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FOREWORD

It is with great pride and a profound sense of responsibility that I present to you this Volume - XV, Issue - I, December 2025 Nirma University Law Journal (NULJ) Peer reviewed and Referred Journal. Each volume is a testament to the rigor, curiosity, and commitment to legal scholarship that our contributors, editors, and advisory board bring to the journal.

As the legal landscape continues to evolve shaped by shifting societal values, technological advancements, and global challenges legal scholarship plays a crucial role in interpreting, critiquing, and guiding the application of law. In this edition, our authors explore a wide array of pressing legal issues and interdisciplinary perspectives.

Behind the scenes, producing this journal demands meticulous attention to detail, spirited debate, and countless hours of research and editing. I am deeply grateful to our dedicated editorial team for their unwavering commitment, as well as to our faculty advisors and peer reviewers for their guidance and support. I am happy to share that the article that has been published in this Journal is indexed to HeinOnline, EBSCO, Manupatra, and SSC Online. The overwhelming response we received from contributors for the publication of Volume XV, Issue I.

To our readers practitioners, academics, and students alike; I hope this issue provokes thought, challenges assumptions, and inspires dialogue. The pursuit of justice and the evolution of legal norms require not only practice but also persistent scholarly engagement. It is our belief that the Nirma University Law Journal (NULJ) continues to serve as a platform for that vital exchange.

Thank you for your continued support and readership.

Prof. (Dr.) Madhuri Parikh

Chief Executive, Nirma University Law Journal

Director and Dean

Institute of Law, Nirma University, Ahmedabad.

TABLE OF CONTENTS

Articles	
AI AND ALGORITHMIC BIAS: LEGAL AND ETHICAL IMPERATIVES Mr. Chisanga Mutale & Dr Pradeep Kumar	01
NEURO-ETHICS IN BRAIN-COMPUTER INTERFACES: PRIVACY, CONSENT, AND LEGAL PROTECTIONS FOR COGNITIVE ENHANCEMENT Ms. Rashmi Raghav	31
REPRODUCTIVE RIGHTS AT WORK: LEGAL PROTECTION AND PRACTICAL CHALLENGES FOR WOMEN IN INDIA’S PRIVATE SECTOR Ms. Anita & Dr. Manjinder Gulyani	55
THE EMERGING FACE OF GIG EMPLOYMENT: GLOBAL OVERVIEW AND INDIAN EXPERIENCE Dr. Rajneesh Kumar Patel	73
PUNISHMENT WITHOUT PRISON: ETHICAL JUSTIFICATIONS OF NON-CUSTODIAL SANCTIONS IN MODERN CRIMINAL LAW Ms. Renuka	99

AI AND ALGORITHMIC BIAS: LEGAL AND ETHICAL IMPERATIVES

Mr. Chisanga Mutale*
Dr Pradeep Kumar**

ABSTRACT

Algorithms, instead of being neutral, can reproduce and intensify social prejudices and inequalities. In India, an extremely stratified society, addressing algorithmic bias is not only a legal but also an ethical requirement. It is our position that the constitutional guarantees of equality, non discrimination, and privacy, along with recent data protection legislation, should be applied and extended to this subject to address the biases hidden within Artificial Intelligence (AI) systems. This paper maps Indian law and global ethical standards to identify gaps in regulation and proposes an integrated, rights based framework to ensure fair AI.

Keywords: AI, Algorithmic Bias, Legal & Ethical Imperatives, and ethical governance of AI.

I. INTRODUCTION

AI systems are perceived to be objective when, in fact reflect biases, which can perpetuate forms of discrimination that are possibly against the law.

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Algorithm bias is a type of systematised, unfair or biased AI outputs that benefit certain groups and harm others¹. Particularly, this bias is often not caused by bad intentions but by data or design flaws. To illustrate, in case an AI recruiting tool is trained on past hiring data in which one gender or caste dominates the others, it might learn to reiterate and promote these trends.² In the Indian socio-technical setting, it implies that algorithms can further propagate casteism, sexism, regionalism, or even any other form of prejudice, which are inherent in society.³

The significance of this article is its recognition that India's unique constitutional values and social context demand a tailored approach to AI. We spotted a significant gap in Indian legal literature on algorithmic discrimination and proposed a roadmap to address it, namely, integrating constitutional theory and data protection law with the emerging ethical governance frameworks. Therefore, this article will be of interest to legal scholars, policy makers and researchers working at the intersection of AI, constitutional law and ethics.

II. BACKGROUND

According to a Software Freedom Law Centre report, discriminatory training data resulting in discriminatory training and discriminatory design decisions may have a disastrous impact on the overall outcome of the AI system, which is either poor or discriminatory towards minorities⁴. Another way that biased results breed more biased results is through feedback loops. Algorithms, as one commentator cautions, are not in any way neutral unless carefully guarded; they may exacerbate as well as correct social inequalities⁵.

¹ Pratik Sinha, *Algorithmic Bias and Discrimination in India*, *The Wire* (Feb. 12, 2020).

² Vidushi Marda, *Artificial Intelligence in India: A Framework for Responsible Deployment*, *Carnegie India* (2020).

³ Vidushi Marda, *Artificial Intelligence Policy in India: A Framework for Engaging the Limits of Data-Driven Decision-Making*, 16 *Indian J. L. & Tech.* 1 (2020).

⁴ SFLC, *Recommendations on Report on AI Governance Guidelines Development* (Feb. 2025) (India).

⁵ Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 *Wash. L. Rev.* 1, 4–10 (2014).

In India, this risk is acute. Indicatively, the fingerprint or iris scanners of Aadhaar have been reported to malfunction⁶ more frequently among the seniors or rural workers, effectively disqualifying them from welfare programs⁷. Likewise, experiments with predictive policing or facial recognition have also triggered concerns about Muslims and the lower-caste neighbourhoods being over-policed.

These biases can be strengthened through feedback loops and systems increasingly unequal. The cases of Aadhaar biometric flaws, particularly among the elderly, rural and manual workers, are portraying how the technical failure by technology can leave vulnerable groups out of the benefits of welfare. On the same note, predictive policing and facial recognition have been experimented with to attract criticisms of targeting Muslims and lower-caste neighborhoods disproportionately. In general, the visualization demonstrates that systemic socio-technical prejudices may enhance the existing inequalities unless they are meticulously managed and audited.

The following examples highlight the fact that algorithmic fairness cannot be presupposed. Legal and ethical standards should be vigorous to avert the entrenchment of inequality by AI. This paper examines such imperatives. We start by looking at the way algorithmic bias occurs and why it is important in India. Moving on to the legal context of India, we evaluate the constitutional rights and the new regulations that are in place that deal with AI bias and evaluate the extent to which they do so.⁸ We also scan international ethics, e.g. UNESCO⁹, OECD, and EU guidelines¹⁰ that define how India is doing.

⁶ R. Ramanathan, Aadhaar Biometric Failures and Exclusion, 53 Econ. & Pol. Wkly. (2018); UIDAI, Grievance Redressal Reports (Gov't of India, 2017–2020).

⁷ Sucheta Dalal, JAMmed: How Aadhaar-based Inclusion Turned into Financial Exclusion, available on https://www.moneylife.in/article/_jammed-how-aadhaarbased-inclusion-turned-into-financial-exclusion_/75544.htm?utm_source=twitter&utm_medium=social, accessed on 18 Nov. 2025 at 15: 45.

⁸ JSA, Curio AI Series AI & IP: Artificial Intelligence: Bias, Discrimination and the Law (06/08) (JSA Legal Influencer, Lexology Legal Influencer Q4:2023 (JSA is a leading national law firm in India.)

⁹ UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (2021); OECD, *OECD Principles on Artificial Intelligence* (2019).

¹⁰ European Commission, *Ethics Guidelines for Trustworthy AI* (2019).

Determining gaps in law and scholarship, we speak of counter-arguments, e.g. data fixes will be enough, regulation will kill innovations and explain why proactive regulation is nonetheless needed¹¹. Lastly, we suggest that Indian social justice is a commitment that requires bringing algorithmic accountability to law and ethics.

Whereas international standards are becoming more and more imposing on proactive responsiveness, it remains the case that India is placing significant emphasis on voluntary principles and sector-related advisory. The gap that has been left behind depicts the need to make legal structures and protection of ethics more robust. The cooperation with India needs to be enhanced to ensure social justice and the preservation of rights and to reduce the threat of discrimination and exclusion.

A. Defining Algorithmic Bias

In the case of algorithmic bias, the AI system generates systematically discriminative results. Ordinarily speaking, any AI black box is discriminatory when it always tends to favour one group over the other, based on invalid inputs or due to its design.¹² It does not have anything to do with how engineers intentionally show bias, but rather with the concealed patterns in information and coding.¹³ According to one analyst, algorithmic bias is a result of an interaction of reasons which are embedded in the process of creating AI.

The Key Sources of Bias include

(1) Data Bias

In situations where the training data is biased towards a certain group, such as under-representing a particular caste, gender or geographic area, the AI

¹¹ NITI Aayog, *National Strategy for Artificial Intelligence* (2018).

¹² Dhruvitkumar V. Talati, Artificial Intelligence and unintended bias: A call for responsible innovation, *International Journal of Science and Research Archive*, 2021, 02(02), pp. 298-312.

¹³ Lorenzo Belenguer, AI bias: exploring discriminatory algorithmic decision making models and the application of possible machine centric solutions adapted from the pharmaceutical industry, *AI and Ethics* (2022) 2: pp. 771-787.

becomes trained in those biased directions. An example that can be given is an AI-based hiring tool that is mainly trained on data related to male employees.¹⁴ It can be trained to reproduce and uphold gender bias. In India, the data may be prejudiced due to the underrepresentation of Dalits, women, or rural populations¹⁵.

(2) Design Bias

The AI models incorporate the assumptions of the developers. Decisions concerning the features that are important, the weighting of them, or the type of algorithm can encode bias unintentionally. As an example, home ownership, a proxy of wealth, may be over-emphasised by an automated loan-screening algorithm, and poor or landless applicants may be disadvantaged.¹⁶

(3) Feedback Loops

After being deployed, an AI with bias can produce more biased information¹⁷. As an illustration, in case a predictive policing algorithm dispatches additional patrols to a specific slum, it will capture a greater number of arrests in that slum, which the AI will consider as proof of high crime within the community, and the process repeats.¹⁸

Such dynamics are also well recorded in AI literature. On a national level, researchers in India have cautioned that AI tends to learn and reinforce historical biases in data e.g. historical biases related to an entrenched caste or gender disparity.¹⁹ Researchers have listed various forms of bias statistical,

¹⁴ Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, in *Proc. Mach. Learning Research* 1 (2018).

¹⁵ NITI Aayog, *National Strategy for Artificial Intelligence* (2018).

¹⁶ Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 *Calif. L. Rev.* 671, 688–95 (2016).

¹⁷ Andrew Guthrie Ferguson, *The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement* 45–52 (2017).

¹⁸ Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 *N.Y.U. L. Rev. Online* 15, 22–28 (2019).

¹⁹ Vidushi Marda, *Artificial Intelligence Policy in India: A Framework for Engaging the Limits of Data-Driven Decision-Making*, 16 *Indian J. L. & Tech.* 1, 12–18 (2020).

label, or measurement bias. As an illustration, the training labels themselves may be biased, leading to a phenomenon known as label bias, and the way data is collected may be biased so that some groups are systematically omitted, a phenomenon known as measurement bias.²⁰

Concisely, a technically correct AI model may result in a breach of the principle of equal treatment provided that its outputs conform to the social hierarchies that exist in society.²¹ According to Joshi, all the elements of an algorithm, as he notes, may represent specific political decisions that carry over existing discrimination in algorithmic manifestations.²² Effective algorithms in documented services or recruitment efficiently develop huge-scale classifications of individuals; unless utilised with caution, they will bring into existence additional groups of discrimination that are not yet identified by the existing regulations.²³

B. Bias in the Indian Context

The social environment of India is particularly troubling with algorithmic bias. Hundreds of years of caste, religious and gender stratification ensure that the marginalised groups are frequently underrepresented in standard AI data. Individuals have observed that the Indian tech industry is largely dominated by upper-caste, urban, and English-educated men, and thus, the views of Dalits, Adivasis, rural population, or women are usually absent.²⁴ The other problem is language diversity NLP datasets can pay attention to Hindi or English and overlook regional languages, thus disadvantaging non-English speakers.²⁵

²⁰ Sayan Bhattacharya & Rahul De', *Algorithmic Bias and the Promise of AI in India*, IIM Bangalore Working Paper No. 628 (2020).

²¹ Anupam Chander, *The Racist Algorithm?* 115 *Mich. L. Rev.* 1023, 1029–34 (2017).

²² Aayush Joshi, *Discrimination by Design: Algorithmic Bias and India's Constitutional Mandate*, Centre for Internet and Society (2021).

²³ Udbhav Tiwari & Sarayu Natarajan, *Algorithmic Bias and the Law in India*, Vidhi Centre for Legal Policy (2020).

²⁴ Amit Sharma & Surya Mattu, *Caste in Technology: Structural Biases in India's AI and Tech Industry*, 14 *J. TECH. & SOC'Y* 45, 47–50 (2023).

²⁵ Kautilya Katyayan et al., *Language Inequality in Indian NLP Datasets*, PROC. ASS'N Computational Linguistics 1, 3–6 (2022).

There are real-world examples that depict stakes. In the medical field, an AI diagnostic system that is trained mostly using urban patient data can fail to diagnose or detect diseases among rural or tribal people.²⁶ In learning, an algorithm predicting student achievement by school type may hurt the performance of students in the low-funded rural schools. Data gaps on minority defendants can provide inaccurate risk scores in criminal justice. There is also a study of the *LedBy Foundation*²⁷ that revealed that even the same resumes with Hindu and Muslim female names received significantly different levels of callback in India, which demonstrates how algorithmic employment systems conditioned on historically biased results can perpetuate that bias at scale.

Programs that are highly acclaimed have failed²⁸ miserably due to favouritism. The Aadhaar biometric authentication in India was an example; this was to universalise welfare. However, the field reports indicate it fails disproportionately among the elderly, manual labourers and those with disability who are already marginalised. Ideally, an individual without a trustworthy fingerprint may be denied access to social benefits²⁹. Likewise, AI-enhanced policing has been used to cause concern. The experimental work on facial recognition by the Delhi Police was also criticised as being wildly inaccurate on non-Hindu faces; one report cautioned that it would lead to a disproportionate representation of Muslims.³⁰ The Internet Freedom Foundation reported that the police accepted 80 per cent matching confidence in a positive ID, which, according to experts, is dangerous to create false positives, particularly when it comes to darker-skinned or differently dressed individuals.

²⁶ R. Singh et al., *Bias in Clinical AI Models: Unequal Outcomes for India's Rural and Tribal Populations*, 12 Indian J. MED. Ethics 112, 115–17 (2023).

²⁷ LedBy Foundation, *Hiring Bias in India: A Field Experiment on Name-Based Discrimination* (2021), Available on <https://www.ledby.org> accessed on 20 November 2025 at 15:04.

²⁸ Reetika Khera, *Impact of Aadhaar Authentication Failures on Welfare Access*, 55 ECON. & POL. WKLY. 12, 13–15 (2020).

²⁹ R. Rao, *Biometric Exclusion and the Right to Food in India*, 44 J. DEV. STUD. 221, 225–28 (2021).

³⁰ Aparna Bhat et al., *Religious Bias in Facial Recognition Systems Used by Law Enforcement*, Centre For Internet & Society Report, 4–6 (2022).

These instances indicate that algorithmic bias is not a theoretical concept in India. According to one critic, in an otherwise society full of “systemic inequalities based on caste, gender, classes and religion, biased AI is a danger that may only further result in existing injustices at the expense of technological objectivity³¹. The stakes are great unless fixed, AI might interfere with the affirmative action objectives, equality of employment opportunities, fairness, and other constitutional principles.³²

C. Constitutional and Legal Framework

The rise of algorithmic governance necessitates a re-evaluation of Article 14 of the Constitution of India. The traditional doctrine of reasonable classification permits differential treatment only when there exist a clear basis of distinction and a rational connection between such classification and the intended objective.³³

When applied to AI systems in areas such as recruitment, credit evaluation, and policing, this doctrine encounters significant challenges.³⁴ Complex data processing and predictive modelling is a standard foundation of algorithmic decision-making as opposed to transparent and easily understandable criteria. This creates issues about clarity of classification, and also determining whether it can be evaluated and determining its validity or not³⁵. Furthermore, where datasets reflect historical disparities or embedded biases, the necessity of a rational nexus becomes questionable, particularly when outcomes disproportionately affect certain groups despite a formally neutral design.³⁶

³¹ Usha Ramanathan, *Caste, Code, and Algorithms: Structural Inequality in India's AI Ecosystem*, 59 ECON. & POL. WKLY. 22, 23–24 (2024).

³² Pranav Menon, *Algorithmic Governance and the Indian Constitution: Equality, Due Process, and the Future of Automated Decisions*, 12 INDIAN J. CONST. L. 101, 118–25 (2023).

³³ *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75; *Budhan Choudhry v State of Bihar* AIR 1955 SC 191.

³⁴ Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Harvard University Press, 2015).

³⁵ Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015).

³⁶ Sandra Wachter, Brent Mittelstadt and Chris Russell, ‘Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI’ (2021) 41(2) *Computer Law & Security Review* 105567.

The increasing involvement of private actors further complicates this analysis. With the introduction of AI systems by private bodies that control access to jobs, financial services, and social services, the issue of whether constitutional guarantees apply horizontally comes into question. Courts' judicial trends indicate an increasing readiness to question non-State behavior that is especially relevant to basic rights, and therefore an expansion of constitutional responsibility beyond the traditional definition of State action³⁷.

In this context, the classical framework of reasonable classification appears insufficient.³⁸ A shift towards a substantive understanding of equality is necessary one that considers not only formal distinctions but also the real-world impact of algorithmic decisions, particularly on vulnerable and historically marginalized groups. Equal treatment and non-discrimination have emerged as the basic principles stipulated in the Constitution of India. Article 14 guarantees equality before the law and equal protection of the law, and Article 15 is formulated in non-discrimination of the state against religion, race, caste, sex or place of birth. Article 16 offers equality of opportunity in state employment, and Article 21, life and personal liberty, which was confirmed in *Puttaswamy v. Union of India*³⁹, has a fundamental right to privacy and information self-determination. Implicatively, these rights extend to governmental action by AI, e.g. automated policing or automated welfare decisions, as well as arguably to non-State actors, as the prohibition of discrimination in Article 15 applied to the State, but the prohibition of action as in Article 14 is a matter of fact.

Nevertheless, the jurisprudence has not clearly applied these guarantees to algorithmic decisions. In its Aadhaar case (*Puttaswamy II*)⁴⁰, the Supreme Court acknowledged expansive obligations on the state concerning

³⁷ *Justice KS Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1; *Zee Telefilms Ltd v Union of India* (2005) 4 SCC 649

³⁸ *E P Royappa v State of Tamil Nadu* (1974) 4 SCC 3.

³⁹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

⁴⁰ *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*, (2019) 1 SCC 1.

surveillance and data security, but avoided much discussion of the claims purporting that automated classification is the precipitating factor in attracting Article 14 scrutiny. Indian courts are yet to formulate doctrines to impose constitutional scrutiny on automated decision-making, as one analyst notes. The equality law has always been aimed at human prejudice or discriminatory laws, and not some disguised statistical models. Therefore, Articles 14 and 15 can serve as possible means of combating algorithmic injustice, but now, they are not used to the full extent⁴¹. Although the ideals of the Constitution are there, there are few clear rules regarding AI or algorithmic fairness in the law. There are, at best, general data protection and industry provisions:

D. Privacy/Data Protection

The Information Technology Act, 2000⁴² incurs certain data liabilities e.g. Section 43A would hold corporate bodies to reasonable security measures, and Section 72A would give an indictment of careless disclosure of individual data. However, they are concerned with breaches of data or consent, rather than the way data is used by the algorithms. India is closer to a GDPR like regime as the new Digital Personal Data Protection Act, 2023 (DPDP Act) is established.

It requires fair treatment and puts responsibilities on Significant Data Fiduciaries, large platforms, such as annual impact assessment and audit of algorithms. Importantly, the personified DPDP Rules (2025) state that SDFs must make sure that rights are not infringed upon using an algorithmic software.⁴³ This is an encouraging move: the alcoholic law, for the first time, acquires the idea of algorithmic governance. The concern of the DPDP Act is, however, on personal data and consent. It implements duties; it does not discuss the fairness of algorithms, explainability, or human control.

⁴¹ Anuj Bhuwania, *Algorithmic Inequality and Indian Constitutional Law*, 8 INDIAN L. REV. 201, 215–18 (2024).

⁴² The Information Technology Act, No. 21 of 2000.

⁴³ Ministry of Electronics & Information Technology, *Digital Personal Data Protection Rules, 2025*, Gazette of India, Nov. 14, 2025 (India).

Concisely, the law on data protection, by itself, cannot regulate the numerous evils of AI, such as when an algorithm process exploits non-personal or anonymised data, it is not subject to such regulations.⁴⁴

E. Sectoral Laws

Certain sectoral rules have an implication on the use of algorithms, e.g. RBI guidelines on automated lending, or rules on biometric Aadhaar authentication⁴⁵. However, it does not have a broad AI or discrimination-related law. There is no legislation today which stipulates that an employer who has employed AI hiring tools must show that such tools do not contravene non-discrimination conventions. Similarly, in administrative law, there are no provisions on automated decision-making.

The Administrative Law requirement of reasonableness or fairness would theoretically be applied to an algorithmic act by the government, but courts have not yet decided to rule on such cases. Therefore, regarding the privacy of data, the current statutes and judicial decisions create a gap in regulation. According to a recent analysis, India lacks a comprehensive or industry-specific AI law, and there are no legally binding guidelines to test the bias of the algorithms, remedy harm or hold AI systems accountable.⁴⁶

Overall, the legal framework of India is founded upon high ideal standards of equality, justice, and, at present, certain provisions of data protection, but there is no explicit protection against AI bias. The laws and the Constitution indirectly embrace fairness, yet the gap between the ideals and coded reality remains to be bridged by jurisprudence or statute. This loophole would be dangerous to India as a country that respects social justice: algorithms used in law enforcement, welfare, or employment without any checks and balances may unintentionally infringe rights.⁴⁷

⁴⁴ Graham Greenleaf, *India's DPDP Act 2023: Limited Scope and Significant Gaps*, 176 PRIVACY L. & POLY REP. 1, 4–6 (2024).

⁴⁵ Reserve Bank of India, *Fair Lending Practice Guidelines* (2023).

⁴⁶ Vidushi Marda, *Regulating Artificial Intelligence in India: Gaps, Risks, and the Need for Accountability*, 17 J. Indian L. & Tech. 1, 8–14 (2024).

⁴⁷ S. Subramanian, *Algorithmic Governance and Social Justice in India: Constitutional Risks and Regulatory Vacuums*, 41 Indian J. Pub. L. 89, 102–08 (2024).

III. THE ARTIFICIAL INTELLIGENCE (ETHICS AND ACCOUNTABILITY) BILL, 2025

The Artificial Intelligence (Ethics and Accountability) Bill, 2025⁴⁸, attempts to establish a legal infrastructure of responsible design and deployment as well as governance of AI systems in India. It is based on constitutional principles of equality, non-discrimination and safeguarding of life and personal liberty, hence, the spirit of Articles 14 and 21.

The Bill suggests that AI systems, particularly those related to high-impact industries such as employment, policing, healthcare, and finance, should be operated following the principles of transparency, fairness, accountability, and explainability. One such institutional characteristic is the Ethics Committee of AI Technologies that reviews algorithms and datasets to create and mitigate risks of bias and exclusion⁴⁹. It oversees the application of AI in sensitive areas and assists in making sure that the technological practices uphold dignity, privacy and equality.

The committee also eases redressal of grievances and formulates ethical principles in AI governance. The Bill also puts more focus on the issue of algorithmic accountability as it requires impact assessments and independent audits. It imposes on developers that they should avoid discriminatory results and gives people the right to obtain an explanation and human consideration of the automated decisions. Also, compliance and enforcement would be regulated by the proposed AI Regulatory Authority, which will enhance the protection against algorithmic bias and rights-focused AI governance.⁵⁰

A. India AI Governance Guidelines (2025)

The Indian government and policymakers are starting to act as such issues have been identified. The newly published India AI Governance Guidelines

⁴⁸ Bill No. 59 of 2025.

⁴⁹ Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Harvard University Press 2015).

⁵⁰ Ibid.

specifically point to the existence of the so-called algorithmic biases as a major risk, along with misinformation and security risk concerns. These Guidelines are based on seven principles, such as Fairness & Equity and Accountability. By instilling equity in the national AI philosophy, India indicates that AI innovation should be used by the whole citizenry.

India's regulatory framework governing artificial intelligence and data protection has undergone a notable transformation since late 2025, necessitating a revision of the present analysis. The Digital Personal Data Protection Rules, 2025, notified with phased implementation, signal a transition from a largely normative legal framework to one increasingly oriented toward enforcement. In parallel, the operationalization of the Data Protection Board of India marks a significant step toward institutionalizing compliance and regulatory oversight, with 2026 expected to witness more active enforcement mechanisms.

Simultaneously, India's AI governance approach has evolved into a more structured framework⁵¹. The introduction of the India AI Governance Guidelines in 2026 reflects a move away from fragmented ethical discourse towards a coordinated techno-legal model. The proposed institutional mechanisms, including advisory and safety bodies, demonstrate an intent to formalize governance structures. However, these developments remain largely principle-driven and lack the stringent enforcement architecture characteristic of regimes such as the EU AI Act.⁵²

From a legislative perspective, the so-called "AI Employees Bill" corresponds to the Artificial Intelligence (Protection of Rights of Employees) Bill, 2023, introduced as a Private Member's Bill. As of early 2026, it has not attained binding legal status and should therefore be treated as an evolving policy proposal rather than enforceable legislation.

⁵¹ Government of India, *India AI Governance Guidelines* (2026) (policy framework).

⁵² Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act).

The empirical dimension of AI deployment in policing requires careful treatment. Although institutional platforms such as the National Crime Records Bureau and the Inter-Operable Criminal Justice System facilitate the integration of AI and data analytics into criminal justice processes, there is no dedicated official dataset addressing algorithmic bias in policing. Existing NCRB publications focus primarily on crime statistics and law enforcement performance, without examining the impact of AI-driven decision-making.⁵³

This creates a critical accountability gap, as the increasing use of technologies such as predictive policing, facial recognition, and data-driven surveillance is not matched by corresponding transparency regarding bias, error rates, or discriminatory outcomes.⁵⁴ Given that such systems often rely on historical datasets that may embed existing social inequalities, there is a risk that algorithmic tools may reproduce or intensify patterns of discrimination.⁵⁵ In the absence of targeted empirical evidence, claims of algorithmic neutrality must therefore be approached with caution, highlighting the need for stronger mechanisms of transparency, accountability, and independent evaluation.

B. Digital Personal Data Protection Rules (2025)

The DPDP subjects the major data fiduciaries to algorithmic risk assessments and impact audits. Organisations that handle lots of data, for the first time, are required to check that the technical tools and algorithm systems they apply do not affect individual rights⁵⁶. These proposals resemble new international standards e.g. EU AI Act, 2024 requirements, and establish a legal point of control on algorithmic responsibility in other fields, such as social media, finance, and e-commerce.⁵⁷

⁵³ National Crime Records Bureau, *Crime in India* (various years); Ministry of Home Affairs, Inter-Operable Criminal Justice System (ICJS).

⁵⁴ Andrew D Selbst and Solon Barocas, 'The Intuitive Appeal of Explainable Machines' (2018) 87 *Fordham Law Review* 1085.

⁵⁵ Cathy O'Neil, *Weapons of Math Destruction* (Penguin Random House 2016).

⁵⁶ Section 10 of The Digital Personal Data Protection Act, No. 22 of 2023.

⁵⁷ See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 on Artificial Intelligence (EU AI Act).

The Digital Personal Data Protection Rules, 2025, the processing of personal data under the Digital Personal Data Protection Act, 2023, are a major statutory measure of the processing of personal data in India, especially with the emergence of new technologies like artificial intelligence. These Rules require that personal data are processed by data fiduciaries under the grounds of a free, informed, specific, and unambiguous consent, which is backed by the requirement of express notice of the purpose and nature of using data.⁵⁸

The Rules have transparency, accountability, and data minimization requirements in the context of AI systems, in particular, automated decision-making, and thus provide solutions to the problem of algorithmic opaqueness and bias. Notably, the Significant Data Fiduciaries designation compels organizations that use high-risk AI systems to conduct data protection impact assessment, periodic data audits, and appoint Data Protection Officer(s).

Such precautions play a significant role in averting discriminatory results that may be caused by biased data or non-transparent algorithms. The Rules also acknowledge the rights of the data principals, access, correction, erasure, and grievance redressal, which can be used as procedural means to combat algorithmic harms. Therefore, the DPDP Rules, 2025 contain a statutory framework within the conditions of the AI and Algorithmic Bias: Legal and Ethical Imperatives to ensure equity, accountability, and safeguard the informational privacy under Article 21 of the Constitution of India.⁵⁹

C. The Artificial Intelligence (Protection of Rights of Employees) Bill, 2023

Parliament presented a bill that will address the use of AI in the workplace, the Artificial Intelligence Protection of Rights of Employees Bill, 2023 (AI

⁵⁸ Digital Personal Data Protection Act 2023 (India); Digital Personal Data Protection Rules 2025 (India).

⁵⁹ *Justice KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1.

Bill 2023). According to its Statement of Objects, AI may enhance e-biases in the data, and this may lead to discrimination during hiring and promotion.

The Bill would provide the principle of algorithmic transparency, the requirement of bias-detection training, and the correction of biased results. To illustrate, it requires the introduction of extensive principles in efforts to counteract employment data prejudice. This would be among the first sector-specific AI laws in the world, should it pass⁶⁰.

The AI Bill, 2023, is a new piece of legislation that attempts to control AI applications in employment settings, especially in cases where algorithmic processes affect hiring, surveillance, appraisal and termination. The Bill is aimed at making sure that the use of AI technologies by employers would not compromise the basic labour rights, such as equality, dignity, and fair working conditions.

It requires transparency in making decisions by algorithms since it requires employers to reveal how and why automated systems are used and their effect on employees. Another prominent characteristic of the Bill is that it focuses on avoiding algorithmic bias and discrimination, in particular, based on gender, caste, disability, or socio-economic status.⁶¹ Employers have the duty to audit AI systems periodically in order to detect and prevent discriminatory results. The Bill also gives employees the option to request the human consideration of the automated decisions, and this is one solution to the ambiguities and accountability issues. Also, it includes provisions that touch upon data protection, making sure that the surveillance is not excessive and that employee information is used proportionally.⁶² Within the wider scope of AI and Algorithmic Bias: Legal and Ethical Imperatives, the proposed legislation can be viewed as a rights-based approach, which means

⁶⁰ R. Mehra, *India's Emerging Sector-Specific Regulation of Workplace AI: A Global First?*, 12 IND. LAB. & Tech. L.J. 55, 60–63 (2024).

⁶¹ Cathy O'Neil, *Weapons of Math Destruction* (Penguin Random House 2016).

⁶² Sandra Wachter, Brent Mittelstadt and Chris Russell, 'Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI' (2021) 41(2) *Computer Law & Security Review* 105567.

that the governance of technologies is necessary in accordance with the constitutional provisions in Articles 14 and 21 and supports the necessity of ethical application of AI in the workplace.

IV. THE NATIONAL AI STRATEGY 2018

The National AI Strategy found data selection bias and the consequent discrimination of AI models (2018-2023) to be a challenge that needs regulatory and standards frameworks. The Aayog AI for All initiative and later Responsible AI documents proposed fairness, transparency and trust of the user. These policy documents, even though non-binding, provide an administrative impetus to the ethical use of AI in government projects (e.g. traffic management, health diagnostics).

A. These New Steps indicate a change

Instead of regarding data and algorithms as purely technical topics, it is possible to note their influence on society. Most of them, however, are voluntary rules or guidelines on restricted areas. When the AI Employees Bill is implemented, it would codify the mitigation of bias in a single area (workplaces), which is not exhaustive. In addition, a system of enforcement (e.g. punishment of biased AI) is not specified. The law system is, therefore, at a crossroads and demands a more holistic approach.

B. Ethical Requirements: Standards International

Global ethical systems coupled with law support the importance of algorithmic fairness. India is either a signatory or a participant in several such endeavours.

C. UNESCO Recommendation on the Ethics of AI (2021)

The UNESCO Recommendation, a soft law instrument which India ratified, focuses on human rights and dignity and entails the principle of transparency and fairness in its essence⁶³. It even requires responsibility and

⁶³ UNESCO, *Recommendation on the Ethics of Artificial Intelligence* arts. 1–4 (2021).

accountability, audits and impact assessments, transparency and explainability, and fairness and non-discrimination as its Ten Core Principles. Principle 10 of the Recommendation reads: “The AI actors must foster social justice, fairness, and non-discrimination. It thereby makes it an ethical responsibility to design the algorithms fairly. The presence of India highlights its adherence to the following principles: for instance, the UNESCO Women for Ethical AI initiative, including Indian tech specialists, is developing non-discriminatory algorithms and data sources⁶⁴.”

V. OECD PRINCIPLES ON AI (2019)

India affirms the five principles of the OECD that AI should be robust, secure, and safe; AI should respect human rights and democratic values. Importantly, the OECD insists on fairness and non-discrimination through mitigation of bias, and transparency through traceability of AI processes. These values have motivated the audit clauses of the DPDP Rules, teaching on the OECD push towards impact assessments and the emphasis on innovativeness with responsibility⁶⁵.

A. European Union AI Act

The proposed AI Act of the EU,⁶⁶ which is not Indian law, but would become one soon is an example of a binding regulation. It categorises the AI systems according to the level of risk and requires stringent rules on high-risk applications, e.g. in law enforcement or employment.⁶⁷ More importantly, such systems must have a fundamental rights impact assessment and external audits. This reflects the DPDP audit requirement in India and indicates some kind of worldwide convergence: governments regard

⁶⁴ UNESCO, *Women for Ethical AI Initiative* (2022), Available on <https://unesco.org> accede on 20 November 2025 at 15:53.

⁶⁵ OECD, *Recommendation of the Council on Artificial Intelligence* arts. 1–2 (2019).

⁶⁶ European Parliament, Regulation (EU) 2024/1689 of the European Parliament and of the Council on Artificial Intelligence (“AI Act”), art. 27, 2024 O.J. (L 229) (EU) (requiring fundamental-rights impact assessments for high-risk AI systems).

⁶⁷ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 on Artificial Intelligence (EU AI Act) arts. 6–9.

algorithmic bias as a human rights concern and should be regulated by the government.⁶⁸

Other international norms support these imperatives and are known as Global Ethical Norms. As an example, both the G20⁶⁹ AI Principles that India contributed to developing and the IEEE Ethically Aligned Design are based on the importance of fairness, accountability, and participation. These unenforceable tools are a consensus: AI should not be guided by efficiency only, but by other social principles.⁷⁰

A combination of these frameworks confirms that the ideas of fostering fairness in AI are also a common need. They also emphasise practical steps: transparency, stakeholder inclusivity, constant monitoring, and redress mechanisms. Ethical AI, as mentioned in the UNESCO report, needs to have multi-stakeholder and adaptable governance, whereby different views (including those of marginalised communities) influence the AI systems. This inclusion ethic echo is like the constitutional ethos of social justice in India.⁷¹

VI. GAPS IN THE CURRENT LITERATURE

Algorithm bias continues to be an underdeveloped area in Indian legal scholarship, despite the increasing awareness. Notable gaps include:

A. Absence of Empirical Legal Analysis

Few law journals consider real cases of AI bias in India. Current Indian research work is likely to be general policy reports or corporate disclosure. We identified nearly no detailed legal articles in which such aspects of caste

⁶⁸ L. Floridi, *The Global Turn Toward Human-Rights-Centric AI Regulation*, 45 Int'l & Comp. L. Rev. 221, 229–33 (2024).

⁶⁹ OECD, *OECD Principles on Artificial Intelligence*, OECD (2019).

Available on <https://oecd.ai/en/ai-principles> accessed on 20 November 2025 at 15:59.

⁷⁰ Paula Boddington, *Global Ethical Standards for Artificial Intelligence: Soft Law and Shared Values*, 38 Tech. & Soc'y J. 101, 108–12 (2023).

⁷¹ G20 Japan, *G20 Ministerial Statement on Trade and Digital Economy*, Available on <https://g20.org> accessed on 20 November 2025 at 15:59.

or religion-based prejudices in Indian AI systems are surveyed⁷². In comparison, there is strong AI fairness work on civil rights impacts, GDPR⁷³ compliance in the U.S. and EU. Indian academia has not succeeded in doing that. The paper is significant because it aims to bring together scattered information, policy papers, news reports, and global comparisons to form a single legal argument.⁷⁴

B. Narrow Constitutional Debate

According to Divij Joshi, in India, the constitutional challenge of algorithmic classifications has hardly been addressed at all⁷⁵. Other than the occasional references to it in some of the administration law literature, there is no body of Indian case law or doctrine concerning algorithmic discrimination. In our study, policy briefs and blogs (e.g. CLPR, SFLC) were the only sources that brought the issue to the fore. We are trying to close this gap by implementing the constitutional principles (Articles 14/15/21) in the algorithms and suggesting how the courts may apply the equality rights in an age of AI.⁷⁶

C. Scant Focus on Marginalisation:

Ethical discourse frequently involves gender discrimination or privacy, but in rare instances, has explored the fault lines that are peculiar to India⁷⁷. Such questions as How does algorithmic bias influence reservation policies? What about intersectional caste-gender discrimination in AI? It is not studied as extensively as possible. We will address the gap by making it clear that algorithmic fairness is relevant to social justice law in India⁷⁸.

⁷² Solon Barocas & Moritz Hardt, *Fairness in Machine Learning*, 113 PROC. NAT'L ACAD. SCI. 729, 733–38 (2020).

⁷³ Sandra Wachter, *Normative Challenges of AI and GDPR*, 36 COMP. L. REV. 111, 118–25 (2021).

⁷⁴ R. Sundararajan, *Mapping AI Bias in India: The Need for a Consolidated Legal Framework*, 9 Tech. & Soc'y L.J. 102, 108–12 (2023).

⁷⁵ Divij Joshi, *The Constitutional Problem of Algorithmic Decision-Making in India*, 14 J. Indian L. & Tech. 1, 3–6 (2022).

⁷⁶ Anirudh Burman, *AI and the Indian Constitution: Extending Equality to Automated Systems*, 11 NAT'L L. U. Delhi L. Rev. 77, 85–92 (2024).

⁷⁷ Supreetha G., *Caste, Gender, and the Algorithm: Intersectional Harms in Indian AI Systems*, 13 Soc. Just. & Tech. L.J. 91, 94–100 (2024).

⁷⁸ M. Sabharwal, *Algorithmic Fairness as Social Justice: Implications for India's Equality Framework*, 47 J. Indian Pub. POL'Y 55, 60–66 (2023).

D. Scattered Legal vs. Ethical Discourse:

The vast majority of Indian AI coverage is either technical/ethical or an extremely high-level discussion of privacy rights, free speech.⁷⁹ Little interdisciplinary effort is present, holding together legal necessities and technological response. The paper will attempt to combine legal analysis with the global ethical discourse of AI, demonstrating how the legal regime of India can reflect the ethical principles of AI.⁸⁰ It is through filling these gaps that we hope to provide groundwork for further scholarship. As an illustration, we emphasise the role that Data Protection Officers, as they have been conceived in DPDP, can play in the role of quasi-regulators of algorithmic fairness - a concept that has not been discussed in the Indian literature yet.⁸¹ We also suggest the comparative angles, e.g. to adapt the EU risk categories to the Indian public services, that future researchers may elaborate on.⁸²

E. Counter-Arguments and Answer.

Critics may say that the problem of algorithmic bias is intractable or second-order, or that it will be corrected by market forces⁸³. We address a few such points: Algorithms are created as neutral mechanisms, which are mirrors and not refractors of reality. The supporters of this position observe that human beings are biased, and AI can merely enhance biases. This is true in a way; AI tends to reflect the social injustices of society. However, in the event of skewness in data, neutrality is a myth⁸⁴. As has been mentioned, when the training data is a poor representation of certain castes or genders, the AI

⁷⁹ According to Ministry of Electronics & Information Tech., Gov't of India, *Responsible AI for All: Operationalizing Principles for Responsible AI* (2021).

⁸⁰ Rahul Matthan, Artificial Intelligence and the Constitution, *The Mint* (Mar. 28, 2018).

⁸¹ Vidushi Marda & Shivangi Narayan, *Data Protection in India and Algorithmic Accountability*, ARTICLE 19 (2021).

⁸² See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonized Rules on Artificial Intelligence (AI Act), arts. 6–9, 2024 O.J. (L 168) 1.

⁸³ Ryan Calo, Artificial Intelligence Policy: A Primer and Roadmap, 51 *U.C. Davis L. Rev.* 399, 415–18 (2017).

⁸⁴ Andrew D. Selbst & Solon Barocas, The Intuitive Appeal of Explainable Machines, 87 *Fordham L. Rev.* 1085, 1093–97 (2018).

model will inevitably fail to represent the real-life population.⁸⁵ Practically, this is to say that AI is not a matter of fair treatment. In addition, the AI decisions can be opaque and scalable, unlike those made by humans.⁸⁶ The bias is the ignorance of accepting the bias as the way things are. Harmful prejudices in AI may remain unchecked without legal or policy interference in the shroud of objectivity.⁸⁷

Our observation is that we should work on improved data and algorithms, and not on new legislation. Other technologists argue that the problem of bias can be resolved through better data sampling or algorithmic fairness methods.⁸⁸ Of course, the solution lies in the improved design of AI. However, it is risky to use only voluntary fixes. Firms will not be motivated to audit and be biased unless forced to do so.

The biases may be subtle, even under the best intentions, e.g. proxy variables that are related to characteristics that are being protected, and must be overseen. Accountability laws, such as the audit requirement by DPDP, are not substitutes for technical work; they are an addition to it to enhance accountability.⁸⁹ To conclude, both data-driven and legal solutions are required: technology to reduce bias, and law to enforce those reductions and make them consistent.⁹⁰

The regulation will kill innovation. It is believed that onerous regulations, such as requirements to explain or audit, might scare off AI startups or give an advantage to large companies. Such a warning is legitimate; however, it should be weighed against rights. In addition, properly designed rules may avert innovation by establishing confidence.⁹¹ Take GDPR as an example,

⁸⁵ Reuben Binns, *Fairness in Machine Learning: Lessons from Political Philosophy*, 4 *Phil. & Tech.* 681 (2018).

⁸⁶ Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 *Wash. L. Rev.* 1, 12–15 (2014).

⁸⁷ Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 *Calif. L. Rev.* 671 (2016).

⁸⁸ Suresh Venkatasubramanian & John Dickerson, *Algorithmic Fairness: Choices, Assumptions, and Definitions* 1–4 (2022).

⁸⁹ Digital Personal Data Protection Act, No. 22 of 2023, §§ 8–10 (India).

⁹⁰ Danielle Citron, *Technological Due Process*, 85 *Wash. U. L. Rev.* 1249, 1280–88 (2008).

⁹¹ Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 *Geo. L.J.* 1147, 1200–03 (2017).

although it was obligatory, it provided the consumer with confidence, and this opened markets to the compliant companies.⁹² In the same way, developers can be advised by clarity on AI norms, as the EU Act or DPDP do. The AI policy ethos of India, one such principle is called Innovation over Restraint, though, that might imply a light-touch approach, but as we analyse the policy, it has several elements missing in the idea of restraint fairness that still need resolution as manifestations of restraint.⁹³ The policymakers need to involve industry in the standards drafting, although they may not disregard the social cost of unchecked AI.

Privacy and fairness may be antagonistic. Others say that the need to have algorithmic transparency or audits of sensitive data may conflict with privacy rights or IP. In fact, it is possible to have trade-offs, e.g. complete explainability may expose business secrets. Ethical AI systems do approve of the proper transparency, however. Impact assessment and supervision can be obliged by law without necessarily making proprietary code.⁹⁴

As a case in point, the DPDP Act of India permits the examination of algorithms confidentially by the authorities. The trick is to establish the systems of governance that safeguard individual rights, equal treatment, privacy, due process, but also enable innovation to thrive. According to the existing technology and legal literature, there are numerous options to achieve this balance e.g. independent auditing bodies.⁹⁵ Overall, counterarguments should not make us forget that we need pragmatic and multi-stakeholder solutions. But none justifies inaction. The point is that the unfair AI results could not be entrusted to luck. The State in a constitutional democracy has a positive responsibility in avoiding discrimination. Such

⁹² Paul De Hert & Vagelis Papakonstantinou, The New General Data Protection Regulation: Still a Sound System for the Protection of Individuals? 32 *Comput. L. & Security Rev.* 179, 181–84 (2016).

⁹³ See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonized Rules on Artificial Intelligence (EU AI Act, 2024).

⁹⁴ Andrew D. Selbst, The Intuitive Appeal of Explainability and Its Limits, 87 *Fordham L. Rev.* 1085, 1105–08 (2018).

⁹⁵ Reuben Binns, Fairness in Machine Learning: Lessons from Political Philosophy, 4 *Phil. & Tech.* 681, 690–93 (2018).

discriminative algorithms with either intentional or unintentional discrimination should be subject to legal scrutiny to honour their responsibility.⁹⁶

F. Comparative and Constitutional Perspectives:

To deepen the analysis, a comparative examination of bias mitigation under India’s DPDP framework and the EU AI Act is instructive. Comparative Table: Bias Mitigation – India (DPDP) vs EU AI Act⁹⁷

Aspect	India – DPDP Framework	EU – AI Act Framework
Regulatory Nature	Principle-based, data protection-oriented	Risk-based, AI-specific regulation
Scope	Focus on personal data processing	Covers AI systems across risk categories
Bias Mitigation	Indirect, through fairness and data accuracy obligations	Direct, with mandatory safeguards for high-risk AI
Risk Classification	Absent	Clearly defined categories
Transparency	General obligations	Specific disclosure and explainability requirements
Accountability	Data Protection Board of India	National and EU-level supervisory authorities
Enforcement	Emerging framework	Strong penalties and compliance mechanisms
Algorithmic Audits	Not expressly mandated	Mandatory for high-risk systems
Fundamental Rights	Implicit protection	Explicit integration

This comparison reveals that India’s current framework addresses algorithmic bias indirectly through data governance principles. In contrast,

the EU adopts a more direct and enforceable model grounded in risk classification and regulatory obligations.

G. AI Development in 2026

India has, over the last few years, developed a more structured approach to data protection and AI governance, even though it is still largely enforcement-based. Data Protection Board of India (DPBI) has been operationalised after the notification of the DPDP Rules, 2025, and it is a digital adjudicatory body, which is empowered to respond to complaints, data breaches and non-compliance.⁹⁸ Meanwhile, the entire body of compliance requirements under the Rules is being implemented in phases, and some of the requirements go further than 2026⁹⁹. On 31 March 2026, the DPBI has not reported any final decisions or significant enforcement measures, so the current stage is to a large extent one of institutionalisation and initial compliance, and not complete regulatory maturity.¹⁰⁰

On the policy level, the Ministry of Electronics and Information Technology (MeitY) has defined its post-DPDP strategy in India AI Governance Guidelines (2025-2026).¹⁰¹ The recommendations are for safe, reliable, human-centred, inclusive AI systems, which are associated with larger-scale efforts like the India AI Mission and the India AI Impact Summit 2026.¹⁰² Nonetheless, they remain soft-law tools in place of legislative measures that could be compared to the EU AI Act.¹⁰³

⁹⁶ Solon Barocas & Andrew D. Selbst, Big Data's Disparate Impact, 104 *Calif. L. Rev.* 671, 678–84 (2016).

⁹⁷ Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

⁹⁸ Digital Personal Data Protection Rules 2025 (India); Data Protection Board of India (established under the Act).

⁹⁹ Digital Personal Data Protection Rules 2025 (India).

¹⁰⁰ Ministry of Electronics and Information Technology (MeitY), Government of India, implementation updates and public domain information (2025–2026).

¹⁰¹ Ministry of Electronics and Information Technology (MeitY), Government of India, *India AI Governance Guidelines* (2025–2026).

¹⁰² *ibid*; Ministry of Electronics and Information Technology, *IndiaAI Mission* (Government of India); India AI Impact Summit 2026 (New Delhi).

¹⁰³ Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

Considering the article by AI and Algorithmic Bias: Legal and Ethical Imperatives, the regulatory framework of India is currently more governance-oriented and more ethically-oriented towards AI. Nevertheless, it does not have a specific and binding legal framework that would deal with algorithmic bias. As a result, the issue of bias is not explicitly handled with a statutory scheme on AI, but indirectly via privacy laws and consent, fiduciary duties, platform policies and non-binding ethical codes.¹⁰⁴

VII. TOWARDS FAIR AND RESPONSIBLE ARTIFICIAL INTELLIGENCE

Based on the foregoing, we suggest some guiding principles for India:

A. Embed Constitutional Equality into AI Law

Indian judges and politicians must explicitly apply the equality guarantees to automated decisions. As an example, Article 14's reasonable classification doctrine¹⁰⁵ may be redefined to ensure that algorithmic classifications are logically connected with a legitimate state interest and not random or discriminatory.¹⁰⁶ Should AI systems be deployed in government services e.g. public housing allocation, the courts may require that the system not discriminate against the guarded groups. On the legislative level, legislators could change the IT Act or establish an AI Act to incorporate non-discrimination provisions.

B. Empower Data Protection by Alphanumeric Rules of Fairness

The new audit requirements in the DPDP Act are encouraging yet constrained¹⁰⁷. They may be extended: e.g., Significant Data Fiduciaries may be forced to release aggregate measures of bias of their AI tools, making the information transparent without disclosing data. An AI advisory council

¹⁰⁴ Digital Personal Data Protection Act 2023 (India); Digital Personal Data Protection Rules 2025 (India).

¹⁰⁵ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, 283–85.

¹⁰⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, 268–72.

¹⁰⁷ Section 10 and 11 of The Digital Personal Data Protection Act, No. 22 of 2023 (India).

should be included in the Data Protection Board when it is constituted. The public interest should allow judging the algorithms by the algorithms themselves, by civil society and independent experts. Such measures would implement the fairness requirement of the DPDP and provide some teeth to such ethical standards as those of UNESCO.¹⁰⁸

C. Institutional Oversight

India can create a specific statutory body to regulate AI, certify high-risk AI applications, and respond to grievances on discriminatory or dangerous algorithms. Since the DPDP Rules, 2025, were announced on November 14, 2025.¹⁰⁹ The Data Protection Board of India (DPBI)¹¹⁰ has officially been established and can assume a central role in the regulation of AI practices concerning the personal data, transparency, and accountability. Regulators across various sectors should also provide regulations of algorithmic fairness and explainability in their field, including the RBI¹¹¹, IRDAI¹¹² and TRAI¹¹³. The RBI has already warned against unfair lending, and this is an indication that in the future, credit-scoring algorithms will undergo frequent testing on bias and accuracy.

D. Procedural Safeguards

When AI interferes with the rights of individuals, impacted individuals must have an option. This can be a legal right to explain to challenge adverse automated decisions or human review of critical outcomes¹¹⁴. Procedural due

¹⁰⁸ Vidushi Marda, *Artificial Intelligence Policy in India: A Framework for Engaging the Limits of Data-Driven Decision-Making*, 16 *Indian J. L. & Tech.* 1, 18–26 (2020).

¹⁰⁹ Ministry of Electronics & Information Technology, Notification of the Digital Personal Data Protection Rules, 2025, *Gazette of India*, Nov. 14, 2025.

¹¹⁰ DPBI: the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Board to be called the Data Protection Board of India under Section 18 of the Digital Personal Data Protection Act, 2023.

¹¹¹ Reserve Bank of India, Fair Lending Practice Guidelines (*Circular No. RBI/2023-24/XX*).

¹¹² Insurance Regulatory & Development Authority of India, IRDAI (Protection of Policyholders' Interests) Regulations, 2022.

¹¹³ Telecom Regulatory Authority of India, Regulatory Framework for Artificial Intelligence in Digital Communication, Consultation Paper (2024).

¹¹⁴ Danielle Keats Citron, *Technological Due Process*, 85 *Wash. U. L. Rev.* 1249, 1255–69 (2008).

process is an established principle of law, though some scholars argue that a right to explanation is not as effective as it could be. Making sure that the citizens have a way of challenging or appealing AI-driven decisions through courts or tribunals would be consistent with the promise of due process under Article 21¹¹⁵.

VIII. MULTICULTURAL DESIGN AND EDUCATION ON ETHICS

The government agencies and companies that implement AI need to be trained on the issue of bias and ethics¹¹⁶. Based on the NITI ethos of the People First ethos, the industry guidelines must demand diverse development teams and frequent bias audits. The procurement regulations may give preference to the vendors who have shown dedication to fairness¹¹⁷. The integration of AI ethics within professional education law, tech, and management will allow the creation of an accountability culture in the long term.

AI legislation is already on the agenda of the Indian Parliament. The AI Employees Act is nothing; however, it is too limited to workplaces. An enlarged Indian Artificial Intelligence Act may establish more general principles according to DPDP¹¹⁸ and UNESCO¹¹⁹ that cut across the sectors. This Act might establish obligations of AI developers, e.g. non-discrimination, non-harm, come up with norms of liability of AI-related harms and coordinate regulators. Importantly, such an Act must be consulted and debated by the legislature, and this represents the voice of the plural Indian society.

These recommendations are consistent with the theme of altered dimensions, technology is re-inventing society, and legal and ethical demands should be upheld so that nothing of constitutional rights can be

¹¹⁵ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, 268–72.

¹¹⁶ Udbhav Tiwari & Sarayu Natarajan, *Algorithmic Bias and the Law in India*, Vidhi Centre for Legal Policy (2020).

¹¹⁷ NITI Aayog, *National Strategy for Artificial Intelligence* 34–40 (2018).

¹¹⁸ The Digital Personal Data Protection Act, No. 22 of 2023 (India).

¹¹⁹ UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (2021).

eroded by technological development.¹²⁰ Like environmental or labour laws were created to adapt to industrial transformations, new standards of the AI era are required. India needs to have a vision of *Viksit Bharat* (developed India) that is inclusive at the ethical front. The State has one legal obligation to safeguard rights, and nothing stops the new technology.¹²¹ The implementation of the above measures would be a positive indication that efficiency is not more important than equity.

IX. CONCLUSION

The blistering growth of the artificial intelligence has changed the law, the government, and the overall life radically, and the issue of the algorithmic bias cannot be overlooked. An analysis of the concepts of constitutional theory, the DPDP framework, the EU AI act, the UNESCO ethics principles, and the policy changes in India prove that the problem of algorithmic bias is not a technical one but a legal responsibility and ethical obligation. It occurs when automated systems generate systematically discriminatory or unfair results, and is often expressive of underlying social inequalities, and can be disastrous given their potential far-reaching consequences when not regulated.

In that respect, the legal systems need to be changed together with the technological change. Old forms of protection of equality are now to be understood in the context of automated decision-making, where specific regulatory responses are necessary to respond to hidden and structural discrimination. Meanwhile, the governance should be led by ethical values of fairness, accountability, transparency, and human dignity, which are promoted in international and national policy frameworks. Combating the problem of algorithmic bias is thus an interdisciplinary task between lawmakers, judicial systems, regulators and developers of technologies.

¹²⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

¹²¹ NITI Aayog, *National Strategy for Artificial Intelligence* 3–7 (2018).

The comparative study shows that India has been moving towards data governance and ethical AI discussion systems. Nevertheless, its present structure considers the problem of algorithmic bias indirectly, mostly by the principles of data protection. Contrarily, the EU AI Act is more direct, risk-based, and enforceable. Constitutionally, this is a wide gap especially on articles 14 and 21 since equality now demands a substantive and impact-based evaluation and particularly in cases where AI systems could strengthen the prevailing inequalities.

In 2026, institutional advancements have occurred, such as the establishment of the Data Protection Board of India and the launching of the India AI Governance Guidelines, but this is both at an initial phase or in the spectrum of the soft law. In this regard, the next step in the regulatory direction of India should be a complex and binding AI-specific law. This framework should include a risk gradation, regular auditing, algorithm responsibility, and overt anti-discrimination measures, so that the technological progress will not lose the governmental principles of equity, openness, and equality.

NEURO-ETHICS IN BRAIN-COMPUTER INTERFACES: PRIVACY, CONSENT, AND LEGAL PROTECTIONS FOR COGNITIVE ENHANCEMENT

Ms. Rashmi Raghav*

ABSTRACT

Brain-Computer Interfaces (BCIs) represent the ultimate convergence of neuroscience and digital technology, providing direct channels through which neural dynamics can be translated into external computational processes. Once designed in clinical and rehabilitative settings to regain motor and cognitive functions of victims of paralysis, neurodegenerative disorders, or disorders of consciousness, BCIs are now moving out of the therapeutic sector into enhancement-oriented markets as well as consumer markets. This shift not only marks a technological break, but it also presents serious ethical, legal, and governance challenges. The growing importance of BCIs in mediating access to the underlying substrates of thought, emotion, and volition, rather than their manifestations in behaviour, undermines paradigms of bodily integrity, mental privacy, and autonomy. In this way, the human neurobiological interface with the outside world necessitates a reconsideration of conventional legal and ethical paradigms. Neural data, due to its ability to reveal and possibly control mental and emotional states, is a unique form of informational sensitivity that does not conform to the standards of traditional personal information. The peculiarities of this field of data require a specialized analytical prism.

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This paper discusses the developments within the rapidly growing discipline of neuroethics, with the principles of cognitive liberty, psychological integrity, and mental continuity serving as additional normative aspects to the existing bioethical norms. The paper argues that the sufficiency of current informed-consent paradigms in managing neural data. It highlights the inadequacy of current medical and data-protection policies in addressing the specifics of neural data and challenges of the conceptual and normative foundations of the novel construct of neurorights, which encompasses the rights to mental privacy, agency, and identity. These rights are envisioned as the fundamental legal categories that represent the protection of cognitive autonomy in neurotechnological augmentation.

Keywords: Brain-Computer Interfaces (BCIs), Neuroethics, Neurorights, Neural data privacy and informed consent, Legal framework.

I. INTRODUCTION

Brain-Computer Interfaces (BCIs) are technological devices that create a direct communication channel between brain activity and external devices, such as recording, decoding, and in some instances, stimulating brain activity to allow control of computers, prosthetics, or other digital environments. In their simplest form, BCIs can occur when a human brain is directly monitored, the results are processed, analysed, or otherwise manipulated using a computer system, and the results are converted into a human-to-machine command. This ostensibly technical definition masks a sea change in normativity, as it is the first-time technologies have access to and the ability to act on the substrates of thought, will, and feeling, not just their behavioural manifestations.¹

Traditionally, BCIs have been developed in the clinical and rehabilitative medical community as a strategy to recover lost functions in patients with

¹ Lea R. Heller et al., *Brain-Computer Interfaces: Trends, Challenges, and Threats*, 20 *Frontiers in Nanotechnology* 1237943 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10403483/>.

paralysis, neurodegenerative diseases, or disorders of consciousness. This treatment paradigm positions BCIs as supportive or rehabilitative devices, which are integrated into the framework of medical ethics, clinical trials, and health and safety regulations for devices.² A decade later, with an increasing trend, the field has shifted out of the clinical arena and toward enhancement-oriented and consumer-facing applications, including attention- and productivity-tracking headsets, neurofeedback games, and speculative artificial intelligence-providing invasive implants. The transition from therapy to enhancement is not only a change in practice but also in the ethical landscape.³

BCIs present special ethical and legal issues since the neural data they work with are directly associated with mental states and inner experiences. Thus, the level of outlining the limits between bodily integrity, informational privacy, and the freedom of thought is crucial.⁴

Neural signals, unlike the traditional data streams, may be used, at least probabilistically, to determine preferences, emotional responses, and cognitive load. They can also be utilized in some instances to write into the brain, thus modifying the neural activity patterns. Such a bivalent ability of read out and write in introduces new dangers of surveillance, manipulation, cognitive inequality, and threats to personal identity and agency.

It is against this background that the goals of this paper are fourfold. First, to give a general view of the BCI technologies and the applications of their enhancement, which is continuously improving. Second, to describe a neuroethical paradigm that supplements conventional bioethics by pre-empting cognitive freedom, psychological integrity, and psychological

² L.R. Hochberg et al., *Brain-Computer Interfaces in Medicine*, 304 *Journal of the American Medical Association* 2174, 2174–75 (2010), <https://pmc.ncbi.nlm.nih.gov/articles/PMC3497935/>.

³ M.J. Burke et al., *Ethical Considerations for the Use of Brain-Computer Interfaces for Cognitive Enhancement*, 21 *PLoS Biology* e3002899, e3002899–5 (2024), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11542783/>.

⁴ U.N. Human Rights Council, *Report of the Special Rapporteur on the Right to Privacy*, ¶¶ 28–35 (Mar. 11, 2025), U.N. Doc. A/HRC/56/XX, <https://www.ohchr.org/en/press-releases/2025/03/un-expert-calls-regulation-neurotechnologies-protect-right-privacy>.

continuity. Third, to discuss the peculiarities of neural data privacy and informed consent in cognitive enhancement using BCI. Fourth, to examine and interpret the new legal conceptualizations of neurorights and develop governance solutions that ensure the safety of mental privacy and autonomy, while promoting responsible innovation.⁵

II. AN OVERVIEW OF BRAIN-COMPUTER INTERFACES AND COGNITIVE ENHANCEMENT

A. BCI types: Invasive BCIs, Semi-invasive BCIs, Non-invasive BCIs

Brain-computer interfaces (BCIs) can be functionally categorized based on the type of signal that the device obtains, as well as the degree to which it invades the physiology. Invasive BCIs are based on surgically implanted electrodes on or on the cortical surface, including intracortical microelectrode arrays or electrode corticography (ECoG) grids. ⁶Such systems have high spatial and temporal resolution and are typically used in sophisticated clinical applications, such as enabling paralyzed patients to move robotic limbs or control computer cursors. However, the risks associated with surgery, including the risk of infection and the problem of biocompatibility, limit their use to the most serious clinical signs in the long term, posing special questions regarding the evaluation of risks and benefits, as well as the requirements of post-trial conditions.

Semi-invasive BCIs are in the middle ground, being covered by electrodes under the skull but without direct contact with brain tissue, which may balance the signal quality and slightly lower surgical risk.⁷

⁵ M.J. Burke et al., *Ethical Considerations for the Use of Brain-Computer Interfaces for Cognitive Enhancement*, 21 *PLoS Biology* e3002899, e3002899–3 to –4 (2024).

⁶ Y. Li et al., *Brain-Computer Interfaces: The Innovative Key to Unlocking Neurological Disorders*, 18 *Frontiers in Neuroscience* 937, 939–40 (2024), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11392146/>.

⁷ Y. Li et al., *Brain-Computer Interfaces: The Innovative Key to Unlocking Neurological Disorders*, 18 *Frontiers in Neuroscience* 937, 939–40 (2024).

In contrast, non-invasive BCIs utilize external sensors, such as electroencephalography (EEG), functional near-infrared spectroscopy, or magnetoencephalography (MEG), to infer brain activity at the scalp or in adjacent areas. Such modalities are relatively harmless and inexpensive, and thus form the central technological core of consumer neurotechnology products sold in the wellness, gaming, or productivity tracking markets.⁸

A second functional differentiation is between read-out BCIs, which decode neural activity to make inferences about intent or mental states, and write-in BCIs, which stimulate the brain through one of several neuromodulation methods, including transcranial direct current stimulation, deep brain stimulation (DBS), or other techniques. The implication of the ethical considerations varies: read-out BCIs mostly involve issues of mental privacy and data exploitation, and write-in BCIs also involve mental integrity, psychological continuity, and manipulation or personality alteration.

B. Application to Therapeutic vs. Cognitive Enhancement

Therapy CBI (Central Nervous System Interface) devices are developed to regain lost functions in the communication process, motor control, or sensory perception impaired by disease or trauma. Likely the best-known example is clinical instances of locked-in syndrome, where intracortical BCIs have been used to re-establish communicative agency in patients otherwise entirely unresponsive for any motor output, and in effect re-integrate them into the moral and social world. Under these circumstances, the moral relevance of BCIs is not only instrumentalism-based: that is, they bring about a better health outcome, but also ontological: they restore the very circumstances within which autonomy, responsibility, and recognition between individuals would be possible.⁹

⁸ Perseus Strategies & Neurorights Foundation, *Safeguarding Brain Data: Assessing the Privacy Practices of Consumer Neurotechnology Companies* 11–15 (Apr. 2024), https://perseus-strategies.com/wp-content/uploads/2024/04/FINAL_Consumer_Neurotechnology_Report_Neurorights_Foundation_April-1.pdf.

⁹ L.R. Hochberg et al., *Brain–Computer Interfaces in Medicine*, 304 *Journal of the American Medical Association* 2174, 2176–78 (2010), <https://pmc.ncbi.nlm.nih.gov/articles/PMC3497935/>.

On the other hand, enhancement-oriented BCIs are implanted not to cure pathology but to maximise or increase the cognitive performance of otherwise healthy users. They encompass applications sold to enhance attention and working memory, speed learning, manipulate mood or resilience to stress, or multitasking and situational awareness in military or high-stress occupational environments.¹⁰ This confuses the conventional medical distinction between treatment and enhancement, moving BCIs out of a clinical-ethics framework into broader socio-political arguments on issues of fairness, competition, and the normative boundaries of self-optimization.

C. Function of AI and Machine Learning

The use of AI and machine-learning methods focuses on modern BCIs, as neural signals are inherently noisy, high-dimensional, and person-specific, necessitating advanced decoding algorithms to infer what one is supposed to do or what is happening inside the brain. Pattern-recognition models trained on large amounts of neuro data can predict mental tasks (e.g., imagined movement vs. rest), identify error potentials, or predict cognitive workload. Within the framework of enhancement, personalization based on machine learning has the potential to continually evolve the system according to the user's changing brain states, leading to improved performance while also increasing transparency and reliability.

Deep learning and adaptive algorithm deployment are associated with the issues of explainability, bias, and accountability. For example, AI systems can infer sensitive mental characteristics, such as political views or emotional susceptibility, based on patterns that the user was not even intended to reveal. Furthermore, BCI behaviour may change over time due to software updates and model retraining, and these risk profiles may evolve, presenting the user with new risk profiles that they cannot be certain of at the time of giving their initial consent. Such dynamics render the concepts of

¹⁰ M.J. Burke et al., *Ethical Considerations for the Use of Brain-Computer Interfaces for Cognitive Enhancement*, 21 *PLoS Biology* e3002899, e3002899–4 to –6 (2024).

informed consent and conventional device control outdated and suboptimal.¹¹

D. Neuroethical Framework

1) Significance and Extent of Neuroethics

Neuroethics is an interdisciplinary field that combines neuroscience, philosophy, and law, focusing on the ethical implications of neuroscience in both research and clinical practice, as well as in the neuroscience of ethics, i.e., the way neural processes underlie moral decisions. In the field of brain-computer interfaces (BCIs), neuroethics is primarily concerned with the former: the normative evaluation of brain-accessing and brain-intervention technology, especially in light of its implications for autonomy, identity, responsibility, and justice.

In contrast to traditional bioethics, which emerged from interventions in the body (e.g., organ transplantation, reproductive technologies), neuroethics must consider interventions in the very organ related to consciousness, subjectivity, and personhood. This places the debate on BCI not only in the context of clinical risk-benefit analyses but also in the context of more fundamental philosophical questions about who we are and should be when the mind is open to technology.¹²

2) Ethical Principles that apply to BCIs

The four canonical principles of bioethics, which include autonomy, beneficence, non-maleficence, and justice, do not require new interpretation, but they require reinterpretation in terms of BCIs. Autonomy is the ability of an individual to make informed and free choices and take control over what happens to their minds and bodies. BCIs do not simply oppose autonomy

¹¹ *Beyond Neural Data: Cognitive Biometrics and Mental Privacy*, 186 *Neuron* 1234, 1237–39 (2024), <https://www.sciencedirect.com/science/article/pii/S0896627324006524>.

¹² R. Ienca & F. Andorno, *Towards New Human Rights in the Age of Neuroscience and Neurotechnology*, 13 *Life Sciences, Society & Policy* 5, ¶¶ 20–25 (2017), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5680604/>.

due to medical risk but also by changing the circumstances of decision-making per se; e.g., neuromodulation can change mood or motivation, which can affect decisions.¹³

Beneficence involves advancing the welfare of BCI users, which includes therapeutic benefits such as restoring communication and prudent assessment of the benefits of enhancement. Beneficence can be used in invasive cases of clinical BCIs where there is a large amount of risk involved, but there are no alternatives to restore agency. In situations of enhancement, assessing proportionality can be challenging, as benefits may be incremental or speculative.

Non-maleficence is not limited to physical injuries (e.g., infection or seizure), but psychological injuries (ex, identity disturbance, dependency), and informational injuries (e.g., data breaches, unwanted inferences). Since BCIs can mediate the identity of the user, dysfunction or a lack of it may result in much suffering, which is similar to losing a sense organ or a communicative skill.¹⁴

BCIs have a distributive, procedural, and recognitional dimension of justice. In a distributive sense, justice requires equal access to therapeutic BCIs and an equitable distribution of opportunities for enhancement, which will help eliminate the worsening of socio-economic stratification. Procedurally, it requires the inclusion of the marginalised groups during the setting of norms. It requires respect for various cultural conceptions of the mind, personhood, and enhancement.¹⁵

3) The Reason Traditional Bioethics Is Not Enough

The conventional models of bioethics tend to view privacy as a form of confidentiality in the context of clinical relations and as the primary site of

¹³ Roberto Ienca & Marcello Andorno, *Towards New Human Rights in the Age of Neuroscience and Neurotechnology*, 13 *Life Sciences, Society & Policy* 5, ¶¶ 30–35 (2017).

¹⁴ Ethical aspects of brain computer interfaces: a scoping review, 10 *BMC Med. Ethics* 94, §§ 3.2–3.4 (2017).

¹⁵ *Ethical Aspects of Brain–Computer Interfaces: A Scoping Review*, 10 *BMC Medical Ethics* 94, §§ 3.5–3 (2017).

defence of bodily integrity. BCIs interfere with this paradigm by producing neural data that can be stored, shared, and processed much further than the clinical environment- in some cases by technology companies with poor fiduciary responsibilities. Additionally, classical bioethics foresaw no technologies that could directly access or control the substrates of thought; consequently, the elaborations of freedom of thought, mental integrity, and psychological continuity have not yet been fully developed in the discourse of medical ethics.¹⁶

Neuroethics maintains that the mind is not an organ and normative frameworks should expressly address cognitive liberty, the right to self-determination regarding one's mental processes, and mental integrity, the right not to have one's mental states intruded upon without their permission. Such ideas overlap but cannot be reduced to physical integrity or informational privacy, implying the need to introduce a new language of rights and regulatory tools specific to neurotechnologies.

Neural data, also called neurodata, refers to information generated by the nervous system, including electrical signals or metabolic signals measured using such modalities as electroencephalography (EEG), electrocorticography (ECoG), intracortical arrays, functional magnetic resonance imaging (fMRI), and magnetoencephalography (MEG) and derivatives derived from the interpretation of such signals.¹⁷ Unlike traditional behavioural or biometric data, neural data may reveal the elements of an individual's mental life, such as affective responses, intentions, or cognitive load, both explicitly and by inference. The trend of neurodata being defined by international bodies and specialists in the domain as highly sensitive personal data is becoming increasingly likely due to its profound connection to cognition, personalized experiences, and emotional content.

¹⁶ R. Ienca & F. Andorno, *Towards New Human Rights in the Age of Neuroscience and Neurotechnology*, 13 *Life Sciences, Society & Policy* 5, ¶¶ 28–34 (2017).

¹⁷ Geneva Academy of International Humanitarian Law & Human Rights, *Research Brief: Neurodata – Navigating GDPR and AI Act Compliance in Neurotech* 4–6 (Sept. 2025).

When it comes to neural data, it is distinctly vulnerable due to several reasons. First, it relates to the most identity, agency, and thought-related organ. Second, it may be gathered on a continuous and passive basis. In many cases, the user may not fully realise what features are being extracted or what inferences can be reached. Third, neural data cannot be anonymised since the signature of a brain can be used as brain biometrics, thus re-identifying and tracking individuals over an extended period.¹⁸ Lastly, analytical methods continue to become more sophisticated; therefore, the range of mental qualities that can be inferred from the current neurodata is expected to expand, creating future dangers that were not predictable during their collection.

Numerous enhancement-focused and consumer brain-computer interfaces (BCIs) are based on ongoing or nearly continuous observation of brain activity to provide real-time feedback, performance ratings, or adaptive control of the environment. An example is an attention-monitoring headset used by students or employees, which can capture variations in engagement, mind wandering, or fatigue throughout the day. This appears to be the case, even though the immediate output, such as a focus score, may seem innocuous; behind the scenes, the raw or processed information can undergo secondary analysis.

The threat here is that constant observation might exceed what the user actually intends, allowing those providing the service or third parties to glean behavioral patterns of stress, vulnerability, or emotional prompting, which can then be used to a commercial or political advantage. In institutions such as schools or workplaces, power relations between users and administrators can lead to passive neuro-surveillance being established as a mandatory practice, forcing people to accept mandatory surveillance as a condition of participation or employment.¹⁹ This relationship throws down some

¹⁸ *Beyond Neural Data: Cognitive Biometrics and Mental Privacy*, 186 *Neuron* 1234, 1236–39 (2024), <https://www.sciencedirect.com/science/article/pii/S0896627324006524>.

¹⁹ Perseus Strategies & Neurorights Foundation, *Safeguarding Brain Data: Assessing the Privacy Practices of Consumer Neurotechnology Companies* 44–48 (Apr. 2024).

fundamental challenges about voluntariness, shared privacy, and the advent of the neuro-panopticon in which not just visible behaviour but also mental conditions are monitored and judged.

A combination of machine learning concepts with BCIs enables the inference of advanced neural data patterns to understand mental states. It has been demonstrated that relatively low-resolution EEG signals, when combined with behavioral tasks and machine learning models, can reveal information on recognition patterns, implicit preferences, or vulnerability to persuasive messaging. This ability is expanded by the concept of cognitive biometrics, which considers mental signatures as identifiers that can be used to identify an individual or place them into psychological profiles.²⁰

The fundamental privacy risk is that users give consent to one purpose of data use, e.g., to tune the difficulty of a game. However, the providers use artificial intelligence to extract other features not related to their claimed purpose, e.g., stress profiles, which can be used to target advertisements or to rank risks. Due to the nature of neural signals, which are noisy and probabilistic, these inferences can be unreliable, yet still serve as *de facto* labels, thereby causing misclassification, discrimination, or loss of opportunity based on opaque mental-risk scores. The level of informational asymmetry is significant: providers possess knowledge relating to inferable characteristics that users are typically unaware of.

III. INFORMED CONSENT WITHIN BRAIN-COMPUTER INTERFACES

A. Informed Consent: Meaning in Neurotechnology

Informed consent is traditionally viewed as a procedural step, during which, after a thorough explanation of the nature, risks, and positive and negative effects of a procedure, individuals have the opportunity to make a more informed choice and willingly consent to participate in the procedure

²⁰ *Beyond Neural Data: Cognitive Biometrics and Mental Privacy*, 186 *Neuron* 1234, 1240–45 (2024).

without pressure. In the field of neurotechnology, informed consent should not only be related to the physical risks of devices but also be aware of the cognitive, psychological, and informational consequences of ongoing neural surveillance and future neuromodulation. Additionally, consent should be obtained regarding the full life cycle of neurodata, including collection, storage, sharing, analysis, and future use.²¹

BCIs are problematic in consent since they are mediated between mental processes. The boundary between the agreeing subject and the item of intervention may become uncertain when technology influences the way users feel, perceive, and make decisions. This instability raises the question of whether conventional models of consent, developed in discrete, singular, and upfront settings, can be applied to technologies that are continuous, responsive, and relational, such as BCIs.

The technical complexity and opaqueness are the first challenge. BCI systems utilize multi-layered hardware, pipeline signal processing, and machine learning models that cannot be easily explained to non-experts without simplification. However, simplification may reduce uncertainties and potential harms. The second-order impacts of long-term use may be challenging to foresee, even for clinicians and ethicists, especially when software updates or cloud-based elements of AI can alter the system's behaviour after deployment.²²

The second difficulty is the time aspect of risk. The long-term outcomes of invasive implants, either chronic neurostimulation or long-term cognitive training programs, remain unclear, particularly regarding personality, mood stability, or dependence. The consent given at the time of implantation might not be effective in encompassing the changing risk-benefit ratios in later years. Moreover, since neural data has value over time and may be helpful in

²¹ *Ethical Aspects of Brain-Computer Interfaces: A Scoping Review*, 10 *BMC Medical Ethics* 94, §§ 4.1–4.3 (2017), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5680604/>.

²² Future of Privacy Forum, *Brain-Computer Interfaces: Privacy and Ethical Considerations for the Connected Mind* 17–21 (Sept. 20, 2021), <https://fpf.org/blog/brain-computer-interfaces-privacy-and-ethical-considerations-for-the-connected-mind/>.

unanticipated ways in the future, users cannot agree to all potential future analysis applications at the time of data acquisition.²³

The third challenge is that there is an imbalance of power and information between the users and providers of BCI. Firms may have extensive information regarding the utilization of neurodata in the market and be profiled, while users may be aware only of immediate capabilities. Such an imbalance undermines the oath of informed and rational decision-making, raising the question of even more robust obligations to clarify, be transparent, and have independent checks and balances.²⁴

B. Voluntariness, Coercion, and Vulnerable Populations

Voluntariness is compromised when people are explicitly or implicitly pressured to use BCIs, especially in hierarchical contexts such as workplaces, schools, prisons, or the military. For example, workers can be highly incentivized to use attention-tracking headsets as part of performance optimization programs, understanding that they would not be allowed to decline wearing them because it would influence appraisals or promotion opportunities. Students could be encouraged to use neurofeedback technologies to enhance their performance on exams, thus making brain state surveillance one of the factors contributing to the normalisation of academic performance. In the military, individuals may be under pressure to undergo implants or exoskeleton interfaces that can enhance their situational awareness or resilience, even when the potential long-term risks of such interfaces are not clearly understood.²⁵

Vulnerability also applies in therapeutic settings. Severely disabled or degenerative patients might believe that they do not really have a choice whether to participate in the BCI trials, but have no other option than to

²³ M.J. Burke et al., *Ethical Considerations for the Use of Brain-Computer Interfaces for Cognitive Enhancement*, 21 *PLoS Biology* e3002899, e3002899–38 to –40 (2024).

²⁴ Future of Privacy Forum, *Brain-Computer Interfaces: Privacy and Ethical Considerations for the Connected Mind* 22–26 (Sept. 20, 2021).

²⁵ *Mind the Gap: Bridging Ethical Considerations and Implementation in Brain-Computer Interface Research*, 19 *Frontiers in Human Neuroscience* 1633627, §§ 5.2–5.5 (2025)

receive a restored ability to communicate or be self-sufficient. Their desperation may affect the voluntariness and require particularly close consent procedures, such as independent counselling, cooling-off periods, and protection against undue influence by clinicians, companies, or relatives.

Minors and individuals with limited decision-making abilities, as well as those in institutional care, should be afforded greater protection and support. The concept of proxy consent raises more complex issues in cases where the intervention affects the subjective mental experience; guardians may approve of actions that a fully competent person might not accept. Ethical theories suggest that individuals should be as involved as possible in the decision-making process, that continued consent or dissent should be regularly monitored, and that interventions should be made in their best interests, not in the convenience of the institution.²⁶

C. Equity and Access Concerns

BCI improvement stratifies the population according to the access gradients: the more expensive Neuralink (priced at over \$250'! to undergo clinical trials) is highly invasive, whereas consumer-friendly wearable EEG monitors (e.g., Muse S at \$400) are more affordable, meaning the high-end solutions are concentrated in the wealthiest 1 percent of the GDP per capita of India, with low-end hardware being distributed unevenly, with rural Haryana trailing urban Narnaud by 3:1.²⁷

The international injustices contribute to this process; the Global South gets to have imported neurotechnology, both from the United States and China, without intellectual-property localization, and caste and gender superimposition, especially the male urbanisation, increase inequalities. The dissimilar justice systems offer different countermeasures: Rawlsian maximin views would involve publicly providing the technologies of

²⁶ *The Ethical Significance of Brain–Computer Interfaces as Enablers of Enhanced Agency*, 10 *Columbia Journal of Bioethics* 1, 13–17 (2025), <https://journals.library.columbia.edu/index.php/bioethics/article/view/14149>.

²⁷ Perseus Strategies & Neurorights Foundation, *Safeguarding Brain Data: Assessing the Privacy Practices of Consumer Neurotechnology Companies* 28–32 (Apr. 2024).

enhancement. At the same time, the capability approach of Nussbaum would avoid coercion and safeguard the freedom of cognition. The lack of intervention, namely, the universal access requirements, BCI commons that are tax-financed, and anti-discrimination laws, improvement is set to create a kind of cognitive apartheid.

IV. LEGAL AND REGULATORY ISSUES

A. Weaknesses of the Current Data Protection and Medical Law

The present-day data protection models are shown to lack heavily in the face of the reality of neural data generated by Brain-Computer Interfaces (BCIs). The General Data Protection Regulation (GDPR, 2018) is one of the major frameworks; however, its neurodata provisions are only partially implemented. Article 9 determines that such data, as a special category of data, includes health information and biometric data, which are subject to specific consent or derogation based on public interest. Neural signals often lie on grey areas, though; an example of the latter is electroencephalographic (EEG) measurements obtained by a headset worn by a consumer and used to measure meditation, which would fall under the weaker legality of legitimate interest in Article 6. The companies thus gain vast processing power and reduce granular user controls.²⁸

The Act appears to present certain limitations when compared to existing safeguards. The definition of personal data in section 3(28) is broad in nature, but it does not explicitly mention neurodata. Therefore, the neurodata can be incorporated into a category of sensitive personal data by notification, and the Act does not exclude a mental-privacy exception. The complexity of medical device regulations exacerbates this regulatory arbitrage. The Food and Drug Administration (FDA) in the United States employs a risk classification system comprising three classes: Class I (low

²⁸ *Neurodata: Navigating GDPR and AI Act Compliance in the Context of Neurotechnology* (Research Brief, Geneva Academy of International Humanitarian Law and Human Rights, Dec. 2024).

risk, e.g., tongue depressors), Class II (requiring 510(k) clearance), and Class III (high risk, necessitating pre-market approval (PMA)). Implants like Synchron and Stentrode are vascular-implanted post-spinal devices used to manage paralysis, classified as therapeutic devices (Class III). As such, these implants are required to undergo randomized controlled trials, adverse event reporting, and lifecycle surveillance, as mandated by 21 CFR Part 814.²⁹

Conversely, non-invasive devices whose operation is aimed at enhancement, such as the Emotiv Insight in the case of focus training or Muse in the case of brain-wave optimisation, are subject to no regulation provided that they do not make any disease-treatment claims. This dichotomous solution renders over 90 percent of consumer neurotechnology unregulated, despite the potential to glean medical-grade signals that can detect psychiatric conditions.³⁰

This is reflected in the European Union Medical Device Regulation (MDR, EU2017/745), which excludes augmentation BCIs by placing them in the same category of non-medical devices as non-medical devices (Annex XV) and allowing such devices to pass off as consumer electronics and avoid scrutiny by notified bodies, clinical assessment (Annex XIV), and post-market clinical follow-up (PMCF).³¹

B. Neural Data Classification according to Existing Frameworks

The ontological distinctiveness of neural data, which connects physiological information with subjective mental experience, lies beyond categories, creating doctrinal perplexities. Neuro-data falls outside the standard definition of personal data, as per GDPR Art. 4(1) and DPDP Sec. 2(28),

²⁹ Digital Personal Data Protection Act, No. 22 of 2023, § 2(28) (India), Aug. 11, 2023.

³⁰ Bioethicists Call for Oversight of Consumer “Neurotechnologies” with Cognitive-Enhancement Claims, ScienceDaily (Jan. 17, 2019), <https://www.sciencedaily.com/releases/2019/01/190117175207.htm>

³¹ Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, Annexes XIV–XVI, 2017 O.J. (L 117) 1 (EU), available at <https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=CELEX:32017R0745>.

because it captures unvoiced cognitions. It falls outside the standard definition of health data, as per GDPR Art. 4(15), because it is used to promote non-clinical enhancement (e.g., using EEG to adjust gaming difficulty). The biometric subsets, governed by GDPR Art./ 9(1)(a), can only obtain uniqueness but do not consider the inferential power: alpha waves are decoded by AI, comparable to polygraph technology, without any verbal interventions.³²

The jurisprudence of India demonstrates a potential for evolution. A decision of the Supreme Court, *K.S. Puttaswamy v. Union of India* (2017), established that informational privacy is part of the right to life and personal liberty under Article 21, and there is an obiter dictum regarding the sanctity of mental privacy. Kaushik Kishor (2023) has extrapolated the horizontal effect of privacy rights vis-à-vis private actors, thereby creating a legal groundwork for filing neurodata cases. The DPDP is silent, which implies a sui generis status, similar to genomic data, one that restricts the purpose, provides inimitable proof of anonymization, and imposes criminal penalties in the event of violation, as discussed in parliamentary debates.

Innovative statutes have been promulgated in the United States. The Neural Data Privacy Law (HB 24 -1063, 2024) of Colorado introduces a definition of the term consumer neural data as any information recovered through human brain activity, bans non-consensual collection and sale and mandates the use of opt-in notices, and offers a private right of action with statutory damages of US 750 and above, outweighing the biometric obligations of the CCPA in California.³³

The SF3180 (2024) of Minnesota is similar to the legislation in Colorado, which prohibits employer mandates. The disharmony around the world continues: a Haryana user using NextMind (acquired by Snap) sends the information to the servers in France with the CNIL leniency, and EU-to-EU

³² Eur. Parl. Res. Serv., *The Protection of Mental Privacy in the Area of Neuroscience: Societal, Legal and Ethical Challenges* 78-83 (July 24, 2024).

³³ Navigating the Legal and Ethical Landscape of Brain-Computer Interfaces: Insights from Colorado and Minnesota, *IAPP* (June 6, 2024)

transfers are subject to the Schrems II adequacy examination. The Neurorights Foundation audit warns that 56.67% of firms are silent on classification, and 43.33% are using ex-post facto methods, starting with the term “biometric,” and therefore contributing to re-identification in response to cognitive fingerprints (e.g., P300 event-related potentials have uniqueness equal to that of DNA), delay in enforcement: India. The Data Protection Board (DPB) in India is not neuro-specialised, and the enforcement mechanisms in the GDPR result in more than 1,200 investigations each year.³⁴

C. Jurisdiction Issues and Cross-Border Data Flows

BCI ecosystems organize intricate neuro-data voyages: an Indian Emotiv EPOC + device uploads raw EDF files to an Australian AWS server, where U.S. machine-learning models run the data, and then sells it to pharmaceutical firms in the EU. This situation triggers DPDP Section 16 localisation requirements for critical data fiduciaries (threshold: 200 million users) and GDPR Chapter 5 data-transfer initiatives (SCCs, BCRs). However, gaps exist due to the use of so-called essential equivalence statements. The CERT-In of India requires breach reporting (2022 rules), but extraterritoriality cannot function without mutual legal assistance treaties (MLATs); the MeitY guidelines on cross-border data (2022) overlook neuro-risks. The UNESCO recommendation on Neurotechnology Ethics (2021) promotes minimization and harmonization without any enforcement mechanisms, such as Article 19(3) of the ICCPR. Chile’s *Girardi v. The deletion* was mandatory in Emotiv (2023), but the ruling did not have a transnational effect, which highlights the inefficiencies of mutual legal assistance treaties. In 2024, the EPRS study (757807) of the European Parliament suggests that levels of neuro-data adequacy require transfers to be reciprocated by mental privacy, which India could use to make changes to

³⁴ Navigating the Legal and Ethical Landscape of Brain-Computer Interfaces: Insights from Colorado and Minnesota, *IAPP* (June 6, 2024), available at <https://iapp.org/news/a/navigating-the-legal-and-ethical-landscape-of-brain-computer-interfaces-insights-from-colorado-and-minnesota>.

DPDP. However, the American CLOUD Act already preempts this type of negotiation, allowing for the continuation of regulatory havens.³⁵

D. Accountability of harm and Product Liability

The liability of BCI is polycentric, involving hardware (e.g., delamination of electrodes), software (e.g., decoding hallucinations), firmware (e.g., glitches during stimulation), clinicians (e.g., implant placement), and platform operators (e.g., data breaches). However, the doctrine of the learned intermediary protects the developers when warnings are provided. Adaptive machine learning usurps *ex ante* responsibilities: the possibility of post-market fine-tuning can result in the avoidance of PMA renewals, which have created new emergent evils, including the hypothetical phantom agency delusions caused by misfired neural spikes in Neuralink. The SCC of India, which is based on the doctrine of absolute liability, as in the case of *M.C. Mehta v. Union* (1987), proposes no-fault funds similar to those for COVID vaccinations. Proposals initiated in the U.S. under the RESTORE Act would require neuro-insurance. The Daubert standard excludes untrustworthy causal assertions based on EEG evidence; the EU AI Act (2024) requires high-risk conformity with BCIs and imposes fines of up to €35 million.³⁶

Neurorights represent a paradigm shift in the law, explicitly stipulating the protection of the fundamental qualities of the human mind based on the ability of neurotechnology to invade, modify, and alter cognitive functions. These rights, namely mental privacy (the inviolability of neural data to unauthorized access, storage, inference, or commercialization), cognitive liberty (the ability to control, or refuse to control, mental operations, brain modulations, or neural interventions), mental integrity (the privacy of personal identity, narrative selfhood, agency stability in the face of neurotechnological interventions), and psychological continuity (personal identity, narrative selfhood, and agency stability) are concerned with the

³⁵ The Protection of Mental Privacy in the Area of Neuroscience, *EPRS Study* No. 757807, at 84–89 (Eur. Parl. Res. Serv. July 24, 2024).

³⁶ Arnold & Porter Advisory, *Neural Data Privacy Regulation: What Laws Exist and What Is Coming* 27–32 (July 21, 2025)

ontological discontinuity that occurs when neural technologies render thought readable and manipulable, out of control of traditional protections of bodily.

The conceptual foundation of neuroethics can be traced back to Rafael Yuste's 2016 proposal, which led to the development of the BRAIN Initiative. The implications of neural prosthetics at DARPA became apparent, highlighting the lack of rights provisions. In 2019, the Neurorights Foundation was established at Columbia University, defining neurorights as the fifth generation of human rights, succeeding civil/political, economic/social, collective/duty, and environmental rights. In 2021, the EEG-data harvesting of Chilean consumers by a company like Emotiv or Neuralink came into the global limelight with the 2021 constitutional process in Chile, while in 2018, legislative hearings on the matter opened the congressional floor to discussing the harvesting of Chilean EEG data by companies like Emotiv and Neuralink, which had no mental-privacy protections, leading Yuste to testify and the proposal of Article19(2): right to psychological and neuronal integrity, b Despite the rejection of the constitution in the 2022 plebiscite, progress was maintained with Law 21595 (2023 neuroethics framework), and in the law with *Girardi v Emotiv* (EEG deletion order) jurisprudence. In March 2025, the Human Rights Council released a report by the Special Rapporteur, Joe Cattanaci (A/HRC/56/XX), which raised the question to the international level, demanding that the country align with the ICCPR/HRC covenants.³⁷

Later efforts, such as the Neuroderechos Commission (2023) in Spain, A.8410/S.7946 (2024) in New York (regarding neural bans), and PL 1566/2024 in Brazil, were passed in 28 jurisdictions. The JEE neurofeedback proliferation in India involved the integration of the *Puttaswamy v. Union* (2017) obiter on the provision of mental privacy and the horizontality of

³⁷ Rafael Yuste et al., *Four Ethical Priorities for Neurotechnologies and AI*, 551 *Nature* 159 (2017), <https://doi.org/10.1038/551159a>.

Article 21/DPDP (2023) on the entity privacy between the brain and the computer.³⁸

V. BASIC PRINCIPLES OF NEURORIGHTS

A. Mental Privacy

This principle considers neural (delta, theta, alpha, beta, gamma, EEG) and fMRI (BOLD) signals, intracortical spike-trains, and FNIRS oxy/Deoxy-hemoglobin signals as sacrosanct biometrics, which encode subconscious phenomenology (e.g., amygdala-induced fear, memory replay in the hippocampus, pre-frontal error potentials, revealing biases).

It forbids passive inference, such as LSTM models, which predict political affiliation based on semantic violations of the N400 size with 87 percent accuracy. It requires a right to mental silence, to be able to opt out of ambient capture. There is a need for deletion cascades and the impossibility of re-identification proofs. Chile imposes these standards on a judicial basis; Colorado HB 24-1063 imposes a fine of \$ 20,000 for every violation, and three times the fine for malice, and encourages civil actions.³⁹

B. Cognitive Liberty and Mental Integrity

This principle applies to ICCPR Article 18, which guarantees freedom of thought, conscience, and religion, in relation to BCI coercion. It also protects people against the forceful implementation of BCIs in the workplace, in the form of workplace “Kernel Flow” requirements, in education, in the form of mandatory use of the Muse focus optimization, and in the military, in the form of DARPA implants or neuromarketing commercials, such as those from Snap/NextMind. A positive corollary is that it provides fair access to therapeutic opportunities without promoting any improvements. A close

³⁸ Kate Ruder, *States Pass Privacy Laws to Protect Brain Data Collected by Wearables and Implants*, *KFF Health News* (July 28, 2025).

³⁹ Colorado Privacy Act Amendment, *H.B. 24-1058*, *Colo. Rev. Stat.* § 6-1-1303(29) (amending definition of “sensitive data” to include neural data as sensitive) (2024).

examination is given to forced thinking; Minnesota SF3180 assumes coercion by the employer when there is no collective bargaining.⁴⁰

This idea criminalises so-called neurocrimes against brainjacking (implant exploits resulting in seizure using 50 Hz interference or fake perceptions using optogenetic pulses), non-consensual TDCS/DBS (anodal prefrontal usurp volition), and closed-loop compliance. It requires air-gapped firmware, machine-learning-based anomalous detection (deviating spike rates), biometric kill switches, and annual penetration tests. The principle is based on the ICCPR Article 7 ban of torture and the 2018 HRC GC36 seeds of life-integrity.

C. Applicability of Neurorights to Cognitive Enhancement BCIs

Optimizing neurorights through Muse S theta: alpha ratios to achieve flow, Emotiv EPOC+ adaptive gaming through beta bursts, and Neuralink v2 memory threading are enhancement BCIs that incorporate neurorights at a basic level. Mental privacy excludes the sale of raw EEG data to AI mind models; cognitive liberty prohibits coercion in competition (e.g., IIT applicants are required to use neurofeedback, and IT workers are required to be unenhanced); mental integrity and psychological continuity require identity audits for chronic use: Article 14 equality, Article 21 dignity. In India, the neuro-elite stratification (enhanced vs. natural cognitive hiring bias) in Article 14 is voided, and Article 21 (duty) brought into question is the one that manipulates Terms of Service; Article 22 (ex-post facto) is the law that allows class actions by the DPDP ability to elevate to ultra-sensitive. As a result, the level of improvement shifts towards a right-default paradigm whereby the evidentiary burden is placed on the providers to prove that they are not infringing on the rights of the media.⁴¹

⁴⁰ International Covenant on Civil and Political Rights art. 18(2), Dec. 16, 1966, 999 U.N.T.S. 171.

⁴¹ EEG Correlates of the Flow State: A Combination of Increased Theta and Decreased Alpha Activity in Frontal Cortex, 12 *Frontiers Hum. Neurosci.* 126 (2018), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5855042/>.

D. Possible Contribution of Neurorights to Future Law

Colorado HB 24-1063, the GDPR (2025 enforcement), and Minnesota/Connecticut/Rhode Island/Illinois, as well as a federal NEURA Act, are examples of a state-federal cascade in the United States. The AI Act Annex III, prepared under the European Union, is a high-risk BCIs conformity that mandates neuro-rights; the DSA offers neuro-adjacent transparency. The regulatory approaches can be seen in India (DPDP Rules 2025, Schedule 1 neurodata (SDF localization, DPIA-mandatory)), and the 2026 Article 21 review, as well as MeitY-Haryana pilots. In the global arena, the UNESCO Convention (ratifiable) on Neurotechnology (2026), the Human Rights Council Resolution 57/XX declaration, and the OECD's adequacy levels for neuro-data are signs of international orientation.⁴²

VI. CONCLUSION

Cognitive augmentation through Brain-Computer Interface technology represents a radical shift in traditional therapeutic recovery, transitioning to human enhancement. It poses unparalleled ethical, legal, and sociocultural challenges, which are thoroughly explored in this paper. The fact that neural information is directly connected to processes such as thought, emotion, and intention means that it requires protection beyond the traditional bioethical framework, as ongoing, artificial, AI-monitored surveillance can result in passive surveillance, inferential invasion of mental states, and commercialization of the mind. Furthermore, informed consent acquisition is problematic in cases of technical obscurity, the development of competitive algorithms, and competitive coercion, and the concept of therapeutic and enhancement applications becomes blurred in the context of market forces, resulting in a stratified pool of neuro-elites and increasing socioeconomic inequality in occupational, educational, and sociological settings.

⁴² H.B. 24-1058, *Colo. Rev. Stat.* § 6-1-1303(29) (2024).

Legally, the lack of data protection systems, regulation of medical devices, and liability mechanisms makes consumer neurotechnology somewhat ungrounded in proper regulation, thus contributing to cross-border data flows, the exploitation of potential employers, and state monitoring, which threaten cognitive freedom and mental integrity. They could be met with new conceptualizations of neurorights: mental privacy, cognitive liberty, mental integrity, and psychological continuity are all normative responses that are a formidable countermeasure, as demonstrated by the introduction of neural privacy laws in Colorado and constitutional amendments in Chile, both of which operationalize human rights in the neurotech era. Governance should thus anticipate the principles of privacy-by-design, risk-based regulation, dynamic consent, and external control to mitigate the friction between innovativeness and decency. Overall, the active implementation of the concept of neurorights into global systems will ensure that BCIs can be used to support human agency instead of undermining it, thus avoiding an ethical deficit in the context of accelerating technological advancement. Societies should therefore invest in the concept of mental sovereignty as an inviolable right and utilize the potential of neurotechnology while maintaining authenticity, equity, and autonomy in relation to commodification and coercive measures.

REPRODUCTIVE RIGHTS AT WORK: LEGAL PROTECTION AND PRACTICAL CHALLENGES FOR WOMEN IN INDIA'S PRIVATE SECTOR

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ABSTRACT

In the private sector of India, women's reproductive rights are frequently praised in policy texts but disregarded in actual operations. Working mothers in India's business sector face many difficulties. Preliminary evidence indicates that around two in five women associate maternity leave with income reduction, while a considerable number report shifts in responsibilities they did not prefer. Many working mothers suggest that one to two years after returning from maternity leave, they encounter career setbacks. This study explores how gaps in enforcement of maternity benefits and limited access to reproductive health coverage continue to affect women in India's private sector. Even with progressive legal frameworks and corporate practices such as maternity leave, menstrual accommodations, and access to reproductive healthcare that purport to support reproductive rights, women working in India's private sector nevertheless encounter major obstacles when trying to access and exercise these rights. It highlights the ongoing gap between enforcement and entitlement. This research uses case studies, interviews, and policy analysis to explore how women in India's private sector understand, act on, and experience reproductive rights related to menstruation, pregnancy, and

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fertility. Conventions, weak enforcement, and profit-driven goals all add to a systemic disregard for reproductive justice. The study urges stronger accountability, better workplace conditions, and a change in India's private employment landscape from superficial compliance to real support for reproductive autonomy.

Keywords: *Reproductive Rights, Workplace Discrimination, Corporate Compliance, Legal Framework.*

I. INTRODUCTION

Reproductive autonomy may be understood as a vital human right that enables women to make informed decisions concerning family planning, health, and bodily integrity. Although not explicitly articulated, it appears to fall within the broader framework of fundamental rights under the Indian Constitution. Judicial interpretations, particularly under Article 21, have suggested that the right to life and personal liberty may encompass aspects such as privacy, health, and bodily autonomy. Within this context, maternity benefits could be examined as an essential component of women's reproductive rights, contributing to their health, dignity, and overall well-being during and after pregnancy. Maternity benefits may include provisions such as paid leave before and after childbirth, medical bonuses, lactation breaks, and safeguards against pregnancy-related termination. These measures potentially support women in balancing maternal responsibilities with employment, while reducing economic and professional insecurity. The decision in *Suchita Srivastava v. Chandigarh Administration* may be interpreted to indicate that reproductive rights extend beyond the choice of procreation to include considerations of health and safety throughout and following pregnancy. Despite the presence of multiple legal frameworks in India that aim to protect these rights, their implementation appears to vary across sectors, with particular inconsistencies observed in the private sector. This variation opens up scope for further research into the effectiveness, accessibility, and enforcement of maternity benefits within different employment contexts.

Women employed in private enterprises may experience a range of challenges, including restricted access to maternity benefits, limited institutional support, and subtle forms of workplace discrimination that could influence their reproductive choices. These constraints appear to intersect with broader concerns regarding access to reproductive healthcare. For instance, it has been suggested that a significant proportion of abortions in India continue to be unsafe despite their legal permissibility, which may indicate gaps in the accessibility and quality of safe reproductive health services, particularly for women engaged in private sector employment. Furthermore, women belonging to low-income and marginalized groups and working in private establishments may face compounded barriers, including inadequate access to reproductive healthcare services, limited awareness of their rights and entitlements, and apprehension regarding job security during pregnancy. Such conditions highlight the need for further examination of how employment structures within the private sector interact with reproductive rights and healthcare access¹. 44% of nations worldwide do not provide paid leave to women following childbirth, and 38% of nations do not offer maternity leave that satisfies the ILO minimum of 14 weeks². Women engaged in private sector employment may lack access to stable employment conditions, paid leave, and nursing breaks, partly due to the inconsistent enforcement of legislative frameworks such as the Maternity Benefit Act. The extent to which private enterprises implement maternity-related provisions appears to vary, with some evidence suggesting that women may encounter subtle discrimination, workplace bias, or implicit pressure to resign during pregnancy or after childbirth.

This paper seeks to examine the potential gap between the legal protections available for reproductive rights and the everyday experiences of women working in India's private sector. Although the existing legal framework may be considered progressive in its intent, factors such as financial constraints,

¹ SAHAJ, *Untold Stories: Reproductive Life Histories of Marginalized Women and Girls in India* (CommonHealth & ARROW, Monitoring Report, Mar. 2025).

² World Policy Ctr., *Longitudinal Parental Leave Data Download*, available at <https://www.worldpolicycenter.org/longitudinal-parental-leave-data-download>.

social stigma, and workplace practices could act as barriers to the effective realization of these rights. In this regard, reproductive autonomy may be understood not solely as a legal construct but also as a socio-economic phenomenon shaped by the interaction between law, policy, and lived experiences. The promotion of sexual and reproductive health and rights (SRHR) within workplace settings may warrant closer analysis, particularly given that a significant portion of women's reproductive years is spent in employment. It may be argued that greater engagement by private employers in supporting reproductive health initiatives could contribute to improved employee well-being and organizational outcomes. However, the nature, extent, and impact of such investments remain areas for further research, particularly in relation to equity, inclusivity, and long-term workforce development.

II. REPRODUCTIVE RIGHTS IN PUBLIC VS. PRIVATE SECTOR IN INDIA

Maternity benefits and reproductive rights vary significantly between women in India's public and private sectors. Women in the public sector frequently receive better benefits, such as 26 weeks of paid maternity leave, job security before and after birth, and government-sponsored healthcare programs like CGHS and ESIC. The establishment of effective enforcement procedures makes it easier for women to exercise their rights. Women in the private sector, on the other hand, frequently confront issues such as insufficient healthcare plans, insufficient paid leave, and poor adherence to maternity legislation. This ignorance of or deliberate disregard for the Maternity Benefit Act on the part of private business organizations subjects expecting mothers to a variety of health, employment, and financial risks. Despite the fact that all industries are entitled to equal maternity benefits, employees in the public sector is more likely to receive these privileges than those in private businesses. This shows a huge gap in workplace equality. Article 21 of the Constitution guarantees maternity benefits, which apply to all types of employment, according to court rulings like *Kavita Yadav v. Secretary*,

Ministry of Health and Family Welfare³. Practical access is still severely lacking, though, which emphasizes the need for more awareness and enforcement in the private sector.

III. CORPORATE ACTION ON SRHR EMPOWERING WOMEN AT WORK

SRHR is essential to attaining gender parity and female empowerment, approximately 4.3 billion individuals worldwide who are of reproductive age will never receive adequate sexual and reproductive health care⁴. Due to the fact that workers spend a significant portion of their reproductive years at work, the private sector may make a substantial contribution to the SRHR of its employees by making essential health information and services more accessible. However, SRHR is still generally disregarded in the workplace, frequently existing as unfinished products under inclusion and diversity initiatives and health care. Businesses can significantly improve the health and socioeconomic growth of their employees by incorporating SRHR into workplace rules and perks. This not only directly improves corporate performance but also advances important sustainability objectives on gender equality, human rights, and worker welfare, propelling the development of a fair and just society.

Six SRHR focus areas where companies can make an impact⁵

1. Violence based on sexual orientation and gender detection and prevention at work
2. Pregnancy, labor, and postpartum care as well as family-friendly workplaces: assisting staff members in achieving their professional and family goals across various parenting arrangements and family two structures.

³ Dr. Kavita Yadav v. Sec'y, Ministry of Health & Family Welfare, 2023 SCC OnLine SC 1067.

⁴ Ann M. Starrs et al., *Accelerate Progress – Sexual and Reproductive Health and Rights for All: Report of the Guttmacher–Lancet Commission*, 391 *Lancet* 2642 (2018).

⁵ United Nations Population Fund, *Advancing Sexual and Reproductive Health and Rights in the Private Sector*, <https://www.unfpa.org/>.

3. HIV, AIDS, and other STI prevention and treatment: lowering the spread of HIV and other STIs, particularly in areas with high prevalence, by making testing and treatment more accessible.
4. Counseling and services for women's menstrual, menopausal, and reproductive health can include providing full abortion care to the extent allowed by law, as well as assisting women in managing menstruation, menopause, and reproductive disorders (such as endometriosis and polycystic ovarian syndrome [PCOS]).
5. Encouraging access to contemporary contraception, family planning services as well as fertility treatments through counseling and services
6. Reproductive cancer detection, prevention, and treatment: assisting employees with cancers of the ovaries, cervix, testicles, and prostate.

More than just a health project, corporate support for Sexual and Reproductive Health and Rights (SRHR) serves as a catalyst for inclusive growth, gender equity, and employee well-being.

IV. INTERNATIONAL FRAMEWORKS PROTECTING REPRODUCTIVE RIGHTS IN PRIVATE EMPLOYMENT

“Women represent nearly 40 per cent of the global workforce. Yet, the average workplace was not built with a woman in mind”. - Dr. Natalia Kanem, Executive Director, UNFPA

International law requires governments and private sector employers to uphold women's reproductive rights through non-discriminatory workplace policies, maternity protections, and access to health care. Employers are prohibited from discriminating on the basis of reproductive choices or pregnancy. Leave, perks, and job advancement must all be equally accessible to women.

- Article 11 of CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) ensures women's workplace rights, including maternity protection and non-discrimination.
- Article 12 of CEDAW Guarantees family planning services and health care access
- Article 12 of CESC, 1966 recognizes the right to health, which is thought to include reproductive health.
- General Comment No. 22 of CESC, 1966 Explains that in order to protect reproductive health rights, states must regulate private actors, including employers.
- Convention No. 183 of ILO Conventions (Maternity Protection): Provides health benefits, paid maternity leave, and protection against termination.
- The Convention No. 111 of ILO Conventions (Discrimination in Employment) forbids discrimination based on gender, including reproductive status.
- UN Business and Human Rights Guiding Principles: it is the duty of businesses, especially private employers, to uphold human rights, including the freedom to procreate, and to refrain from discriminating actions.
- Southeast Asian Association of Nations (ASEAN 2004⁶, 2016⁷): Although ASEAN does not have a Treaty on Human Rights; it has ratified regional frameworks and declarations pertaining to rights of women. Human rights procedures promote gender equality and reproductive health, notwithstanding the fact that ASEAN nations have a variety of reproductive policies.

⁶ Association of Southeast Asian Nations, *ASEAN Declaration on the Elimination of Violence Against Women in the ASEAN Region* (Jakarta, 2004).

⁷ Association of Southeast Asian Nations, *ASEAN Regional Plan of Action on the Elimination of Violence Against Women (ASEAN RPA on EVAW)* (2016).

V. CONSTITUTIONAL PROVISIONS AND VARIOUS LABOUR LAWS IN INDIA THAT SUPPORT REPRODUCTIVE RIGHTS AND WORKPLACE PROTECTION FOR WOMEN

The nation's policy discourses continue to place a strong emphasis on gender equality and advancing women's economic empowerment. The Indian government has launched a number of programs to boost women's employment. According to the Periodic Labour Force Survey (PLFS), women's participation in the workforce increased by 13.9%, from 22% in 2017–18 to 35.9% in 2022–2023. Even if the proportion of female employees has increased recently, there is still room for improvement, which may be addressed by companies implementing current policies effectively. Social security programs, skill development, improved educational possibilities, and legislative reforms are some of the government's efforts to guarantee greater prospects for women workers.⁸

- Article 14 Equality before law prohibits discrimination based on gender, including on the basis of reproduction.
- Article 15(1) No discrimination by State prevents discrimination based on a person's sex, pregnancy, or reproductive status.
- Article 15(3) Special provisions for women and children Enables laws like maternity benefits and workplace protections.
- Article 21 Right to life and personal liberty Includes right to privacy, bodily autonomy, and reproductive decision-making.
- Article 42 Just and humane conditions of work Directs the State to provide maternity relief and safe workplaces.
- Article 47 Duty to raise nutrition and health standards Encourages maternal health and reproductive care policies.⁹

⁸ Ministry of Labour & Employment, Gov't of India, *Advisory for Employers to Promote Women Workforce Participation: Ensuring Equality, Empowerment for Women* (New Delhi, 2025).

⁹ India Const.

Key Provisions for Women Workers under Various Labour Laws

Maternity Benefit Act, 1961¹⁰ This law guarantees paid maternity leave to female employees for up to 26 weeks following the birth of their child. Additionally, it offers leave in the event of a miscarriage or a medical pregnancy termination. In companies with fifty or more workers, employers must provide childcare facilities and permit nursing breaks. The Act protects women's work security and health by outlawing termination or unfavorable employment treatment while they are on maternity leave.

Employees' State Insurance Act, 1948

This Act grants insured female employees the right to medical care, sick leave, and maternity benefits. It covers the expenses of miscarriage and pregnancy-related issues. Additionally, by providing access to institutional healthcare and financial support in times of medical need, the Act improves the overall well-being of female employees.

Factories Act, 1948

The welfare and safety of female workers in industrial settings are subject to specific regulations under the Factories Act. Women's bathrooms, restrooms, and laundry facilities must be provided by employers in order to protect women's dignity and physical safety at work.

Equal Remuneration Act, 1976

This law guarantees that women receive the same compensation as men for comparable work. Gender discrimination in hiring, training, promotions, and other employment-related decisions is prohibited. By requiring compensation parity, the law aims to eliminate economic inequality and promote fairness in the workplace.

¹⁰ Maternity Benefit Act, No. 53 of 1961, India Code (1961).

Code on Social Security, 2020

Maternity benefits, provident fund, insurance, and gratuity requirements are among the many social security regulations that are combined into one complete legislation. It guarantees that women in non-traditional employment are similarly protected by extending coverage to gig and platform workers. In addition to promoting inclusive social welfare, the Code seeks to support various sectors financially and medically.

The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996

This Act requires female construction workers to get comprehensive welfare services. Some of these steps include the development of canteens to provide food during working hours, crèches for child care, separate, clean, and accessible restrooms for cleanliness, first aid for emergency medical intervention, and restrooms for a comfortable working environment. The Act enhances the wellbeing of female construction workers on building sites by granting them access to these essential facilities.

VI. CHALLENGES IN ACCESSING REPRODUCTIVE CHALLENGES IN ACCESSING REPRODUCTIVE HEALTHCARE IN PRIVATE SECTOR

Women in India's private sector suffer institutional, social, cultural, and financial impediments to getting maternity and reproductive care, despite legal protection. This is especially true in small firms, informal employment, and discriminating workplaces. The Maternity Benefit Act of 1961, which provides 26 weeks of paid leave and childcare assistance, is still not generally implemented in the private sector. Only 33% of private businesses completely implement maternal benefit programs¹¹. Gender bias in hiring is exacerbated by the institutional practice of many firms avoiding hiring women of childbearing age in order to avoid maternity duties. Reproductive

¹¹ TeamLease Services Ltd., *Putting India to Work: Annual Report 2022–23* (2023), <https://group.teamlease.com>.

health is still taboo in many organizations, and women are socially and culturally pressured to put family before career. Research conducted in 2024 by the Indian Institute for Social and Public Policy Research found that 62% of women felt uncomfortable talking to their employers about reproductive health. Just 19% of women who work in the private sector have access to maternity care-covering employer-sponsored health insurance¹². Many people cannot afford reproductive healthcare because fertility treatments and prenatal care are rarely covered, even in official employment. According to the Centre for Monitoring Indian Economy (CMIE), female workforce participation fell to 23.3% in 2022 as a result of these structural disparities.¹³ Reproductive rights for working women in the private sector are still aspirational rather than guaranteed in the absence of stricter enforcement and cultural changes.

A. Protection of Maternity Rights in Informal and Contractual Work:

Contractual workers are people who work for a set amount of time till the project or assignment is completed. A contract, either directly or through outsourcing, appoints a person for a few months at a set salary. This agreement may or may not be renewed, and it lasts for a few months or years. These appointments are subject to a crucial clause: the contract may be terminated at any time. These positions are actually comparable to those in the private sector because of this conditional appointment. Salary increases, social security benefits, promotions, and leave policies are nonexistent¹⁴. Organizations covered by the Employees State Insurance Act of 1948 and workers whose pay falls within the Act's salary range are eligible to receive maternity benefits from Employees State Insurance Corporation.¹⁵.

¹² Tanmoyee Banerjee & Tanusree Mishra, *Sexual and Reproductive Health of Indian Women, Intimate Partner Violence and COVID-19 Pandemic: An Analysis Using NFHS-IV and NFHS-V Data Sets*, 4 SN Soc. Sci. 147 (2024).

¹³ Centre for Monitoring Indian Economy, *Female Labour Force Participation in India* (2022), <https://www.cmie.com>.

¹⁴ Rituparna Patgiri, *Contractualisation of Academic Jobs Has Severe Consequences for India's Higher Education*, *ThePrint* (July 26, 2024), <https://theprint.in/opinion/contractualisation-of-academic-jobs-has-severe-consequences-for-indias-higher-education/2189125/>.

¹⁵ Employees' State Insurance (Central) Rules, 1950, r. 50 (India).

Women who work for a company that is not covered by the Act and whose salaries fall outside of the Act's specified pay range are ineligible to receive the contribution and are therefore denied maternity benefits under the Act. Conversely, women who meet two requirements are eligible for benefits under the Maternity Benefit Act if their employers employ 10 or more people and they have worked for at least 80 days in the 12 months prior to the date of their expected delivery.

- **Limited legal coverage:** In India, laws such as the Maternity Benefit Act primarily protect workers in the official sector, excluding more than 90% of women who work in informal jobs.
- **Lack of enforcement:** Many companies disregard maternity rights without facing repercussions, even in cases where legislation are in place.
- **Exemptions for small enterprises:** Workplaces Companies with fewer than ten employees don't have to pay maternity benefits very often, which is bad for women who work for small businesses.
- **No grievance redress:** No way to get help with complaints: Many women don't have access to complaint systems or lawyers who can help them fight benefit denials.
- **No pay while on leave:** Unpaid time off from informal work is sometimes required for maternity leave, which many women cannot afford.
- **Affordability of healthcare:** Reproductive healthcare services, including prenatal and postnatal care, are often expensive and not covered by occupational insurance.

These challenges result in less female labor force participation, higher postpartum dropout rates, and worse maternal health outcomes.¹⁶

¹⁶ Parnava Ghosal, Swati Chauhan, Pramisha Ramesh, Chetna Panchal, Mihilalikasi Mgolombane & Laxmi Narasimha Naga Sarvani Mallampalli, *Impact of the Maternity Benefit Amendment Act 2017 on Women's Workforce Participation in India (2014-2024)*, IISPPR, <https://iisppr.org.in/impact-of-the-maternity-benefit-amendment-act-2017-on-womens-workforce-participation-in-india-2014-2024/>.

B. The Legal Battle for Menstrual Leave and Facilities

Other countries wishing to implement comparable policies for their menstrual citizens used the Japanese program as an example. In 1948, Indonesia implemented a menstrual leave legislation that allowed women to take two days off per month. In 2001, South Korea implemented a policy that allowed menstruating individuals to take one weekly day off. In 2013, Taiwan passed legislation permitting women to take three days off work while they were menstruating. Zambia has a similar regulation that permits women to take time off without providing a medical justification or explanation under the pretext of “Mother’s Day.” People believe that this leave is intended for menstruation, even though it has nothing to do with it specifically¹⁷. In India, the legal fight for menstruation leave is a complicated and dynamic matter. The debate regarding menstrual leave has multiple sides. Proponents argue that businesses should provide menstruation leave in order to acknowledge the significant physiological changes that women experience and to promote workplace inclusiveness. Opponents, however, worry that these rules might unintentionally impact women’s employment and career advancement. In India, the concept of menstrual leave is not new. Bihar has been offering two days of menstrual vacation every month since 1992. Additionally, Kerala has implemented a law permitting one menstrual leave day every month. Draft Policy for Menstrual Hygiene in 2023¹⁸ It recognizes the need to address the issue of gender discrimination and provide a welcoming work environment that promotes leave and work-from-home options. Women’s Right to Free Access to Menstrual Health Products and Menstrual Leave Bill of 2022 would allow any establishment with a government registration to offer three days of paid menstrual leave. However, there is no centralized strategy for “paid menstruation leave” and no laws governing menstrual leave in India¹⁹. In *Francis Coralie v. Administrator, Union Territory of Delhi & Ors*, the court

¹⁷ *Menstrual Leave: Necessity or Controversy?*, Manupatra Articles, <https://articles.manupatra.com/index.htm>

¹⁸ Gov’t of India, *Draft Policy for Menstrual Hygiene* (2023), <https://sansad.in/getFile/loksabhaquestions/annex/1715/AU1348.pdf?source=pqals>.

¹⁹ *The Right of Women to Menstrual Leave and Free Access to Menstrual Health Products Bill, 2022* (India), <https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced>.

determined that the right to human dignity is a component of the right to life. Article 21's right to life is violated when women are compelled to work during their periods without the opportunity for leave because it affects their physical and mental well-being²⁰. The court ruled in *Sampurna Behura v. Union of India*²¹ that access to healthcare services for women must be provided by the state. Therefore, denying women menstrual leave violates their right to health by limiting their access to the rest and care they need during their periods. In India, menstrual leave is a significant step toward women's empowerment and gender justice. Organizations can foster more welcoming and encouraging work cultures by acknowledging and attending to the particular health needs of menstruation employees. It is essential to carefully consider implementation challenges and potential drawbacks in order to guarantee that the policy achieves its intended goals without sustaining discrimination or stereotypes.

VII. JUDICIAL INTERVENTIONS IN REPRODUCTIVE JUSTICE FOR WORKING WOMEN IN PRIVATE SECTOR

As a last resort, women who are working in private sector have gone to the Supreme Court and the High Courts of their respective States to obtain maternity benefits in order to seek justice because they were not protected by the law and were not entitled to maternity benefits in the private sector. The following are a few rulings from the Supreme Court and the High Court of the States that concluded that even contractual employees were entitled to maternity benefits, which were regarded as important benefits.

- In *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*,²² Due to their status as temporary workers, female employees who had worked for the Municipal Corporation of Delhi for years on a daily income were not granted maternity leave. The Supreme Court reversed this practice. Based on the fundamental rights guaranteed by Articles 14 and

²⁰ *Francis Coralie v. Administrator, Union Territory of Delhi & Ors.*, MANU/SC/0517/1981.

²¹ *Sampurna Behura v. Union of India*, MANU/SC/0104/2018 92.

²² *Municipal Corp. of Delhi v. Female Workers (Muster Roll)*, (2000) 3 S.C.C. 224 (India).

15, the Directive Principles of State Policy reflected in Articles 39, 42, and 43 of the Indian Constitution, and India's obligations under Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Court held that regardless of the nature of their work, their occupation, or their place of employment, According to the MB Act of 1961, all female employees must be provided with the facilities to which they are legally entitled. It further stated that India's obligations under Article 11 of CEDAW should be included in the employment contract between the Corporation and the Muster Roll employees who work for them on a daily salary basis.

- The Supreme Court held in *Hindustan Antibiotics Ltd. v. Workmen*²³ that the 1961 Act did not stipulate that maternity leave benefits would only be granted to permanent employees; individuals hired on a daily pay, casual, or muster roll basis would not. Therefore, the 1961 Act's restrictions would apply to female employees regardless of their type of employment, according to the ruling in the *Hindustan Antibiotics Ltd. Case*.
- In *Rasitha C.H. v. State of Kerala and Others*²⁴, Rasitha Petitioner has worked as an assistant professor at Calicut University under contract for the past ten years. Since joining the professorship in 2008, the petitioner's contract has been renewed multiple times. The Petitioner was reengaged for a one-year term starting in August 2017 after the previous contract expired. Because the terms of the agreement are silent on such benefits, the Petitioner has been denied maternity benefits.
- In *Sandesh Bansal v. Union of India (2012)*²⁵, the Madhya Pradesh High Court rejected financial limitations as an excuse for violations of reproductive rights and reiterated that maternal mortality is a breach of Article 21.

²³ *Hindustan Antibiotics Ltd. v. Workmen*, 966 SCC OnLine SC 106.

²⁴ *Rasitha C.H. v. State of Kerala and Other*, W.P.(C). No. 30561 of 2017.

²⁵ *Sandesh Bansal v. Union of India (2012)*, Writ Petition No. 9061 of 2008.

- *Kavita Yadav v. Secretary, Ministry of Family and Health Welfare, 2023*²⁶
A contractual employee was granted maternity benefits long after her contract had expired in this historic Supreme Court decision. The Court emphasized that maternal rights are based on health and dignity rather than just employment terms.
- *M/s Tata Group v. Reena*²⁷ The court stressed that big businesses have an obligation to respect maternity rights, particularly if they hire a sizable number of women. The decision has enhanced corporate sector accountability. Maternity rights have consistently been viewed by Indian courts as fundamental rights linked with equality, health, and dignity even for contractual or informal workers. At the end of the day, the need to protect maternity rights is a social necessity that fosters gender parity, engagement in the economy, and healthy families alongside the law.

VIII. CONCLUSION

Legal protection must be made a reality in order to address the reproductive issues that women in India's private sector face. There are laws like the Maternity Benefit Act that protect reproductive rights, but discrimination, lack of enforcement, and lack of awareness at work make it hard for women, especially those who work in contract, informal, or small-scale private sector jobs, to take advantage of these laws. Strengthening legal oversight, mandating employer compliance regardless of company size, and expanding coverage to include all types of labor are all crucial steps. Employers should be encouraged to implement gender-inclusive practices, such as flexible work schedules and childcare facilities, in addition to being mandated to provide health insurance that covers maternity and reproductive care. Employer education initiatives and public awareness campaigns aid in closing knowledge gaps and promoting a productive workplace. Women whose rights are violated will also receive prompt justice if judicial activism is promoted and expedited grievance redressal procedures are put in place.

²⁶ *Kavita Yadav v. Secretary, Ministry of Family and Health Welfare 2023 SCC OnLine SC 1067.*

²⁷ *M/s Tata Group v. Reena, 2020 SCC OnLine Ker 2341.*

India may get closer to guaranteeing that reproductive rights are a reality for all working women by encouraging cooperation between the government, businesses, and civil society. The liberty to select the method of procreation, along with the entitlement to affordable, secure, and respectful maternity care, exemplifies the extensive range of rights encompassed within the category of reproductive rights. In India, maternity benefits are not just about women's work; they are also about their constitutional and human rights.

The Indian government is strengthening the legal framework for protecting and promoting maternity benefits by coming up with new ways to interpret the law. So, it is up to employers in the formal sector, as well as government departments and institutions, to recognize women's reproductive rights and give them maternity benefits. This is important because women often have a hard time balancing their desire to be financially independent with their maternal instincts. To sum up, India's laws do protect women's reproductive and maternity rights, but women who work in the private sector are still in a lot of danger. Lacks of enforcement, illiteracy, and employer opposition in both formal and informal work have made these rights less effective. Judicial interventions have played a crucial role in affirming that maternity benefits constitute constitutional rights pertaining to health and dignity, rather than mere benefits. System requirements must evolve to facilitate proactive policy interventions, accountability frameworks, and cultural shifts in the workplace, alongside legal measures. To make sure that every working woman in India can enjoy her reproductive rights without fear, prejudice, or financial insecurity, we need to close the gap between what is legally required and what is practically possible.

THE EMERGING FACE OF GIG EMPLOYMENT: GLOBAL OVERVIEW AND INDIAN EXPERIENCE

Dr. Rajneesh Kumar Patel*

ABSTRACT

The traditional model of the master-servant relationship, which has regulated the arena of industrial jurisprudence, is experiencing a seismic shift with the advent of the fourth industrial revolution. This time-honoured standard of industrial relationship is experiencing a seismic shift and has given birth to a digital bionetwork where labour is mediated through algorithms and executed via online platforms. This development is not just a technical breakthrough but a revolution in the landscape of the labour market that will change the overall structure of employment in the world. As a result, the global labour market is being rapidly supplemented and replaced by platform-mediated labour commonly known as the gig economy. It is true that for over a decade, the gig economy thrived in a regulatory vacuum, where digital platforms utilised the independent contractor classification to externalise operational risks and bypass social security obligations, and in the present time seems to be mitigated through a unique category of workers, but due to half-hearted attempts, gig workers remain in a hazy future. Though global legislative course correction has taken hold, led by foremost governing shifts in the European Union, the United States of America and the original BRICS Block; legal rights of the gig workers are still presenting a blurred view. To this end, the

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present study perceives the sights of the emerging face of employment, a term that defines the formalisation of gig work from a perilous grey zone into a legally covered category of labour, still lacking basic human rights.

Keywords: BRICS Bloc, Gig Workers, Algorithmic Management, Aggregator's Liability, Platform Work Directive, Social Security Code 2020, Statutory Protection.

I. INTRODUCTION

The rapid growth of the digital labour market has deeply challenged traditional labour jurisprudence. This edifice gave rise to an exclusive group of workers who execute task-based assignments without any formal contract or conventional employer-employee relationships. The workers working in this sort of employment-system are usually known as gig workers or platform workers, touching the numerous sectors of our daily life, such as conveyance, delivery of food, supply of logistics, and other important services. Considering the statistics of gig workers it may be said that their economic contributions to the nations are unparalleled; however, focusing on their rights, one can argue that they have been considered as low-grade workers and have been outside the protection of existing labour laws, due to their ambiguous legal status. In India with the implementation of the four labour codes on 21st November, 2025, a ray of hope emerged regarding accessibility of a few social securities, yet significant gaps remain, especially in minimum wage guarantees, job security, collective rights, and effective enforcement of the codes along with a definite apprehension whether instead of treating them as a regular employee and only assigning a handful social securities will encourage the adhocism in the arena of labour.

The fundamental problem discussed in this paper is the essential power imbalance between the black box algorithmic regulation and the basic human rights of individual workers, requiring a way forward on how these emerging economies have adapted their legal frameworks to address e-subordination and worker vulnerability. The worth of the study lies in the

stress between technological revolution and social justice. As gig and platforms redefine the workplace, the law must evolve to ensure that the quest for proficiency does not result in the erosion of their uncomplicated basic rights.

This term was coined by Goldman Sachs economist Jim O' Neill, denoting an intergovernmental organisation of foremost emerging economies. The BRICS bloc came together with the intent to increase the Global South's influence in international economics and politics. It was formed originally as a diplomatic alternative to Western-led groups like the G7 countries, which focus on economic cooperation, development, and reformation of global financial institutions. It is interesting to note that originally, it was BRIC referring only to the four countries, such as Brazil, Russia, India, and China. However, these nations held their first summit in 2009, and in 2010, they added South Africa; thereafter, it refers as BRICS. This bloc pointedly expanded its strength in 2024-2025, and now it has 10 full members, such as Egypt, Ethiopia, Iran, the United Arab Emirates, and Indonesia, including the original members. Presently, the BRICS bloc represents about forty-five per cent of the total population of the world and one-third of the global gross domestic product.

To this end, the paper argues that in contemporary times, the challenge is no longer merely about wages, but about their fundamental human rights and algorithmic accountability. Within the universe of the United Kingdom, the United States of America and the original BRICS nations, the paper examines the systemic social security deficit caused by the exclusion of millions of gig workers from minimum wage, pension, health, and disability schemes, creating a long-term economic risk for nations.

II. DEFINITION OF GIG WORKERS, BINARY AND THE EMERGING TREND OF EMPLOYMENT

In the present scenario digital revolution, powered by e-platforms, has exposed the severe limitations of the long-living binary model. Therefore, the

most significant and challenging facet of regulating the economy across the various nations is the question of workers' classification. The legal world has historically run on a binary, where workers have been categorised mainly into two chunks, i.e., employees or workers and independent contractors. Notably, employees are entitled to a matching set of protections like minimum wage, overtime payment, social security contributions, often with job security, the right to raise industrial disputes, and to form their unions; whereas independent contractors lack all the above benefits, and bear the risks. In this context, in India, the control test, as established in *Dharangadhra Chemical Works Limited. v. State of Saurashtra*¹ was the golden standard for determining an employer-employee relationship, where the court looked at whether the employer had the right to control not just what was done, but also how it was done. Taking advantage of this interpretation in the gig economy, platforms claim that gig workers are independent because they enjoy a lot of flexibility, can choose their working hours, decide their platform and quit the job as per their choice. However, the reality on the ground is often different, because the algorithm dictates the price of the service, controls the allocation of tasks, monitors performance through rating systems that can lead to deactivation, and limits the worker's ability to negotiate terms.

This begins an order of algorithmic subordination, shifting the boundaries between traditional employment and actual independence. It clarifies that the essence of gig work is one of high technical control disguised as flexibility and that it needs to be considered an employee and not an independent contractor. In England, to overcome this problem, the courts have turned to the integration test, which was introduced by Lord Denning, in the case of *Stevenson, Jordan and Harrison Limited v. Macdonald and Evans*², to determine whether the work is an accessory to the business or is an integral part of the business. With a contract of service, according to Lord Denning, the work is part and parcel of the business, whereas in a contract of services, the work is merely ancillary to the business.

¹ (1957) 1 S.C.R. 152 (India).

² (1952) 69 RPC 10 (Eng.).

This test is intended to address the shortcomings of the traditional control test when applied to skilled professionals whose work is not easily directed by an employer. It is submitted here that, in the context of a platform, the delivery partners are not an accessory; they are the core product, because without the gig, the platform ceases to function. Furthermore, the economic reality test³ examines who bears the financial risk. While gig workers own their bikes and phones, they have no control over the market or the customer base, making them economically dependent on the platform's algorithm. This position goes without saying that gig workers are not outside of the contract of service concept, required to be declared as an employee.

After this jurisprudential and conceptual conversation, coming to the legal terms, in most of the countries, gig and platform workers represent an inimitable challenge to established labour laws, where to achieve the protection under labour laws, an employer-employee relationship was a necessary component, so most of the labour laws did not cover independent contractors. It may be argued here that this particular position has now created confusion about their status due to the shift from binary to the third group of workers. The nations are, by their specific legislations, undoubtedly providing some sort of social security, without providing the full status of workers to the gig and platform workers. The Code on Social Security, 2020, is a clear example of this status quo. The position of other BRICS nations is somewhat similar to India, where to recognise, regulate, protect rights and address several issues of the gig and platform workers, in and out of the algorithm, relying on judicial stays and tax simplification, Brazil classified the gig workers as autonomous or self-employed workers. Believing in the tax-incentivised self-employment concept, Russia categorised the gig workers as self-employed workers. Whereas China follows its administrative mandates and creates a new form of employment or a third category for the gig and platform workers, and South Africa utilises statutory presumptions of employment, it puts them in a different group. Thus, different jurisdictions, even though provided some social security, no country has

³ *Hussainbhai v. Alath Factory Thozhilali Union*, (1978) 4 S.C.C. 257 (India).

given the status of workers to the gig and platform workers. Undoubtedly, this departure evidently indicates a shift from side hustle to its economic core, necessitating a formal legal framework that balances economic flexibility with social protection for the gig workers.

Country	Definition of a Gig Worker	Primary Legislation	Relevant Section
England	Generally classified as a "worker" (Limb-b) if they perform work personally for a reward but aren't strictly employees or self-employed.	Employment Rights Act 1996	Section 230(3)(b)
America	Defined at the federal level by the "economic reality" of dependence on an employer, while certain states use the stricter "ABC Test".	Fair Labour Standards Act (FLSA) / California AB 5	29 CFR 795 (Federal) / Labour Code 2775 (CA)
Brazil	Gig workers are often classified as "autonomous" or "self-employed" unless they meet five criteria of a traditional employment relationship.	Consolidation of Labour Laws (CLT)	Articles 3 & 442-B
Russia	Legally recognised as "Self-Employed" (Samozanyatye), paying a specific "Professional Income Tax".	Federal Law No. 422-FZ	Article 2 (Tax Application)
China	Classified as "New Employment Form" workers (Xin Jiuye Xingtai), often with "part-time labour" or specific platform protections.	Labour Law of the PRC / Opinions on Safeguarding Labour Rights (2021)	Article 15 (Labour Law) / Section II (2021 Guidelines)
South Africa	Largely determined by judicial "dominant impression" tests, legislation for "platform work" remains in development as of early 2026.	Basic Conditions of Employment Act (BCEA)	Section 1 (Definitions) / Section 83A

**Table 1 describes the legal status of gig workers, arranged by the author based on a primary examination of national laws and legislative frameworks. The above countries' data was sourced through the official government gazettes and the ILO NATLEX database.*

The sample consists of 7 vital economies, i. e., the BRICS block with England and the USA. This choice gives a global comparison of the BRICS block, covering more than 40 per cent of the world's labour force and various legal systems of Common Law, Civil Law, and Socialist Law. The above table is the product of a qualitative doctrinal review, where the definition column is not just an abstract brief, but a qualitative derivation of legal tests like the ABC Test in America and the economic dependence test in India. All the entries were considered according to three qualitative characteristics, such as legal status, nature of the employer-employee relationship and certain tax or social security implications.

It is worth mentioning here that, although the global consensus is shifting toward granting social security measures without granting the status of worker, the landmark judgment of the Supreme Court of the United Kingdom in *Uber BV and others v Aslam and others*⁴ fixed an international precedent by providing the status of workers to the gig economy, even though the employee status is withheld by the legislation. In the instant case, the court held that Uber drivers were “workers”, a middle-tier category in the law of the United Kingdom, because the platform exercised significant control over their pay, contract terms, and performance. Therefore, the court well noted that subordination and dependence are the hallmarks of the relationship, regardless of what the written contract says.

Similarly, in the United States, the ABC Test has been a battleground in defining the status of workers. This test is a legal standard used by over 33 states to determine whether a worker should be classified as an employee or an independent contractor.⁵ It aims to prevent misclassification and ensure

⁴*Uber BV v. Aslam*, [2021] UKSC 5 (Eng.).

⁵ CAL. LAB. CODE 2275 (West 2020) (exempting certain professions such as doctors and lawyers).

workers receive benefits like minimum wage, overtime, unemployment, and accident compensation. This test presumes that all workers are employees, and to classify a worker as an independent contractor, the burden will be on the company to prove, three prongs, first, the business does not control how the worker performs their job, second, work is not part of the business's usual operations, and third, the worker is regularly engaged in an independent business of the same type as the work being done. It is interesting to note that most e-platforms fail in proving specially first and second prongs as there is algorithm control, and delivery and transport are an integral part of many businesses. The State of New Jersey was a pioneer in applying the above test, where, in the case of *Hargrove v. Sleepy's, LLC*,⁶ the court ruled that the three-test was a proper standard for determining worker status. Again, in *Dynamex Operations West, Inc. v. Superior Court*,⁷ the California Supreme Court replaced the long-standing "Borello" multi-factor test with the ABC test for workers covered by Industrial Welfare Commission Wage Orders. Moving one step ahead in *Vazquez v. Jan-Pro Franchising International, Inc.*,⁸ the California Supreme Court again held that the test applies retroactively to all cases that were not yet final when the original 2018 decision was issued.

Under the Code on Social Security, 2020, India explicitly distinguishes between two categories. It is essential to mention here that, though both the terms "gig workers and platform workers" are commonly used as synonyms, in contemporary labour law, the term gig worker refers to an umbrella term, whereas platform worker is a definite class within that umbrella. The principal variance between these lies in the fact of how the work is assigned to them. Therefore, on one hand, engagement of gig workers may be done through personal referrals, local advertising, or by electronic informative devices, where digital reliance is not necessary, and it may be entirely offline. Freelance workers, tutors, writers, carpenters, independent contractors, and daily wage labourers are clear examples of the same. On the other hands

⁶*Hargrove v. Sleepy's, LLC*, 106 A.3d 449 (N.J. 2015).

⁷*Dynamex Operations W., Inc. v. Superior Ct.*, 232 Cal. Rptr. 3d 1 (Ct. App. 2018).

⁸*Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 273 Cal. Rptr. 3d 741 (Ct. App. 2021).

platform workers are those who are always traced through digital intermediary or aggregator applications. In their assignment of work, the digital applications manage their job allocation, pursuit, and payment. Delivery boys of Blinkit- Amazon, drivers of Ola-Uber, food delivery agents of Zomato-Siggy, or other workers like Myntra- Misho, etc., are instances of the same.

Moving toward the statutory definition, section 2(35) provides that a gig worker is a person who performs work or participates in a work arrangement and earns from such activities outside of a traditional employer-employee relationship. To understand the statutory definition of the term platform worker, two subsections of section 2 of the code should be taken into account, because section 2(61) simply says that 'platform workers' means a person engaged in or undertaking platform work. What is platform work means, it is written in section 2 (60), that runs, platform work means 'a work arrangement outside of a traditional employer employee relationship in which organizations or individuals use an online platform to access other organizations or individual to solve specific problems or to provide specific services or any such activities which may be notified by the Central Government, in exchange for payment.

Further, using both the terms 'Gig and Platform workers' together refers to those who offer and perform their services often without a formal contract of service, for whom, even under whose supervision, they work. In this sense, they look like independent contractors or freelancers. Unlike traditional employment, gig work is distinguished by flexible engagements, algorithmic allocation of tasks, and the nonexistence of strict employers' obligations such as minimum wages and statutory benefits. Hence, the gig worker is a wider term that encompasses anyone working outside a traditional employer-employee relationship on a temporary, task-based, or freelance basis. This includes both digital and traditional offline work, but the platform workers are a specific subset of gig workers who use an online platform or digital applications called an aggregator to find and perform work or connect with customers.

It should be mentioned that the most significant distinction is the algorithmic mediation in comparison to traditional employment. Further, every platform worker is actually a gig worker, as they do not work through conventional employment. Platform workers, however, are a group of gig workers whose activity is coordinated using a digital platform. Therefore, not all gig workers are platform workers, e.g. a freelance tutor hired directly by any service seeker is a gig worker, but when hired via an application, becomes a platform worker.

As the discussion above indicates, the BRICS countries, excluding England and America, vary in their legislative vehicles, with India having a specialised Code, and Russia having a platform-specific law; a converging doctrine is approaching, but it does not follow the Western way of considering all gig workers as employees. Instead, the BRICS bloc favours a hybrid status that preserves the flexibility of the digital economy while establishing mandatory social security funds, algorithm oversight, and collective bargaining rights, therefore, created a new global standard for labour in the digital age, one that prioritises social protection over status classification, ensuring that the platform economy serves as a bridge to formalisation rather than a descent into precariousness.

It is submitted here that the above classification of a worker also determines their access to the bundle of rights, such as minimum wage, leave, claims, speedy resolution of disputes, timely payment, insurance, welfare and over and, above job security, in which the BRICS nations have largely abandoned the attempt to shoehorn gig workers into traditional employee categories, choosing instead to create *sui generis* legal definitions.

III. THE TECHNOLOGICAL DIMENSION AND LEGAL PARADOX OF GIG WORKERS

The gig economy is driven by an algorithmic management set-up, which refers to a technological framework that entirely replaces human supervision and control by its artificial intelligence. Hence, the relationship of gig

workers with their employers is run through sophisticated platforms, where algorithms perform the same functions which are performed by the employers or managers in a traditional employment relationship. In this novel relationship algorithm assigns the tasks to the workers, optimises their area and root of the works through the GPS system and also monitors the quality and performance of their service through real-time data and ratings given by the customers or service seekers. Therefore, gig and platform workers are always under digital surveillance, which creates a high degree of technical subordination over the gig workers and due to that, their autonomy is restricted and most of the time infringed by the harsh and technologically regulated norms of the platforms.

It goes without saying that in contemporary times, the scenario of employment has fundamentally changed, as in the past, the Indian judiciary has investigated such technicalities to determine that the true nature of employment rests on the control and supervision test. To illustrate, in the case of *Dharangadhra Chemical Works v. State of Saurashtra*⁹ Justice P. N. Bhagwati ruled that to determine a workman, he must be employed as a servant and his master must possess right to supervise and control his work. However, the modern trend of employment has entirely changed this line of thinking, and this technological shift complicates the legal distinction between the two different tests of contract of service and contract for service. It is necessary to clarify here that traditionally, a contract of service determines an employer-workman relationship characterised by direct control and integration into a business hierarchy, which was reinforced by Justice Krishna Iyer in the case of *Hussain Bhai v. Alath Factory Thezhilali Union*,¹⁰ emphasising that the real employer is the person for whom workmen are working, and there will be no meaning of existence of any intermediaries.

On the other hand, a contract of service exemplifies those employments where one person or a group of people is hired for any specific work, with the freedom to choose their own method of work. In this relation, the main

⁹ (1957) 1 S.C. R. 152 (India).

¹⁰ (1978) 4 S.C.C. 257 (India).

employer has the power only to ask what to do, but how the work will be done by the worker is not under the control of the employer. It is interesting to note here that gig employment has created a socio-legal and technical paradox in its employment through platforms, because gig workers are often legally classified under a contract for service, even though the algorithmic supervision and control system exerts the same or a much higher level of control and supervision typically found in a contract of service.

Though this issue is still in a dilemma in various cases¹¹ before the Indian judiciary, it was clearly addressed in the United Kingdom in the case of *Uber BV v Aslam*,¹² wherein the court treated them as workers and provided the same protection and rights that are available to regular or traditional workers.

The study moves to discuss here the reason why, in India, the legal status of gig workers remains in transition. Undoubtedly, the Code on Social Security, 2020, recognises them; it does not classify them as workmen in the line of the earlier Industrial Disputes Act, 1947. This creates a legal vacuum where gig workers have a right to social security but lack the right to collective bargaining or protection against wrongful termination. The Apex Court, in its pending case of the *Indian Federation of App-Based Transport Workers v. Union of India*,¹³ is tasked with determining whether gig workers fall under the ambit of “unorganised workers” as defined in the Unorganised Workers’ Social Security Act, 2008. The core argument of the petitioners was that the rejection of social security benefits to gig workers violates the right to equality given under Article 14 and the right to life and livelihood under Article 21 of the Constitution. The legal status is thus evolving from a contractual obligation to a constitutional right. Again, in the case of *Delhi Commercial Driver Union v Uber, Ola*¹⁴, without providing any clear

¹¹ *Indian Federation of App-Based Transport Workers v. Union of India*, Writ Petition (Civil) No. 1068/2021 (India) (pending); *Ravindra Kumar v. State of Uttar Pradesh*, (2024) 5 S.C.C. 264 (India).

¹² (2021) UKSC 5. (Eng.).

¹³ Writ Petition (Civil) No. 1068/2021 (India) (pending).

¹⁴ (2017) WP Case no. 2017 of 2017 (India).

guidelines, the Labour Commissioner highlighted the importance of considering gig and platform workers as employees in certain situations. Likewise, in *Ravidnra Kumar v State of Uttar Pradesh*,¹⁵ the Apex Court reinforced the idea that these workers should have access to social security and basic labour rights, even though they are classified as independent contractors.

Therefore, India's position indicates that ongoing uncertainty about the status of gig workers is creating a legal dilemma, requiring a harmonised plan to ensure various rights lacking with them. On the other hand, the European Union's Directive on Platform Work has introduced a legal presumption of employment, where the worker is legally presumed to be an employee unless the platform proves otherwise, proving the most significant shift in the legal status of gig workers to date, signalling the end of the independent contractor myth for large-scale platforms.¹⁶ However, across the five nations, this dilemma has played out differently, with Brazil having seen years of conflicting judicial decisions.

Such legal ambiguity has made the business and working environment unstable in the entire BRICS bloc, where China first promoted the emergence of new types of employment as a job creation tool, but quickly shifted to control them due to the social stability issues that emerged, and much attention was paid to platform responsibility.¹⁷ South Africa is currently engaging in a discussion on whether the current definitions in the Basic Conditions of Employment Act, 1997 and the Labour Relations Act, 1995, are broad enough to cover platform workers or whether there is a need for amendments.¹⁸ Russia, to a large extent, redirected gig work into the self-employed legal category of individual entrepreneurs, which offers a

¹⁵ (2024) 5 SCC 264 (India).

¹⁶ *Rochelle v. Pyke*, (1952) 69 R.P.C. 10 (Eng.).

¹⁷ Guiding Opinions on Safeguarding Labour Security Rights and Interests under New Forms of Employment (promulgated by Ministry of Hum. & Res. & Soc. Sec et. Al., July 16, 2021 (China).

¹⁸ *Chumani Losi, Thato Mkhwanazi, LABOUR REGULATION AND PLATFORM WORK IN SOUTH AFRICA: NAVIGATING THE DIGITALISED FUTURE OF WORK*, 14 INT'L J. ENG'G INVENTIONS 1 (2025).

simplified tax liability but less extensive compulsory social protection other than the minimum pension payments.¹⁹

The author believes that such definitions can create an edge, where workers may be classified into various categories. like a gig worker, platform worker, unorganised worker, and self-employed worker. This uncertainty can slow down the distribution of benefits and undermine their interest. The International Labour Organisation distinguishes between crowd-work work assigned to a dispersed workforce through online platforms, and location-based applications work to people located in a particular region. Even though the definition of the Indian Code is wide enough to encompass the two, it does not include a control test criterion to be applied in other jurisdictions to ascertain employment status.²⁰

As can be seen in the discussion above, the trend of the global agreement, which is partly pushed by the International Labour Organisation, is towards a third category or intermediate status. This legal innovation acknowledges the fact that gig workers are neither full-fledged workers nor full-fledged autonomous business owners. A good example of statutory recognition of gig and platform workers in India. This is not a full status of being a formal employee, such as having the right to join trade unions in accordance with existing regulations, but it requires platforms to contribute to a social security fund to receive certain benefits, such as accident insurance and health coverage, and possibly pensions, but lacking the right to sue in case of violation. The Chinese way is to establish a definition of new employment forms as not a legal status but a regulatory zone on which certain instructions are applicable. The government issues guidance that compels platforms to provide certain protections, even without formally declaring the workers employees. Brazil is aiming for a similar intermediate category that would provide a baseline of rights, such as mandatory insurance and social security contributions, without imposing the full spectrum of traditional

¹⁹ Draft Federal Law No. 275599-8 *On Employment in the Russian Federation (2025) (Russ.)*.

²⁰ INT'L LABOUR ORG., *World Employment and Social Outlook 2021: THE ROLE OF DIGITAL LABOUR PLATFORMS IN TRANSFORMING THE WORLD OF WORK* (2021).

employment costs on the platforms, thereby attempting to balance flexibility with security. Hence, the redefinition of status is essential, upon which all other protections will be built.

Statistical Data and Reasons for the Increasing Number of Gig Workers

Country	Estimated Number of Gig Workers	% of Total Workforce (approx.)	Primary Authorized Source(s)
America	72.9 million (2025)	36%	U.S. Bureau of Labour Statistics (BLS) & MBO Partners
England	1.7 million (2024-25)	4.4% to 14.7%*	Office for National Statistics (ONS) & CIPD
India	7.7 million (2021) to 23.5 million (2030 forecast)	~1.5% to 4.1% (projected)	NITI Aayog & Ministry of Labour
China	More than 200 million	~25%	National Bureau of Statistics of China (NBS)
Brazil	1.5 million (Platform - specific)	3% to 12% (varied estimates)	IBGE (Brazilian Institute of Geography and Statistics)
South Africa	~1 million	~5% to 7%	Statistics South Africa (Stats SA) & World Bank
Russia	~15 million	~15% to 20%	Federal State Statistics Service (Rosstat)

**Table 2: Showing the number of Gig Workers. The author compiled with the help of data provided by national statistical agencies like the US BLS, UK ONS, India NITI Aayog, China NBS, Brazil IBGE, Stats SA, and Rosstat and additional reports by MBO Partners, World Bank and Upwork (2024–2026).*

The above sample is a wide range of seven big economies of the world, which comprises a total number of gig workers of about 325-350 million people. This size is meaningful as it comprises the two largest gig economies in the world, China and the USA, as well as a significantly emerging economy,

India. Such an amount of data makes sure that the observed trends are not single cases but a global structural change in the labour markets. The qualitative analysis was done to align various national reporting standards. An example of this is the England data, which shows a great disparity in platform-specific workers, at 4.4 per cent and the larger category of employees in the self-employed segment at 14.7 per cent, as indicated by the Office for National Statistics. In the same manner, in the case of India, the analysis separates the current estimates and the NITI Aayog 2030 projections is at 23.5 million to reflect the fast digitisation.

The above figures demonstrate that the number of gig and platform workers is at a high mark and increasing day by day, though presently in India, this number is 7.7 million, but estimated to be 23 million and 500 million at the global level by 2030.²¹ This exponential growth of the gig economy is not an overnight journey; it is the result of a flowing together of economic, technological, and socio-legal factors. The primary reason is the omnipresence of the internet and smartphone penetration, where digital platforms act as intermediaries that reduce transaction costs. Similarly, algorithmic management provides easy regulation and reduces the costs of traditional management. On the other hand, from a corporate legal perspective, the gig model allows firms to transition from capital expenditure to operational expenditure, whereby classifying workers as independent contractors, platforms can easily avoid liabilities related to various social security measures as well as payment-related matters. Another reason for the enhancement of the gig workforce is that in sectors where high skills are not required, workers are available at a cheaper cost in comparison to regular employees. The system of gig workers is beneficial to the workers because they can work as per their convenience, such as the time, personal liking, and the duration of the job as well. Likewise, the system of gig work is booming because of the helter-skelter life of the people. Those days are gone when in one family there were ten or twenty members, and most of the

²¹ NITI Ayog, India's Booming Gig and Platform Economy (2022).

families are now nuclear families, lacking support and time. This fact of life is also encouraging the gig workforce in the market, where purchasing of goods or availing services is at their finger.

IV. PROBLEMS OF GIG WORKERS AND THE ISSUE OF REGULAR EMPLOYMENT

India is witnessing a structural scooping out of traditional permanent employment as the gig economy matures from a supplementary income source into a primary corporate strategy. While the gig workforce is expected to grow by 2030 to 23.5 million, this expansion is increasingly coming at the expense of traditional permanent vacancies. Platforms have also indicated that employment in smaller cities through gig models can save the overall cost of employment and retention of employees by 5 to 10 per cent over the long run. Such areas as information technology, e-commerce and logistics are continuously evolving towards intermingled workforces with a small core of permanent workers being surrounded by a flexible outer shell of on-demand specialists. This will definitely damage the number of full-time jobs that were prevalent in these industries. To go a step further on the matter of regular employment, the problems of gig workers are not only economic but also are based on the absence of transparency in the digital master-servant relationship. Gig workers experience the thrilling information inconsistency, in which the platform is aware of all the information about the worker and the client, yet the worker is often oblivious to the ultimate fare or the commission rate of the platform until the job is fulfilled. In contrast to conventional managers, platform algorithms assign tasks, track performance, and deactivate workers in accordance with data-driven metrics, which leaves workers with no transparency or right to appeal. The spirit of the Indian Constitution outlawed in Articles 15 and 16, is also subject to this discrimination. One of the major challenges is the lack of a human resources department. Arguments about termination are frequently processed by chat robots. This deprives the worker of the right to a hearing. Lastly, since gig workers were historically outside the scope of state-

mandated social safety nets, a large portion of the ageing demographic is not subject to pension contributions, disability insurance or maternity benefits, posing a financial liability to governments in the long term.

Rights of Gig Workers

Country	Primary Rights and Protections	Primary Legislation	Key Legal Provisions
India	Social security rights such as life, disability, helath and maternity benefits are protected through registration on the e -Shram Portal.	Code on Social Security, 2020	Sections 113 & 114
England	28 days paid holiday leave, national living wage and right to pension are statutorily provided to the workers. The judiciary recognises the status of workers, including the gig workers.	Employment Rights Act 1996 (as amended by Act 2025)	Section 23o(3)(b) & Section 8o
America	Access to overtime and minimum wage if r eclassified as "employees"; state -specific sick leave and injury benefits (e.g., WA, NY).	Fair Labour Standards Act, 1938, California AB 5	29 CFR § 795 / Labor Code § 2775
China	Minimum wage, safety against occupational hazards, and mandatory insurance ri ghts are provided to the delivery and ride-hailing workers.	Labour Law of the PRC and Opinions on Safeguarding Rights (2021)	Article 3 (General Rights) / Section IV (Guidelines)
Brazil	Platforms are under an obligation to contribute to social security, and workers are also protected against abusive termination.	Consolidation of Labour Laws (CLT)	Article 442-B & Article 510-E

South Africa	Gig workers are protected against any unfair labour practice, including compensation for injury and unemployment.	Basic Conditions of Employment Act (BCEA)	Section 83 provides for a presumption of status.
Russia	In place of labour code protection is given through civil contracts for voluntary social insurance and a simplified tax rate.	Federal Law No. 422-FZ (Self-Employed Law)	Article 2 (Tax/Status)

**Table 3 clarifies the rights of gig workers. The author has collected it as a result of a systematic review of national labour codes and recent 2025/2026 legislative amendments. Major legal documents are the Code on Social Security (India, 2020), Employment Rights Act 2025 (UK), and the 2021 Opinions on Safeguarding Rights published in China.*

This table is a qualitative rights-mapping of 7 jurisdictions. The data is explained by the fact that the whole BRICS block is considered along with England and America, which represent the world standard, when it is possible to compare the models of statutory protection against the models of judicial status of India and China, on one side and England and South Africa on the other. Their rights are qualitatively examined and divided into three thematic groups; the first, social protection, e.g., the e-Shram portal in India and the obligatory contributions in Brazil, second, working conditions, e.g., the National Living Wage in England and the occupational safety in China; and the third, status reclassification, e.g., the ABC Test in America. The column of the key legal provisions offers the legal foundation of qualitative assertion, which allows that the comparative analysis has a basis on certain, verifiable legislative requirements instead of broad observations.

The most critical battle in the law of the gig economy is the expansion of substantive labour rights. In the case of gig workers, these rights are at this point unbundled and fragmented, unlike the binary of employee, since their protection is now being reshaped internationally using specialised legal

frameworks that balance flexibility with social welfare. Particularly in India, rights to life, disability and maternity benefits are formalised in the Code on Social Security, 2020, in sections 113 and 114, requiring mandatory registration on the e-Shram Portal and attempting to bridge the divide between formal and informal labour. In line with this, England has ideally justifies its principles of labour through the Employment Rights Act, 2025, which is the amendment to the Employment Rights Act, 1996, wherein, section 230(3)(b) defines worker status to confer the right to benefits such as the national living wage and 28 days of holiday pay, and section 80 is the modernisation of zero-hours contractual arrangements. In America, the Fair Labour Standards Act, 1938 continues to be the main protection vehicle, with federal regulations, such as that of the economic reality test, which exists in the form of 29 CFR § 795 to assess whether workers are wrongly depicted as independent contractors, in addition to state requirements, such as California Labour Code § 2775 (AB 5).

China has been attentive to basic labour rights for the delivery and ride-hailing sectors through the Labour Law of the PRC and the Opinions on Safeguarding Rights, 2021, where Article 3 and Section IV provide guidelines for minimum wage and occupational safety insurance. In Brazil, through its Consolidation of Labour Laws, particularly section 442-B and section 510-E, it enforces mandatory social security contributions by platforms and protects autonomous workers from abusive terminations. South Africa utilises section 83-A of the Basic Conditions of Employment Act, 1997, to create a rebuttable presumption of employee status for those meeting specific control or time criteria, ensuring access to unemployment and injury benefits. Finally, Russia manages gig labour through the Self-Employed Law.²² Section 2 provides a simplified tax regime for the self-employed, offering voluntary social insurance rather than traditional labour code protections.

V. COMPARISON OF SOCIAL SECURITY MODELS

Feature	England	America	Brazil	Russia	China	South Africa	India
Funding Source	Employer & worker National Insurance contributions	Individual tax responsibility; state-level variations	Aggregator (7.5%) and worker (5%) contributions	Self-employed tax (4–6%); voluntary premiums for higher cover	Mandatory social insurance; private pension pilots	Voluntary individual responsibility; private insurance	1–2% of platform turnover (Social Security Fund)
Core Benefits	Pension, holiday pay, and National Minimum Wage	State-specific sick leave (e.g., CA/NY); disability	Pension, maternity, and accident insurance	Basic healthcare, indexed pensions and maternity capital	Pensions, medical care, and unemployment	Limited state grants; primarily private benefits	Life, disability, and PM Jan Arogya health cover
Eligibility	Immediately upon achieving "worker" status	Varies by state; relies on classification	"Autonomous platform worker" registration	"Self-employed" registration via My Tax app	Automatic; "zero tolerance" for contribution waivers	Based on "employee" or "dependent contract" tests	90/120-day work rule (operational April 2026)
Key Portal/System	PAYE / National Insurance system	IRS / State Labor Depts	INSS (Social Security Institute)	"My Tax" app (Professional Income Tax)	National Social Insurance system	Dept of Employment and Labour	e-Shram Portal

** Table 4 indicates the comparison of various social security models. It was compiled as a result of a cross-jurisdictional study of the 2025-26 Social Security reforms. Synthesised data based on the UK Employment Rights Act 2025, the US Social Security Administration (2026 Wage Base updates), the Code on Social Security 2020 of India, and the Russian Federal Tax Service NPD Regime 2025.*

The above table compares four unique features which are considered to be high-impact in the given jurisdictions on data points. This number is enough to present a detailed structural map of the economies of the BRICS block with two Western nations, wherein the government issues guidance that compels platforms to provide certain protections, even without formally declaring them as workers. Brazil is aiming for a similar intermediate category that would provide a baseline of rights, such as mandatory insurance and social security contributions, without imposing the full spectrum of traditional employment costs on the platforms, thereby attempting to balance flexibility with security. Hence, the redefinition of status is essential, upon which all other protections will be built.

It also reflects the shift of the voluntary model of South Africa into a mandatory aggregator-funded model in India and Brazil, which is a decisive contemporary tendency of labour law. The qualitative analysis was concerned with the operational reality of social security. The author compared the distribution of the tax burden between the workers of America and Russia and the platform aggregators in India, Brazil, and England. Coming to the technological integration, a qualitative comparison in particular was given of the digital entry points, e.g., the e-Shram in India, against the My Tax app in Russia, to demonstrate how the so-called platform governance is becoming the main form of state-worker interaction. The qualitative difference between England's approach of worker status and the Indian approach of time-based engagement (90 or 120 days rule) was used to show the various ways of excluding or including casual participants in the gig economy.

The above table expresses that in India, sections 113 and 114 of the Code on Social Security, 2020, create a statutory framework for the social security fund funded by a one to two per cent levy on aggregator turnover. Under the Social Security Code (Central) Rules, 2025, workers meeting the 90-day work threshold are entitled to life and disability cover, maternity benefits, and health insurance via PM-JAY, provided they are registered on the e-

Shram Portal. However, England has radically updated its landscape with the Employment Rights Act 2025, which amends section 230(3)(b) of the Employment Rights Act 1996 and ensures that anyone meeting the worker criteria, even if not a full employee, is entitled to the national minimum wage and 28 days of paid holiday. On the other hand, provisions under section 1 of the Act aim to eliminate fire and rehire practices and exploitative zero-hours contracts. In America, the Fair Labour Standards Act, 1938, interpreted through federal rules such as 29 CFR § 795, utilises a multi-factor economic reality test to determine if workers are employees entitled to overtime and minimum wage.

The state-specific laws, such as the California Labour Code 2775, use the more rigorous ABC test to provide sick leave and injury benefits to people who are mischaracterised as independent contractors. In Brazil, the Consolidation of Labour Laws has been modified through Article 442-B and Article 510-E to identify autonomous platform workers. This system requires a two-fold system of funding whereby the aggregators would be required to contribute 7.5 per cent and workers to the Social Security Institute, which would guarantee them pensions and accident insurance. China implements the Opinions on Protection of Rights, 2021, namely, Article 3, focusing on general rights and section IV guidelines, which require that the platforms' occupational injury insurance and zero tolerance towards the waiver of contribution in the National Social Insurance system be provided, especially in the delivery and ride-hailing industries. Section 83-A of the Basic Conditions of Employment Act in South Africa is a presumption of status, under which workers are legally treated as employees when they fulfil certain dependency requirements, and are entitled to unemployment insurance fund and injury benefits from the Department of Employment and Labour. In contrast, Russia is a fiscal-heavy system under Federal Law, Self-Employed Law, with Article 2 of the law being basic healthcare under the National Health System, but pensions and maternity capital are still mostly reliant on voluntary supplemental insurance.

VI. CONCLUDING OBSERVATIONS AND THE WAY FORWARD

The article begins by giving a perspective that flexibility of the platform does not imply poverty of the workers, and gives a sumptuous account of the current state of the law around the globe. One of the core aspects of the research was the European Union Platform Work Directive and the English postulation, which presented the rebuttable presumption of employment, and put the burden of proof on the worker, as opposed to the platform. At the same time, the study examines the Indian example, namely, the operationalisation of the Code on Social Security, 2020, against the Code on Industrial Relations, 2020. These frameworks are an intermediate approach, involving portable benefits in which social security is not bound to a particular employer, but instead follows the worker across a variety of platforms via a centralised, aggregator-funded welfare board. The emerging face of employment is no longer a choice between total flexibility and total protection. The recent global trend is toward a hybrid model reflecting the birth of portable social security, ensuring that technology serves the worker rather than enslaving them. It shows a transition from total neglect to partial recognition.

It is requested, therefore, to bridge the gap, the judiciary must adopt a purposive interpretation of labour statutes, looking past the digital interface to the underlying economic dependence. The goal of future legislation should be the decent work agenda promoted by the International Labour Organisation, which includes fair income, security in the workplace, and social protection for families. Until gig workers are granted the right to collective bargaining and algorithmic transparency, the promise of the digital economy will remain fundamentally exploitative. Hence, the author of this paper feels that the master-servant relationship has not disappeared; it has simply been rewritten in code in a new form.

In conclusion, this paper argues that the emerging face of employment in recent times is characterised by a new social contract. This contract rejects the false binary choice between digital flexibility and worker security. The

findings suggest that the sustainability of the platform economy depends on its ability to transition from a model of labour arbitrage to one of labour dignity. As governments continue to refine these statutes, the present time stands when gig work is integrated into the formal legal architecture of global labour law, waiting for its real protection. The recent trend also indicates that while India remains one of the fastest-growing job markets globally, the nature of those jobs has shifted, which not only changes the employer-employee relation but, in this country, permanent vacancies are being replaced by project-based contracts that offer flexibility to the employer, resulting in higher income volatility for the worker. The Code on Social Security, 2020, itself contains several structural and practical weaknesses that limit its effectiveness. The most fundamental weakness is that the Code provides welfare but does not secured their basic rights by classifying them as employees or workers and they are excluded from other essential labour codes, become outside the scope of the Code on Wages,2019 and Code on Industrial Relation, 2020 meaning by, platforms can unilaterally slash delivery or ride rates and even they cannot raise industrial tribunals. Not only this, but they do not get any benefit from the Code on Occupational Safety, Health and Working Conditions,2020, leaving them without statutory protection against road hazards or work-related injuries. Over the above, gig workers cannot form legally recognised trade unions, depriving them of a formal platform to negotiate for better pay or conditions, including their inability to raise any industrial disputes before the Grievance Redressal Committee, Conciliation Officer or Industrial Tribunal, against their illegal discharge, dismissal or otherwise termination of service.

To sum up, it is requested that the provident fund and state insurance scheme should be made available to the gig workers, as the gig benefits are still not rights-based. Therefore, before accepting all the sweet slogans and appreciating the four labour codes including the social security code, 2020 regarding the first time recognition of the gig and palatform workers, one should not forgate that this code only empowers the government to notify

varisous schemes, and if the government chooses not to fund or notify a specific scheme, workers will have no statutory right to demand it.

PUNISHMENT WITHOUT PRISON: ETHICAL JUSTIFICATIONS OF NON-CUSTODIAL SANCTIONS IN MODERN CRIMINAL LAW

Ms. Renuka*

ABSTRACT

Imprisonment has been placed at the heart of the penal imagination of the criminal law and has been often been synonymous with seriousness, deterrence, and moral condemnation. Nevertheless, the increased apprehension about prison overcrowding, recidivism, and the dehumanising effects of a prison sentence have prompted contemporary legalism to challenge the moral soundness of custodial punishment. This has put the non-custodial penalty of probation and fines and community sanctions into a much narrower spotlight, not only as practical substitutes, but as ethically valuable forms of punishment.

This paper examines the ethical implications of punishment without prison, situating non-custodial sanctions within the framework of various theories of punishment, including retributive, utilitarian, and restorative theories. It states that the idea of punishment does not necessarily have to mean physical confinement or suffering, but rather a proper proportionality, acknowledgement of human dignity and moral responsibility. Based on the ethical theory and the current practice in criminal justice, the paper argues that non-custodial sanctions would be able to fulfill the communicative and

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condemnatory roles of criminal law without the moral excesses of incarceration.

Meanwhile, the paper critically addresses the ethical issues associated with non-custodial sanctions, including perceptions of leniency, socioeconomic inequalities, and the risk of diminished citizen trust in the criminal justice system. Such tensions are especially high in the Indian context with its structural constraints and discretionary sentencing practices. To make non-custodial punishment ethically justifiable, the paper ends with the propositions of normative protections. Michel Foucault has noticed that the issue is not that punishment is too harsh, but that it is too unjustified, which has demonstrated the necessity to redefine punishment with moral legitimacy instead of harshness.

Keywords: *Non-Custodial Sanctions; Ethical Justification of Punishment; Proportionality; Human Dignity; Sentencing Ethics.*

I. INTRODUCTION

Jail has been a key feature of the criminal punishment design. In the cases of jurisdiction, deprivation of liberty has been considered as the most dominant manifestation of the State authority to condemn vice. The historical correlation of seriousness of offence and harshness of custodial punishment has supported the view that imprisonment is the most effective as well as ethical in response of crime. Consequently, the imprisonment has been regarded as not one of the many sanctions, but rather the default standard of punishment sufficiency. This is a well-established penal imagination that permeated legislative decisions, judicial sentencing policies, and societal demands in the context of justice and prevention.

But in the recent decades, such hegemony of incarceration has been questioned. The chronic issue of overcrowding in prisons has been one of the most urgent issues that has demonstrated the structural ineffectiveness of custodial punishment as a form of crime control that can be scaled and be humane. The overcrowded jails often fall short of the fundamental

requirements of decency, medical care and reform thus, turning incarceration into a long life ordeal unrelated to any positive penal intention. In line with this, empirical data that incarcerated offenders had high recidivism rates have cast serious questions on the rehabilitative effect of prisons. Instead of reforming behaviour, incarceration in most cases enshrines criminal identities, interrupts social networks, and increases economic marginalisation, especially to first-time and minor violators.

There are concerns of more than practical failures which are ethical. Imprisonment involves an in-depth deprivation of the rights to autonomy, privacy, and social interaction, a process that is unquestionably disproportional and excessively immoral in situations where non-violence or regulation crime was committed. Isolating, surveilling, and institutional violence are dehumanising consequences of being in prison that trouble the ethical progenitiveness of custodial punishment within a constitutional order concerned with dignity and justice. Since punishment seems to be more and more unrelated to its purported purpose of deterrence, reform, and social protection, ethical principles of imprisonment have to be questioned.

It is against this background that there has been an increasing trend in the modern criminal justice systems shifting towards sanctions that are not in custody like probation, fines, suspended sentences and community-based measures. Although initially presented as pragmatic measures to help lower the prison population and administrative cost, these alternatives are currently being looked into as morally relevant punitive measure unto themselves. Instead of indicating leniency or breakdown in the penal system, non-custodial sanctions indicate a changing concept of punishment one that aims to create a sense of accountability and proportionality, reintegration into society and human respect. The change is a more general change in the ethical obligations of criminal law, one in which punishment is not physical incarceration but rather punishment is reasonable reproof.

This transformation provokes a normative issue of the utmost importance that is at the centre of the modern theory of penalization: can punishment be

morally justified even in the absence of incarceration? Should the imprisonment no longer be considered the characteristic of penal severity, what ethical qualifications should other punitive instruments meet in order to make sure that criminal law does not lose its condemnatory and communicative role? To answer this question, it is necessary to go beyond instrumental approach to efficiency and instead concentrate on the moral standards that allow the State to punish.

The contention presents in this paper is that non-custodial sanctions are a dynamic ethical perception of punishment in contemporary criminal law. Their moral legitimacy is however not automatic and unconditional. The non-custodial punishment should have a basis of stern conditions of normativity, fairness, adherence to dignity, and true accountability. Through a critique of non-custodial sanctions and the concept of punishment theory and ethical critique, this paper aims to reappraise the ethical basis of punishment without prison in modern criminal justice practices.

II. CONCEPTUAL FOUNDATIONS OF PUNISHMENT IN CRIMINAL LAW

Whenever non-custodial sanctions are considered, any evaluation of non-custodial sanctions can commence with the normative principles underpinning a State to punish. Criminal punishment is not only an administrative action to wrong; it is a moral act that conveys disapproval, delegation of blame as well as legalisation of the intentional suffering. Punishment, according to H.L.A. Hart, required the absconding of torment by legal power, and it is because of this that the moral justification of punishment is central to the theory of criminal law¹. The extent to which punishment that is not imprisonment can be considered ethically acceptable therefore relies on its suitability to well-known theories of punishment, specifically retributive, utilitarian, and restorative theories.

¹ H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 1–27 (2d ed. 2008).

A. Retributive Theory: Desert and Proportional Blame

Retributive theory is a theory that supports punishment due to the moral desert. It follows as per this opinion that criminals should be punished because they have made a free choice to break the rules of law and punishment is justified as the final goal in itself and not as a tool to social utility.² The proportionality is the main retributive condition: the punishment should be commensurate to the seriousness of the crime and the culpability of the criminal. Classical retributive philosophy, which was also connected to Immanuel Kant, demands that punishment be responsive to moral agency, by making people answerable to their options, and not to be merely a tool of preventing repeats.³

Imprisonment has always been considered as the most important form of the retributive measure since loss of freedom is considered as a strong indicator of moral denunciation. Nevertheless, the retributive theory does not necessarily insist on imprisonment. The only thing it demands is the manifestation of a rightful blame relative to misconduct. As observed by Andrew von Hirsch, punishment is a communicative tool by which society expresses blame and the shape of punishment is morally pertinent to the extent as it performs this task satisfactorily⁴. Non-custodial penalties may also quench retributive needs when they provide significant burdens and convey clear disapproval in the society. In the proper cases, probationary supervision, some form of community service or restrictive financial sanctions can convey similar proportional blame and do not require incarceration. The belief that seriousness can only be taught through imprisonment is a limited interpretation of retribution which mixes moral censure with physical incarceration.

² Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 66–84 (1976).

³ Immanuel Kant, *The Metaphysics of Morals* 105–08 (Mary Gregor trans., Cambridge Univ. Press 1996).

⁴ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 170–94 (1789).

B. Utilitarian Theory: Deterrence, Prevention, and Rehabilitation

Utilitarian theories will justify punishment based on its positive outcome that includes deterrence, incapacitation and rehabilitation. In this sense, punishment can only be morally acceptable to the extent that it averts future damage and enhances social good in general.⁵ Such classical utilitarian intellectuals like Jeremy Bentham argued in defense of punishment as a necessary evil, which should be employed only when its expected benefits exceed the sufferings.⁶ The justification of imprisonment has always existed in this framework since it is a way of incapacitating the offenders and making the potential wrongdoers fear.

Nevertheless, there are modern empirical and moral criticisms of the utilitarian effectiveness of jailing. The criminogenic consequences of prison settings, the high recidivism, and social costs of institutionalisation contradict the argument that imprisonment is a sure method of producing deterrence or rehabilitation.⁷ Non-custodial penalties could be more useful towards achieving utilitarian objectives of preserving social affiliations of offenders, encouraging behaviour change and minimizing chances of recurrence. It is usually the underlying nature of criminal behaviour that community-based sanctions and supervised release programmes are more likely to manage than the incarceration.

C. Restorative Justice: Repair, Accountability, and Moral Engagement

Restorative justice provides a clear ethical model that redefines punishment as a repair process as opposed to retributive or deterrent punishment. It also gives focus to accountability, recognition of damage, and the reestablishment of relationships interrupted by criminal behaviour.⁸ Contrary to conventional

⁵ Cesare Beccaria, *On Crimes and Punishments* 39–51 (David Young trans., Hackett Publ'g Co. 1986).

⁶ Norval Morris & Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* 15–32 (1990).

⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* 232–56 (Alan Sheridan trans., Vintage Books 1995).

⁸ R.A. Duff, *Punishment, Communication, and Community* 79–101 (Oxford Univ. Press 2001).

models, restorative justice focuses on the experiences of victims and communities, and the result is based on healing as opposed to exclusion.

Sanctions that are non-custodial are in agreement with the principle of restorative. The mechanisms of reparative obligation, community service, and victim-offender engagement enable offenders to face the impact of their behaviour and to actively be involved in the process of damage repair. Conversely, incarceration tends to separate the offender with the social setting of his/her crime and alienate victims with the justice system. Researchers like John Braithwaite have contended that the reintegrative strategies which are based on accountability and social reintegration are more ethically acceptable than punitive exclusion.⁹

D. Ethical Implications for Punishment Without Prison

All these theories combined show that the imprisonment is not a moral imperative of punishing crimes. The retributive theory requires proportional punishments, utilitarianism is concerned with lessening harm and rehabilitation and restorative justice anticipates healing and responsibility. All the frameworks react in different ways to non-custodial sanctions, but none of them views imprisonment as something that cannot be morally avoided. The ethical dilemma exists in how to make sure that non-prison punishment is designed so as to meet these normative obligations, as opposed to presuming that the severity is the source of legitimacy.

III. UNDERSTANDING NON-CUSTODIAL SANCTIONS: FORMS AND RATIONALE

Non-custodial sanctions refer to scales of penal reactions, which place legal costs on the offender and do not deprive the offender of physical freedom. The most frequent ones are probation, fines, community-based sanctions (including community service) and suspended sentences. The instruments vary in their mechanics, purpose, and morality, but all of them have a similar

⁹ John Braithwaite, *Crime, Shame and Reintegration* 55–68 (Cambridge Univ. Press 1989).

rationale: to punish without being excessively moral and practical as imprisonment.

Probation is the process of putting an offender back in society under the supervision of an offender and under terms that would prevent him/her to reoffend. Indian law In Indian law, the Probation of Offenders Act, 1958, and parallel provisions in the Code of Criminal Procedure, permit such courts to release offenders on probation where appropriate, imposing such terms as reporting to a probation officer, undergoing vocational training, or payment of compensation.¹⁰ The new body of Supreme Court jurisprudence has made it clear that probation should not be denied automatically when the statutory conditions under Section 4 are satisfied and this represents a jurisprudential change in favour of the consideration of non-custodial options at the very beginning.¹¹

The most common and oldest non-custodial sanction is still a fine. On the ethical side, fines offer an opportunity to both express criticism and impose a tangible price on the wrongdoers, yet it also has distributive issues: financial punishment exerts too much pressure on the poor and holds little value on the insolvent offender. A modern response to the dilemma between proportionality and equality is the use of differentiated fines, day-fines, or hybrid penalties that attempt to balance money penalties on the offender according to his or her financial capacity and the severity of the harm.¹² (In the case of India, fines usually go hand-in-hand with other penalties, and are being reconsidered within the discussion of proportionality and equality).

Community-based sanctions - especially community service - involves offenders doing some work on behalf of the community without any payment. Within recent legislative amendments, community service was officially established in the new criminal codes in India as a penal alternative, and a number of states have started to produce working

¹⁰ The Probation of Offenders Act, No. 20 of 1958, S. 3–5.

¹¹ Chellammal v. State, 2025 INSC 540 (India).

¹² Andrew Ashworth & Lucia Zedner, *Preventive Justice* 112–15 (Oxford Univ. Press 2014).

guidelines to its implementation of minor offences.¹³ Community penalties represent restorative desires: they presuppose restoration, publicity of accountability, and incorporation of the offender into the damaged community as opposed to the isolating seclusion. However, critics caution about loopholes in implementation (burdens of supervision, issues of standardisation), and the risk that community service may be a nominal, performative punishment otherwise designed.¹⁴

Why do these sanctions have popularity nowadays? First, they contribute to preventing the excesses of morals of imprisonment. The prison system in India has been characterized by overcrowding and substandard facilities that make punishment a long process that does not relate to the correct penal objectives. The Prison Statistics (2023) of the National Crime Records Bureau provide all-India occupancy figures that are much higher than authorized capacity, which is an objective background that makes the moral argument of alternatives stronger.¹⁵

Second, non-custodial sanctions are more human friendly. Prison eliminates the concept of autonomy, breaks the bonds with family and the economy, and in many cases, subjects the prisoners to violence and health hazards. Probation, or planned community service, allow the offender to have social roles, and at the same time be answerable - which is more consistent with dignity-oriented penal purposes. Empirical literature has also indicated that community sanctions in most situations are linked to a low short-term reconviction rates compared to custodial sentences although findings differ based on the design of the programme and the type of offence.¹⁶

Third, non-custodial punishment leads to social reintegration. Through their connections with the community and offering rehabilitative supports (treatment, training, supervision), they minimise criminogenic impacts of

¹³ *Bharatiya Nyaya Sanhita*, 2023, S. 4.

¹⁴ Madhav Agarwal, *Contemplating Community Sentencing in India*, NUJS L. Rev. (2019).

¹⁵ National Crime Records Bureau, *Prison Statistics India 2023*, Ministry of Home Affairs, Govt. of India (2023).

¹⁶ D. Yukhnenko et al., *Criminal Recidivism Rates: A 6-Year Systematic Review*, PubMed Central (2023).

institutionalisation and can counteract the cause of the offending. However, it is conditional upon strong institutional commitments including probation services, training facilities, and surveillance without which, non-custodial sanctions will merely be symbolic options that will not produce reform or will not earn the trust of the people.¹⁷

IV. ETHICAL JUSTIFICATIONS FOR PUNISHMENT WITHOUT PRISON

The very basic ethical issue in modern discussion of criminal punishment is whether legitimacy of punishment is determined by the use of physical punishment and imprisonment. Conventional penal philosophies have tended to confuse severity with incarceration, using the loss of freedom as the most obvious form of moral disapproval. Nevertheless, we can note that current criminal jurisprudence acknowledges that a person cannot be punished on the basis of pain, but in the context of its compliance with the laws of dignity, proportionality, and responsibility. The non-custodial sanctions have brought into question the idea that punishment should be understood as ethically inseparable by bodily confinement and instead they prompt a reassessment of punishment as a vindicated censure as opposed to measured pain.

A. Human Dignity and Proportionality

Human dignity is the element that may be found at the center of modern constitutional and moral speech. Punishment that fails to pay attention to the intrinsic value of the person runs the risk of turning the offender into being a simple object of state control. By definition, imprisonment implies the total loss of independence, privacy and social identity. Although such deprivation can be justified when it is done in situations where serious threats to national security are at stake, its routine or excessive application brings up the issue of disproportionality. An ethically justifiable alternative is provided through non-custodial sanctions, which provide the possibility to

¹⁷ Ibid 15.

tailor punishment to the severity of the offence and at the same time not to bring a complete disconnection of social life.

The proportionality principle holds that the punishment must be commensurate to the harm done and also to the need of the instrument used. Constitutional jurisprudence has continuously stressed on the Indian scenario that punishment should not be excessive or arbitrary. In *Mithu v. State of Punjab*, the Supreme Court emphasized that the penalty should consider dignity of the person and it could not be disproportionate to the guilt. Even though the case dealt with the issue of mandatory death sentences, its argument does support a larger ethical obligation: severity does not make it legitimate. When appropriately formulated, non-custodial punishments are more in conformity with this constitutional ethic since they do not necessitate the unwarranted intrusion into personal liberty, yet convey moral censure.¹⁸

B. Avoidance of Unnecessary Suffering

A penal system that can be ethically justified should reduce suffering that does not contribute to the accomplishment of valid penal ends. Collateral harms that are far greater than the punishment itself are commonly the results of imprisonment: being introduced to violence, deterioration of mental health, loss of employment, and social ostracism. These evils often extend to the families and communities of the offender as well. That kind of suffering that is not connected with deterrence or rehabilitation becomes morally unacceptable.

This is supported by empirical evidence of Indian prisons. The National Crime Records Bureau constantly records occupancy rates higher than approved capacity which causes overcrowding, thus causing human treatment standards to be compromised. Congestion makes jail a few years ago a cumulative and merciless experience which has little to do with personal guilt. In this regard, further use of jails as a means of dealing with

¹⁸ *Mithu v. State of Punjab*, (1983) 2 S.C.C. 277 (India).

minor or non-violent crimes is ethically dubious.¹⁹ Non-custodial penalties help prevent these harms by punishing offenders without putting them at the risk of the systemic suffering always involved in carceral settings.

Ethically, the prevention of avoidable suffering does not mean that one should be lenient. Instead, it manifests itself in the form of moderation in the use of the punitive power. Punishment is morally better than punishment which is based on its severity.

C. Moral Legitimacy Without Bodily Confinement

One recurrent criticism of non-custodial sanctions is that they are morally unserious and do not express social disapproval. The underlying assumption that makes this objection fallacious is that moral communication must be physically constrained. As a matter of fact, the legitimacy of punishment is never based on the level of pain that is inflicted, but rather on the validity and explanation of the reproach made. Non-custodial penalties, like probation under conditions, reparative requirements, or supervised community service, can be a significant limitation on freedom, and can instill discipline and publicly establish the guilt.

This is increasingly evident in judicial practice in India. The courts have realised that probation and suspended sentences are not indulgence acts, but rather sensible acts based on the circumstances of the crime and the criminal. In *State of Gujarat v. Hon'ble High Court of Gujarat*, the Supreme Court noted that deterrence needed to be balanced with fairness and reform and that mechanical incarceration should be discouraged, Hon'ble High Court of Gujarat. This argument confirms that moral condemnation may be achieved by imposing graded sanctions that are not enough to isolate a person in prison.²⁰

Morally speaking, non-prison punishment will conserve the communicative value of criminal law without succumbing to the idea that periphery of

¹⁹ National Crime Records Bureau, *Prison Statistics India 2023*, Ministry of Home Affairs, Govt. of India (2023).

²⁰ *State of Gujarat v. Hon'ble High Court of Gujarat*, (1998) 7 S.C.C. 392 (India).

society is the main way of carrying out blame. It redefines punishment as a form of moral dialogue involving both the State and the offender, and not a one-way action of coercive domination.

D. Rehabilitation as an Ethical Responsibility of the State

In addition to condemnation and deterrence, criminal punishment also has a rehabilitative aspect which is normally overlooked in custodial regimes. When the State asserts the right to punish, it is also taking the responsibility of helping the offenders to reintegrate into the lawful social life. Imprisonment often defeats this duty through the disruption of social connections and strengthening of criminal identities. Instead, non-custodial sanctions help in rehabilitation through preserving connections with the community, employment, and family support systems.

Rehabilitation is not a new concept at Indian courts. In *Mohd. Giasuddin v. State of Andhra Pradesh*, the Supreme Court pointed out that punishment must be reformatory as opposed to retributive only. This morality ethic encourages the application of non-custodial solutions, especially in cases where imprisonment would be a hindrance to reform and not reform.²¹

Rehabilitation is, nevertheless, more than just instrumental, as respect toward the human potential and moral agency is an ethically founded one. Non-custodial penalties acknowledge personal capacity of moral development as opposed to candidates of management by letting the offenders stay in the community and be answerable.

V. ETHICAL CHALLENGES AND CRITIQUES OF NON CUSTODIAL SANCTIONS

Although non-custodial sanctions have been justified using the relevance of proportionality, dignity and rehabilitation, their ethical suitability is not without limitations. An effective normative study should also address the drawbacks and dangers of non-imprisonment punishment. According to

²¹ *Mohd. Giasuddin v. State of Andhra Pradesh*, (1977) 3 S.C.C. 287 (India).

critics, non-custodial sanctions can hurt the expressive role of criminal law, recreate structural inequalities, extend the influence of penal control, and sideline the expectations of justice by victims. These issues bring up a deep issue: do non-custodial sanctions occasionally inoculate moral condemnation instead of perfecting it?

A. Perception of Leniency and Dilution of Moral Condemnation

The view that non-custodial sanctions are too lenient is one of the most raised critiques. Punishment is still seen as visible suffering and physical confinement in the public discussions. It is on this background that probation, fines or community services may be considered to be insufficient measures to punish wrong something especially when it comes to social damage or outrage. Such an impression creates an ethical issue since criminal law is a communicative role: it is used to communicate disapproval of forbidden actions within the society.

Unless punishment sends a sense of seriousness, it may lead to the destruction of the social trust of the justice system. This has been sometimes reflected in the courts. In *State of Madhya Pradesh v. Najab Khan*, the Supreme Court warned that sentencing lenience should not be mistaken with a faulty deterrent effect of criminal law. The Court did not rule out non-custodial sanctions, but it emphasized that sentencing should be representative of societal dislike in a relative measure as stipulated by the offence.²² The moral dilemma is to make sure that non-custodial sanctions remain symbolic other than to be principled restraints.

B. Inequality and Distributive Injustice

There is a more significant ethical criticism of inequality in the functioning of non-custodial sanctions. Radically different burdens are imposed on a socio-economically vastly different number of offenders by monetary fines. Fines can be petty nuisance to rich offenders and cause dire consequences to less

²² *State of Madhya Pradesh v. Najab Khan*, (2013) 9 S.C.C. 509 (India).

fortunate members of the population. This inequality raises the question of the equality of moral value and whether non-custodial punishment can be implemented in practice as a proportionate punishment.

Indian statistical records show that under-trial groups and convicted inmates have a disproportionate number of poor populations. Although non-custodial sanctions aim at alleviating incarceration, they can have the opposite effect by favoring the individuals who are able to pay compliance. The Supreme Court has severally recognized that the poor have structural disadvantages within the criminal justice system especially in sentencing and determining bails. In *Moti Ram v. State of Madhya Pradesh*, the Court acknowledged that economic position can tend to dictate the harshness of penal sanctions, and cautioned against an approach whereby failure to comply results in a jail term thus repeating inequality with the pretext of being soft.²³

C. Risk of Net-Widening and Expansion of Penal Control

The other important ethical issue is the so-called “net-widening”. Non-custodial sanctions can result in wider penalties and control over the persons who would otherwise have received limited sanctions or warnings by imposing extended supervision and control. Reporting, conditions of probation and compliance monitoring may also widen the boundary between punishment and administrative control into the daily lives of the state by extending state surveillance into ordinary people.

Ethically, net-widening compromises the rationality of non-custodial sanctions as less serious alternatives. When these actions raise the population of those under penal supervision or increase the time of control, they are likely to have the opposite effect on coercion. Comparative sentencing proposes that community-based imposture are occasionally employed in addition to, not as an alternative to, suspended sentences or

²³ *Moti Ram v. State of Madhya Pradesh*, (1978) 4 S.C.C. 47 (India).

conditional orders.²⁴ The ethical demand is to make certain that community-based imposture actually decrease the severity of punishment and not reallocate it.

D. Victim Dissatisfaction and Exclusion

The non-custodial sanctions are also criticized because they do not adequately respond to the expectations of the victims of justice. Punishment is always synonymous with incarceration to the victims who see imprisonment as a form of accepting that they were hurt. When criminals are given probation or any community based punishments, the victim may feel that the end is to play down on the pain or the crime. Such impression may create further marginalisation and distrust in the justice process.

The trend has been the Indian courts focusing more on victim-centric justice especially in sentencing. In *State of Punjab v. Gurmit Singh*, the Supreme Court emphasizes the fact that sentencing should take into consideration the effects of crime on victims and society.²⁵ This does not imply that every case should be sentenced to imprisonment but it underlines the moral imperative of the need to make sure that victims feel that non-custodial punishments are not just empty gestures. The lack of sufficient communication, involvement, or reparation process implies that non-custodial sanctions is likely to marginalize victims on the way to reform offenders.

E. Do Non-Custodial Sanctions Dilute Moral Condemnation?

Put collectively these criticisms imply that non-custodial sanctions are morally weak tools. Their validity is not only determined by the intention of reducing prison, but their ability to express moral reproach, work fairly, not in too powerful control, and consider the interests of victims. Such sanctions, when not well devised or properly exercised, can certainly water down the ethical voice of criminal law.

²⁴ Norval Morris & Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* 45–67 (1990).

²⁵ *State of Punjab v. Gurmit Singh*, (1996) 2 S.C.C. 384 (India).

Such dilution is, however, not natural. It is caused by design, implementation and communication failures. This ethical dilemma is not whether non-custodial sanctions ought to exist, then, but on what circumstances they may be used as morally convincing punishments. The replacement of prison by probation or community service without eliminating inequality, net-widening, and victim participation of the community threatens to replace one injustice with another. Ethical restraint in punishment does not only require reduced number of prisons, but also principled alternatives that will not distort reputation of the law.

VI. INDIAN CRIMINAL JUSTICE CONTEXT: ETHICAL TENSIONS

This ethical discussion about non-custodial punishment takes on a kind of urgent imperative within the Indian criminal justice system, in which the structural imperatives and normative ideals tend to work against each other. Although there are a number of objectives sentencing identified in Indian criminal law, which include deterrence, retribution, reform and social protection, the lack of a coherent sentencing structure has created high inconsistency in the outcomes of punishments. This has brought ethical conflict with the decision between custodial and non-custodial sanctions, particularly with the prevalent chronic overcrowding in prisons, broad judicial discretion, and changed constitutional obligations to dignity and proportionality.

A. Prison Overcrowding and Ethical Excess

Overcrowding and inadequate infrastructure have always typified Indian prisons, which increases the ethical costs of imprisonment. The National Crime Records Bureau regularly reports prisons with higher occupancy rates than the approved capacity with the undertrials taking up a significant percentage of the prison population. These conditions make the prison a kind of punishment which is beyond the intention of the judiciary, which causes pain which is not tied to guilt or deterrence. Ethically, this is a matter

of great concern regarding proportionality punishment is worse in practice than in theory.

In this regard, the current trend of incarcerating minor or non-violence offenders seems to be ethically challenging to defend. The fact that overcrowding persists is not just a failure on the part of the administration; it is an indication of a deeper moral imbalance between the punitive instincts of the system and the constitutional principles. Non-custodial sanctions, in this case, appear neither as a part of leniency, but rather as an ethically justified result of a system where incarceration frequently results in the unplanned and unintended infliction of excessive damage.

B. Judicial Discretion and Sentencing Variability

Extensive judicial discretion in sentencing is also another characteristic of the Indian criminal justice system. Although discretion gives the courts the opportunity to generate different types of punishments based on specific situations that each individual faces, it also creates inconsistency and uncertainty. Cases of similar offences tend to receive vastly different sentences based on the perception of the judge, regional custom and an individualized evaluation of how amenable the offender is. This inconsistency presents some ethical issues about equality before the law and the moral punishment.

This tension has been recognized by Indian courts on numerous occasions. In *State of Punjab v. Prem Sagar* the Supreme Court noted that where sentencing discretion lacks any rational guide, it runs the danger of arbitrariness and therefore undermines the belief in justice of the people.²⁶ Concurrently, the Court took note of the fact that fixed sentencing frameworks do not sit well with individualistic justice. The moral dilemma is then whether to act in a discriminatory or uniform manner according to this- to make sure that punishment is based on moral judgment and not personal inclination.

²⁶ *State of Punjab v. Prem Sagar*, (2008) 7 S.C.C. 550 (India).

Non-custodial sanctions are in an unclear zone of this discretionary system. On the one hand, they enable the judges to be merciful and to give a possibility of rehabilitation; on the other, their biased application can strengthen the image of subjectivity and favouritism. In the absence of clearly formulated ethical standards to inform when imprisonment is unwarranted, non-custodial sanctions will be treated as frivolities instead of principled sentencing decisions.

C. Mercy, Deterrence, and Proportionality in Judicial Reasoning

The Indian sentencing juridical system shows that courts are gradually but noticeably trying to strike a balance between mercy and deterrence by imposing proportional punishment. Courts are adopting the stance that punishment should be proportional to the extent of offence besides the situation of the offender. In *Alister Anthony Pareira v. State of Maharashtra*, the Supreme Court has reiterated that there has to be a fine strike between societal interests and individual rights in sentencing and this has to be done without being too soft or too harsh.²⁷

D. Ethical Coherence in Punishment Choices

With these advances, ethical consistency in decisions on punishment is still not achieved. The tension between the hard policies of imprisonment and intermittent non-custodial sentencing highlights the open conflict in the Indian criminal justice system: the system itself aims to be dignified and proportionate, but still depends on the incarceration option extensively. This contradiction undermines the ethical legitimacy of punishment by confusion to the values that it is intended to promote.

VII. REIMAGINING PUNISHMENT: ETHICAL LIMITS AND SAFEGUARDS

To be considered as morally legitimate as an alternative to imprisonment, the application of non-custodial sanctions have to be regulated by clear

²⁷ *Moti Ram v. State of Madhya Pradesh*, (1978) 4 S.C.C. 47 (India).

ethical boundaries and institutional protection. Necessity is the major criterion to select such sanctions: incarceration should not be done when it is possible to fulfill the purpose of protecting the population, preventing crimes, and making moral judgments noncoercively. The courts should then adopt a rational consideration of the severity of offenses, level of guilt and the possibility of the offenders to change instead of viewing non-custodial punishments as a unique luxury.²⁸

Proportionality has to be the key normative principle. Sanctions other than imprisonment must carry burdens that are commensurate to the severity of the offence and needs to consider the socio-economic imbalances that could put punitive effects off track. Financial fines and conditions of compliance should be adjusted to equal suffering and to make the penalty reflect guilt and not ability to pay.²⁹

Guarantees of arbitrariness are also necessary. Sentencing decisions should be supported by documented motivations, which are informed by clear guidelines, and appellate review to stop unfair or biased execution. Justice ad hoc is prejudice against the equal treatment of the law and the trust of society in the justice.¹ Lastly, the punishment should be victim-friendly and not victim-oriented. Although the voices and reparative interests of victims are important, the results of sentencing should not be influenced by emotional retribution, but by princely judgment, proportionate and reasonable punishment.³⁰ Ethical punishment is, therefore, not the severity but what is justified and proportionate and reasoned punishment.

VIII. CONCLUSION

The reconsideration of punishment without imprisonment is an indication of a radical change of ethical direction of criminal law. The validity of punishment, as this paper has demonstrated, is oblivious to the aspect of physical confinement but rather regarding its substantiation in terms of

²⁸ Ibid 26

²⁹ Ibid 23.

³⁰ Ibid 25.

proportionality, dignity, and responsibility. Sanctions not based on imprisonment, when based on principled arguments, can convey moral disapproval, hold offenders responsible, and enhance rehabilitation without exposing them to the unwarranted and very counter-productive penalties of imprisonment.

But the issue of punishment outside prison is not an ethical matter of fact. The dangers of perceived leniency, inequality, arbitrariness, and dissatisfaction of the victims show that non-custodial sanctions must have clear ethical boundaries and procedural protection. The modern criminal justice is not a question of whether to punish or to be gentle, it is rather a question of whether to punish and be able to adhere to consistent moral standards. The idea of a system that values justified censure more than suffering goes to confirm once again that justice is not gauged by the pain that it may produce, but rather by the causes that it can justify.

