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Trial in Absentia: The Balancing Dilemma

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ARTICLE

TRIAL IN ABSENTIA: THE BALANCING DILEMMA

Shaurya Mahajan & Revathi Satish*

Abstract

This paper critically examines the introduction of trial in absentia under Section 356 of the Bharatiya Nagarik Suraksha Sanhita, a significant departure from the Criminal Procedure Code that permits courts to proceed against accused persons in their absence, subject to prescribed safeguards. It situates this legislative shift within Herbert Packer's Crime Control and Due Process models, examining the tension between preventing absconding accused from frustrating the administration of justice and preserving the right to a fair trial. It traces the Supreme Court's recommendation for a trial-in-absentia mechanism in *Hussain v. Union of India* and examines the procedural and constitutional dilemmas it raises. Drawing from international and Indian jurisprudence, it argues that while trial in absentia is a conceptually efficacious remedy, its current state compromises due process and requires enhanced safeguards. The paper concludes with a call to balance the rights of the accused and the victim and to align domestic procedural innovation with comparative international standards.

Keywords: Trial in absentia; Due Process; Fair Trial; Retrial; BNSS; BSA; BNS.

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TABLE OF CONTENTS

1. Introduction	236
2. Trial in Absentia – A New Addition?	239
3. Understanding the Necessity	241
4. Key Concerns	243
4.1. Right to be Present at the Trial and the Question of Waiver.....	244
4.2. Right to Effective Legal Representation for the Accused	245
4.3. Absence of Provision for the Accused’s Statement under Section 351 BNSS	247
5. Problems with the Bare Text	247
6. International Insights	252
7. Conceptualising A Right Of Retrial.....	254
8. A Balanced Way Ahead.....	257

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1. Introduction

The introduction of the *Bharatiya Nagarik Suraksha Sanhita* (BNSS) replaces the half-century-old *Criminal Procedure Code* (CrPC) as the procedural criminal law of the land. This change comes as part of the Parliament’s effort to decolonise the criminal legal system and sever ties with its colonial underpinnings.¹ While the need for a shift remains essential, it is perhaps most imminent in the criminal law arena, where procedural law occupies a special position, as it bridges the gap between what the law says and what the law does. Maneka Guruswamy eloquently captures this special status while referring to procedural criminal law as the “*Accused’s Constitution*”.²

¹ Ministry of Law and Justice, *India’s Progressive Path in the Administration of Criminal Justice System*, Press Information Bureau (Apr. 21, 2024), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2018392>.

² Menaka Guruswamy, *Menaka Guruswamy Writes on Centre’s Proposed Criminal Code: The Custody Question*, *The Indian Express* (Aug. 19, 2023), <https://indianexpress.com/article/opinion/columns/criminal-code-bills-bharatiya-nyaya-sanhita-criminal-laws-mcoca-ipc-crpc-8920188/>.

With this special importance in mind, the Parliament introduced several key changes to the procedural framework. The most ground-breaking among them is the introduction of trial in absentia under Section 356 of the BNSS for *grave offences*.³ This addition was not born of legislative initiative; rather, it stemmed from the Supreme Court's (SC) recommendation in *Hussain v Union of India*.⁴ This discussion is supported by observations of the Jharkhand and Calcutta High Courts, which noted the need to amend the CrPC provision as a legislative remedy to address trial delays.⁵ However, despite the Court's endorsement, the introduction of this provision marks a significant departure from settled jurisprudence. It raises pertinent fair-trial questions that warrant closer examination. It is also worth noting that the constitutional validity of the provision has been challenged in the *Mannargudi Bar Association* case⁶, which is currently pending before the Supreme Court.⁷

While the statutory introduction under section 356 BNSS has sparked discussion regarding its impact in the Indian context, it is worth noting that the debate on trial in absentia has been long-running in international law and thus provides relevant insights for our discussion. Indeed, the SC noted section 339B of the Bangladesh Criminal Procedure Code as a possible measure to remedy delays in trials caused by accused persons absconding during trial proceedings.

The issues under consideration in this paper also remain of contemporary significance, as the government has begun operationalising the new mechanism. Recently, proceedings were

³ Bharatiya Nagarik Suraksha Sanhita, 2023, § 356, No. 46, Acts of Parliament, 2023 (India).

⁴ *Hussain v. Union of India*, (2017) 5 SCC 702.

⁵ *Hari Singh v. State of Jharkhand*, (2018) SCC OnLine Jhar 2534; *Kader Khan v. State of West Bengal*, (2022) SCC OnLine Cal 1038.

⁶ *Mannargudi Bar Association v. Union of India & Ors*, W.P.(C) No. 625/2024.

⁷ Debby Jain, *Bar Association Approaches Supreme Court Challenging Validity of 4 BNSS Provisions*, LiveLaw (Oct. 18, 2024), <https://www.livelaw.in/top-stories/supreme-court-bar-association-plea-challenging-bnss-provisions-handcuffing-cognizance-attachment-272884?fromIpLogin=73168.96403563913>.

initiated towards conducting in absentia trials against six Pakistani nationals accused in the 26/11 Mumbai attacks, including Hafiz Saeed and Zaki-ur-Rehman Lakhvi.⁸ This illustrates the perfect kind of cases for which the provision was included in the BNSS and provides useful guidance in situating our understanding in this paper.

This paper aims to analyse the newly introduced provision of trial in absentia under Section 356 BNSS from the perspectives of the accused and the victim, and to assess whether the need for a fair trial has been balanced against the equally important need for justice. The issue of trial in absentia is a dilemma – a question of ‘to be or not to be’. It presents the competing positive and negative implications as manifestations of Herbert Packer’s ‘Crime Control’ and ‘Due Process’ models.⁹ The Crime Control model prioritises swift and efficient identification, prosecution, and punishment of offenders in the interests of public safety and timely justice. The Due Process model, by contrast, views the criminal justice system as an obstacle course that requires scrutiny at every stage to prevent wrongful convictions and protect the accused’s rights through formal and fair procedures. The paper uses these models as a lens to analyse trial in absentia, wherein the Crime Control model supports proceeding despite the accused’s absence to prevent evasion of justice. In contrast, the Due Process model highlights the accused’s inability to defend themselves meaningfully.

Through a close reading of Section 356 of the BNSS, the paper highlights several key issues arising from the current provision. It

⁸ Mateen Hafeez, *Ball Set Rolling for Trial in Absentia Against Six 26/11 Pakistani Accused*, The Times of India (Aug. 18, 2026), <https://timesofindia.indiatimes.com/city/mumbai/ball-set-rolling-for-trial-in-absentia-against-six-26/11-pakistani-accused/articleshow/133302907.cms>; Rajeev Singh, *26/11 Case: Mumbai Police Seek Interpol Route to Try Pakistani Terrorist Hafiz Saeed, 5 Others*, The Times of India (Aug. 21, 2026), <https://timesofindia.indiatimes.com/india/26/11-case-mumbai-police-seek-interpol-route-to-try-pakistani-terrorist-hafiz-saeed-5-others/articleshow/133426972.cms>.

⁹ Herbert Packer, *Two Models of the Criminal Process*, 113 U.P.A.L.REV 1 (1964).

also discusses the debate on trial in absentia under international law and draws on insights, placing them within the broader rights-centric framework. While *prima facie* the provision appears to contain several procedural safeguards, a deeper examination reveals that these safeguards are incomplete and in need of strengthening. The paper argues that while the addition of trial in absentia is a conceptually balanced measure, there remains a need to integrate a right of retrial and to strengthen safeguards to prevent excessive state action.

2. Trial in Absentia – A New Addition?

Trial in Absentia refers to the commencement or continuation of a criminal trial *in absentia* or “*in the absence*” of the accused.¹⁰ This is an exception to the regular trial requirement of the accused’s presence¹¹ and is based on the accused’s forfeiture of his right¹² by evading the legal process.¹³ While the CrPC allowed for a partial trial in absentia by recording evidence in the accused’s absence, BNSS, for the first time, has introduced a complete trial-in-absentia provision.¹⁴ Interestingly, while BNSS marks the first time such a measure has been codified and statutorily provided, the Gujarat High Court in 2016 issued a circular directing all subordinate courts to continue trials and pass verdicts even in the absence of the accused.¹⁵

¹⁰ Legal Information Institute, https://www.law.cornell.edu/wex/in_absentia (last visited Jul. 4, 2024).

¹¹ Fawzia Cassim, *The Accused’s Right to be Present: A Key to Meaningful Participation in the Criminal Process*, 38 Comp. Int. Law J. South. Afr. 285 (2005).

¹² Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977).

¹³ Priyank Ladoia, Tanmay Sharma and Pranav Tomar, *Trial-In-Absentia: Implications under New Law*, Azb and Partners (2025), <https://www.azbpartners.com/wp-content/uploads/2024/07/Part-V-Trial-In-Absentia-Implications-Under-New-Law.pdf>.

¹⁴ Sanjana Hooda, *Conducting Trials “In Absentia”*, The Criminal Law Blog (Jul. 25, 2019), https://criminallawstudiesnluj.wordpress.com/2019/07/25/conducting-trials-in-absentia/#_ftn1.

¹⁵ Saeed Khan, *Continue Trial Even If Accused Is Absent: Gujarat HC to Lower Courts*, The Times of India (Jul. 11, 2016),

The CrPC under Section 299 allowed the Court to examine prosecution witnesses and record their statements as evidence in the accused's absence.¹⁶ This was limited in application to cases where the accused had absconded, and there was no immediate prospect of arrest. Additionally, Section 317 CrPC permitted the court to proceed with trial in absentia in case the personal attendance of the accused was not required,¹⁷ or if the accused "*persistently disturbed*" the court's proceedings.¹⁸ These provisions have been retained without any substantive changes under the BNSS framework, as Sections 335 and 355, respectively.¹⁹ However, these CrPC provisions are only partial measures as they do not permit the judgment to be delivered in absentia and are only aimed at recording the prosecution's evidence. They do not provide for a complete trial in absentia.²⁰ The new trial-in-absentia provision under Section 356 BNSS requires the satisfaction of three essential conditions to conduct a trial in the absence of the accused.²¹ It provides that (i) the accused must be a proclaimed offender under law; (ii) must have absconded to evade trial; (iii) there must be no immediate prospect of arrest.²² The first condition must be read in consonance with Section 84(4) BNSS, which limits the classification of 'proclaimed offender' to offences punishable with ten years or more of imprisonment, life imprisonment or capital punishment.²³ In addition to these requirements, the section provides multiple procedural safeguards to ensure that the accused is communicated with. The Court must

<https://timesofindia.indiatimes.com/city/ahmedabad/continue-trial-even-if-accused-is-absent-gujarat-hc-to-lower-courts/articleshow/53160786.cms>.

¹⁶ Code of Criminal Procedure, 1973, § 299, No. 2, Acts of Parliament, 1974 (India).

¹⁷ Code of Criminal Procedure, 1973, § 317, No. 2, Acts of Parliament, 1974 (India).

¹⁸ K.N. CHANDRASEKHARAN PILLAI, R. V. Kelkar's Criminal Procedure 275 (7th Ed. 2021).

¹⁹ Bharatiya Nagarik Suraksha Sanhita, 2023, § 355, No. 46, Acts of Parliament, 2023 (India).

²⁰ Ladoia, *supra* note 13.

²¹ BNSS, *supra* note 3.

²² Westen, *supra* note 12.

²³ Bharatiya Nagarik Suraksha Sanhita, 2023, § 84(4), No. 46, Acts of Parliament, 2023 (India).

make reasonable attempts to inform the accused about the trial against him by issuing at least two warrants, publishing a court summons in a national/local daily newspaper, informing their friends and relatives, and affixing trial information on a conspicuous part of the accused's residence.²⁴ The section further provides that the accused's act of actively absconding would be deemed "*as a waiver of the right of such person to be present*" and requires the court to note the reasons in writing.²⁵ Only once the Court has satisfied the essential requirements and exhausted the procedural safeguards can it proceed with the trial.

These requirements have been noted and affirmed recently by the Allahabad HC in its decision in *Ravi Alias Ravindra Singh v State of UP*.²⁶ Importantly, the court held that the action of a proclaimed offender evading trial "*shall be deemed to operate as a waiver of the right of such person to be present and tried in person.*"²⁷ The court further directed all concerned courts, public prosecutors and police authorities to proceed in accordance with the new provision and take necessary action within 60 days of the order to conclude in-absentia proceedings.²⁸

3. Understanding the Necessity

The need for a trial in absentia provision stems from the need for a strong crime-control mechanism that prevents perpetrators from exploiting the system by absconding and bringing the trial to a halt. This need can be contextualised by referring to Packer's twin models of criminal processes, which provide competing normative lenses for analysing the provision vis-à-vis its need.²⁹ The objective of holding perpetrators accountable and using the law as a

²⁴ Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(2), No. 46, Acts of Parliament, 2023 (India).

²⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(1), No. 46, Acts of Parliament, 2023 (India).

²⁶ *Ravi Alias Ravindra Singh v. State of U.P.*, 2026 SCC Online ALL 4491, 37.

²⁷ *Id.* at 52.

²⁸ *Id.* at 54.

²⁹ Packer, *supra* note 9.

deterrent closely aligns with Packer's Crime Control Model.³⁰ This model emphasises the importance of an efficient system, whose primary function is to suppress and control crime, ensuring societal safety and public order.³¹ Trial in absentia serves the core objectives of the model – holding offenders accountable and reducing crime.³² The tilt of the provision towards Crime Control, as opposed to the competing Due Process Model, evidences its focus on deterrence and efficiency in substance, thus highlighting the need for procedural safeguards to ensure an overall balanced approach.

The provision allows trials to be concluded in cases where the accused has absconded and cannot be apprehended.³³ It remedies the deadlock created by the accused's unavailability to be present at trial. It ensures the victim's right to justice and to a speedy trial, as guaranteed under Article 21 of the Constitution.³⁴ This balance is further ensured by providing for trial in absentia only in cases of *grave offences*.³⁵

This categorisation is key to ensuring the delicate balance between the state and the victim on one side and the accused on the other.³⁶ First, it ensures access to justice and closure for victims of serious offences and prevents them from having to continue living with

³⁰ *Id.* at 1.

³¹ Shanell Sanchez, *The Crime Control and Due Process Models*, Open Oregon Educational Resources (2019), <https://openoregon.pressbooks.pub/ccj230/chapter/1-8-due-process-and-crime-control-model/>.

³² Ministry of Human Resources and Development, *Criminal Justice Administration: Models of Criminal Procedure*, Inter-University Centre Of The University Grants Commission (2024), https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000020LA/P000841/M010096/ET/1513752430etext.pdf.

³³ G.S Bajpai, *Trial in Absentia Can Help the Cause of Justice*, THE TRIBUNE (Aug. 18, 2021), [https://www.tribuneindia.com/news/comment/trial-in-absentia-can-help-the-cause-of-justice-298606/#:~:text=GS%20Bajpai&text=Trials%20in%20absentia%20\(TIA\)%20evokes,himself%20in%20an%20open%20court](https://www.tribuneindia.com/news/comment/trial-in-absentia-can-help-the-cause-of-justice-298606/#:~:text=GS%20Bajpai&text=Trials%20in%20absentia%20(TIA)%20evokes,himself%20in%20an%20open%20court).

³⁴ SN Sharma, *Fundamental Right to Speedy Trial: Judicial Experimentation*, 38 J.I.L.I. 236 (1996); INDIA CONST. art. 21.

³⁵ BNSS, *supra* note 25.

³⁶ Akshath Indusekhar, *The Absentia Dilemma: The Introduction of Trial In-Absentia in Indian Legislation*, Oxford Human Rights Hub (Jan. 16, 2024), <https://ohrh.law.ox.ac.uk/the-absentia-dilemma-the-introduction-of-trial-in-absentia-in-indian-legislation/>.

the trauma. Secondly, the provision serves as a deterrent against future crimes and against the accused exploiting their right. This approach recognises that less heinous crimes impose a differential burden than grave and heinous offences.³⁷ Indefinitely delaying trial would be contrary to the ends of justice, deny closure to the victim and defeat the spirit of the law.³⁸

The introduction of Section 356 BNSS marks a step towards the Crime Control Model and emphasises efficiency and accountability. It eliminates the loophole that allowed the accused to halt proceedings by absconding from court. Under the new system, once reasonable attempts have been made to summon the accused, the court may proceed with the trial regardless of the accused's presence. This serves as a powerful deterrent to potential perpetrators who plan to escape liability by absconding and ensures justice and closure for the victim. However, the step towards Crime Control raises concerns about the accused's rights and calls for a balance between it and the Due Process model.

4. Key Concerns

The incorporation of trial in absentia raises several key constitutional concerns, as a matter of conceptual understanding of the provision. These concerns are rooted in Packer's Due Process Model,³⁹ which emphasises procedural fairness and fair trial rights. In the Indian constitutional context, these requirements are enshrined under Articles 14 and 21 of the Constitution.⁴⁰ This model, in contrast to the Crime Control Model highlighted above, provides a normative lens for conceiving challenges to the provision and offers fertile ground for formulating revisions to

³⁷ *Mangal Singh v. Kishan Singh*, AIR 2009 SC 1535.

³⁸ Utkarsh Anand, *No Speedy Trial, No Justice: SC Warns against Eroding System's Credibility*, The Hindustan Times (Feb. 18, 2025), <https://www.hindustantimes.com/india-news/no-speedy-trial-no-justice-sc-warns-against-eroding-system-s-credibility-101739818163362.html>.

³⁹ Herbert Packer, *supra* note 9.

⁴⁰ INDIA CONST. art. 14 and 21.

ensure a balance between expediency and individual rights. These concerns must be addressed by positing a balanced, effective, and narrowly constructed provision for trial in absentia.

4.1. *Right to be Present at Trial and Question of Waiver*

The constitutional implications raised by the introduction of trial in absentia stem from whether the accused's right to be present at trial is a fundamental right. This distinction is important because the SC in *Basheshar Nath v Central Income Tax Commissioner* held that individuals cannot waive fundamental rights.⁴¹ Subsequently, the SC in *Jayendra Vishnu Thakur v State of Maharashtra* narrowed this definition and held that the right to be present at trial does not constitute a fundamental right,⁴² thereby making it possible to be waived by absconding.⁴³

Alternatively, even if the right to be present at trial is accepted as a fundamental right, the provision is not affected by the prohibition on the waiver of fundamental rights imposed by *Basheshar Nath*. This is because while the wording of Section 356 mentions the phrase “*waiver of right*”,⁴⁴ the provision's true nature is that of a reasonable restriction. The SC in *Chintaman Rao v State of Madhya Pradesh* has held that reasonable restrictions are restrictions that balance individual liberties with societal needs and are not arbitrary or excessive.⁴⁵ As has been rightly argued, the provision aims to reach a delicate balance between the rights of the victim and the accused and is thus structurally similar to reasonable restrictions.⁴⁶ This aim is in line with the requirement of ‘procedure established

⁴¹ *Basheshar Nath v. Central Income Tax Commissioner*, AIR 1959 SC 149; Nathaniel L. Nathanson, *Waiver of Constitutional Rights in Indian and American Constitutional Law*, 4 J.I.L.I 157 (1962).

⁴² *Jayendra Vishnu Thakur v. State of Maharashtra*, (2009) 7 SCC 104.

⁴³ James G. Starkey, *Trial in Absentia*, 53 S.J.L.R. 721,724 (1979).

⁴⁴ BNSS, *supra* note 25.

⁴⁵ *Chintaman Rao v. State of Madhya Pradesh*, AIR 1951 SC 118.

⁴⁶ Avantika Jain and Arnav Sinha, *Reconciling Rights: An Analysis of Section 356 of BNSS*, The Crime & Justice Blog (Apr. 11, 2025), <https://crimeandjustice.blog/2025/04/11/reconciling-rights-an-analysis-of-section-356-of-bnss/>.

by law' under Article 21 as well as the theoretical understanding emanating from Packer's 'Due Process' model, and thus overcomes the protective ambit of Article 21. This distinction is relevant to conceptualising the provision as a reasonable restriction because it circumvents the issue of waiver by providing for the forfeiture of rights⁴⁷ arising from violations of reasonable restrictions.⁴⁸

This is challenged by understanding the right to be present at trial not as a single right but as a bundle of ancillary rights that form an essential part of a fair trial.⁴⁹ These ancillary rights have been explained by the SC in *Natasha Singh v CBI*, and include presenting a defence, receiving legal assistance, cross-examining and adducing evidence in favour of the accused.⁵⁰ The accused's absence directly engages the natural justice principle of *audi alteram partem*, as it deprives the accused of the opportunity to personally hear, respond to, and participate in the proceedings.⁵¹

4.2. *Right to Effective Legal Representation for the Accused*

However, this analysis overlooks a critical procedural safeguard under Section 356 of the BNSS. Section 356(3) provides that the court shall appoint an advocate to represent the absent accused and their interests before the court.⁵² The presence of a legal practitioner for the accused ensures the opportunity to present a defence and to cross-examine the prosecution's evidence. This becomes even more important considering the mandate imposed by Section 356(7), which restricts the right of appeal which is available in ordinary cases.

⁴⁷ Peter Westen, *supra* note 12.

⁴⁸ Bhumika Indulia, *Trial in Absentia: A Necessary Evil?*, SCC TIMES (Feb. 7, 2023), <https://www.scconline.com/blog/post/2023/02/07/trial-in-absentia-a-necessary-evil/amp/>.

⁴⁹ Criminal Justice Administration, *supra* note 32.

⁵⁰ *Natasha Singh v. CBI*, (2013) 5 SCC 741.

⁵¹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁵² *Bharatiya Nagarik Suraksha Sanhita*, 2023, § 356(3), No. 46, Acts of Parliament, 2023 (India).

However, the mere presence of a lawyer does not ensure ‘effective’ legal representation.⁵³ *Zahira Habibullah Sheikh v State of Gujarat* has emphasised the importance of ‘effective’ legal representation and its nexus with fair trial.⁵⁴ *Anokhilal v State of Madhya Pradesh* held that effective legal representation is an essential requirement of due process.⁵⁵ ‘Effective’ legal representation can be ensured only by allowing the accused to be represented by counsel of his choosing.⁵⁶ Article 22(1) of the Constitution guarantees this right to engage a lawyer “*of his choice*”.⁵⁷ While Section 356 provides for the Court’s appointment of a legal practitioner for the accused, it fails to establish any guidelines to ensure effective representation. It disturbs the delicate balance required for trial in absentia.⁵⁸ This imbalance must be corrected by providing safeguards to ensure access to effective representation.⁵⁹ However, it is important to note that the lack of effective legal representation is not unique to trial in absentia; it is a deeper structural problem in the criminal justice system. Nonetheless, its significance becomes particularly pronounced in the context of in absentia trials where the accused’s physical absence limits their ability to personally instruct counsel, clarify key factual circumstances and participate in preparing their defence. The argument, therefore, highlights the unique challenges

⁵³ Abhinav Sekhri, *Dancing in the Dark: The Right to Effective Legal Assistance in India*, 4(3) Comp. Const. L. & Admin. L.Q. 10 (2019).

⁵⁴ *Zahira Habibullah Sheikh v. State of Gujarat*, AIR 2006 SC 1367.

⁵⁵ *Anokhilal v. State of Madhya Pradesh*, (2019) 18 SCR 1196.

⁵⁶ Yash Mittal, *Legal Aid Must Be Effective; Prosecutors Must Ensure Fair Trial: Supreme Court Issues Guidelines To Legal Aid Lawyers, Prosecutors*, LIVELAW.IN (Dec. 2, 2024), <https://www.livelaw.in/supreme-court/legal-aid-must-be-effective-prosecutors-must-ensure-fair-trial-supreme-court-issues-guidelines-to-legal-aid-lawyers-prosecutors-277034>.

⁵⁷ INDIA CONST. art. 22, cl. 1.

⁵⁸ Divyansha Goswami, *Re-Imagining Kafka’s Courtroom: Unpacking the Procedural Challenges of Trial-In-Absentia Under the New Criminal Procedure*, LiveLaw (Oct. 8, 2024), <https://www.livelaw.in/articles/re-imagining-kafkas-courtroom-unpacking-procedural-challenges-trial-in-absentia-new-criminal-procedure-271902>.

⁵⁹ Anupama Arigala, *Trial in Absentia – A Necessary Evil?*, SCC Times (Feb. 7, 2023), <https://www.sconline.com/blog/post/2023/02/07/trial-in-absentia-a-necessary-evil/>; Commonwealth Human Rights Initiative, *Hope Behind Bars? Status Report on Legal Aid for Persons in Custody*, Commonwealth Human Rights Initiative (Sept. 18, 2018), <https://www.humanrightsinitiative.org/publication/hope-behind-bars-status-report-on-legal-aid-for-persons-in-custody.html>.

presented by the inclusion of trial in absentia within a criminal legal system that lacks an effective legal representation framework.

4.3. *Absence of Provision for the Accused's Statement under Section 351 BNSS*

Another significant concern for the accused is the recording of the accused's statement under Section 351 BNSS (Section 313 CrPC).⁶⁰ This statement allows the accused an opportunity to explain the evidence presented against him by the prosecution. This provides the accused a chance to convince the court that the charges against him are invalid and assuage the court by justifying the testimony and evidence presented against him.⁶¹ Importantly, this statement is not recorded under oath, and its contents cannot be used against the accused at a later stage.⁶² The trial in absentia scheme envisaged under Section 356 makes no special provision for this statement and thereby deprives the accused of a vital tool to prove his innocence. Combined with the lack of access to effective legal representation, this lack tips the scales against due process and renders the section vulnerable to constitutional and due-process infirmities.

5. Problems with the Bare Text

The wording of Section 356 raises several issues that require closer examination and legislative intervention. While the Court can remedy some of these issues through interpretive tools, legislative enactment is the more efficacious approach to ensure uniformity.

First, Section 356(1) provides that the trial cannot be initiated unless a minimum period of 90 days has elapsed since framing the

⁶⁰ Bharatiya Nagarik Suraksha Sanhita, 2023, § 351, No. 46, Acts of Parliament, 2023 (India).

⁶¹ Surepalli Prashanth, *Scope and Significance of Examination of Accused U/S.313 Cr.P.C.*, 2 Indian J. Integr. Res. Law 396 (2022).

⁶² Pushkraj Deshpande & Yohaana Abraham, *Overview of Criminal Investigations and Trials under BNSS, BNS, BSA - Part II*, Bar & Bench (Jun. 28, 2024), <https://www.barandbench.com/view-point/overview-criminal-investigations-and-trials-bnss-bns-bsa-part-ii>.

charges.⁶³ Section 251(2) BNSS (which reiterates the position under CrPC) requires the accused's presence for the framing of charges.⁶⁴ A harmonious construction of these two provisions implies that Section 356 only applies to people who abscond after the framing of charges and during the pendency of the trial.⁶⁵ This restricts the provision's application and defeats the legislature's intention. The resulting defeat of the provision's objective would then raise a question about the need for such a toothless position itself.

This issue came up for consideration before the Allahabad HC in *Ravinder Singh* where the court considered the situation of an accused absconding at the stage of framing of charge and after noting several relevant provisions under the BNSS holds that the court "*shall appoint amicus curiae/ advocate to collect the record of the case on behalf of the proclaimed offender to defend the absconded accused in his absence at every stage of the court proceedings.*"⁶⁶ However, the court did not provide any detailed reasoning or interpretation to support this conclusion, and thus, the door on this question remains open.

Importantly, it remains possible to delineate a reasoning to include the framing of charge within the ambit of the provision through the judiciary adopting a textual interpretation, especially in light of the heading of section 356 BNSS, including the words "*inquiry, trial or judgment.*"⁶⁷ The word "inquiry" has been defined under section 2(1)(k) as being every proceeding before a Magistrate or court other than a trial. It is settled law that a trial begins after the framing of a charge,⁶⁸ and therefore, framing of a charge is covered under "inquiry" as defined under section 2(1)(k). Nevertheless, such a

⁶³ BNSS, *supra* note 25.

⁶⁴ Bharatiya Nagarik Suraksha Sanhita, 2023, § 251(2), No. 46, Acts of Parliament, 2023 (India).

⁶⁵ Project 39A, *Criminal Law Bills 2023 Decoded #11: Proclaimed Offenders and Trials in Absentia*, The P39A Criminal Law Blog (Nov. 6, 2023), <https://p39ablog.com/2023/11/criminal-law-bills-2023-decoded-11-proclaimed-offenders-and-trials-in-absentia/>.

⁶⁶ Ravi Alias, *supra* note 26, at 10.

⁶⁷ Bharatiya Nagarik Suraksha Sanhita, 2023, § 356, No. 46, Acts of Parliament, 2023 (India).

⁶⁸ Hardeep Singh v. State of Punjab, AIR 2014 SC 1400, 13.

reading opens the door to judicial ambiguity and divergence and runs contrary to the spirit behind the overhaul of the criminal legal system.

Secondly, the current framework provides that the provision shall apply only to cases of grave offences punishable by 10 or more years' imprisonment.⁶⁹ However, Clause 8 allows the state to expand the provision's scope through the notification mechanism.⁷⁰ Such unrestricted power to add offences is open to potential misuse and arbitrary state action.⁷¹ The potential for misuse and arbitrary action under the provision casts a long shadow and raises questions that must be addressed when assessing its constitutional validity.

However, this issue is not hypothetical or merely potential misuse; rather, it involves real actions by states. States like Maharashtra,⁷² Tamil Nadu,⁷³ and Mizoram⁷⁴ have invoked section 356(8) to enlarge the scope of the provision to cover all instances under section 84(1) of the BNSS.⁷⁵ This is pertinent, as Section 84(4) provides for the understanding of a proclaimed offender and applies only to *grave* offences punishable with imprisonment of 10 years or more.⁷⁶ On the other hand, Section 84(1) is applicable in case of any person who is absconding and against whom a warrant

⁶⁹ BNSS, *supra* note 25.

⁷⁰ Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(8), No. 46, Acts of Parliament, 2023 (India).

⁷¹ Pushkraj Deshpande, *supra* note 62.

⁷² Government of Maharashtra, Home Department, *Notification No. BNSS-0425/CR-47/Spl-9*, Government of Maharashtra (Aug. 14, 2025).

⁷³ Ram Sundaram, *TN Govt Empowers Cops, Courts to Act Against Absconders Under BNSS Section 356*, Times of India (Oct. 12, 2025), <https://timesofindia.indiatimes.com/city/chennai/tn-govt-empowers-cops-courts-to-act-against-absconders-under-bnss-section-356/articleshow/124490029.cms?utm>.

⁷⁴ Government of Mizoram, Home Department, *Notification No. C-32012/9/2025-HM-Part (1)*, Government of Mizoram (Jul. 21, 2025), <https://home.mizoram.gov.in/uploads/qms/09fa04984bba8c33b5ed14a5cbcd e18e/in-pursuance-of-section-1875-of-the-bharatiya-nagarik-suraksha-sanhita-2023.pdf>.

⁷⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, § 84(1), No. 46, Acts of Parliament, 2023 (India).

⁷⁶ Bharatiya Nagarik Suraksha Sanhita, 2023, § 84(4), No. 46, Acts of Parliament, 2023 (India).

has been issued.⁷⁷ This extends the application of the in-absentia mechanism under Section 356 BNSS to virtually all offences, runs counter to the spirit of the provision, which reserves its application only for *grave* offences, and thus undermines the doctrinal foundations of the provision. Additionally, it creates a situation in which an offence chargeable under the same central substantive criminal statute would be treated substantially differently across states. The unfettered discretion available to the government to expand the provision's scope undermines the very rationale for its need and therefore presents a compelling problem.

Thirdly, the provision provides many procedural safeguards to ensure that the commencement of the trial is communicated to the accused and to ascertain that he is intentionally absent from the trial.⁷⁸ There is a lack of clarity on whether these safeguard provisions will be read as part of the proclamation procedure outlined in Section 84 or as additional measures required to trigger Section 356.⁷⁹

Fourthly, the standard proclamation format under Form 5 of Schedule 2 does not address the commencement of the trial and cannot be taken to satisfy the procedural safeguards.⁸⁰ The lack of a specified uniform format can lead to divergent actions by different states and raise inconsistencies regarding procedural aspects of the proclamation notice, especially as to whether a separate notice is required to intimate the initiation of the trial. This non-inclusion also detracts from the comprehensive overhaul and procedural simplification that underpin the introduction of the new criminal laws.

⁷⁷ Bharatiya Nagarik Suraksha Sanhita, 2023, § 84(1), No. 46, Acts of Parliament, 2023 (India).

⁷⁸ BNSS, *supra* note 24.

⁷⁹ Bharatiya Nagarik Suraksha Sanhita, 2023, § 84, No. 46, Acts of Parliament, 2023 (India).

⁸⁰ Bharatiya Nagarik Suraksha Sanhita, 2023, sched. II, Form 5, No. 46, Acts of Parliament, 2023 (India).

Fifthly, the provision fails to distinguish between intentional and unintentional absences on the part of the accused.⁸¹ Both of these cases must be dealt with separately to ensure the proper dispensation of justice.⁸² Common administrative hurdles in issuing and delivering summons to the accused accentuate this issue.⁸³ The BNSS does not change the mechanism for issuing summonses, warrants, and proclamations and, given the current deficient state, opens the door to a situation in which a person can not only be declared a proclaimed offender but also tried and convicted – all without his knowledge.

Lastly, there is a lack of clarity regarding the probative value of evidence recorded in absentia in cases of appeal. This uncertainty becomes significant when an appellate court remands the matter to the trial court on substantive questions of fact. It remains an open question whether the evidence recorded in the absence of the accused can continue to be relied upon, or whether it must be recorded afresh in the presence of the accused. This is especially the case when there is non-compliance with procedural safeguards. The lack of clarity increases the possibility of procedural irregularity and, in turn, the likelihood that cases will be remanded to trial courts, resulting in an indefinite extension of trials and defeating the very purpose of the provision's introduction.

These problems dilute the legislature's intention, opening the door to executive excesses. Resolving these issues is central to giving effect to the provision's intention and balancing it against the accused's due process rights. Ensuring this balance is central to the provision's constitutional validity.

⁸¹ Sandeep Devashish Das, Kanak Malik & Tanishq Juneja, *Absent but Accountable: India's New Procedure for Trials in Absentia*, The Legal 500 (2025), <https://www.legal500.com/guides/hot-topic/absent-but-accountable-indias-new-procedure-for-trials-in-absentia/>.

⁸² Jayendra Thakur, *supra* note 42.

⁸³ Pushkraj Deshpande, *supra* note 62.

6. International Insights

International law recognises the right of the accused to be present at trial as an essential human right.⁸⁴ Article 14(3)(d) of the ICCPR expressly recognises the accused's presence as a mandatory requirement for a fair trial.⁸⁵ This principle has been enunciated and upheld by various ad hoc international criminal tribunals, such as the International Criminal Tribunal for Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").⁸⁶ The Rome Statute maintains this position in establishing the International Criminal Court ("ICC").⁸⁷ The right to be present at trial finds an essential nexus with the guarantee of due process and fair trial.⁸⁸ While there are exceptions, such as in cases of confirmation of charges or of the accused's disruption of the trial, trials in absentia are generally not permissible under international criminal law. They are strictly forbidden when the accused cannot be found or has fled the court's enforcement.⁸⁹

However, such an understanding overlooks practical realities by overemphasising the accused's rights and underemphasising the victim's right to justice. Such an attitude erodes trust in the international criminal framework and calls into question its effectiveness as a tool for justice. Indeed, the Nuremberg Tribunal, which forms the foundation of the modern international criminal order,⁹⁰ allowed trials in absentia in limited cases where the accused

⁸⁴ International Bar Association, *Report on the "Experts' Roundtable on Trials in Absentia in International Criminal Justice*, International Bar Association (Sept. 2016), <https://www.ibanet.org/document?id=Experts-roundtable-trials-in-absentia>.

⁸⁵ International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171.

⁸⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia art. 21(4)(d), May 25, 1993, 32 I.L.M. 1192; Statute of the International Criminal Tribunal for Rwanda art. 20(4)(d), Nov. 8, 1994, 33 I.L.M. 1598.

⁸⁷ Rome Statute of the International Criminal Court art. 63(1), July 17, 1998, 2187 U.N.T.S. 90.

⁸⁸ Shanell Sanchez, *supra* note 31.

⁸⁹ Shouvik Kumar Guha, *The Concept of Trials in Absentia in International Criminal Law and the Special Tribunal for Lebanon: An Overview*, 1 CULJ 11 (2012).

⁹⁰ Dennis J. Hutchinson, *Tribunals of War: A History Lesson in Mass Crimes*, Chicago Tribune, Nov. 18, 2001, at C21.

“has not been found” or “in the interest of justice”.⁹¹ This is echoed by the UNHRC’s interpretation in *Mbenge v Zaire*, which upheld the right under Article 14(3)(d) as qualified rather than absolute.⁹² The UNHRC General Comment No. 13 also qualifies the right in exceptionally justified cases.⁹³ Despite the qualification of the right,⁹⁴ the ICTY, ICTR, and ICC provide only for a partial trial in absentia, in the form of procedural rules governing the confirmation of charges and the issuance of an arrest warrant.⁹⁵

A major shift was noted in the creation of the Special Tribunal for Lebanon (STL), which, under Article 22, provided for an absolute trial in absentia in cases where the accused has expressly waived his right, has not been handed over to the tribunal, or has absconded.⁹⁶ The STL provides that for a trial in absentia to proceed, it is essential to ensure that the notice was served to the accused or made public and that a defence counsel represents the accused’s interests.⁹⁷ While such a provision seems to tip the scales away from due process,⁹⁸ Article 22(3) of the STL rebalances them by providing for a right of retrial in cases where the accused was represented by defence counsel not of his choice.⁹⁹

⁹¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 12, Aug. 8, 1945, 82 U.N.T.S. 279.

⁹² *Monguya Mbenge v. Zaire*, Communication No. 16/1977, U.N. Doc. A/38/40, at 134 (1983).

⁹³ Human Rights Comm., General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14), ¶ 11, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).

⁹⁴ Maurice Meli, *Trials in absentia: Erosion of the rights of the accused? A comparative study*, Faculty Of Laws, University Of Malta (2016), <https://www.um.edu.mt/library/oar/handle/123456789/17510>.

⁹⁵ Geert-Jan Alexander Knoops, *An Introduction To The Law Of International Criminal Tribunals*, 327–341 (Brill Nijhoff 2014).

⁹⁶ Statute of the Special Tribunal for Lebanon art. 22(1), annex, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

⁹⁷ Statute of the Special Tribunal for Lebanon art. 22(2), annex, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

⁹⁸ Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 Fordham Int’l L.J. 57 (2009).

⁹⁹ Statute of the Special Tribunal for Lebanon art. 22(3), annex, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

7. Conceptualising A Right Of Retrial

A close reading of the position under international law reveals two useful insights. First, a trial in absentia is valid only in a select class of cases. This is drawn from the limited jurisdiction of the ad hoc tribunals and the ICC when adjudicating the most severe international crimes.¹⁰⁰ This narrow scope is echoed under Section 356 BNSS, which restricts trial in absentia to grave offences. Secondly, the STL balances a complete trial in absentia by affording the accused the right of retrial. This right requires the accused to present himself before the tribunal.¹⁰¹ However, Section 356 incorporates a complete trial-in-absentia mechanism without a right to seek retrial and fails to balance the rights of the accused and the victim. The lack of retrial rights within the Indian trial-in-absentia scheme disturbs the delicate balance between the demands of fair trial and justice. It undermines the provision's benefits to the criminal justice system by depriving the accused of due process rights. It is imperative to incorporate a right of retrial or a *de novo* trial within the provision to achieve harmony. The example from STL provides useful insight. This example is also echoed in the judgment of the ECtHR in *Sejdovic v Italy*, wherein the court posited the twofold safeguards that must accompany a valid trial in absentia, i.e., valid notification and the right of retrial.¹⁰²

While there is no right to retrial under Section 356, there is a right to appeal, albeit with a 3-year limitation. Notably, retrial is not a new addition to the legal framework and is within the appellate court's powers. Section 427(b)(i) BNSS provides the appellate court with the power to commit the accused for retrial.¹⁰³ However,

¹⁰⁰ Astrid Reisinger Coracini, *The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last ... In Reach ... Over Some*, 2 GoJIL 745 (2010).

¹⁰¹ Mohammad Hadi Zakerhossein, *In Absentia Proceedings*, Max Planck Encyclopedias Of International Law, Oxford Public International Law, (Jul. 2021), <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3314.013.3314/law-mpeipro-e3314>.

¹⁰² *Sejdovic v. Italy*, 42 Eur. H.R. Rep. 17 (2006).

¹⁰³ Bharatiya Nagarik Suraksha Sanhita, 2023, § 427(b)(i), No. 46, Acts of Parliament, 2023 (India).

judicial precedents have established that this power should be exercised exceptionally, only in cases where the omission or irregularity has occasioned a failure of justice.¹⁰⁴ As a result, courts order a *de novo* trial only sparingly. Still, it nevertheless remains as a narrow course of action that may be adopted by appellate courts.

The submission advanced here is that the proceeding in case of trial in absentia *ipso facto* satisfies the exceptional threshold requirement and therefore should trigger the relief of retrial. This must be made substantive by expanding the right of appeal to a mandatory retrial. However, the three-year limitation period prescribed by the proviso to Section 356(7) should be retained to ensure that procedural delays are avoided.¹⁰⁵ This secures the accused's right to a fair trial while balancing the victim's right to finality and justice.

A key reason for this submission is the recording of the statement under Section 351 BNSS.¹⁰⁶ While a re-trial in the accused's presence would include such a statement, a trial in absentia would not entail such a right. The absence of a retrial provision under Section 356 creates an imbalance and fails to ensure effective legal representation for the accused. Including a right of re-trial would ensure the accused's access to effective legal representation and the opportunity of real and meaningful participation in the trial through the availability of tools like effective cross-examination and the opportunity to give a statement under Section 351 BNSS, wherein the court allows the accused an opportunity to explain any incriminating circumstances. This would strengthen the accused's protections while preserving the finality achieved by the original in absentia trial, thereby balancing Due Process with Crime Control.¹⁰⁷ The absence of these tools seriously prejudices the

¹⁰⁴ Ajay Kumar Ghoshal v. State of Bihar, 2017 SCC OnLine SC 74.

¹⁰⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(7), No. 46, Acts of Parliament, 2023 (India).

¹⁰⁶ Bharatiya Nagarik Suraksha Sanhita, 2023, § 351, No. 46, Acts of Parliament, 2023 (India).

¹⁰⁷ Bharatiya Nagarik Suraksha Sanhita, 2023, § 351, No. 46, Acts of Parliament, 2023 (India).

accused, renders the other remedies that may be granted on appeal insufficient, and thus makes a case for the mandatory relief.

A plausible counter to incorporating a mandatory right of retrial under the provision can be traced to the very purpose behind the provision – the need to reduce delay and achieve finality in criminal trials. Conducting a retrial appears to be antithetical to the very purpose of trial in absentia and gives rise to the same problems the provision aims to remedy. However, this *prima facie* approach fails to consider that the right of retrial crystallises only upon the accused presenting himself post-conviction. This indicates that the trial has already been completed and he has been convicted of the offence, satisfying the requirement of finality for the victim. The right of retrial merely provides the accused with an opportunity to obtain effective legal representation, present evidence in his favour, and examine the evidence presented against him. The prosecution's case would remain the same as before, except for the added responsibility of examining and rebutting the evidence presented by the defence. Additionally, the requirement for the accused to present himself ensures that he is not able to unduly benefit from the right by absconding again and further incentivises the accused to present himself and 'have his day in court'.

This incorporation can be brought either through a judicial interpretation of 'appeal' under Section 356(7) of the BNSS or by way of a statutory enactment.¹⁰⁸ While the latter remains more desirable, the former, being posited by the SC, would also remedy the critical flaw in the provision and balance the scales between fair trial and justice. This interpretation would, in turn, rest on long-established principles of due process and fair trial and help advance the true purpose of the provision.

¹⁰⁸ Bharatiya Nagarik Suraksha Sanhita, 2023, § 356(7), No. 46, Acts of Parliament, 2023 (India).

8. A Balanced Way Ahead

The addition of Section 356 to the BNSS is a pivotal step in harmonising the accused's right to a fair trial and due process with the practical and pressing requirements of justice and crime prevention. Packer's conceptualisation of the Crime Control and Due Process models eloquently captures this conflict. The harmonisation of the conflict between them requires balancing the victim's need for justice, the State's responsibility to reduce crime and the accused's right to a fair trial.

The current provision for trial-in-absentia is a step in the right direction towards reaching this delicate balance. However, it misses the mark by failing to ensure the accused has access to effective legal representation. The incorporation of a right of retrial would resolve this concern and balance the scales with due process. The current provision also faces an issue regarding its scope. While Clause 8 allows the government to expand the scope of the provision using the notification mechanism, a conjunctive reading of the provision with Section 251(2) restricts its scope to only individuals who abscond during the trial.

It becomes clear that, while the introduction of trial in absentia is a much-needed step in the right direction, the provision needs refinement. It is important to give teeth to the provision, close the door to potential misuse and create a right of retrial as a balancing measure. Only then would we be able to harmonise the competing interests and achieve a balance between rights and practical necessity.
