of the Indo-Pacific Economic Framework for Prosperity ((IPEF), a 14-country grouping for promoting economic cooperation in the region led by the United States of which India is a part. Six months ago, IPEF members forged an agreement relating to supply chain resilience seeking, among other things, "to promote supply chains in which labor rights ... are respected, and create market demand for sustainable and responsible sources of supply" (https://shorturl.at/dmCJR). Labour rights, according to this agreement, includes the ILO's Fundamental Conventions, including "acceptable conditions of work with respect to minimum wages and hours of work". This implies that Indian companies can participate in the supply chains among IPEF members only if they respect labour rights.

Supply chain regulations

Finally, the EU member-states have put in place regulations on supply chains, the so-called "Supply Chain Due Diligence", obliging companies to implement due diligence processes to address their adverse impact on slavery, child labour, labour exploitation, besides environmental degradation throughout across the supply chains that they participate in.

France led the way by enacting the Corporate Duty of Vigilance Law, 2017, applicable to French companies having at least 5,000 employees in France or 10,000 worldwide, either directly or in their subsidiaries. Such companies must establish a "plan of vigilance" to "identify risks and forestall serious infringements of or harm to human rights and fundamental freedoms, personal health and safety ..." (https://bit.ly/3QpgDEw). Germany enacted the Supply Chain Due Diligence Act, 2022 making it mandatory for German companies with 3,000 or more employees to monitor and act on violations of human rights, including forced labour, both within their own operations, as well as those of their direct suppliers. This requirement is applicable regardless of whether the activity was performed in Germany or abroad (https://bit.ly/3SsY6dh).

Earlier this year, the EU member-states collectively adopted the Corporate Sustainability Due Diligence Directive, 2023, making it mandatory for companies to undertake due diligence to identify, and, where necessary, also prevent, end, or mitigate the negative impact of their activities on child labour and labour exploitation (https://bit.ly/460tUJx). Companies must assess the impact of their activities on their value-chain partners including, suppliers, sales, transport, distribution and storage.

With the developed world veering towards strict enforcement of ILS across global supply chains, India Inc. can ill-afford to support a weakening of labour rights.

i.e., India, which considers its large young | labour rights | promoting economic cooperation in the region

A verdict that hampers international law obligations

Prabhash Ranjan
teaches at the Faculty of Legal Studies, South Asian University

One of the foremost challenges foreign investors face in India is the uncertainty in taxation measures. Taxation-related improbabilities arise not just due to the actions of the executive but also the judiciary. This makes doing business in India difficult for foreign players. The Supreme Court of India's recent judgment in the Assessing Officer Circle (International Taxation) New Delhi vs M/s Nestle SA case, which disposed of 11 petitions involving corporations such as Nestle (a Swiss multinational company) and Steria (a European company) deserves to be seen in this light. The critical question in the case was whether the most favoured nation (MFN) clause in tax treaties such as the Double Taxation Avoidance Agreements (DTAAs) that India has signed, could be given effect in India without notification for the same under Section 90 of the Income-Tax Act. This provision allows India to sign tax treaties with other countries to avoid an income being taxed twice.

On Most Favoured Nation status

India's bilateral DTAAs with the Netherlands, France, and Switzerland – all three countries are members of the Organization for Economic Co-operation and Development (OECD) – require imposing a 10% withholding tax (tax on dividends paid by Indian entities of foreign companies to the residents of Netherlands, France, and Switzerland). These DTAAs also contain an MFN provision. Thus, if India extends a preferential tax treatment to any third country "which is a member of the OECD", the same treatment should be accorded to the Netherlands, France, and Switzerland under their respective DTAAs. India's DTAAs with Slovenia, Colombia, and Lithuania have a lower withholding tax requirement of 5%.

When India signed DTAAs with these countries, they were not OECD members but joined the group later. When the matter initially came before the Delhi High Court, it held that under the MFN provision, the preferential tax in, say, the India-Slovenia DTAA should extend to the India-Netherlands DTAA. However, the Supreme Court overruled this, holding that when the India-Netherlands DTAA was signed, Slovenia was not an OECD member. Thus, the benefits given to Slovenia, which became an OECD member later, do not apply to the India-Netherlands DTAA. This ruling will impose a tax burden estimated to be ₹11,000 crore on foreign investors. It may also lead to opening past cases.

The recent judgment in the Assessing Officer vs Nestle case rationalises a violation of international law and leaves India vulnerable

This reasoning is specious because it freezes the provisions of a treaty in time. There is nothing in the text of the India-Netherlands DTAA, for example, to prove that the words "is a member of the OECD" are restricted to countries that were members on the day the treaty was signed. It is puzzling that the top court used domestic interpretative techniques to interpret a term in an international treaty. Such an interpretation defeats the purpose of including non-discrimination standards such as MFN in economic treaties. MFN in a treaty ensures that future benefits given to a third country by one of the treaty-signing countries become automatically available to its treaty partners.

Dualism strikes back

The Supreme Court held that to give effect to the MFN provision in the DTAA, notification under Section 90(1) of the Income Tax Act is necessary and mandatory. Thus, the Court advocated the doctrine of dualism wherein international law is not enforceable domestically till it is transformed into municipal law through enabling legislation. While it is true that the Indian Constitution provides for such formal dualism, the Supreme Court has moved away from this principle toward the monist tradition of incorporating international law in the domestic legal regime, even if it is not explicitly incorporated, provided the international law is not inconsistent with domestic law.

This principle has been laid down in cases such as *PUCL vs India*, *Vishakha vs State of Rajasthan*, and *Puttaswamy vs Union of India*. The premise in these cases was the 'presumption of compatibility' or 'presumption of consistency' between domestic and international law. This presumption can be rebutted only if a domestic law explicitly contravenes international law. In other words, wherever possible, domestic law should be interpreted in a manner that does not contradict India's obligations under international law. This approach ensures that progressive international law is given effect by the courts to protect the rights of citizens and persons even if the legislature and the executive have not acted to transform it into domestic law for whatever the reason.

Thus, international law is not just an interpretative tool. It has essential implications domestically. Surprisingly, the Court did not refer to this line of cases in its reasoning. This decision is a setback to the progressive judicial journey unleashed by cases such as *Vishakha* to take international law seriously. If India had issued a notification that expressly went against the MFN provision in some of the DTAAs, one could have plausibly argued that there is an inconsistency between domestic and international law. Thus, the former should be given effect, not the latter. However, without a notification under Section 90(1), the Court should have harmoniously interpreted India's international law obligations contained in the DTAA with that of the Income Tax Act. It should have read the DTAA provision as part of Indian law. In any case, issuing a notification under Section 90(1) is an executive, not a legislative act. So, even from the principle of dualism, the Court's reasoning is suspect.

The Court's interpretation allows the executive to undo its international law obligations by not issuing the relevant notifications domestically. This not only rationalises violation of international law but also makes India susceptible to international claims under other instruments of international law such as bilateral investment treaties.

This judgment has once again proved the adage that the Supreme Court is supreme because it is final, not because it is infallible.

The views expressed are personal

LETTERS TO THE EDITOR

EVA STALIN