
TRIAL IN ABSENTIA: FAIRNESS VS. EXPEDIENCY UNDER THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023

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ABSTRACT

Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)¹ is a procedural landmark document restructuring the criminal justice administration in India by the induction of Section 356² leading to “trial in absentia” - conducting trials without the accused being physically present. This article traces the provisions' struggle to balance fairness with expediency. It goes through the reform's journey from the BNSS, the rationale behind it, the concept's evolution for the law from the Criminal Procedure Code, 1973³, and the comparison of the idea with the practice in the UK, USA, and international tribunals. Moreover, the article discusses the impact on the constitutional safeguards under Article 21, the principles of natural justice, and human rights issues stating that even if there are procedural changes, the right to be heard should not be discontinued.

The investigation also considers the policy rationale for such cases - judicial delays shortening, handling of absconding alleged, and victim-centric justice accomplishing. Employing a critical stance, it warns of the risk of the right to be misused if the right to a retrial is not available and points out the need for judicial and legislative safeguards to resolve this issue. The study paper ends with the proposals for the changes such as the insertion of retrial provisions, the assurance of technological facilitation for fair representation, and the establishment of oversight mechanisms for the prevention of abuse. In the end, it states that the effectiveness of “trial in absentia” under BNSS is contingent on striking the right balance between courts' efficiency and the old-standing principles of fairness and due process.

¹ The Bharatiya Nagarik Suraksha Sanhita, No. 45 of 2023, Gazette of India, pt. II, sec. 1 (Dec. 25, 2023)

² BNSS, supra note 1, § 356

³ Code of Criminal Procedure, No. 2 of 1974, INDIA CODE (1974)

I. Introduction

1. Background and Rationale of BNSS Reforms

The BNSS (Bharatiya Nagarik Suraksha Sanhita) 2023 represents a major change to the criminal justice system in India with the replacement of the Code of Criminal Procedure, 1973 (CrPC)⁴. Through this reform, the government plans to update the workings of criminal justice by including various new initiatives aimed at making the whole process faster, more transparent, and more sensitive to the needs of the victims. Its most controversial feature is arguably Section 356⁵, which allows for “trial in absentia”, that is, a trial to be carried out without the defendant’s presence. By this step, the legislature attempts to solve problems caused by delays in the justice process and absconding of those accused of crimes. The reform, however, goes against the idea that even in the most rapid of procedures the constitutional guarantee of a fair trial under Article 21⁶ of the Indian Constitution is respected.

2. Concept and Significance of Trial in Absentia

The idea of “trial in absentia” is well known to scholars of criminal law worldwide. A number of legal systems such as the UK, the US, and some international courts have accepted the concept of limited trials without the accused. Nevertheless, Indian law poses the biggest challenge since the practice severely violates the most fundamental principles of natural justice, especially the “Audi alteram partem” rule (the right to be heard), and as such, raises serious constitutional and ethical issues. The provision is intended to stop the phenomenon of judicial delay being used by those who run away from the law, but at the same time, it substantially retards the basic right of the defendant to make his or her own defence. Therefore, the BNSS’s dispositive concerning “trial in absentia” is a legal paradox: it makes the procedure more effective but also endangers fairness and due process.

3. Research Objectives and Methodology

The main question considered in this research is whether Section 356⁷ of the BNSS

⁴ BNSS, supra note 1, Statement of Objects and Reasons

⁵ BNSS, supra note 1, § 356

⁶ India Const. Art. 21

⁷ BNSS, supra note 1, § 356

manages to balance the court's need for "judicial expediency" with the demand for "individual fairness". This involves looking back at the changes of the provision from CrPC to BNSS, its alignment with the Indian Constitution, and the comparison of India's standards with those of other countries and international tribunals. The author uses doctrinal analysis as the main tool and complements it with comparative and critical inquiry to arrive at an assessment of the normative grounds and legal risks of "trial in absentia" implementation. In the end, the paper's position is that this reform's success is contingent upon setting up the right kind of safeguards – like making a provision for retrials, employing technology to help with fair representation, and having the judge supervise – so that the procedural innovation does not result in justice principles being abandoned.

II. Evolution and Legal Framework

1. Position under the CrPC, 1973

The Code of Criminal Procedure, 1973 (CrPC)⁸ is mostly centered around the conduct of a trial in the accused's presence. Essentially, it makes up the whole system of justice and is the method through which "Audi alteram partem" or hearing the other side, which is a very well-known legal maxim, is carried out. In fact, it can be seen from the records that it was also their presence at the performance of sections 273⁹ and 317¹⁰ not only that made them be directly involved but also that they could communicate with their lawyer. The law did not envisage trials in absentia and such cases were only very rarely referred to as minor offenses or situations in which the court allowed the accused to be absent. The underlying thought was to safeguard the constitutional rights of the accused under Article 21¹¹ and at the same time, to adhere to the principles of natural justice. Problems with fugitives and procedural inefficiencies leading to delay, however, were a very frequent occurrence, therefore, the authorities were asked to present a solution which would not only solve the problem but also be in line with procedural fairness and justice.

⁸ Code of Criminal Procedure, No. 2 of 1974, INDIA CODE (1974)

⁹ *CrPC*, supra note 2, § 299

¹⁰ *CrPC*, supra note 2, § 317

¹¹ India Const. Art. 21

2. Section 356 of BNSS: Key Features and Procedure

Section 356 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)¹² is widely discussed and a radical point of law that merely “trial in absentia” can be held if the accused by fleeing from the court of law has deliberately left the court of law to evade it. It is one of the most significant changes in the law, i.e. a landmark in law the CrPC and a reflection of the judiciary system's hierarchy of demands with justice and efficiency as the victims' first priority. Local courts may under certain conditions consider that the accused is not present at the hearing even though they have already been notified, a warrant has been served, and the person's appearance is awaited. This legal provision solely enables the court to handle the issue and make the decision when the party is not present. Nevertheless, it provides the possibility that in the event of absence, there may be a new hearing or an appeal. In fact, it was this very legalization that ended the procedural delay and thus made a significant contribution to the return of the accountability principle which had been lost. Still, it is a serious matter in terms of constitutional conformity, particularly the right to be heard and adequately represented.

3. Comparative Overview: UK, USA, and International Tribunals

Various words are used for the idea of “trial in absentia” and it is only recognized if different places in the world provide for detailed procedural safeguards for its performance. These courts in the United Kingdom are not permitted to hold such hearings unless it is proved that the defendant deliberately stayed away after being notified, which was the verdict in the case of “R v. Jones (Anthony) [2002] UKHL 5”¹³. Similarly, the US limits in absentia performances under “Federal Rule of Criminal Procedure 43¹⁴” solely to situations where the defendant has expressly given up the right and also provides the defendant with the right to a new trial¹⁵. The International Tribunals such as “ICTY” and “ICTR” generally do not allow the option of in absentia judgment except for very few cases and they always give the accused the right to refuse the judgment later.

¹² BNSS, supra note 1, § 356

¹³ *R v. Jones (Anthony)*, [2003] 1 A.C. 1 (H.L.) (appeal taken from Eng.)

¹⁴ *Illinois v. Allen*, 397 U.S. 337 (1970)

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

When put side by side with those two models which aim at balancing the judiciary's need for efficiency with the observance of fair trial rights, section 356 BNSS India is the source of a number of controversies. Besides being procedurally sound, the article also conforms to the international standard but, nevertheless, it should be accompanied with such guarantees as a new trial being allowed, provision of legal aid, and the presence of monitoring agencies ensuring that it is not being abused.

III. Fair Trial Concerns

1. Constitutional Safeguards under Article 21

The right to life and personal liberty that come as a gift of Article 21¹⁶ of the Indian Constitution are the very bases of a fair trial right. In a manner inconsistent with the abovementioned constitutional concept, BNSS in Section 356¹⁷ which enables “trial in absentia” through specification allows a hearing of cases without the presence of the accused in the court. Certainly, the novelty is to sidestep the situation of procedural delays as well as the law absconders, yet at the same time the question is raised whether such trials are able to satisfy constitutional requirements of fairness, reasonableness, and due process as the Supreme Court confirmed in “Maneka Gandhi v. Union of India” (1978)¹⁸. The defendant's absence may make contact with the lawyer impossible, the defendant may be unable to challenge the witness, and may not even understand the process, hence the defendant may be denied the right to participate in their defence. For this reason, any judgment “in absentia” has to be backed up by procedural safeguards, e.g. a possibility for the re-trial, provision of the technology for remote participation, and judge's discretion in deciding not to violate fundamental rights for the rapid case resolution.

2. Natural Justice and Right to Be Heard

The natural justice principle, in particular “audi alteram partem” (the right to be heard), is the foundation of procedural fairness in criminal law. A decision to the detriment of the accused carried out in their absence constitutes an infringement of the principle

¹⁶ INDIA CONST. art. 21

¹⁷ BNSS, supra note 1, § 356

¹⁸ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248

unless the absence is voluntary and the party has been informed. In the case of “State of Maharashtra v. P.K. Pathak” (1980)¹⁹, the Supreme Court pointed out that the defence opportunity is the very essence of justice concept. As a result, the usage of Section 356 should be permitted merely in situations where the accused intentionally escape the law enforcement process. Besides that, activities like statement-taking, having a lawyer in the room, and being able to ask for a new hearing after the decision are ways of facilitating the natural justice principle. A “trial in absentia” without such measures may result in a situation where the judiciary's efficiency is on the side of procedural injustice.

3. Judicial Precedents and Human Rights Implications

The fair trial rights according to judicial interpretation and international human rights standards are non-derivable rights of absolute character. The European Court of Human Rights in *Colozza v. Italy* (1985)²⁰, held that a proceeding without the presence of the interested party is in contravention of Article 6²¹ of the European Convention unless the concerned party waives the right to be present. In the same vein, Indian law has also been watchful of the equilibrium between fairness and expediency, as it is shown in “*Zahira Habibulla Sheikh v. State of Gujarat*” (2004),²² where a fair trial was called the very foundation of the whole criminal justice system. If the BNSS plan is improperly used, India might be in violation of her binding commitments under the International Covenant on Civil and Political Rights (ICCPR), especially Article 14²³. Section 356²⁴ is to be the subsequent stage in the reform journey of the criminal procedure. However, it must be in line with human rights and operate as a defender of the accused that justice is not only in fact but also in view.

IV. Expediency and Policy Rationale

1. Addressing Judicial Delays and Absconding Accused

¹⁹ State Of Maharashtra vs P.K. Pathak, AIR 1980 SC 1224

²⁰ Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221.

²¹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221

²² *Zahira Habibullah Sheikh (5) v. State of Gujarat*, (2006) 3 S.C.C. 374

²³ International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171

²⁴ BNSS, supra note 1, § 356

Creating a “trial in absentia” through Section 356 of the “Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023”²⁵ appears to be a tool designed to cope with the long-standing problem of delayed court cases in India. It frequently happens that the traditional criminal procedure comes to a halt due to the fact that the accused escape arrest or, actually, extend the proceedings so that they can have their judgment postponed. Thus, victims find themselves in a situation where their rights are trampled upon and courts are burdened with cases. In this way, the legislature with the aid of the new law, conveys the message to society that it is a fundamental right of the victims that justice shall be done even if the accused are absconded and that it cannot be indefinitely postponed just to not be cheated by the procedural steps. The modification introduced is in line with what is happening in other countries, for instance, the UK Criminal Justice Act, 2003, and Rule 60 of the ICTY Rules of Procedure²⁶, where trials in absentia, however, under judicial safeguards, are permitted to a certain extent. But the Indian government, unlike the other ones, has to consider the very significant constitutional provision of a fair trial under Art. 21²⁷ and ensure that to be absent does not mean to lose one's defence rights.

2. Victim-Centric Justice and Timely Resolution

A change in the law of that nature for a “trial in absentia” is a strong indication of the victim-centered conception of justice which recognizes as the main axiom that delayed justice is justice denied. There are many instances, in particular, those concerning severe crimes or absconding of financial offenders, where due to the non-appearance of the accused, the continuation of the trial is impossible and therefore the direct victims are victimized again and also the trust of the citizens in the system is undermined. As a result, this provision of the BNSS is considered both a moral and legal measure towards the victims' rights commitment by ensuring prompt judgement and deterrence. What is more, the reform reiterates the UN General Assembly Resolution 40/34 (1985)²⁸ on victims' rights which characterizes justice as being timely and sees redress as an integral part of it. Nonetheless, even though the reform is directed towards increased efficiency, fairness should remain the basis of the proceedings whereby the accused

²⁵ BNSS, supra note 1, § 356

²⁶ Rule 60, *International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence* (adopted 11 Feb. 1994, as amended)

²⁷ INDIA CONST. art. 21

²⁸ U.N. G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985)

appearing again should be given the right to seek a retrial or file an appeal thus integrating victim justice with procedural loyalty.

3. Balancing Efficiency with Due Process

One cannot argue that the criminal justice reforms that aim at improving the system's efficiency should at the same time consider the necessity of due process. To a great extent, success of Section 356²⁹ will depend on how smoothly different procedural requirements such as those related to public notification of the trial, provision of legal assistance for representation, and the right of “retrial upon the return of the accused” can be practically carried out. Courts handing down sentences must, therefore, serve as a safeguard and cease the practice being resorted to in instances where ill-treated or uneducated defendants are unfairly placed in a disadvantageous position without the knowledge of their rights. The European Court of Human Rights rulings (e.g., “Colozza v. Italy”, 1985³⁰) offer valuable insights that first of all trials without the presence of the concerned party should be very few and secondly, they can only be considered in cases where it is proven that the accused has deliberately avoided the hearing. Hence, even if the BNSS initiative is enthusiastic about ushering the justice system into the new era and making it more efficient, the certification it gets is dependent on whether it manages to balance “judicial efficiency and the core principles of fairness and natural justice that cannot be violated”.

V. Critical Analysis

1. Risks of Misuse and Procedural Gaps

As per Section 356 of BNSS (Bharatiya Nagarik Suraksha Sanhita, 2023), a trial in absentia is a description of a legal proceeding against the defendant who is not physically present. The point is really to eliminate very old delays and the get justice back to the victims fast. Still, there is a quite significant risk of an improper use of the tool and a problem of a procedural gap due to the fact that the court is held without the presence of the accused. The new law seems to infringe on a person's right to a fair trial

²⁹ BNSS, supra note 1, § 356

³⁰ *Colozza v. Italy*, App. No. 9024/80, 1985 Eur. Ct. H.R. (ser. A) no. 89

as stipulated in Article 21³¹ of the Indian Constitution, which in general terms means the right to be heard and defend oneself. Such trials may become court hearings on one side only if there are no procedural safeguards thus the defendants' rights may be violated in cases of mistaken identity, issuance of summons at an unknown location, or systemic bias. Besides that, this article does not provide for the standard of evidence nor the point at which a person is considered "absconding", so it allows some people to use this provision at their own discretion. The comparison between the UK and the US shows that trials in absentia are only very slightly allowed and only under very clear and narrowly defined circumstances. Hence, India ought to be using judicial restraint and proportionality as its criteria.

2. Absence of Retrial Provisions

The major flaw of the 356 Section is that it omits the right to a retrial which, in most cases, would be the one where the accused appears or is arrested, it being implied. The absence of such a clause is incompatible with the principles of natural justice and human rights standards, for example, Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR)³², which recognizes the right to be present at one's trial.

Backing this up, several international courts and European countries have introduced a provision on the right to a retrial as a protection against wrongful convictions. The link between the issue of a retrial and absconding is that the accused may be indefinitely in a situation where they are not given the opportunity to present their defence. Besides that, the lack of such a provision puts local courts in a position where they have to choose between judicial expediency and fairness thus influencing the public's trust in the criminal justice system.

3. Need for Judicial and Legislative Safeguards

The Section 356³³ enforcement safeguards should not merely act as a means of keeping up with the tempo but also as an assurance of the fairness of the performance.

³¹ INDIA CONST. art. 21

³² International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171

³³ BNS, supra note 1, § 356

Parliament is required to enact a statute that governs trial regulation in the case of a surrendering accused thus it will not be the case of his procedural rights being violated. Judges should be given the authority to ensure that the offender was leaving of his own free will and it was voluntary and for that reason, “trial in absentia” should be the case.

If we consider the right to a fair trial, then remote presence may be of great use for starting it, the lawyer may represent the party, and the documents may be in digital form. Apart from that, independence may be related to the activity of problem-solving and giving due process support. A judicial opinion may also serve as an instrument for the proper adjustment of the proportionate usage, keeping the closest ties with fairness, and being accountable to the law.

In brief, BNSS-led “trial in absentia” is the way to modernize India's criminal procedure to be consistent with worldwide standards and decrease the backlog of cases, the success of the reform being determined by the constitutional and human rights safeguards. The law should not go faster than justice; therefore, it is the only way the reform can achieve both the efficiency and the legitimacy it intends by balancing the two.

VI. Recommendations and Conclusion

1. Introducing Retrial Rights and Representation Safeguards

The newly added trial in absentia provision to Section 356 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) aims at primarily simplifying the processes by appropriately handling the issue of absconding accused persons. However, the procedural fairness, which is the main idea of the criminal law as per Article 21 of the Indian Constitution, should not be put aside for the purpose of procedural efficiency. To prevent the commission of the offense and guard the due process, it is necessary for the accused to be allowed a “right of retrial” once they are apprehended or surrender themselves. This assurance, which is broadly found in the law of international and comparative law such as the UK and the European Court of Human Rights (ECHR), serves as a deterrent to the interpretation of absence as a final waiver of the right to be heard. In addition, the procedural safeguards have to guarantee “the presence of a lawyer” either through the counsels appointed by the state or through some virtual mode

so that the procedures do not lose their adversarial nature and become illegitimately one-sided even though the accused are not physically present.

2. Using Technology for Ensuring Fair Presence

The application of technology may not only be for the purpose of judicial efficiency but also for the ensuring of fairness. The BNSS reform is an opportunity to implement various “digital presence mechanisms”, e.g. secure video conferencing, digital documentation, and real-time access to case materials for the accused or their counsel. These are some of the steps that are not only effective in the prevention of procedural abuse but also in building more transparency and accountability. The UK Criminal Justice Act (2003) together with the U.S. Federal Rules of Criminal Procedure remote participation with judicial supervision regulations might be of some assistance in this matter. Technology-based framework can be a means of ensuring the procedural presence of the accused when they are physically absent.

3. Concluding Remarks on Fairness vs. Expediency

BNSS “trial in absentia” introduction is the first step towards a large-scale reform of India's criminal justice system aimed at radically changing the way the system works by increasing the speed of the process and concentrating on the victim. Nevertheless, the outcome of the reform will be determined by its ability to maintain “procedural fairness” and respect for the constitutional safeguards. The principle of efficiency should not be an end in itself but a means to achieve justice. Therefore, Section 356³⁴ will only work effectively when there are “robust retrial provisions, digital fairness measures, and judicial control” which, when combined, maintain the balance between the rapidity of the proceedings and the fundamental right of the accused to a fair hearing.

³⁴ BNSS, supra note 1, § 356