

TRIAL IN ABSENTIA AND THE RIGHT TO FAIR TRIAL: AN ANALYSIS OF SECTION 355 & 356 OF BNSS, 2023

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ABSTRACT

The right to a fair trial is a cardinal principle of criminal justice and an essential element of constitutional governance under Article 21 of the Constitution of India. The presence of the accused is important during criminal proceedings, which facilitates effective participation, legal representation, and the opportunity to contest the prosecution's case. The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), however, introduces an explicit statutory framework for trial in absentia under Sections 355 and 356, permitting courts to proceed against proclaimed offenders who deliberately evade the judicial process. This legislative shift represents a significant transformation in Indian criminal procedure and raises critical questions concerning its compatibility with the right to a fair trial.

This article undertakes a doctrinal and analytical examination of Sections 355 and 356 of the BNSS to assess whether the procedure of trial in absentia conforms to constitutional mandates and principles of natural justice. The study further contextualises the Indian framework within international human rights standards, such as Article 14 of the International Covenant on Civil and Political Rights, which permits trial in absentia only under strictly limited conditions.

The article argues that while trial in absentia may serve legitimate objectives such as expeditious justice and deterrence against abscondence, it poses inherent risks to procedural fairness, including unequal adversarial balance and diluted defence rights. It concludes that the constitutional sustainability of Sections 355 and 356 depends upon their exceptional

application, rigorous judicial scrutiny, and the recognition of effective remedial mechanisms to prevent miscarriage of justice.

Keywords: Trial in Absentia- Right to Fair Trial- Bharatiya Nagarik Suraksha Sanhita, 2023- Criminal Procedure Transformation- Principles of Natural Justice

I. INTRODUCTION

The legitimacy of a criminal justice system is fundamentally measured by its commitment to fairness, due process, and respect for individual rights. Among the procedural guarantees that underpin this commitment, the right to a fair trial occupies a central and non-derogable position. The presence of the accused during criminal proceedings has traditionally been regarded as an essential component of this right, enabling effective participation in the trial, confrontation of witnesses, consultation with legal counsel, and meaningful exercise of the right of defence. The introduction of *trial in absentia*, which permits criminal proceedings to continue in the absence of the accused, therefore presents a profound legal and constitutional dilemma—one that directly engages the tension between procedural efficiency and fundamental rights.

The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), replacing the Code of Criminal Procedure, 1973, marks a watershed moment in the evolution of Indian criminal procedure. Among its most debated innovations is the express statutory recognition of trial in absentia under Sections 355 and 356. These provisions empower courts to proceed with the trial of proclaimed offenders who deliberately evade the judicial process, subject to certain conditions and safeguards. While the legislative intent behind these provisions appears to be the curtailment of delay tactics and the strengthening of the justice delivery mechanism, their implications for the constitutional guarantee of a fair trial demand rigorous scrutiny.

The scale of judicial pendency provides essential empirical context for the legislative impetus behind these provisions. According to a report prepared by the Centre for Research and Planning of the Supreme Court of India, as of November 2023, over 4.4 crore cases were pending in district and taluka courts, with as many as 1.8 crore of these stalled at the stage of appearance or service of the accused.¹ Research on delayed criminal proceedings indicates that

Centre for Research and Planning, Supreme Court of India, *State of the Judiciary: A Report on Infrastructure, Budgeting, Human Resources* (Supreme Court of India, November 2023), cited in 'India: 21k Judges Struggle to

abscondence by the accused is one of the most persistent contributors to this backlog, with thousands of criminal cases across districts unable to proceed because proclaimed offenders could not be located or secured for trial.² These statistics underscore the systemic cost of deliberate evasion and illuminate the policy imperative that the Legislature sought to address through the introduction of Sections 355 and 356 of the BNSS.

Historically, Indian criminal jurisprudence has been reluctant to endorse trials conducted in the absence of the accused. The CrPC, 1973, though permitting limited exceptions such as summary proceedings or representation through pleaders in minor cases, largely proceeded on the assumption that the physical presence of the accused was indispensable to a valid trial. This approach was consistent with constitutional jurisprudence developed under Article 21 of the Constitution of India, which mandates that any procedure depriving a person of life or personal liberty must be “just, fair and reasonable”.³ Judicial interpretations have repeatedly affirmed that fairness in criminal procedure includes not merely formal compliance with statutory rules but substantive adherence to principles of natural justice.

The recognition of trial in absentia under the BNSS must also be situated within a broader global context. Comparative criminal law reveals that several jurisdictions permit trials in absentia under narrowly defined circumstances, particularly where the accused has absconded after being duly informed of the proceedings. International human rights law, especially Article 14 of the International Covenant on Civil and Political Rights (ICCPR), implicitly acknowledges the right of the accused to be present at trial as an integral aspect of a fair hearing.⁴ The Human Rights Committee has clarified that while trials in absentia are not per se prohibited, they are compatible with the Covenant only when the accused has been informed of the proceedings and has voluntarily waived the right to be present.⁵ These standards underscore that absence cannot be presumed lightly and that procedural safeguards must be sensible enough to prevent irreversible injustice.

Clear 5 Crore Cases' (*The Tribune*, 17 December 2023) <<https://www.tribuneindia.com/news/india/21k-judges-struggle-to-clear-5-crore-cases-572887>> accessed 25 September 2026.

National Judicial Data Grid (NJDG), Criminal Pendency Statistics (2023); see also 'Decoding Section 356 BNSS: Constitutional Perils of "Deemed Waiver" and Trial in Absentia' (*LiveLaw*, 20 September 2026) <<https://www.livelaw.in/articles/decoding-section356-bnss-constitutional-perils-deemed-waiver-trial-in-absentia-550914>> accessed 25 September 2026.

1. *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

2. International Covenant on Civil and Political Rights, art 14, adopted 16 December 1966, 999 UNTS 171.

3. Human Rights Committee, *General Comment No 32: Article 14 – Right to Equality before Courts and Tribunals and to a Fair Trial* (2007) UN Doc CCPR/C/GC/32.

Sections 355 and 356 of the BNSS attempt to codify this exceptional procedure within the Indian legal framework. Section 355 empowers the court to dispense with the personal attendance of the accused where personal attendance is not necessary in the interests of justice, or where the accused persistently disturbs the proceedings in court, provided the accused is already represented by an advocate. Section 356, separately and distinctly, permits the continuation and conclusion of the trial in respect of proclaimed offenders who have absconded to evade trial, subject to the appointment of a defence counsel on behalf of the absent accused. On a textual reading, these provisions reflect an effort to balance the rights of the accused with the collective interest in the effective administration of criminal justice. However, the practical operation of these sections raises serious questions regarding informed waiver, adequacy of representation, evidentiary fairness, and the possibility of retrial upon the appearance of the accused.

The right to a fair trial is not a static concept; rather, it encompasses a constellation of procedural rights, including the presumption of innocence, equality of arms, the right to legal representation, and the right to examine witnesses. Trial in absentia directly impacts several of these guarantees. The absence of the accused inevitably weakens the adversarial balance of the trial, particularly in criminal proceedings where the prosecution enjoys the institutional advantage of the State. Although Section 356 provides for legal representation of the absent accused, the effectiveness of such representation remains contingent on the availability of instructions, access to evidence, and the ability to cross-examine witnesses meaningfully.

From a constitutional standpoint, the compatibility of Sections 355 and 356 with Article 21 hinges on whether the procedure prescribed can be regarded as fair, just, and reasonable. Indian courts have consistently held that procedural fairness is not sacrificed at the altar of expediency.⁶ The introduction of trial in absentia, therefore, must withstand constitutional scrutiny not only in theory but also in its implementation. The potential for misuse, particularly in cases involving socio-economically disadvantaged accused persons or politically sensitive prosecutions, cannot be ignored.

Moreover, the principle of *audi alteram partem*, which lies at the heart of natural justice, assumes heightened significance in this context. While the doctrine does not mandate physical presence in all circumstances, it does require that a party be given a real and effective opportunity to be heard. Trial in absentia challenges the very notion of participatory justice by

4. *Zahira Habibulla H Sheikh v State of Gujarat* (2004) 4 SCC 158.

substituting presumed waiver for actual participation. The legitimacy of such substitution depends on stringent adherence to procedural safeguards, including proof of due notice, voluntary evasion, and the availability of post-conviction remedies.

Another critical concern arising from Sections 355 and 356 is the question of finality. If a trial conducted in absentia results in conviction, the scope for reopening the proceedings upon the subsequent appearance or arrest of the accused becomes a matter of vital importance. International jurisprudence suggests that the availability of a retrial or substantive appeal is an essential safeguard against miscarriage of justice in such cases.⁷ The BNSS, however, does not explicitly articulate the contours of such remedial mechanisms, leaving their scope to judicial interpretation.

The introduction of trial in absentia under the BNSS thus represents a paradigm shift in Indian criminal procedure—from a presence-centric model to a conditional efficiency-oriented framework. While this shift may be justified by pragmatic considerations such as pendency and abscondence, it simultaneously reconfigures the relationship between the State and the accused. The danger lies in normalising exceptional procedures and eroding the procedural guarantees that distinguish a constitutional democracy from an authoritarian system.

This article undertakes a critical analysis of Sections 355 and 356 of the BNSS, 2023, through the lens of the right to a fair trial. It examines the constitutional validity of these provisions, their consistency with international human rights standards, and their potential impact on the foundational principles of criminal justice. By situating the discussion within both domestic and international legal frameworks, the article seeks to assess whether trial in absentia under the BNSS constitutes a justified procedural innovation or an unwarranted departure from due process norms.

II. INTERNATIONAL LEGAL FRAMEWORK ON TRIAL IN ABSENTIA

Although domestic legal systems adopt divergent approaches on trial in absentia, international law establishes minimum fair trial standards applicable to such proceedings. International law does not prohibit such trials per se. The legitimacy of trials in absentia depends on procedural

5. *Colozza v Italy* (1985) 7 EHRR 516 (ECtHR).

safeguards ensuring due process, effective notice, legal representation, and post-conviction remedies.

But trials in absentia raise serious concerns under international human rights law, particularly in relation to the right to a fair trial guaranteed under international instruments.⁸ The presence of the accused at trial is regarded as a fundamental component of procedural justice, as it enables the accused to understand the charges, challenge evidence, instruct counsel, and effectively participate in the defence. Conducting criminal proceedings in the absence of the accused risks undermining the principles of natural justice and due process, unless justified by exceptional circumstances and accompanied by adequate safeguards.

International human rights bodies have consistently emphasised that a trial in absentia should not become a tool to expedite criminal proceedings at the cost of individual rights. Instead, such trials must remain an exception rather than the rule, ensuring that the accused has knowingly and voluntarily waived the right to be present or has deliberately absconded after receiving proper notice of the proceedings.⁹

International Covenant on Civil and Political Rights (ICCPR)

Article 14 of the International Covenant on Civil and Political Rights guarantees equality before courts and tribunals and the right to a fair and public hearing. Although the Covenant does not expressly mention the right of the accused to be physically present at trial, this right is implicit in Article 14(3)(d), which ensures the right of the accused “to be tried in his presence.” The Human Rights Committee has clarified that trials *in absentia* are not per se prohibited under the ICCPR, provided the accused was duly informed of the proceedings and given an effective opportunity to be retried upon appearance.¹⁰

In *Mbenge v Zaire*, the Human Rights Committee held that conducting a trial in the absence of the accused violates Article 14 unless it is established that the accused was duly informed of the proceedings and deliberately chose not to appear.¹¹ The Committee further stressed that states must provide an effective remedy, including the possibility of a retrial, where a

6. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

7. Human Rights Committee, ‘General Comment No 32: Article 14 – Right to equality before courts and tribunals and to a fair trial’ (2007) UN Doc CCPR/C/GC/32.

8. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 14; Human Rights Committee, *General Comment No 32: Article 14 – Right to Equality before Courts and Tribunals and to a Fair Trial* (23 August 2007) UN Doc CCPR/C/GC/32.

9. *Mbenge v Zaire* (1983) Communication No 16/1977, UN Doc CCPR/C/18/D/16/1977 (Human Rights Committee).

conviction has been secured in absentia without the accused's informed waiver of the right to be present. This case is frequently cited as an authoritative international standard on trials *in absentia*. It clearly establishes that efficiency of criminal justice cannot override fundamental defence rights.

Thus, under international law, the permissibility of trials in absentia hinges upon the existence of procedural guarantees such as proper notice, legal representation, and the availability of a fresh determination of the case upon the accused's appearance.

European Convention on Human Rights (ECHR)

Article 6 of the European Convention on Human Rights protects the right to a fair hearing, including the rights of the defence. The European Court of Human Rights has consistently held that trials *in absentia* do not violate Article 6 where it is established that the accused knowingly and unequivocally waived the right to appear, or deliberately absconded after receiving effective notice of the proceedings. Crucially, the availability of a remedy enabling the accused to seek a retrial or reopening of proceedings upon appearance is considered a decisive safeguard.¹²

The European Court of Human Rights' approach reflects a balance between the interests of effective criminal justice administration and the protection of individual rights, insisting that trials in absentia must be accompanied by mechanisms that restore the accused's right to defence.

Inter-American Human Rights System

Article 8 of the American Convention on Human Rights guarantees the right to a fair trial and due process of law. The Inter-American Court of Human Rights has emphasised that criminal proceedings conducted *in absentia* must not undermine the effective exercise of defence rights, including the right to participate meaningfully in one's trial. The Court has stressed that absence should not result in structural inequality or prejudice to the accused.¹³

African Human Rights Framework

The African Charter on Human and Peoples' Rights safeguards fair trial rights under Articles 7 and 26. The African Commission on Human and Peoples' Rights has expressed concern over

11. *Colozza v Italy* (1985) 7 EHRR 516; *Sejdovic v Italy* (2006) 42 EHRR 17.

12. *Tibi v Ecuador* (Judgment) Inter-American Court of Human Rights Series C No 114 (7 September 2004).

convictions rendered *in absentia* without adequate procedural guarantees, particularly where the accused was not properly informed of the proceedings or denied the opportunity to challenge the conviction upon return.¹⁴

International Criminal Law

International criminal tribunals have generally rejected trials *in absentia* as incompatible with the fundamental rights of the accused. The Rome Statute of the International Criminal Court mandates the presence of the accused during trial proceedings, subject only to narrowly tailored exceptions that ensure full respect for defence rights and procedural fairness.¹⁵

State Practice and Emerging Norms

State practice increasingly reflects harmonisation with international fair trial standards. Contemporary domestic legal frameworks tend to permit trials *in absentia* only upon strict proof of effective notice, provision of legal representation, and the availability of a substantive right to reopen or retry the case upon the appearance of the accused. This trend indicates the emergence of a customary norm balancing procedural efficiency with the protection of fundamental defence rights.

While trials *in absentia* serve legitimate interests such as preventing impunity, they risk undermining fairness. International jurisprudence stresses proportionality, necessity, and procedural justice.

International law permits trials *in absentia* only as an exception. The prevailing framework prioritizes the right to fair trial, ensuring that absence does not extinguish justice. The overarching principle remains that the accused must not be deprived of the right to a fair trial merely due to absence, unless such absence is voluntary and informed. Both international and regional human rights frameworks require states to ensure effective notice, access to legal representation, and the availability of retrial or appeal mechanisms.

Accordingly, trials *in absentia* are compatible with international human rights law only when they preserve the essence of the right to a fair trial and prevent miscarriages of justice arising from the exclusion of the accused from criminal proceedings.

13. *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 63(1).

III. TRIAL IN ABSENTIA IN OTHER JURISDICTIONS

1. United States of America

1.1 Constitutional Basis & Legal Framework

The United States does not categorically prohibit trials in absentia, but the Sixth Amendment to the U.S. Constitution guarantees the accused the right to a public trial and to confront witnesses — which has been interpreted to include the right to be present during trial proceedings.¹⁶

The leading case law on absence during trial is *Faretta v California*, where the U.S. Supreme Court recognised the right of a defendant to represent themselves, but stressed that affirmative waiver of the right to be present must be unequivocal.¹⁷

1.2 Key Case Law

In *Taylor v. United States*, the Supreme Court held that a defendant's voluntary absence after trial commencement could result in a valid conviction, provided they had knowingly and intelligently waived their presence.¹⁸

Similarly, in *Illinois v. Allen*, the Court affirmed that a defendant who becomes disruptive and is removed from the courtroom forfeits the right to be present during trial.¹⁹

1.3 Setbacks and Criticisms

- **Ambiguity in “waiver” standards:** There is no uniform national standard for what constitutes an effective waiver of presence.
- **Risk to fair trial guarantees:** Critics argue that trials proceeding in absence can undermine confrontation rights and cross-examination.

13. US Const amend VI.

14. *Faretta v California* 422 US 806 (1975).

15. *Taylor v United States*, 414 US 17 (1973).

16. *Illinois v Allen* 397 US 337 (1970).

2. United Kingdom

2.1 Legal Provisions

In England and Wales, trials in absentia are provided for under the Criminal Justice Act 2003.²⁰ The law allows trials to proceed if a defendant, having been served with proper notice, fails to attend, except in serious cases such as those on indictment where the court must be satisfied it is in the interests of justice to proceed.²¹

2.2 Leading Case Law

In *R v Jones*, it was held that the court must balance:

- the importance of ensuring the defendant's presence, and
- the public interest in effective case disposal.²²

The court must consider if the defendant's absence is deliberate and if they had full knowledge of the trial date.

2.3 Setbacks

- **Complex judicial balancing test:** Judges often struggle to weigh the seriousness of the offence against the need to avoid undue delay.
- **Uneven application:** Lower courts have been inconsistent in how they apply the interests of justice test.

3. France

3.1 Civil Law Approach

France's civil law system applies trials in absentia under strict rules. The French Code of Criminal Procedure (Code de procédure pénale) allows for trial in absentia only if the prosecutor petitions for it and the accused was duly summoned and consciously avoided the trial.²³

17.Criminal Justice Act 2003 (UK) s 57.

18.Ibid.

19.*R v Jones* [2004] EWCA Crim 2897.

20.Code de procédure pénale (France) arts 399–406.

3.2 Representative Case

In *Cour de cassation, Crim, 12 June 1996*, the French Court of Cassation overturned a trial in absentia because the accused's counsel did not have adequate instructions from the defendant, leading to a violation of fair defence rights.²⁴

3.3 Setbacks

- **Defence strategy limitations:** The presence of defence counsel alone may not adequately protect a defendant's interests if instructions are insufficient.
- **Risk of irreversible rulings:** Once the conviction in absentia becomes final, retrial rights are limited, affecting remedies for the accused.

4. Germany

4.1 Constitutional and Procedural Basis

Under German law, the Criminal Procedure Code (Strafprozessordnung) generally requires the physical presence of the accused.²⁵ However, trials may proceed when:

- the accused has been summoned and knowingly fails to appear, or
- the accused flees after trial begins.

4.2 Key Judicial Position

The Federal Constitutional Court (Bundesverfassungsgericht) has held that absence cannot automatically lead to conviction; the defendant must have voluntarily and deliberately evaded trial, and the court must ensure fairness is preserved.²⁶

4.3 Setbacks

- Strict interpretation limits prosecutorial flexibility.

21. *Cour de cassation, Chambre criminelle*, 12 June 1996.

22. Strafprozessordnung (Germany) §§ 230–232.

23. *BVerfG*, 2 BvR 192/07 (2007).

- Defendants fleeing prosecution may exploit legal avenues for delay, leading to extended adjournments.

5. Italy

5.1 Civil Law Regime

Italy historically allowed trials in absentia under strict notice requirements.²⁷ However, Italian law also provides for retrial if the accused appears after conviction, reinforcing the need for strong procedural safeguards.

5.2 European Court of Human Rights' Case Law Influences

Italy's jurisprudence on trials in absentia has been significantly guided by European Court of Human Rights decisions such as *Colozza v Italy* and *Sejdovic v Italy*, which emphasise effective notice and retrial rights.²⁸

5.3 Setbacks

Although procedural safeguards exist, practical issues persist:

- Proof of delivery of notice may be disputed.
- Retrial rights are sometimes procedurally cumbersome.

6. Comparative Analysis: Key Issues & Setbacks

6.1 Adequacy of Notice

Almost all jurisdictions require effective notice of the trial date. The challenge is twofold:

- Translating notice requirements into reliable proof, and
- Ensuring vulnerable populations (illiterate, language barriers, indigent persons) receive genuinely effective notice.

6.2 Waiver and Voluntariness

24.Codice di procedura penale (Italy) art 420.

26.*Colozza v Italy* (1985) 7 EHRR 516; *Sejdovic v Italy* (2006) 42 EHRR 17.

The central question remains: Has the accused knowingly and voluntarily waived the right to appear? Most systems grapple with how to define and prove such a waiver without undermining fundamental fair trial rights.

6.3 Retrial and Remedy Mechanisms

A prevalent theme in case law is that trial in absentia should not be final without an opportunity for retrial once the accused appears. In *Sejdovic v Italy*, the European Court of Human Rights held that a mere appeal without a full rehearing of the case may not be sufficient.²⁹

6.4 Potential for Abuse

Critics warn that :

- It overburdened courts (e.g., U.S. federal and state systems),
- In authoritarian states with weak procedural safeguards, there exists a real danger that trials in absentia become tools for conviction without real defence participation.

IV. NATIONAL LEGAL FRAMEWORK OF IN ABSENTIA TRIAL

No one should be convicted without being heard, according to the Latin maxim "Audi alteram partem," which embodies the idea of natural justice. The accused must be given a chance to be heard at the case's hearing, and his presence is required for the trial. The criminal justice system's fair trial premise grants the accused a number of rights. The requirement that evidence be taken in the accused's presence is one of the well-known rights. A sense of fairness in court is emphasized by international human rights documents such as the International Covenant on Civil and Political Rights (ICCPR). Everyone is guaranteed the right to a fair public hearing by an unbiased, independent, and competent court established by law under Article 14 of the ICCPR. When it comes to trials in absentia, European Union court has consistently rejected them unless certain particular procedural safeguards are included, such as notifying the accused of the proceedings and giving them the chance to be present.

27.*Sejdovic v Italy* (2006) 42 EHRR 17.

There is no provision for trial and disposition in absentia in the Code of Criminal Procedure, 1973. Section 299 of the Code of Criminal Procedure, 1973 restricts the use of prosecution testimony against abscond or unknown accused persons to four scenarios such as if the deponent is dead, or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience following their arrest or discovery. The accused frequently attempt to abuse their right to appear in person by absconding, which hinders the quick investigation and trial. The fact that criminal law has not been updated to address cases in which the accused has fled is a significant contributing factor to the backlog of cases in the Indian judiciary. Split and piece-meal trials cause a great deal of inconvenience for the victims and witnesses. The day-to-day trial of significant criminal cases is impacted by the accused's absconding, which also contributes to the docket explosion and clogs Malkhana with seized materials. When an accused person abscond, it makes it difficult for courts to issue processes for production, puts strain on agencies in executing processes of court. Many nations, including Bangladesh, Belgium, Italy, and the Czech Republic, have laws allowing for the trial of accused persons in absentia. In the United States, the accused may forfeit his right to attend the trial after it has commenced. The Criminal Procedure Code, 1898 (Bangladesh), Section 339 (B), allows for the trial of the accused and the recording of evidence while he is not present.

The empirical scale of this problem is instructive. According to the National Judicial Data Grid, as of 2023, approximately 3.2 crore criminal cases were pending before Indian courts, with a substantial proportion of delays attributable to the non-appearance of the accused during hearings.³⁰ The persistent failure to secure the attendance of proclaimed offenders has historically paralysed Malkhana management and court docket administration, delayed the examination of witnesses whose recollections deteriorate with time, and subjected complainants to prolonged uncertainty. It is against this documented pattern of systemic disruption that the BNSS provisions must be evaluated.

This clause was acknowledged by Hon'ble Apex Court in ***Hussain & Others v. Union of India***³¹. In this case, the Hon'ble Apex Court instructed the Government to think about adding a comparable clause allowing an accused person to be tried

National Judicial Data Grid (NJDG), Criminal Case Pendency Statistics (2023), discussed in Avantika Jain and Arnav Sinha, 'Reconciling Rights: An Analysis of Section 356 of BNSS' (*The Crime & Justice Blog*, 11 April 2025) <<https://crimeandjustice.blog/2025/04/11/reconciling-rights-an-analysis-of-section-356-of-bnss/>> accessed 25 September 2026.

³¹ (2017) 5 SCC 702

in absentia under certain circumstances. In the case of *Kader Khan v. State of West Bengal*,³² the Hon'ble High Court of Calcutta likewise emphasized the significance of trying absconding accused in absentia. Hon'ble Apex Court voiced its concern in *Bachche Lal Yadav v. Akhand Pratap Singh*³³ when the accused purposefully escapes to evade trial and undermine the administration of justice. Additionally, the High Court requested that Section 299 of the Code of Criminal Procedure be amended in *Hari Singh v. State of Jharkhand*³⁴ in order to speed up criminal cases. In *State of Maharashtra v. Dr. Praful B. Desai*,³⁵ the Supreme Court emphasized that “presence” of the accused includes physical or virtual presence, highlighting its necessity for cross-examination and fairness. In *Kartar Singh v. State of Punjab*,³⁶ while upholding stringent TADA provisions, the Court reiterated that fair trial cannot be sacrificed even for combating terrorism.

The BNSS has included clauses that allow certain types of accused to be tried in absentia. In contrast to the preceding Code of Criminal Procedure, 1973, this permits the trial and pronouncement of a judgement in the absence of the accused. A criminal trial conducted without the accused present in court is known as a trial in absentia. In the past, even for serious crimes, Indian law prohibited anyone from being tried, convicted, or sentenced in absentia.

The constitutional sustainability of this framework has already attracted direct judicial scrutiny. In October 2024, the Mannargudi Bar Association filed a writ petition before the Supreme Court of India (W.P.(C) No. 625/2024, *Mannargudi Bar Association v Union of India and Others*), challenging the constitutional validity of Section 356 alongside three other provisions of the BNSS, on the grounds that they violate Articles 14, 19, and 21 of the Constitution.³⁷ The petitioners argued, inter alia, that the mechanism of Section 356 impermissibly deems a waiver of the fundamental right to a fair trial, which cannot be surrendered through a statutory fiction, and that the provision permits conviction on the basis of the confession of an absconding accused without affording the accused a genuine opportunity to contest the proceedings. The

³² 2022 SCC Online Cal 1038

³³ 2018, SCC online SC 3813

³⁴ 2018 SCC Online Jhar-2534

³⁵ (2003) 4 SCC 601

³⁶ (1994) 3 SCC 569

'Bar Association Approaches Supreme Court Challenging Validity of 4 BNSS Provisions' (*LiveLaw*, November 2024) <<https://www.livelaw.in/top-stories/supreme-court-bar-association-plea-challenging-bnss-provisions-handcuffing-cognizance-attachment-272884>> accessed 25 September 2026; see also 'BNSS Provisions Under Scrutiny: SC to Hear Petitions on 18th December' (*CMI & Co India Newsletter*, December 2024) <<https://cmiandco.com/cmi-talks-india-newsletter-dec-2024/>> accessed 25 September 2026.

matter remains pending before the Supreme Court, rendering the constitutional legitimacy of Section 356 an open question of the first order.

According to Section 355 of the BNSS, if it is determined that the accused's personal attendance is not required in the interests of justice or if the accused consistently interferes with court procedures, the judge or magistrate may try the accused in his absence. Under certain circumstances, the BNSS permits proclaimed offenders to be tried in absentia. When a person designated as a proclaimed criminal has absconded to avoid trial and there is no immediate chance of apprehending him, Section 356 of the BNSS requires the court to conduct the trial in absentia. Additionally, it stipulates a mandatory waiting period of 90 days from the date of framing of the charge before commencing the trial. Provisions for rendering judgments in in-absentia cases are provided by the BNSS. It says that even if the accused is arrested or appears at the end of the trial, their voluntary absence after the trial has started will not stop the trial from continuing, including the pronouncement of the judgement.

The provision offers several riders to ensure justice and to give the accused enough time to learn about the court's proposal to proceed with the trial in his absence. Before holding a trial in absentia, the court must follow the obligatory procedure outlined in this section.

- There must be two consecutive arrest warrants issued at an interval of at least 30 days.
- The court will publish a notice in a national or local daily newspaper requiring the proclaimed offender to appear before the court within 30 days; if he doesn't, the trial will start without him.
- To notify the accused's friends and family, if any, about the commencement of trial.
- To display information about the commencement of the trial in the police station and on a prominent area of the home or homestead where the accused usually resides.
- To give a 90-days period between the date the charge was framed and the commencement of the trial.

The court must appoint a defence counsel at the state's cost to represent the accused if the proclaimed offender lacks an advocate. Taken deposition U/s. 356 of B.N.S.S., 2023 may, to the extent that it is practical, be recorded by audio- video electronic means and stored as the Court directs. The goal is to further safeguard the interests of justice and a fair trial.

Additionally, the clause restricts the proclaimed offender's ability to appeal. No appeal against the judgment under this section may be filed unless he personally appears before the appellate court. Additionally, there is a three-year limitations for appeals in such cases. After three years have passed since the conviction judgment under section 356 B.N.S.S., 2023, no appeal may be filed.

So, after analysing Section 356 of the BNSS, it is clear that the following essentials are necessary to conduct a trial in absentia:

1. The accused must be a proclaimed offender under law;
2. The accused has absconded to evade trial; and
3. There is no immediate prospect of arrest;



V. IN ABSENTIA TRIALS : A HUMAN RIGHTS PERSPECTIVE

Well known principle of criminal Justice, given by the jurist William Blackstone the '*Blackstone Ratio*' —“Better that ten guilty persons escape, than that one innocent suffer” — highlights the importance of safeguarding individual rights.

The right to a fair trial is recognized as a fundamental principle that safeguards life and individual liberty in Article 21 of the Indian Constitution. The courts have given this article a broad and liberal interpretation, interpreting it to include a number of rights, such as the right to a free trial, the presumption of innocence, the right to an adequate defence, and the right to a speedy trial. These rights apply to everyone facing criminal charges and guarantee that justice is administered in a free and fair manner. The court stated in *Dwarka Prasad Agarwal v. B.D. Agarwal and Ors.*³⁸ that the right to a fair trial is a fundamental right guaranteed by both the

³⁸ AIR 2003 SUPREME COURT 2686

Indian Constitution and India's adherence to international treaties and conventions pertaining to the same. The Court broadened the application of Article 21 in *Maneka Gandhi v. Union of India*³⁹ by ruling that any procedure restricting liberty must be "fair, just, and not arbitrary." By its very nature, an in absentia trial runs the risk of compromising this idea. The accused is denied the chance to support his lawyer, cross-examine witnesses, and defend himself. In *Zahira Sheikh v. State of Gujarat*,⁴⁰ the Court stressed that, in accordance with Article 14 of the International Covenant on Civil and Political Rights (ICCPR), a fair trial is both a constitutional requirement and a component of human rights doctrine.

Criminal procedures are based on the fundamental principles of natural justice, which include the right to self-defence and to be heard. Due process may be violated by the BNSS's trial-inabsentia provisions, which permit convictions without ensuring that the accused was informed of the proceedings. This goes against fundamental fair trial norms, especially when procedural errors like improper summons delivery result in erroneous convictions. Although the designation of a proclaimed criminal under Section 84 BNSS has significant legal consequences, the act does not provide enough protection against false classification. The investigating authorities have the primary ability to declare someone a proclaimed offender, which raises concerns about the possibility of arbitrary application. In *Hussain v. Union of India*,⁴¹ the Supreme Court emphasized against procedural shortcuts which undermine due process rights and emphasized the significance of cutting down on trial delays. Erroneous convictions in absentia are more likely when someone is classified as a proclaimed offender without sufficient evidence of purposeful evasion.

According to Article 22(1) of the Constitution, everyone has the right to consult with and be represented by a legal practitioner of his choice. Section 356 BNSS permits the court to designate legal representation for the proclaimed offender even in cases when the accused is not present. However, as a strong defence frequently necessitates the accused's direct involvement, the effectiveness of such representation is questionable. The Court determined that legal aid is a necessary part of the right to a fair trial under Article 21 in *Hussainara Khatoon v. State of Bihar*.⁴² Extending this idea, one could contend that absentia trials run the risk of turning legal representation into a formality.

³⁹ (1978) 1 SCC 248.

⁴⁰ (2004) 4 SCC 158

⁴¹ AIR 2017 SUPREME COURT 1362

⁴² (1980) 1 SCC 98.

The systemic inadequacy of state-funded legal aid in India compounds this concern substantially. According to the India Justice Report 2025, India spends a mere Rs. 6 per capita annually on legal aid, the lowest allocation among all four pillars of the justice delivery system assessed by that report.⁴³ Despite approximately 80 per cent of India's population being eligible for free legal services under the Legal Services Authorities Act, 1987, only 15.5 lakh persons availed of legal aid in 2023-24. With one legal aid clinic serving an average of 163 villages, the structural reach of state-funded legal assistance remains acutely inadequate. In the specific context of trials in absentia, where a court-appointed pleader functions as the sole line of defence for an absent accused who has no opportunity to give instructions, this systemic deficit in the quality and reach of legal aid substantially amplifies the risk of wrongful conviction.

International Human Rights Standards the ICCPR's Article 14(3)(d) protects an accused person's right "to be tried in his presence." According to the UN Human Rights Committee, this means that in absentia trials are only allowed if the accused has been properly informed about the proceedings and given the chance to be represented. In *Colozza v. Italy*⁴⁴, the European Court of Human Rights ruled that absentia trials are against Article 6 of the European Convention unless the accused has given up his right to be present. When Indian courts assess whether Section 356 BNSS complies with Article 21, these criteria will be effective. There are risks that the procedural safeguards under Section 356 may not always ensure the right to having a free trial in cases where the accused is genuinely unaware of any proceedings against him, cases against marginalised individuals or people with unstable addresses.

Trials in absentia sit at a precarious intersection between the State's interest in effective criminal justice and the individual's non-derogable right to a fair trial. While the BNSS seeks to address delays and deliberate evasion of law by accused persons, its provisions permitting trials in absentia raise serious constitutional and human rights concerns. Giving the accused the appropriate notice is one of the issues with an in absentia trial. Public announcements and registered mail are required by BNSS. Again, the efficacy of these techniques varies, and it is unclear if the accused could have fairly been aware that he was facing criminal charges. In the BNSS, defence lawyers play a crucial role in representing an accused person who is not present.

India Justice Report 2025 (Tata Trusts, April 2025); see 'India Justice Report 2025: Key Findings, Gaps & Reforms' (*InsightsOnIndia*, 16 April 2025) <<https://www.insightsonindia.com/2025/04/16/india-justice-report-2025/>> accessed 25 September 2026; see also 'Legal Aid in India: Challenges, NALSA Initiatives & Way Forward' (*InsightsOnIndia*, 1 August 2025) <<https://www.insightsonindia.com/2025/08/01/legal-aid-and-nalsa/>> accessed 25 September 2026.

⁴⁴ App. No. 9024/80, Eur. Ct. H.R. (1985)

However, this is ineffective if the accused is unable to properly communicate with his lawyer or if counsel refuses to provide material that is crucial to the case. One of the corollaries of a fair trial—effective legal representation—is seriously compromised by this circumstance. An accused person found guilty in absentia has access to the BNSS's appellate provisions. However, the accused would need to demonstrate that he was not given a chance to present his case in court and that his absence was not voluntary in order for these laws to be applied in practice. The general public's opinion of the court will probably be significantly impacted by holding such trials in absentia. In addition to undermining the process's legality and impartiality, convictions without the accused's presence also erode public trust in the legal system and the rule of law. Deep moral questions are raised when someone is convicted when they are not present. Since the accused cannot contest the accusations or offer mitigating circumstances, such methods are incompatible with the fundamental principles of justice and equality. There is a very high chance of a miscarriage of justice in these situations. The effectiveness of the legal system as a whole is damaged by such a possibility.

The analysis of constitutional jurisprudence and international human rights standards demonstrates that the right to be present at one's trial is not a mere procedural formality, but a substantive safeguard against arbitrariness, wrongful conviction, and abuse of state power. Inadequate notice, questionable proclamation procedures, and the limited effectiveness of legal representation in the absence of the accused collectively undermine the presumption of innocence and the equality of arms that lie at the heart of criminal justice. For marginalized and vulnerable individuals, these risks are even more pronounced, increasing the likelihood of irreversible miscarriages of justice.

VI. CONCLUSION

The introduction of trials in absentia under Section 356 of the BNSS, 2023 reflects the State's legitimate concern with preventing fugitives and proclaimed offenders from frustrating the criminal justice process. However, this procedural shift marks a clear departure from the long-standing emphasis in Indian criminal jurisprudence on the physical presence of the accused as a cornerstone of a fair trial. As consistently underscored by the Supreme Court in decisions such as *Maneka Gandhi v. Union of India*⁴⁵ and *Rattiram v. State of M.P.*⁴⁶, procedural

⁴⁵ (1978) 1 SCC 248

⁴⁶ 2012) 4 SCC 516

fairness is inseparable from substantive justice, and any dilution of due process directly implicates the guarantee of life and personal liberty under Article 21 of the Constitution.

While Section 356 is accompanied by certain safeguards—such as proclamations, attachment of property, and representation through counsel—these measures remain largely procedural and do not fully compensate for the absence of the accused. The lack of an express statutory right to retrial upon the accused's reappearance, unlike comparative models under the European Convention on Human Rights or UK law, represents a significant constitutional gap. Without such protection, trials in absentia risk undermining core principles such as the presumption of innocence, the right to confront witnesses, and effective participation in one's own defense. The danger of wrongful convictions, disproportionate property forfeiture affecting dependents, and the implicit treatment of abscondence as guilt further accentuates these concerns.

The constitutional challenge now pending before the Supreme Court in *Mannargudi Bar Association v Union of India and Others* (W.P.(C) No. 625/2024) gives this critique immediate practical urgency.⁴⁷ The petitioners' central argument, that Section 356 creates an impermissible statutory fiction of waiver of a fundamental right under Article 21, aligns precisely with the concern developed in this article: that the procedural safeguards currently prescribed by the BNSS do not adequately substitute for the accused's actual and informed participation in the trial. The Supreme Court's eventual ruling on this challenge may well determine whether Section 356 as presently enacted is constitutionally tenable or whether it requires the kind of legislative recalibration recommended in the final section of this article.

Moreover, practical challenges in implementation—ineffective execution of warrants, potential misuse by the prosecution, and the risk of targeting marginalized or dissenting voices—raise serious questions about the provision's operation at the ground level. As cautioned in *Kartar Singh v. State of Punjab*⁴⁸, unchecked expansion of State power in criminal procedure can erode civil liberties. Ironically, while trials in absentia are projected as a tool to reduce pendency, they may instead generate extensive appellate litigation, shifting rather than resolving the burden on the judiciary.

Mannargudi Bar Association v Union of India and Others, WP(C) No 625/2024 (Supreme Court of India, pending); 'Bar Association Approaches Supreme Court Challenging Validity of 4 BNSS Provisions' (*LiveLaw*, November 2024) <<https://www.livelaw.in/top-stories/supreme-court-bar-association-plea-challenging-bnss-provisions-handcuffing-cognizance-attachment-272884>> accessed 25 September 2026.

⁴⁸ (1994) 3 SCC 569

In sum, trials in absentia are not per se unconstitutional, but their legitimacy depends on the presence of robust safeguards that preserve the accused's right to a fair trial. Courts must therefore adopt a cautious and restrictive interpretation of Section 356, ensuring strict scrutiny of deliberate abscondence, meaningful legal representation, and strong judicial oversight—potentially including periodic High Court review. Unless recalibrated to restore the balance between efficiency and fairness, Section 356 BNSS risks constitutional infirmity and may ultimately invite judicial correction to align it with the fundamental values of due process and human rights.

VII. RECOMMENDATIONS

In view of the constitutional concerns highlighted in the foregoing analysis and conclusions, it is imperative that the framework governing trials in absentia under Section 356 of the BNSS, 2023 be recalibrated to restore the balance between procedural efficiency and the fundamental right to a fair trial. The following recommendations are therefore proposed to ensure conformity with Articles 21 and 300A of the Constitution, as well as with evolving international human rights standards.

1. **Statutory right to retrial for an accused convicted in absentia**

Upon appearance before the court, such an accused must be entitled, as a matter of right, to have the trial reopened and evidence reconsidered. This safeguard would align Indian law with comparative jurisprudence, particularly the principle laid down in *Colozza v. Italy*⁴⁹, which recognizes that a conviction in absence can only be legitimized by providing an effective opportunity for retrial.

2. **Judicial discretion under Section 356 must be structured through mandatory safeguards**

Courts should be statutorily required to record detailed reasons in writing before ordering a trial in absentia. Factors such as the voluntariness of the accused's absence, prior service of summons and warrants, and the possibility of coercive State action must

⁴⁹ App. No. 9024/80, Eur. Ct. H.R. (1985)

be carefully examined. This would prevent mechanical invocation of the provision and ensure that absentia trials remain an exceptional measure.

3. Right to legal representation must be meaningfully strengthened

Appointment of a pleader for an absent accused should not be a mere formality. The law should mandate the provision of competent and experienced legal aid counsel, with adequate time and resources to prepare a defence. Effective representation is essential to mitigate the disadvantages faced by an absent accused and to reduce the risk of wrongful conviction.

4. Notice and proclamation mechanisms should be modernized

In addition to traditional modes under Sections 84–85 BNSS, courts should require the use of electronic means such as email, SMS, and official online publication to ensure maximum reach. Enhanced notice mechanisms would better satisfy the principles of natural justice and reduce disputes over lack of knowledge or service.

5. Property rights under Section 107 BNSS require explicit constitutional protection.

The statute should clearly recognize the mandate of Article 300A by ensuring that attachment and forfeiture of property are proportionate and reversible. Restoration of property upon the accused's appearance should be made mandatory, subject only to reasonable costs incurred by the State, so as to prevent undue hardship to dependents and innocent third parties.

6. Comparative harmonization with international human rights standards

Guidance from the European Convention on Human Rights and the UN Human Rights Committee demonstrates that trials in absentia are permissible only when accompanied by strict safeguards, including effective notice, legal representation, and retrial rights. Aligning BNSS with these standards would strengthen the legitimacy of Section 356 and reduce the risk of constitutional invalidation.

7. Judicial guidelines must fill the existing gaps

The Supreme Court and High Courts should lay down binding directions to ensure that Section 356 is applied sparingly, cautiously, and in strict conformity with constitutional guarantees. Such judicial intervention would be consistent with the Court's role in reading down and regulating expansive criminal provisions, as seen in *Kartar Singh v. State of Punjab*⁵⁰.

Collectively, these recommendations aim to transform trials in absentia from a prosecution-centric expedient into a constitutionally balanced mechanism—one that advances efficiency without sacrificing fairness, liberty, and the foundational values of the Indian criminal justice system.



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⁵⁰ (1994) 3 SCC 569