
TRIAL-IN-ABSENTIA AND THE RIGHT TO FAIR TRIAL – A NECESSARY REFORM OR A RISK TO JUSTICE?

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ABSTRACT

The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, establishes trial-in-absentia under Sections 355 and 356, permitting comprehensive trials, convictions, and punishment without the presence of the accused. This represents a notable departure from the Criminal Procedure Code (CrPC), 1973, which solely allowed for the recording of evidence in the absence of the accused. It seeks to minimize delays and prevent intentional evasion of justice; yet, it raises significant concerns over due process violations, false convictions, and the unequal impact on regular persons in comparison to influential fugitives.

This paper analyzes the legal framework of trial-in-absentia under BNSS, assessing its procedural safeguards including the 90-day waiting period, proclamation process, and limited ability to appeal and interrogates whether these protections adequately prevent unjust convictions. It also compares BNSS with global legal standards to identify best practices India currently lacks, such as automatic retrial rights and stricter judicial oversight before declaring an accused an absconder.

This research also examines the economic and social disparities in the application of trial-in-absentia. Although BNSS might theoretically be applied to fugitive businessmen such as Vijay Mallya, Nirav Modi, and Mehul Choksi, the implementation is frequently hindered by international extradition rules and human rights considerations. Simultaneously, ordinary defendants particularly those from underprivileged groups encounter significant legal repercussions to contest inaccurate proclamation as absconders. This paper contends that BNSS may establish a dual justice system, wherein the affluent escape accountability while the impoverished endure the full consequences of in-absentia convictions.

This paper suggests essential legal reforms to guarantee that trial-in-absentia does not infringe upon fundamental rights, including automatic retrial provisions, enhanced judicial oversight, equitable appeal processes, and uniform legal treatment for white-collar offenders and regular defendants. This study evaluates whether the BNSS trial-in-absentia represents progress

in criminal justice reform or establishes a risky precedent that compromises fairness and due process through the integration of legal research, case studies, and international comparisons.

“Speedy trial is in fact more in the interest of an accused who claims innocence; but expedition in trial cannot be at the cost of fairness of trial, since that would be against all canons of justice” – Delhi High Court in Mohd. Danish Vs. State of NCT of Delhi & Anr.¹ The phrase "Trial in Absentia" is derived from Latin and refers to a criminal trial held in the absence of the accused. Ideally, an accused individual is given the opportunity to defend themselves against the evidence against them, ensuring that the legal procedure maintains the fundamental right to a defence. When an individual intentionally abstains, absconds, or voluntarily waives their right to be present, they effectively forfeit their right to personal representation during the trial.

By Sections 355 and 356, the Bharatiya Nagarik Suraksha Sanhita 2023, hereinafter referred to as BNSS, presents trial-in-absentia. The provision largely aims to ensure that the absence of the accused does not result in criminal procedures being indefinitely stopped and helps to avoid deliberate obstruction of justice. It has been a problem for a long time for courts and police to find missing suspects, which causes trials to be delayed, witnesses to leave, and criminal cases to be weaker. The Supreme Court has stressed earlier that failing to bring absconding accused to trial undermines the justice system and fuels continuing case backlogs².

But the introduction of trial-in-absentia demands serious constitutional and legal questions. This clause raises fundamental questions about how it will affect the rights of the accused, particularly in relation to procedural fairness and judicial oversight. Critics argue that the section undermines the fundamental right to a fair trial particularly with reference to the accused's right to be heard and defend oneself. The absence of the accused limits their power to cross-examine witnesses, challenge prosecution evidence, and take a defence, therefore increasing the possibility of unfair convictions.³

This paper looks at whether the BNSS trial-in-absentia provides a required judicial change or a threat to due process and fair trial values. It evaluates procedural safeguards, judicial monitoring, global legal comparisons, and socioeconomic variation in application.

¹ MANU/SCOR/02644/2024

² The State of West Bengal v Kader Khan, MANU/SCOR/123832/

³ Divyansha Goswami, 'Re-imagining Kafka's Courtroom: Unpacking Procedural Challenges of Trial in Absentia in the New Criminal Procedure' (Live Law, 8 October 2024) <https://www.livelaw.in/articles/re-imagining-kafkas-courtroom-unpacking-procedural-challenges-trial-in-absentia-new-criminal-procedure-271902> accessed 19 March 2025.

Legal Framework of Trial-in-Absentia Under BNSS

BNSS adopts trial-in-absentia to mitigate judicial delays caused by absconding defendants. This provision, however, significantly changes the procedural structure by allowing courts to conduct extensive trials, deliver judgements, and impose punishments in the absence of the accused. The BNSS framework distinguishes between discretionary trials-in-absentia (Section 355) and mandatory trials-in-absentia for proclaimed offenders (Section 356), so expanding judicial authority beyond the limitations set by the Criminal Procedure Code (CrPC) of 1973.

A. Section 355: Discretionary Trials in Absence.⁴

Section 355 allows courts to hold trials in the absence of the accused under specific conditions. If an accused person interrupts proceedings or the court determines that their presence is unnecessary to justice, a judge or magistrate has the authority to proceed with the trial in their absence. Nonetheless, the accused must have legal representation during the process. This ensures that, at least procedurally, the accused's defense is presented, even if they are not physically present.

This clause tries to prevent deliberate obstruction of justice by uncooperative defendants intending to postpone proceedings. Critics argue that subjectively determining whether an accused's presence is "unnecessary" could lead to judicial overreach and possible abuse of power, particularly in politically sensitive trials or cases involving marginalised groups.⁵

B. Section 356: Compulsory in-absentia trials for proclaimed offenders⁶

Unlike the discretionary provisions of Section 355, Section 356 mandates in-absentia hearings for proclaimed offenders. This applies to circumstances in which an accused has been classified a proclaimed offender under Section 84 of BNSS after intentionally fleeing to avoid trial. To prevent arbitrary application, the BNSS requires a 90-day waiting period once charges are filed before continuing with an in-absentia trial. Furthermore, before designating an individual as a proclaimed offender, police must issue two consecutive arrest warrants within 30 days and

⁴ Bharatiya Nagarik Suraksha Sanhita, 2023. Sec. 355.

⁵ Divyansha Goswami, 'Re-imagining Kafka's Courtroom: Unpacking Procedural Challenges of Trial in Absentia in the New Criminal Procedure' (Live Law, 8 October 2024) <https://www.livelaw.in/articles/re-imagining-kafkas-courtroom-unpacking-procedural-challenges-trial-in-absentia-new-criminal-procedure-271902> accessed 19 March 2025.

⁶ Bharatiya Nagarik Suraksha Sanhita, 2023. Sec. 356.

require newspaper publication in the accused's last known residence and direct authorities to notify a relative or friend of the proceedings. These safeguards are intended to prevent an accused from being wrongfully classified as an absconder as a result of procedural inadequacies.

"Let a hundred criminals be set free, but no innocent person must be incriminated" is a long-standing legal maxim. An unjust trial in absentia can occur when a person is wrongfully declared a proclaimed offender due to improper summons, lack of knowledge about the law, or police discretion. The BNSS is stricter than other international legal standards as it lacks methods for instantaneous retrial if the accused later present themselves and prove ignorance of the proceedings. Procedural defects, such as errors in summons delivery or unreasonable police judgements, may still lead to flawed classifications, despite the provision's safeguards.

C. Notable Changes to the CrPC 1973

Trials were generally required to be held in the presence of the accused or, if exempt, in the presence of their legal counsel under the Criminal Procedure Code (CrPC) of 1973.

When the accused escaped and there was no imminent likelihood of his arrest, the court allowed for the recording of witness depositions, which may later be utilised if the accused was found but the witness was unavailable.⁷

If the accused's presence was deemed unnecessary for justice or caused interruptions, the court could proceed with the case as long as they were represented by legal counsel.⁸ If unrepresented, the court may postpone the case, have a separate trial, or proceed with only those in attendance.

The BNSS integrates Section 317 of the CrPC into Section 355. But for the first time, the BNSS introduced a provision for the proclaimed offender's inquiry, trial, or judgement in absentia.⁹ This modification significantly expands the court's authority by permitting full judgements to be issued in absentia, as well as facilitating trials without the presence of the accused.

D. Global Comparison.

⁷ Criminal Procedure Code, 1973. Sec. 299.

⁸ Criminal Procedure Code, 1973. Sec. 317.

⁹ Bharatiya Nagarik Suraksha Sanhita, 2023. Sec. 356.

In France and Italy, absentia trials are permitted, but an automatic retrial is permitted if the accused can prove that they were unaware of the proceedings. This ensures that no one is permanently denied the right to self-defence due to procedural errors. In the United Kingdom and the United States, in-absentia trials are strictly prohibited, unless the accused expressly and voluntarily waives their right to be present.¹⁰

According to article 14(3) (d) of the ICCPR¹¹, the right of the accused to present in trial and defend his case is explicitly recognized. The lack of an automatic retrial option in BNSS makes it incompatible with international due process requirements. Under BNSS, an accused convicted in absentia must be physically present to file an appeal, which is not required in most other jurisdictions.¹² In contrast to the BNSS, numerous international systems include clauses that permit immediate retrial in the event that the accused is unaware of the procedures, thereby safeguarding the due process.

The Dual Nature of Justice: Economic Offenders vs Ordinary Citizens

The BNSS trial-in-absentia is theoretically applicable to all declared criminals. Nevertheless, its implementation is determined by socio-economic status. High Profile fugitives like Vijay Mallya, Nirav Modi, and Mehul Choksi continue to evade justice, despite having been classified as proclaimed offenders.

While BNSS allows trial-in-absentia, its impact on economic offenders residing abroad is virtually insignificant due to extradition legislation and international fair trial standards. The UK, US, and European Union reject extradition requests if the conviction was obtained in absentia without a requisite retrial option.¹³

Vijay Mallya has successfully contested his extradition in UK courts by claiming that India's judicial system does not provide adequate safeguards against wrongful in-absentia

¹⁰ Dishha Bagchi, 'What is India's New Trial in Absentia Law & How It Compares to Similar Provisions in Other Countries' (The Print, 30 December 2023) <https://theprint.in/theprint-essential/what-is-indias-new-trial-in-absentia-law-how-it-compares-to-similar-provisionsin-other-countries/1905350/> accessed 19 March 2025.

¹¹ International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) Part III Art 14(3)

¹² Divyansha Goswami, 'Re-imagining Kafka's Courtroom: Unpacking Procedural Challenges of Trial in Absentia in the New Criminal Procedure' (Live Law, 8 October 2024) <https://www.livelaw.in/articles/re-imagining-kafkas-courtroom-unpacking-procedural-challenges-trial-in-absentia-new-criminal-procedure-271902> accessed 19 March 2025.

¹³ Mohammed Seid, 'The Legal Regime Governing Criminal Trials in Absentia under Ethiopian Law: A Threat to the Right to a Fair Trial' (2021) 11 Bahir Dar Univ J L 169.

convictions¹⁴. Nirav Modi's legal defence has also invoked human rights concerns to delay his extradition, demonstrating that the BNSS trial-in-absentia protocols are predominantly ineffectual against prominent fugitives living abroad.

Unlike economic fugitives, regular defendants bear the full weight of BNSS without the means to establish a defence. Numerous individuals are designated as proclaimed criminals without their knowledge of judicial procedures, frequently due to missed summons, inaccurate addresses, or insufficient legal assistance.¹⁵

For Instance, a daily wage worker who unintentionally misses a court hearing owing to job relocation may be convicted in absentia, ignorant that a trial has happened. Unlike fugitives who extend legal proceedings for years, these individuals cannot contest incorrect classifications, leading to swift convictions and severe consequences. This results in a disparity where low-income individuals, who frequently lack knowledge of legal processes, receive rapid and irreversible sentences, while prominent offenders escape consequences.

Constitutional and Human Rights Concerns

Article 21 of the Indian Constitution recognises the right to a fair trial as a fundamental principle that protects life and personal liberty. The principles of natural justice, which includes the right to be heard and to self-defence, are fundamental to criminal procedures. The trial-in-absentia provisions of the BNSS may violate due process by allowing convictions without ensuring that the accused was notified of the proceedings. This violates core fair trial principles, particularly when procedural flaws such as failed summons delivery lead to wrongful convictions.¹⁶

The designation of proclaimed offender under Section 84 BNSS carries major legal consequences; yet, the statute lacks effective safeguards against false classification. The

¹⁴ Prasun Sonwalkar, 'Extradition Trial: Mallya's Defence Raises Doubts About Legal Process in India' (Hindustan Times, 11 December 2017) <https://www.hindustantimes.com/business-news/vijay-mallya-case-questions-raised-about-legal-process-in-india/story-wWyEE5GB61thzmTMf3r5XL.html> accessed 19 March 2025.

¹⁵ Divyansha Goswami, 'Re-imagining Kafka's Courtroom: Unpacking Procedural Challenges of Trial in Absentia in the New Criminal Procedure' (Live Law, 8 October 2024) <https://www.livelaw.in/articles/re-imagining-kafkas-courtroom-unpacking-procedural-challenges-trial-in-absentia-new-criminal-procedure-271902> accessed 19 March 2025.

¹⁶ Arunoday Gupta & Sanjukta Majumdar, 'The Plight of Trial in Absentia: An Analysis in Reference to the Operative Criminal Procedural Laws' (2023) 3 Indian J Integrated Rsch L 1.

authority to designate an individual as a proclaimed offender predominantly lies with the investigating authorities, which causes concerns regarding the potential for arbitrary misuse.¹⁷ In *Hussain v. Union of India*¹⁸, the Supreme Court emphasised the importance of reducing trial delays and cautioned against procedural shortcuts that jeopardise due process rights. Classifying someone as a proclaimed offender without sufficient evidence of purposeful evasion increases the possibility of wrongful convictions in absentia.

Recommendations for Reform

The BNSS is intended to reduce trial delays. However, its provisions for trial in absentia require safeguards to ensure due process and prevent wrongful convictions. The likelihood of arbitrary misuse and wrongful convictions in absentia will be reduced by judicial control over the classification of proclaimed offenders. There might be misuse, mistakes, or operational issues that may lead to wrong classifications if there isn't enough oversight. Granting this authority to the courts will increase accountability and reduce the number of unjust "in-absentia" trials.¹⁹

The BNSS complicates the appeal process by mandating that individuals be physically present, which is particularly challenging for those who were wrongfully convicted while they were absent. Allowing appeals in absentia is consistent with international human rights standards and simplifies the process of contesting incorrect convictions.²⁰

The BNSS does not differentiate between financial fugitives and ordinary defendants, they are all grouped together. Many individuals fail to appear in court due to systemic issues or lack of awareness, while economic offenders intentionally fail to appear by exploiting extradition loopholes with the intention of evading arrest. The implementation of a distinct set of laws for financial offenders could be beneficial for individuals who are already underprivileged.²¹

¹⁷ Anupama Arigala, 'Trial in Absentia: A Necessary Evil?' (SCC Online, 7 February 2023) <https://www.scconline.com/blog/post/2023/02/07/trial-in-absentia-a-necessary-evil/> accessed 19 March 2025.

¹⁸ MANU/SC/0274/2017

¹⁹ Divyansha Goswami, 'Re-imagining Kafka's Courtroom: Unpacking Procedural Challenges of Trial in Absentia in the New Criminal Procedure' (Live Law, 8 October 2024) <https://www.livelaw.in/articles/re-imagining-kafkas-courtroom-unpacking-procedural-challenges-trial-in-absentia-new-criminal-procedure-271902> accessed 19 March 2025.

²⁰ Mohammed Seid, 'The Legal Regime Governing Criminal Trials in Absentia under Ethiopian Law: A Threat to the Right to a Fair Trial' (2021) 11 *Bahir Dar Univ J L* 169.

²¹ Divyansha Goswami, 'Re-imagining Kafka's Courtroom: Unpacking Procedural Challenges of Trial in Absentia in the New Criminal Procedure' (Live Law, 8 October 2024) <https://www.livelaw.in/articles/re-imagining-kafkas-courtroom-unpacking-procedural-challenges-trial-in-absentia-new-criminal-procedure-271902>

The BNSS will be able to achieve a balance between judicial efficiency and fairness by adhering to these steps. This will guarantee that trial-in-absentia serves accountability and does not result in erroneous convictions.

Through the implementation of these procedures, the BNSS will achieve a balance between judicial efficiency and fairness, ensuring that trial-in-absentia serves accountability rather than leading to wrongful convictions.

Conclusion

The BNSS uses trial-in-absentia to speed up criminal proceedings, but its lack of safeguards raises concerns about due process and potential wrongful convictions. The provision aimed at preventing absconding accused from impeding justice falls short of international fair trial standards. It lacks retrial provisions and prohibits appeals unless the defendant is physically present. These limitations, particularly for underprivileged people who may be unaware of their trial, endanger the fundamental ideas of equity.

To ensure justice is served, BNSS should implement automatic retrial provisions for wrongful absentees, improve judicial supervision when proclaiming offenders, and create an appeals procedure without physical presence. Moreover, distinguishing economic fugitives from ordinary accused individuals would guarantee that trial-in-absentia would not disproportionately disadvantage underprivileged people while failing to hold financial offenders accountable.

A modernised trial-in-absentia structure must balance efficiency with constitutional protections, guaranteeing that justice is both equitable and effective. Altering the trial-in-absentia framework will safeguard marginalised communities from unjustified hardship while maintaining the effectiveness and equity of the justice system.

It is imperative to establish a balanced approach that maintains judicial efficiency while also upholding international fair trial norms and constitutional rights. Trial-in-absentia threats may transform from a tool for justice to a tool just for expediency in the absence of these revisions.