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Trial in Absentia under the Bharatiya Nagarik Suraksha Sanhita, 2023

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ABSTRACT

Section 356 of the Bharatiya Nagarik Suraksha Sanhita, 2023 permits a criminal trial to be commenced, concluded and a conviction recorded entirely in the absence of a proclaimed offender whom the court is satisfied cannot presently be arrested. This article argues that the constitutional question is not whether trials in absentia are inherently permissible, but whether the statutory architecture preserves the minimum conditions of meaningful participation when the accused is absent. It develops the Participatory Fairness Framework, a cumulative test of five minimum elements: knowledge, deliberate abscondment, effective representation, evidentiary participation and corrective remedy. Applying that framework, the article accepts that Section 356 already supplies a partial architecture for each element, since sub-section (1) requires reasons recorded in writing, sub-section (2) prescribes a four-step pre-trial notice procedure, sub-section (3) guarantees an advocate at the expense of the State, and sub-sections (4) and (7) address reappearance and appeal. Its argument is that each safeguard falls short in substance: notice without verified receipt, abscondment without a defined evidentiary threshold, representation without instructions, evidentiary participation subject to unguided judicial discretion, and a corrective remedy that is conditional and time-barred. The article further isolates the distinction between a trial that continues after voluntary absence and one that begins in complete absence, a boundary preserved in United States practice under Rule 43 of the Federal Rules of Criminal Procedure and Crosby v. United States and abandoned by Section 356. Situating the provision against Articles 14 and 21, the Strasbourg jurisprudence in Colozza and Sejdic, and Article 14(3)(d) of the ICCPR, it concludes that Section 356 is susceptible to constitutional challenge rather than unconstitutional on its face, and proposes interpretive and legislative reforms directed at making the enacted safeguards substantively adequate.

Keywords: trial in absentia, section 356 bnss, bharatiya nagarik suraksha sanhita 2023, proclaimed offender, article 21, article 14, fair trial, participatory fairness, manifest arbitrariness, right to be present, comparative criminal procedure, legal aid

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I. INTRODUCTION

The present article examines Section 356 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) through the lens of constitutional criminal procedure, natural justice, and comparative fair trial jurisprudence.¹ While the provision has largely been defended as a procedural response to absconding accused persons and mounting judicial backlog, this paper argues that the introduction of trials *in absentia* into ordinary criminal procedure marks a significant transformation in the constitutional understanding of adversarial justice in India.

This article argues that Section 356 should not be assessed through the binary question of whether trials *in absentia* are inherently constitutional or unconstitutional. The more precise question is whether the statutory architecture preserves the minimum conditions necessary for meaningful participation when the accused is absent. The article's central claim is that Section 356 is constitutionally more vulnerable where it permits the evidentiary trial to commence without any prior participation by the accused than where a trial has already begun with the accused present and later continues after deliberate absence. The distinction between commencement and continuation therefore provides the article's principal doctrinal lens.

Rather than treating presence at trial as a purely procedural entitlement, this article conceptualises the right of presence as an integral constitutional component of substantive fairness, adversarial participation, and institutional legitimacy.² The article therefore seeks to move beyond the conventional question of whether trials *in absentia* are permissible and instead asks what the emergence of Section 356 reveals about the changing philosophy of criminal adjudication in India.

Crucially, the paper does not characterise Section 356 as unconstitutional on its face. Rather, the analysis proceeds on the basis that the provision, in its present form, is susceptible to constitutional challenge and raises substantial questions regarding compatibility with Articles 14 and 21 of the Constitution.³ This distinction is significant: the paper does not seek to invalidate a legislative response to genuine institutional dysfunction, but rather to identify the conditions under which such a provision may survive constitutional scrutiny.

¹ Bharatiya Nagarik Suraksha Sanhita 2023, s. 356. The provision permits a court to proceed with the inquiry, trial or judgment of a person already declared a proclaimed offender who has absconded to evade trial and in respect of whom there is no immediate prospect of arrest, after the court has recorded its reasons in writing; the proviso to Section 356(1) bars commencement of the trial until ninety days have lapsed from the framing of the charge.

² LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. edn, Yale University Press 1969). Fuller argues that the legitimacy of a legal order depends upon fidelity to an internal morality of procedure and not upon the substantive content of its outcomes alone.

³ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248. The Supreme Court held that the procedure established by law under Article 21 must be fair, just and reasonable, transforming procedural due process into a substantive constitutional guarantee.

To make this argument analytically testable, the article develops the Participatory Fairness Framework. The framework is presented as an original synthesis rather than as a claim that the underlying values of notice, waiver, effective representation, adversarial testing, and remedial fairness have never appeared in prior scholarship or jurisprudence. Its contribution lies in bringing these strands together as a cumulative method for evaluating the constitutional legitimacy of trials *in absentia* under Indian law.

The five elements operate as a structured constitutional inquiry, but they should not be treated as an inflexible checklist. Their content is context-sensitive and may be satisfied through different procedural mechanisms. A virtual hearing may preserve meaningful participation where physical attendance is impossible; deliberate evasion may be established through a combination of conduct and surrounding circumstances rather than a single form of proof; and the appropriate post-appearance remedy may depend upon the nature of the prejudice suffered. The framework therefore proposes a constitutional floor while preserving doctrinal flexibility.

The paper follows this architecture. It first identifies the statutory and constitutional problem created by Section 356, then situates the argument within existing scholarship and comparative practice. It next develops the Participatory Fairness Framework, examines the statutory safeguards and ambiguities in Section 356, and isolates the distinction between commencing a trial in complete absence and continuing a trial after voluntary absence. The constitutional analysis then proceeds through Articles 14 and 21, followed by comparative and international human-rights perspectives. The final sections assess the provision against the framework and propose interpretive and legislative reforms.

II. RESEARCH QUESTIONS

The article is guided by the following research questions:

- Whether Section 356 of the BNSS is compatible with the constitutional guarantees of fair trial and natural justice under Articles 14 and 21 of the Constitution of India.
- To what extent the constitutional guarantee of fair procedure requires the accused's physical or functional participation in criminal proceedings.
- To what extent comparative jurisdictions permit trials *in absentia*, and what procedural safeguards accompany such mechanisms.
- Whether the procedural safeguards incorporated within Section 356 BNSS are sufficient to withstand constitutional scrutiny.

- Whether Indian courts are likely to read further procedural content into Section 356 through constitutional interpretation rather than invalidate the provision entirely.

III. RESEARCH METHODOLOGY

This paper adopts a doctrinal and comparative legal methodology. The doctrinal component primarily analyses the constitutional validity and procedural implications of Section 356 BNSS through judicial precedents, statutory interpretation, and principles of natural justice developed under Indian constitutional jurisprudence.⁴ Particular emphasis is placed upon Articles 14 and 21 of the Constitution, Supreme Court jurisprudence concerning fair trial rights, and the constitutional requirement of procedural reasonableness.

The comparative dimension of the study evaluates the legal treatment of trials *in absentia* within selected common law and human rights jurisdictions, including the United Kingdom, the United States, and the jurisprudence of the European Court of Human Rights.⁵ These jurisdictions have been selected because they represent influential adversarial systems that similarly attempt to balance procedural fairness with prosecutorial efficiency.

The paper further relies upon parliamentary debates, Law Commission reports, NCRB statistics,⁶ committee recommendations, and secondary academic literature relating to criminal procedure, procedural justice, and constitutionalism. The objective is not merely to compare statutory models but to analyse the constitutional cultures and institutional safeguards underlying such procedural frameworks.

IV. CONTRIBUTION AND LIMITATIONS

The article's contribution is primarily conceptual and doctrinal. It does not argue that the five elements proposed here are entirely novel legal values; rather, it offers a structured synthesis through which Indian courts and scholars can evaluate the interaction between notice, intentional evasion, defence representation, evidentiary challenge, and post-appearance remedies. The framework is particularly useful because it avoids treating physical presence as the sole measure of participation while also rejecting the assumption that formal notice and appointed counsel automatically cure the absence of the accused.

⁴ LAW COMMISSION OF INDIA, *Expedition Investigation and Trial of Criminal Cases Against Influential Public Personalities* (Report No. 239, 2012). The Commission identified abscondment by influential accused persons as one of the primary causes of prolonged delay in high-profile criminal proceedings.

⁵ *R v. Jones*, [2002] UKHL 5, [2003] 1 AC 1 (HL). The House of Lords held that a court may proceed in the absence of a defendant only after the most careful consideration of all the circumstances, and that the discretion must be exercised with great care, particularly in serious cases.

⁶ NATIONAL CRIME RECORDS BUREAU, *Prison Statistics India 2022* (Ministry of Home Affairs, Government of India 2023). The data record that a significant proportion of undertrial prisoners have been held in custody for extended periods pending trial, illustrating the structural consequences of trial delay.

The analysis also has limitations. Because Section 356 is a relatively new statutory mechanism, the paper cannot yet evaluate a mature body of Indian case law applying the provision in practice. The comparative analysis is therefore used as a source of principles and institutional contrasts, not as evidence that foreign safeguards must be transplanted wholesale into Indian law. The paper's claims should consequently be understood as a constitutional argument for principled interpretation and reform rather than as an empirical prediction of how every court will apply the provision.

V. THE PARTICIPATORY FAIRNESS FRAMEWORK

Before turning to the doctrinal material, it is necessary to set out in full the analytical device that organises the remainder of this paper. The Participatory Fairness Framework treats the constitutionality of any trial *in absentia* as a function of five minimum, cumulative elements. None of the five is, by itself, sufficient; the absence of any one of them is capable of vitiating the constitutional legitimacy of the proceeding as a whole.

A. Element One: Knowledge

The first element requires effective notice and a meaningful opportunity to know that proceedings are taking place. This is deliberately framed as a standard of meaningful opportunity rather than formal compliance. A regime that treats the completion of prescribed steps, publication in a newspaper, affixation of notice, or delivery to a third party, as conclusively establishing knowledge, without requiring any inquiry into whether the accused in fact learned of the proceedings, does not satisfy this element merely because the steps were followed. The element therefore asks whether the State took reasonable and sufficiently reliable steps calculated to inform the accused and whether the accused was deprived of a genuine opportunity to know and participate, rather than treating formal compliance as automatically conclusive of subjective knowledge.

B. Element Two: Deliberate Abscondment

The second element requires the State to establish that the accused intentionally evaded proceedings, as distinct from being absent for reasons unconnected to evasion, poverty, migration, lack of information, or inability to access the forum. This element demands an evidentiary standard capable of distinguishing deliberate evasion from mere non-appearance, and it demands that courts apply that standard rather than infer abscondment from absence alone.

C. Element Three: Representation

The third element requires that the accused have genuinely effective legal representation, not merely the formal appointment of counsel. Representation that is procedurally present but substantively hollow, because counsel cannot take instructions, verify facts, or make tactical decisions that depend on client contact, does not satisfy this element regardless of whether a lawyer nominally appears on the accused's behalf.

D. Element Four: Evidentiary Participation

The fourth element requires that the defence retain a meaningful ability to challenge the prosecution's case. This may occur contemporaneously, through cross-examination conducted by appointed counsel, or retrospectively, through a right to recall or re-examine evidence upon the accused's return. What the element forecloses is a proceeding in which the prosecution's case is established without any functioning adversarial test, whether at the time of trial or afterwards.

E. Element Five: Corrective Remedy

The fifth element requires that, where the accused later appears, the law provide a meaningful mechanism to correct whatever procedural prejudice the trial *in absentia* produced. This may take the form of an unconditional retrial, a right to reopen specific evidence, or an unrestricted appeal. What it forecloses is a scheme in which reappearance triggers only execution of sentence, with no mechanism capable of correcting the prejudice caused by the accused's earlier absence.

Read together, the five elements convert the abstract question of whether trials *in absentia* are constitutionally permissible into a concrete, falsifiable inquiry: does a given statutory scheme secure each element, and if not, which element does it fail to secure. The remainder of this paper applies that inquiry to Section 356 BNSS, beginning with a detailed statutory analysis of the provision organised around the stages at which each element becomes operative.

VI. LITERATURE REVIEW

The constitutional legitimacy of trials *in absentia* has historically generated tension between two competing visions of criminal justice: procedural fairness and institutional efficiency. Classical natural justice scholarship, particularly the work of Lon Fuller, treats fidelity to the internal morality of procedure as a condition of legal legitimacy.⁷ Fuller's theory of procedural

⁷ FULLER, *supra* note 2, at 39–41 (arguing that legal systems derive legitimacy from adherence to principles of procedural fairness).

morality suggests that adjudication derives legitimacy not merely from outcomes but from the integrity of the process itself.

Similarly, Jeremy Waldron's scholarship on procedural justice emphasises that legal systems preserve dignity by allowing individuals an opportunity to answer accusations publicly before coercive punishment is imposed.⁸ This perspective becomes particularly relevant in criminal proceedings, where the State exercises its highest coercive authority.

Comparative criminal procedure scholars such as Mirjan Damaska and Andrew Ashworth have examined how adversarial systems historically treat the accused's presence as central to legitimacy, confrontation rights, and evidentiary fairness.^{9,10} Damaska, in particular, argues that procedural structures are inseparable from broader political and institutional cultures.

Indian constitutional jurisprudence has also consistently expanded the scope of fair trial rights under Article 21. Beginning with *Maneka Gandhi v. Union of India*,¹¹ the Supreme Court transformed procedural due process into a substantive constitutional guarantee requiring fairness, non-arbitrariness, and reasonableness. Subsequent decisions including *Zahira Habibullah Sheikh v. State of Gujarat*¹² and *Mohd. Hussain alias Julfikar Ali v. State (Govt. of NCT of Delhi)*¹³ further reinforced that fair trial rights are not formal procedural rituals but substantive guarantees essential to justice.

The existing literature therefore provides important but fragmented resources. Scholarship on procedural justice explains why participation matters; comparative criminal procedure explains how legal systems manage voluntary and involuntary absence; and human-rights jurisprudence develops standards concerning notice, waiver, effective representation, and post-conviction remedies. What remains underdeveloped is a unified Indian constitutional framework that tests these dimensions together against the specific architecture of Section 356 BNSS. This article

⁸ Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in GETTING TO THE RULE OF LAW 3, 8 (James E. Fleming ed., NYU Press 2011). Waldron argues that dignitary proceduralism is a defining feature of the rule of law, distinct from its substantive commitments.

⁹ MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 10–16 (Yale University Press 1986). Damaska's comparative analysis demonstrates that procedural structures are deeply embedded in political cultures and cannot be transplanted without attending to the institutional context in which they operate.

¹⁰ ANDREW ASHWORTH, *THE CRIMINAL PROCESS: AN EVALUATIVE STUDY* 246 (2nd edn, Oxford University Press 1998). Ashworth identifies confrontation and cross-examination as central legitimating features of the adversarial system.

¹¹ *Maneka Gandhi*, *supra* note 3.

¹² *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 SCC 158, ¶ 43. The Court held that a fair trial is the foundation of a just society and that denial of a fair trial is as much an injustice to the accused as to the victim and to society.

¹³ *Mohd. Hussain alias Julfikar Ali v. State (Govt. of NCT of Delhi)*, (2012) 2 SCC 584. The Court reaffirmed that the right to a fair trial is a fundamental right under Article 21 and includes the right to effective legal representation and meaningful participation in proceedings.

addresses that gap through the Participatory Fairness Framework and, more specifically, through the distinction between a trial that continues after prior participation and one that begins without it.

VII. STATE JUSTIFICATIONS AND COUNTER-ARGUMENTS

A balanced constitutional analysis requires serious engagement with the concerns that likely motivated the enactment of Section 356 BNSS. India's criminal justice system continues to face severe structural challenges, including massive pendency of criminal cases, prolonged trial delays, witness hostility, intimidation, and the increasing phenomenon of accused persons absconding to evade prosecution.¹⁴

According to recent NCRB data and judicial statistics, criminal courts across India face significant backlog, particularly in Sessions Courts dealing with serious offences.¹⁵ Delayed trials not only undermine public confidence in the justice system but also prejudice victims, witnesses, and the broader societal interest in timely adjudication.

A. State Interest in Preventing Procedural Abuse

The State may legitimately advance several distinct justifications in support of Section 356. These arguments deserve careful articulation before any constitutional rebuttal is offered, since a rigorous academic analysis must engage with the strongest version of the opposing position.

First, witness memory degradation constitutes a serious evidentiary concern. Where accused persons deliberately delay proceedings through abscondment, witnesses are compelled to recall events across periods extending several years. Memory distortion, witness fatigue, and the consequent weakening of testimonial reliability may fundamentally compromise the quality of evidence available at the eventual trial.¹⁶

Second, the institutional imperative of backlog reduction cannot be dismissed as a merely administrative consideration. The pendency of millions of criminal cases across Indian courts is not simply a matter of statistical embarrassment; it represents a structural failure that affects every stakeholder within the justice system.¹⁷ Accused persons who strategically abscond

¹⁴ LAW COMMISSION OF INDIA, *Report No. 245: Arrears and Backlog: Creating Additional Judicial (Wo)manpower* (Government of India 2014); MALIMATH COMMITTEE, *Committee on Reforms of Criminal Justice System* (Ministry of Home Affairs, Government of India 2003); NATIONAL JUDICIAL DATA GRID (NJDG).

¹⁵ LAW COMMISSION OF INDIA, *Report No. 245*, *supra* note 14; NATIONAL JUDICIAL DATA GRID (NJDG).

¹⁶ *P. Ramachandra Rao v. State of Karnataka*, (2002) 4 SCC 578 (recognising that undue delay in criminal proceedings erodes the quality and reliability of evidence and prejudices the administration of justice for all stakeholders, including witnesses).

¹⁷ LAW COMMISSION OF INDIA, *Report No. 245*, *supra* note 14 (documenting the scale of judicial pendency in India and identifying backlog as a systemic institutional problem affecting the efficiency and credibility of the justice delivery system).

exploit this systemic pressure, knowing that delay itself may eventually result in proceedings collapsing through witness attrition or statutory limitations.

Third, victim rights provide an increasingly significant justification. Contemporary criminal procedure scholarship and legislative reform across jurisdictions have progressively recognised that victims possess legitimate interests in timely adjudication.^{18,19} In cases involving sexual offences, organised crime, financial fraud, and violence, the indefinite prolongation of proceedings caused by the accused's deliberate abscondment may itself constitute a form of ongoing harm to victims.

Fourth, the challenge posed by transnational fugitives has assumed particular institutional salience. Economic offenders, financial fraudsters, and individuals involved in serious organised crime have demonstrated an increasing capacity to relocate across international borders while retaining practical immunity from prosecution.²⁰

Fifth, organised crime networks have historically exploited procedural delay with particular sophistication. The capacity to intimidate witnesses, exhaust investigative resources, and manipulate the pace of judicial proceedings represents a distinct category of systemic harm to which conventional criminal procedure has struggled to mount an effective response.

B. Rebuttal of State Justifications

These arguments, while weighty, do not individually or collectively establish that trials *in absentia* in the form enacted by Section 356 satisfy the requirements of constitutional fairness. Several significant rebuttals must be registered.

The witness memory argument, while legitimate, is better addressed through statutory mechanisms for the preservation of evidence, early recording of testimony, and judicial case management measures rather than through the wholesale exclusion of the accused from participation.²¹ To permit conviction on the basis of evidence that the accused had no

¹⁸ Domestic Violence, Crime and Victims Act 2004 (UK), s. 35; MINISTRY OF JUSTICE (UK), *Code of Practice for Victims of Crime* (2020). English law has progressively expanded victim entitlements within criminal proceedings, including rights to information, support and participation, while preserving the accused's procedural rights.

¹⁹ MALIMATH COMMITTEE, *supra* note 14, vol. I, ch. 6. The Committee recommended a victim-centric approach to criminal procedure reform while cautioning that victim rights must be balanced against the accused's constitutional entitlements.

²⁰ United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209 (recording the international consensus that economic offenders and organised crime networks exploit jurisdictional borders to evade prosecution, and providing for enhanced cooperation and extradition mechanisms to address that practical immunity).

²¹ ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* 298–302 (4th edn, Oxford University Press 2010).

opportunity to test by cross-examination is to treat the evidentiary problem as justifying a procedural response disproportionate to the actual mischief identified.

The backlog reduction rationale, similarly, does not establish that trials *in absentia* are constitutionally permissible without adequate safeguards. Institutional efficiency is unquestionably a legitimate constitutional value, but efficiency cannot be purchased at the price of individual procedural fairness without constitutional justification that withstands proportionality review.²²

The victim rights argument, while reflecting a genuinely important jurisprudential development,²³ does not resolve the constitutional difficulty. Victim rights and accused rights are not zero-sum values in constitutional criminal procedure. Rather, constitutionally compliant procedure must accommodate both.

Finally, while the transnational fugitive and organised crime concerns identify genuine categories of systemic harm, they would more appropriately be addressed through targeted legislative frameworks with heightened evidentiary safeguards, rather than through a general provision applicable across ordinary criminal procedure.²⁴

VIII. THE CONSTITUTIONAL STANDARD PROPOSED BY THIS ARTICLE

The five safeguards are cumulative as constitutional concerns but context-sensitive in their procedural form. A virtual hearing may satisfy functional participation in a case where physical attendance is impossible; effective notice may be established through a combination of reliable methods rather than a single form of service; and the appropriate post-appearance remedy may vary according to whether the accused lacked notice or deliberately waived participation. The framework therefore supplies a constitutional standard, not a rigid procedural checklist.

The article's central contribution is an analytical framework for assessing trials *in absentia* through participatory fairness. The framework does not assume that physical presence is constitutionally mandatory in every circumstance. Instead, it asks whether the State preserves a meaningful opportunity for the accused to know of the proceedings, whether absence is shown to be deliberate rather than inferred from non-appearance alone, whether the defence is substantively capable of functioning, whether the prosecution case remains subject to

²² *Shayara Bano v. Union of India*, (2017) 9 SCC 1, ¶ 101 (Nariman J). The Court held that legislation that is 'manifestly arbitrary' in the sense of being capricious, irrational, and not informed by any discernible principle will be struck down as violating Article 14 of the Constitution.

²³ Rome Statute of the International Criminal Court art. 68(3), 17 July 1998, 2187 UNTS 90.

²⁴ United Nations Convention against Transnational Organized Crime, *supra* note 20.

meaningful adversarial testing, and whether an effective corrective remedy exists if the accused later appears.

IX. SECTION 356 AND THE ARCHITECTURE OF TRIALS IN ABSENTIA

A close reading of Section 356 reveals several interpretive ambiguities that may generate constitutional difficulty.²⁵ Rather than treating these ambiguities as a miscellaneous list, this section maps them onto the stages at which the Participatory Fairness Framework's five elements become operative: what must happen before the court may proceed *in absentia*; what threshold defines abscondment; what notice is required; when the trial may be said to commence; how evidence is taken and tested; and what happens at conviction, sentencing, and after arrest.

A. Preconditions for Proceeding in Absentia

Section 356(1) permits a court to proceed only upon being satisfied that there is 'no immediate prospect of arresting' the accused, and requires the court to record its reasons in writing. This precondition is the statutory gateway through which Elements One and Two of the framework, Knowledge and Deliberate Abscondment, are meant to be tested. The difficulty is that the provision specifies the precondition without specifying its content: it does not indicate what evidentiary material must support the finding of 'no immediate prospect', nor whether the recorded reasons must engage with the likelihood that the accused actually received notice, as opposed to merely reciting compliance with the formal steps in Section 356(2).

B. The Meaning of 'Absconding'

Although Section 356 requires that the accused have 'absconded to evade trial', it does not specify the evidentiary standard or factors by which a court should determine that this purposive element has been established. This is the statutory location of Element Two. A constitutionally adequate application of the phrase 'to evade trial' must distinguish at least six distinct factual situations, only some of which amount to deliberate evasion: mere non-appearance on a given date; temporary absence for reasons unconnected to the proceedings; avoidance of a specific summons while remaining otherwise reachable; deliberate, sustained evasion of the legal process as such; permanent flight from the jurisdiction; and absence caused not by evasion but by an inability to access the proceedings at all, whether through poverty, incarceration elsewhere, migration, or lack of information. Section 356 does not distinguish between these situations on its face, and a court applying it may therefore treat the third, fifth, or sixth category

²⁵ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (reaffirming that laws affecting fundamental rights must satisfy constitutional standards of fairness, reasonableness and non-arbitrariness).

as indistinguishable from the fourth, allowing a finding of 'abscondment' to rest on inference from absence rather than on affirmative proof of intentional evasion.

C. Notice

Section 356(2) prescribes a detailed pre-trial notice procedure, requiring two consecutive arrest warrants at least thirty days apart, publication in a national or local daily, information to a relative or friend, and affixing of notice at the accused's residence and the local police station. This is the statutory location of Element One, Knowledge. The provision leaves ambiguity as to the evidentiary weight of compliance with these formal steps: whether they are conclusive of knowledge or merely rebuttable indicators that the accused had a meaningful opportunity to know. None of the prescribed mechanisms, personal service, substituted service through a third party, or publication, requires verified receipt by the accused personally. In an increasingly digital environment, the same question recurs with greater force in relation to electronic communication, service by WhatsApp message, email, or digital court portals: a delivery report or read receipt confirms only that data reached a device, not that the accused personally read it, and treating such receipts as conclusive proof of knowledge risks converting a technological artefact into a legal fiction of notice.

D. Commencement of Trial

This is one of the paper's strongest arguments, and it is developed as a standalone constitutional argument in the section immediately following this one. In outline, the statutory architecture of Section 356 permits a court, upon being satisfied that there is no immediate prospect of arrest, to commence and complete an entire trial, after the framing of charge and the expiry of the statutory ninety-day period, without the accused ever having physically appeared for the evidentiary trial. This is constitutionally distinct from a trial that begins with the accused present and later continues after the accused absconds. The distinction between commencement and continuation is central to the framework's application to Section 356 and is addressed in full below.

E. Evidence and Cross-Examination

Uncertainty persists regarding witness recall, cross-examination rights, and the evidentiary consequences of the accused's later appearance. This is the statutory location of Element Four, Evidentiary Participation. Section 356(3) guarantees State-funded counsel for an unrepresented proclaimed offender, which formally answers the question of who cross-examines witnesses in the accused's absence. But formal appointment does not resolve whether that cross-examination is meaningful: counsel instructed by no one is confined to testing the prosecution's

case on its face, without the benefit of the accused's account of events, potential alibi witnesses, or factual objections that only the accused could supply. The proviso to Section 356(4) supplies a post-appearance evidentiary mechanism: where the proclaimed offender is arrested and produced, or appears before the court during the trial, the court may, in the interest of justice, allow him to examine any evidence taken in his absence. The constitutional question is therefore not whether the statute provides any remedy, but whether the remedy is sufficiently accessible and effective when the court's assessment of the interests of justice determines its operation. This gap becomes constitutionally significant because comparative jurisdictions, and the European Court of Human Rights in particular, generally treat an unconditional or near-unconditional right to reopen the evidentiary record as central to the legitimacy of trials *in absentia*.

F. Conviction and Sentencing

Finally, the statute leaves substantial uncertainty regarding whether conviction recorded *in absentia* is to be treated as final in the same sense as an ordinary conviction, whether sentence may be executed immediately upon arrest, and whether the appellate remedy available under Section 356(7), conditioned upon the offender's surrender and extinguished after three years from judgment, is sufficient to correct whatever prejudice the trial *in absentia* produced. This is the statutory location of Element Five, Corrective Remedy, and it is taken up in detail in the discussion of Section 356(7) later in this paper.

Taken together, Sections A through F demonstrate that Section 356 already speaks, in some form, to each of the five elements of the Participatory Fairness Framework: it addresses knowledge through Section 356(2), abscondment through Section 356(1), representation through Section 356(3), evidentiary participation through Section 356(4), and corrective remedy through Section 356(7). The constitutional difficulty is not, therefore, an absence of statutory architecture. It is that the architecture, at each of these five points, falls short of the standard the framework requires: notice without verified receipt, abscondment without a defined evidentiary threshold, representation without instructions, evidentiary participation subject to unguided judicial discretion, and a corrective remedy that is conditional, discretionary, and time-barred. Section 356 accordingly creates substantial judicial discretion without corresponding procedural guidelines at each of these five points, thereby raising concerns under Article 14 regarding arbitrariness and inconsistent application.²⁶

²⁶ *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555. The Court held that equality under Article 14 is a dynamic concept with many aspects and dimensions, and that it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits.

X. THE COMMENCEMENT VERSUS CONTINUATION DISTINCTION

The statutory analysis above identifies commencement of trial as the point in the architecture of Section 356 at which the constitutional difficulty is most acute, and this section develops that point into a standalone argument. The proposition advanced here is that a constitutional distinction must be drawn between a trial that begins with the accused present and later continues after the accused's voluntary absence, and a trial that begins and concludes without the accused ever having participated at all. This distinction, rather than the mere fact that a trial proceeds *in absentia*, is what should determine the constitutional weight to be given to the accused's absence.

A. Situation One: Voluntary Absence After Trial Begins

In the first situation, the accused knows about the trial, has participated in at least its initial stages, has had an opportunity to instruct counsel on the facts, and then absconds. Because the accused has already exercised the participatory elements the framework requires, at least once, before departing, the State's continuation of the trial in the accused's subsequent absence is comparatively easy to justify: the accused's own conduct, rather than any deficiency in the State's procedure, accounts for the absence of further participation.

B. Situation Two: Trial Begins in Complete Absence

In the second situation, the accused has never participated in any stage of the proceedings, may not know that they are taking place at all, cannot instruct counsel because no attorney-client relationship has ever been formed, cannot challenge evidence because no cross-examination informed by the accused's own account has occurred, and may be convicted and sentenced without ever having entered a courtroom. Here, none of the five elements has been satisfied through the accused's own prior participation, and several elements may be significantly impaired from the outset. This situation is therefore far more constitutionally problematic than the first, because the State, rather than the accused, bears responsibility for the absence of prior participatory engagement.

C. Where Section 356 Sits Between the Two

The statutory architecture of Section 356 permits, and in cases of successful evasion from the outset effectively requires, proceedings that resemble Situation Two rather than Situation One. Because Section 356(1) is engaged precisely where there is 'no immediate prospect of arresting' the accused, the provision is most likely to operate in exactly those cases where the accused has had no prior contact with the proceedings, no opportunity to instruct counsel, and no occasion

to exercise any of the five framework elements before the trial commences. The paper's central submission is that Section 356 BNSS moves the ordinary criminal process from the first model toward the second, and that this movement, rather than the bare permissibility of trials *in absentia*, is what generates the provision's constitutional vulnerability.

The chronological boundary separating these two situations finds support in comparative law. Under United States jurisprudence, codified in Rule 43 of the Federal Rules of Criminal Procedure and reinforced by the Supreme Court's reasoning in *Crosby v. United States*, a distinct boundary is maintained between the commencement and the continuation of criminal proceedings. *Crosby* held that a defendant's voluntary absence after a trial has already begun may be treated as an implied waiver of presence, allowing the court to complete the case, but that Rule 43 does not permit a trial to begin in the defendant's complete absence.²⁷ Section 356 BNSS departs from this chronological model by permitting the evidentiary trial to commence after charge has been framed and the statutory ninety-day period has elapsed, even where the accused has never physically appeared for the trial. By authorising trials that are *in absentia* from inception rather than merely accommodating a mid-trial departure, Section 356 operates as a substantially more radical departure from participatory norms than the waiver-based mechanisms recognised under the Sixth Amendment.

XI. ARTICLE 14 ANALYSIS: CLASSIFICATION, ARBITRARINESS, AND PROPORTIONALITY

The Article 14 analysis in relation to Section 356 is organised here around three separate questions, moving from the weakest to the strongest available ground of challenge: whether the underlying classification is constitutionally legitimate; whether the statutory mechanism implementing that classification is arbitrary; and whether the consequences the mechanism produces are disproportionate. This sequencing matters because conceding the first question, rather than weakening the analysis, is what makes the third question credible.

A. Is the Classification Constitutionally Legitimate?

The State may argue, correctly in this paper's assessment, that accused persons who have absconded are different in kind from accused persons who remain present, and that this classification bears a rational relationship to the legitimate objective of preventing indefinite

²⁷ *Crosby v. United States*, 506 US 255 (1993) (holding that Rule 43 of the Federal Rules of Criminal Procedure does not permit the trial *in absentia* of a defendant who is absent at the beginning of trial, and that the distinction between flight before trial and flight during trial is a rational one).

delay caused by deliberate evasion.²⁸ Courts may readily hold that proclaimed offenders constitute an intelligible differentia for the purpose of differential procedural treatment. The paper concedes that this classification is probably rational: the argument from mere differential classification is the weakest available basis for constitutional challenge, and treating it otherwise would overstate the case against Section 356. The concession is deliberate. It isolates the true constitutional difficulty, which lies not in the classification itself but in the two questions that follow.

B. Is the Statutory Mechanism Arbitrary?

A substantially more powerful argument proceeds from the doctrine of manifest arbitrariness as developed in *Shayara Bano v. Union of India* and affirmed in *Navtej Singh Johar v. Union of India*.²⁹ These decisions established that legislative action may be struck down not merely because it draws irrational distinctions but because it operates in a manner that is capricious, excessive, or disproportionate even where some rational basis can nominally be identified. Applying this doctrine requires asking whether 'abscondment' is clearly defined, whether objective evidentiary standards govern the finding, whether actual knowledge is required before the finding is made, and whether courts are given sufficient guidance in exercising the discretion the provision confers. On each of these questions, Section 356 falls short. Section 356(1) requires the court to be satisfied that there is 'no immediate prospect of arresting' the accused and to record its reasons in writing, and Section 356(2) prescribes a fixed sequence of notice steps, but neither provision defines the evidentiary threshold for that satisfaction, nor specifies what the recorded reasons must actually address, for instance, whether they must engage with the likelihood that the accused in fact received notice, or whether bare recitation of compliance with the Section 356(2) steps will suffice. Where different courts may apply fundamentally different standards in determining whether to proceed under Section 356, the resulting inconsistency in the application of criminal procedure represents a structural arbitrariness within the operation of the provision itself, generated by insufficiently structured statutory standards guiding the exercise of judicial discretion. It is this latitude within an otherwise codified scheme, rather than an absence of safeguards altogether, that renders the provision's operation potentially capricious.

²⁸ *Shayara Bano*, *supra* note 22, ¶¶ 101–104 (holding that legislation may be invalidated under Article 14 where it is manifestly arbitrary, capricious, irrational, or lacks a determining principle).

²⁹ *Shayara Bano*, *supra* note 22, ¶¶ 101–104; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (applying and affirming the doctrine of manifest arbitrariness as a ground of invalidity under Article 14).

C. Are the Consequences Disproportionate?

This is the strongest available Article 14 argument. A person may be convicted without ever having challenged the prosecution's evidence, even where the person's absence resulted not from deliberate evasion but from defective notice, poverty, migration, technological exclusion, or mistaken identity. Recorded reasons, formal notice, and appointed counsel do not, on their own, guarantee the accused any opportunity for cross-examination, confrontation, or evidentiary challenge, and the possibility that a person may be convicted, sentenced, and subjected to the full penal consequences of criminal adjudication despite that formal compliance constitutes a consequence that is disproportionate to the procedural objective of preventing strategic delay.³⁰ The constitutional problem, on this analysis, is not the classification itself but the disproportionate severity of the consequences that flow from applying it through a mechanism insufficiently calibrated to distinguish the deliberate evader from the accused who was simply never reached.

XII. ARTICLE 21 ANALYSIS: FAIR PROCEDURE AND MEANINGFUL PARTICIPATION

If Article 14 identifies disproportionate consequence as the sharpest point of constitutional difficulty, Article 21 supplies the doctrinal standard against which that difficulty must ultimately be measured, and this section situates it as the heart of the paper's constitutional analysis. Article 21 does not merely require the existence of a procedure; since *Maneka Gandhi v. Union of India*, it requires a procedure that is just, fair, reasonable, and constitutionally proportionate.³¹ Applied to the accused's presence at trial, this standard is best understood not as a single, binary requirement but as a standard with three distinct dimensions.

A. Physical Presence

The first and narrowest dimension is physical presence: the accused's bodily attendance in the courtroom. Historically, this has been the dimension most closely associated with the right to be present at one's own trial, but it is, on this paper's analysis, the least constitutionally essential of the three.

³⁰ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353, ¶¶ 59–64 (affirming the doctrine of proportionality and requiring that restrictions on rights must not be excessive in relation to the objective sought to be achieved).

³¹ *Maneka Gandhi*, *supra* note 3.

B. Procedural Presence

The second dimension is procedural presence, meaning the accused's capacity to hear the evidence as it is led, instruct counsel in response to it, cross-examine witnesses, and respond to the prosecution's case as it develops. Procedural presence does not require physical attendance; *State of Maharashtra v. Praful B. Desai* demonstrates that Indian criminal procedure does not invariably equate legal presence with physical presence. The case provides a useful foundation for distinguishing physical presence from functional participation, although the broader concept of 'meaningful presence' developed here is this article's analytical extension.

C. Meaningful Presence

The third and most demanding dimension is meaningful presence: a real opportunity for the accused to influence the outcome of the proceedings, rather than a formal opportunity that exists on paper but cannot be exercised in fact. This is the paper's most original proposition within the Article 21 analysis: the Constitution may not require physical presence in every case, but it requires meaningful procedural participation, and a mechanism that supplies the appearance of participation, appointed counsel, a notice procedure, a discretionary right to reopen evidence, without the substance of it, does not satisfy Article 21 merely because it satisfies the first dimension or gestures at the second.

Video-conferencing, on this analysis, may supply meaningful procedural presence, because it preserves the accused's capacity to observe, instruct counsel, and respond to evidence as it is led. A trial conducted under Section 356, by contrast, may supply none of the three dimensions at all: no physical presence, because the accused has not appeared; no procedural presence, because there is no live channel through which the accused can instruct counsel or respond to evidence as it is led; and, most importantly, no meaningful presence, because appointed counsel operating without instructions cannot convert the formal opportunity to cross-examine into a real opportunity to influence the outcome. Applying the 'just, fair, and reasonable' standard from *Maneka Gandhi*, a procedure that forecloses all three dimensions of presence, while formally supplying notice and counsel, does not thereby become constitutionally adequate.³² The Article 21 inquiry, in other words, converges with Elements Three and Four of the Participatory Fairness Framework, Representation and Evidentiary Participation, and demonstrates that satisfying the framework's elements only in form, rather than in substance, is precisely what Article 21 as interpreted since *Maneka Gandhi* does not permit.

³² *Maneka Gandhi*, *supra* note 3, ¶ 56 (establishing that Article 21 requires a balance between individual rights and the requirements of effective governance, and that procedure must be fair, just and reasonable rather than purely formalistic).

XIII. EXPANDING DOMESTIC JURISPRUDENCE ON ACCUSED PRESENCE

The constitutional critique of Section 356 is most persuasively grounded in the trajectory of domestic Indian jurisprudence on fair trial rights, rather than in comparative law alone. Several decisions of the Supreme Court have directly or indirectly addressed the relationship between the accused's presence and the constitutional legitimacy of criminal proceedings.

In *Mohd. Sukur Ali v. State of Assam*, the Supreme Court emphasised the importance of fair hearing and legal representation as conditions of constitutional validity in criminal proceedings.³³ The decision supports the broader argument that effective opportunity of participation is central to fair adjudication; this article extends that principle analytically to the problem of trials conducted in the accused's absence.

*Zahira Habibullah Sheikh v. State of Gujarat*³⁴ remains among the most significant articulations of fair trial jurisprudence in Indian constitutional law. The Court in that case treated fair trial not as a formal or procedural luxury but as a substantive constitutional entitlement grounded in Article 21. The principle that criminal adjudication must provide the accused with a genuine and effective opportunity to contest the prosecution's case is directly engaged by a provision that permits conviction in the accused's complete absence.

*State of Maharashtra v. Praful B. Desai*³⁵ provides a useful, if analytically distinct, reference point. In that decision, the Court addressed the permissibility of recording evidence through video-conferencing and held that virtual presence could constitute adequate participation for the purposes of criminal procedure. The significance of *Praful B. Desai* for the present analysis lies in the contrast it establishes: even the Court's recognition of technological substitutes for physical presence proceeded upon the premise that some form of participatory presence, enabling the accused to observe, instruct counsel, and respond to evidence, remains constitutionally necessary. The provision in question, by contrast, contemplates adjudication in circumstances where no such participatory modality is available to the accused at all.

These decisions collectively establish a domestic doctrinal foundation for the constitutional critique of Section 356 that does not depend upon transplanted comparative reasoning. The

³³ *Mohd. Sukur Ali v. State of Assam*, (2011) 4 SCC 729 (holding that a criminal case should not be decided against an accused in the absence of his counsel, that the court must appoint an amicus curiae in such a situation, and that a decision rendered without effective representation violates Article 21).

³⁴ *Zahira Habibullah Sheikh*, *supra* note 12, ¶¶ 35–43 (holding that a fair trial requires a meaningful opportunity to present and challenge evidence, including the right to cross-examine witnesses, and that procedural fairness is integral to the administration of criminal justice).

³⁵ *State of Maharashtra v. Praful B. Desai*, (2003) 4 SCC 601, ¶ 18. The Court held that 'presence' for the purposes of criminal procedure does not necessarily connote physical presence and that evidence may be recorded through video-conferencing. Even this expanded conception of presence required that the accused retain the capacity to observe, instruct counsel and respond to testimony.

principle of participatory fairness in criminal adjudication is well-embedded in Indian constitutional jurisprudence, and the departure from that principle by Section 356 must be assessed against this established domestic baseline.³⁶

XIV. COMPARATIVE CONSTITUTIONAL ANALYSIS

Although comparative jurisdictions recognise limited forms of trials *in absentia*, such systems generally operate within robust procedural frameworks designed to preserve fairness.

In England and Wales, *R v. Jones* illustrates a cautious common-law approach to proceeding in the defendant's voluntary absence, requiring careful judicial consideration of whether proceeding is fair in the circumstances. Judicial discretion is exercised cautiously, particularly in serious offences.

The United States similarly recognises waiver-based absence under limited conditions. At the federal level, Rule 43 of the Federal Rules of Criminal Procedure, as interpreted in *Crosby v. United States*, preserves a distinction between commencement and continuation of trial, while constitutional protections including confrontation rights and effective assistance of counsel continue to impose substantial constraints. As developed in the commencement-versus-continuation argument above, the departure of Section 356 BNSS from these Anglo-American baselines becomes starkest precisely at the boundary between commencing and continuing a trial, a boundary that Rule 43 and *Crosby* preserve and that Section 356 abandons.

The European Court of Human Rights has consistently held that trials *in absentia* are not inherently incompatible with Article 6 of the European Convention on Human Rights, provided the accused was adequately informed or had unequivocally waived the right to appear and the legal system provides an effective possibility of a fresh determination of the merits where the circumstances require it.

This principle finds concrete expression in *Sejdovic v. Italy*, where the Court emphasised that, absent a clear waiver or adequate knowledge of the proceedings, the State must provide an effective mechanism capable of securing a fresh determination of the merits. The precise scope of that remedy depends on the circumstances and should not be reduced to an automatic rule that every case requires an unconditional retrial. Applying this standard to Section 356, a strict application of the 'just, fair, and reasonable' standard laid down in *Maneka Gandhi v. Union of India* would require that a returning accused not be permanently barred from contesting the validity of evidence recorded entirely outside their view. On this reasoning, Section 356 should

³⁶ *Maneka Gandhi*, *supra* note 3, ¶ 56; *Zahira Habibullah Sheikh*, *supra* note 12, ¶¶ 35–43; *Shayara Bano*, *supra* note 22, ¶¶ 101–104.

at minimum be interpreted to preserve an effective procedure for reopening or reconsidering evidence where the accused demonstrates that the absence materially impaired the defence, with a fresh determination of the merits required where the absence resulted from inadequate knowledge or notice. The precise remedy should therefore remain sensitive to the cause of absence and the prejudice demonstrated, rather than operating as an automatic rule of unconditional retrial in every case.

The principle that trials *in absentia* may be constitutionally permissible has appeared across several historical and modern legal traditions. However, the historical recognition of the mechanism has always been accompanied by a parallel insistence upon procedural safeguards that preserve the essential character of adversarial adjudication.

The comparative experience therefore demonstrates that the constitutional legitimacy of trials *in absentia* depends less upon the existence of the mechanism itself and more upon the procedural architecture surrounding it. India's Section 356 differs from many comparative models not for lacking a fair-trial architecture, since it does provide for recorded reasons, notice, and appointed counsel, but because that architecture stops short of guaranteeing retrial as of right, leaves reopening of evidence to judicial discretion under Section 356(4) rather than securing it as an entitlement, and does not require the rigorous, individualised finding of informed waiver that Anglo-American systems demand.³⁷

XV. LIKELY JUDICIAL APPROACHES: INTERPRETATION BEFORE INVALIDATION

Indian constitutional courts are unlikely to examine Section 356 solely through formal procedural validity. Instead, courts may apply the broader post-*Maneka Gandhi* doctrine of substantive procedural fairness.³⁸

Rather than striking down the provision entirely, the Supreme Court may attempt to preserve its constitutional validity through judicial interpretation. Because Section 356 already contains a recorded-reasons requirement, a notice procedure, and a right to State-funded counsel, the relevant judicial task is less one of invention than of reading substantive content into safeguards that presently exist only in formal terms. Potential safeguards that courts may read into the

³⁷ *R v. Jones*, *supra* note 5; *Colozza v. Italy*, App. No. 9024/80, ¶¶ 27–29 (Eur. Ct. H.R., 12 February 1985) (demonstrating that the legitimacy of trials *in absentia* depends upon safeguards such as informed waiver, judicial scrutiny of absence, and the availability of an effective remedy or fresh determination upon the accused's reappearance).

³⁸ *Maneka Gandhi*, *supra* note 3, ¶ 56 (holding that any procedure established by law must be 'right, just and fair' and not arbitrary, fanciful or oppressive, thereby introducing the doctrine of substantive procedural fairness under Article 21).

provision, whether by supplementing it or by giving its existing text more demanding content, include:

- Strict standards for proving deliberate abscondment.³⁹
- Mandatory judicial satisfaction regarding effective notice and a meaningful opportunity to know.
- Minimum qualitative standards, such as guaranteed access to the case file and adequate preparation time, for the State-funded advocate already mandated by Section 356(3).⁴⁰
- An effective post-appearance remedy, with a fresh determination of the merits ordinarily available where the accused lacked effective notice and a more calibrated reopening or evidentiary remedy where the accused had effective notice but deliberately absconded.
- Enhanced appellate scrutiny.⁴¹
- A requirement that the reasons already mandated by Section 356(1) substantively address the adequacy of notice, rather than merely reciting compliance with the Section 356(2) steps.⁴²

Such an approach would align with the Supreme Court's broader tendency toward constitutional balance and procedural due process protection.

A. The Paradox of the Absent Client: Ethical and Structural Dilemmas in Legal Aid

Section 356(3) already requires that an unrepresented proclaimed offender be provided with an advocate for his defence at the expense of the State, and that guarantee preserves a formal adversarial structure. It nevertheless introduces an acute professional and operational paradox for defence counsel. In an adversarial criminal justice paradigm, effective cross-examination and strategic defence-building are contingent upon confidential, continuous instructions from the client. A defence lawyer tasked with representing an absent accused is effectively blind to the factual nuances of the case: they cannot verify the prosecution's assertions, cannot proffer a viable alibi, and cannot make the critical tactical decisions, such as whether the accused should testify, that ordinarily depend on direct engagement with the client. The representation that

³⁹ *R v. Jones*, *supra* note 5 (requiring courts to satisfy themselves that the accused's absence is voluntary and deliberate before proceeding with the trial in the accused's absence).

⁴⁰ *Zahira Habibullah Sheikh*, *supra* note 12, ¶¶ 35–43 (stressing the judiciary's duty to ensure fairness and prevent miscarriage of justice through effective judicial oversight).

⁴¹ *Zahira Habibullah Sheikh*, *supra* note 12, ¶¶ 35–43 (requiring heightened judicial scrutiny, including appellate oversight, to prevent miscarriage of justice and ensure fairness in criminal adjudication).

⁴² *See also M.P. Industries v. Union of India*, AIR 1966 SC 671 (reaffirming that a reasoned order is a necessary check against the arbitrary exercise of judicial or quasi-judicial power).

results may be formally present yet materially impaired, particularly where the defence depends upon facts uniquely within the accused's knowledge. Although appointed counsel may still cross-examine witnesses, challenge the prosecution's evidence, and make legal submissions, the absence of client instructions can limit the factual and strategic foundation on which an effective defence is built.

XVI. INTERDISCIPLINARY DIMENSIONS OF SECTION 356 BNSS

Modern constitutional criminal procedure scholarship increasingly recognises that questions of procedural fairness cannot be examined solely through black-letter legal doctrine. The operation of trials *in absentia* also implicates concerns relating to criminology, procedural psychology, sociology of law, and institutional legitimacy.

From a criminological perspective, abscondment itself is not always a uniform phenomenon. Individuals evade criminal proceedings for multiple reasons, including fear of custodial violence, lack of financial resources, distrust of investigative agencies, political persecution, migration-related vulnerabilities, or systemic barriers in accessing legal representation. Treating all absconding accused persons as deliberate obstructers of justice may therefore oversimplify the socio-legal realities surrounding non-appearance.

Procedural psychology scholarship further suggests that participation in adjudicatory proceedings plays a significant role in public acceptance of legal outcomes. Tom Tyler's procedural justice theory argues that individuals are more likely to perceive legal systems as legitimate when they are provided an opportunity to participate meaningfully in proceedings affecting their rights.⁴³ The legitimacy of criminal conviction therefore derives not merely from substantive correctness but also from the perceived fairness of process.

Additionally, Section 356 raises important questions regarding access to justice and structural inequality. Economically vulnerable accused persons, migrant labourers, individuals lacking digital literacy, and persons residing in remote regions may face disproportionate risk of being proceeded against *in absentia* due to inadequate notice mechanisms or inability to secure effective legal representation.⁴⁴ The constitutional concern therefore extends beyond individual fairness into broader questions of systemic inequality and procedural exclusion.

⁴³ TOM R. TYLER, WHY PEOPLE OBEY THE LAW 163–68 (2nd edn, Princeton University Press 2006) (arguing that perceptions of procedural fairness and opportunities for participation significantly influence the legitimacy of legal institutions and public acceptance of legal outcomes).

⁴⁴ TELECOM REGULATORY AUTHORITY OF INDIA, *Annual Report 2022-23* (TRAI 2023). The report records significant disparities in digital connectivity and telephone penetration across urban and rural India, with rural teledensity and internet access substantially lower than urban figures.

XVII. DIGITAL NOTICE, TECHNOLOGY, AND SURVEILLANCE CONCERNS

One of the underexplored dimensions of Section 356 concerns the growing digitisation of criminal procedure and its implications for procedural fairness. Contemporary criminal justice systems increasingly rely upon electronic communication, digital summons, online publication, and technological tracking mechanisms to establish notice and appearance obligations.⁴⁵

In the Indian context, significant digital inequality continues to persist across economic, linguistic, and regional lines.⁴⁶ Reliance upon electronic notice systems may therefore create serious constitutional risks if procedural safeguards are not carefully designed. Several unresolved questions emerge:

- Whether WhatsApp service, email communication, or online publication satisfy constitutional standards of effective notice.
- Whether failure to access electronic communication can legitimately be interpreted as intentional evasion.
- How courts will verify authenticity and receipt of digital communication.⁴⁷
- Whether technologically disadvantaged accused persons may be disproportionately prejudiced.⁴⁸
- To what extent surveillance technologies may be used to establish deliberate abscondment.

This concern is not merely theoretical. A messaging application's read receipt, or an automated server delivery report, confirms only that data reached a particular device or SIM card; it cannot verify the identity of the person who actually read the message. If a family member, landlord, or other third party opens a digitally transmitted summons, the system logs successful delivery, and a court might readily treat this as conclusive proof of 'actual knowledge and deliberate evasion' by the accused.

⁴⁵ *In Re: Cognizance for Extension of Limitation*, Suo Motu Writ Petition (Civil) No. 3 of 2020 (Supreme Court of India, 23 March 2020). The Court, addressing the disruption caused by COVID-19, extended procedural timelines in recognition of the practical difficulties litigants faced in approaching the courts.

⁴⁶ NITI AAYOG, *India's Booming Gig and Platform Economy* 87–89 (2022) (noting persistent disparities in digital access across rural–urban, economic, educational and regional groups in India).

⁴⁷ *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, (2020) 7 SCC 1, ¶¶ 41–52 (emphasising the authentication and reliability requirements governing the admissibility of electronic records).

⁴⁸ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637 (recognising the significance of access to digital communication in modern society, and supporting the concern that technologically disadvantaged persons may suffer disproportionate prejudice where legal processes rely increasingly upon electronic modes of communication).

Accordingly, automated digital delivery should not be treated as conclusive proof of personal knowledge without considering the surrounding circumstances. The constitutional requirement should be reliable and reasonably calculated notice, assessed in context, rather than a universal requirement of biometric or other technologically burdensome confirmation.

The increasing integration of technology into criminal procedure therefore complicates the constitutional analysis of Section 356. Procedural efficiency achieved through digital mechanisms cannot substitute for substantive fairness unless accompanied by rigorous safeguards ensuring accessibility, verification, and a meaningful opportunity to participate.

XVIII. VICTIM RIGHTS VERSUS ACCUSED RIGHTS

A balanced constitutional analysis must acknowledge the growing recognition of victim-centric justice within contemporary criminal procedure. Modern criminal procedure scholarship increasingly examines victim participation not merely as a peripheral concern but as a constitutionally significant dimension of the justice process.⁴⁹

A critical question that Section 356 implicitly raises is whether delaying proceedings indefinitely disproportionately prejudices victims. In cases involving sexual offences, organised crime, economic fraud, and political violence, the prolongation of proceedings inflicts continuing harm upon those who have already suffered injury.⁵⁰

Can victim rights therefore justify a limited curtailment of accused participation in criminal proceedings? The scholarly literature on this question is divided. Those who favour a more victim-centred proceduralism argue that the right of the accused to participate cannot function as an indefinite veto over the prosecution's entitlement to adjudication. Others maintain that constitutional procedural rights are grounded in the structural relationship between the individual and the State and cannot be subordinated to the private interests of third parties, however sympathetically situated.⁵¹

This creates a genuine constitutional tension between two competing dimensions of fairness: fairness to the accused through participatory procedural guarantees, and fairness to victims and

⁴⁹ JO-ANNE WEMMERS, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 15–20 (2010) (arguing that contemporary criminal justice systems increasingly recognise victim participation as an important component of procedural fairness, legitimacy and effective justice administration).

⁵⁰ P. Ramachandra Rao, *supra* note 16 (observing that undue delay in criminal proceedings undermines the administration of justice and adversely affects all stakeholders, including victims, whose interests may be prejudiced by prolonged uncertainty).

⁵¹ WEMMERS, *supra* note 49, at 15–20; ASHWORTH & REDMAYNE, *supra* note 21, at 85–90 (illustrating the continuing debate between victim-centred models of criminal procedure, which emphasise the interests of victims in timely adjudication, and due process models, which regard the procedural rights of the accused as fundamental safeguards against State power that cannot be displaced merely by competing private interests).

society through timely and effective adjudication. The paper accordingly argues that constitutional criminal procedure should not be viewed as a zero-sum conflict between accused rights and victim rights. The legitimacy of the system depends upon preserving both, and Section 356 in its present form fails to articulate how this balance is to be achieved.⁵²

XIX. SECTION 356 AND TRANSFORMATIVE CONSTITUTIONALISM

Another significant constitutional dimension concerns the relationship between Section 356 and the doctrine of transformative constitutionalism.^{53,54} Indian constitutional jurisprudence, particularly after *Maneka Gandhi*, has increasingly interpreted Article 21 expansively to strengthen procedural dignity, access to justice, and protection against arbitrary State power.⁵⁵

Critics of Section 356 may therefore argue that permitting criminal conviction in the absence of the accused risks reversing the trajectory of rights-expansive constitutionalism developed over decades of Article 21 jurisprudence. At the same time, defenders of the provision may contend that transformative constitutionalism cannot ignore the structural realities of procedural abuse, systemic delay, and institutional collapse. From this perspective, effective administration of justice may itself constitute a constitutional value. The constitutional debate surrounding Section 356 thus reflects a broader jurisprudential conflict between rights-centred proceduralism and efficiency-oriented institutional reform.⁵⁶

XX. INTERNATIONAL HUMAN RIGHTS PERSPECTIVE

The constitutional validity of trials *in absentia* must also be examined within the broader framework of international human rights law. Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which India is a party, guarantees the right to fair hearing, legal representation, and participation in criminal proceedings.⁵⁷

⁵² *Maneka Gandhi*, *supra* note 3, ¶ 56; *Zahira Habibullah Sheikh*, *supra* note 12, ¶¶ 35–43 (recognising that criminal procedure must balance the participatory fairness owed to the accused with the broader interest in the effective administration of justice).

⁵³ Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 146, 150 (1998). Klare's foundational articulation of transformative constitutionalism emphasises that constitutions may function as instruments for the restructuring of social and institutional power relations.

⁵⁴ GAUTAM BHATIA, *THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS* ch. 1 (HarperCollins India 2019). Bhatia situates the Indian Constitution within the transformative tradition and argues that its guarantee of individual rights is inseparable from its structural commitments to social transformation.

⁵⁵ *Id.*

⁵⁶ *Maneka Gandhi*, *supra* note 3, ¶ 56 (establishing that Article 21 requires a balance between individual rights and the requirements of effective governance, and that procedure must be fair, just and reasonable rather than purely formalistic).

⁵⁷ International Covenant on Civil and Political Rights art. 14, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Article 14(3)(d) guarantees the right to be tried in one's presence and to defend oneself in person or through legal assistance of one's own choosing. India ratified the Covenant on 10 April 1979.

The United Nations Human Rights Committee has emphasised that reasonable steps must be taken to inform the accused of the proceedings and to secure a meaningful opportunity to prepare and defend the case. Similarly, European human rights jurisprudence has consistently stressed the importance of clear and informed waiver, adequate notice, and an effective remedy where the accused was not properly informed or did not unequivocally waive participation.

The absence of an explicit retrial safeguard within Section 356 may therefore create tension not only with domestic constitutional principles but also with evolving international fair trial standards. Additionally, international cooperation in criminal matters, including extradition proceedings, increasingly depends upon compatibility with human rights norms.⁵⁸ Foreign courts may hesitate to extradite accused persons to jurisdictions where convictions *in absentia* occur without adequate procedural guarantees.

XXI. NEED FOR LEGISLATIVE SAFEGUARDS AND INTERPRETIVE REFORM

Section 356 already contains the skeleton of a fair-trial architecture: Section 356(1) requires recorded reasons, Section 356(2) prescribes a pre-trial notice procedure, and Section 356(3) guarantees State-funded counsel for an unrepresented proclaimed offender. If the provision is to survive constitutional scrutiny while maintaining procedural legitimacy, the legislative task is accordingly not to supply these safeguards afresh but to make them adequate in substance, and to address the two respects in which the enacted text falls short of the *Colozza* and *Sejdovic* standard and Article 14(3)(d) of the ICCPR: the absence of an unconditional right to retrial or reopening of evidence, and the conditional, time-limited appeal in Section 356(7). The article proposes the following reforms:

- A statutory requirement of strict judicial satisfaction regarding deliberate abscondment, with explicit evidentiary standards rather than discretionary inference.⁵⁹
- Supplementing the Section 356(2) notice procedure with a requirement that the court assess whether the prescribed steps were reasonably calculated to inform the accused and whether the surrounding circumstances support a meaningful opportunity to know.

⁵⁸ UN HUMAN RIGHTS COMMITTEE, *General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, UN Doc CCPR/C/GC/32 (23 August 2007), ¶ 36 (stating that proceedings in the absence of the accused are permissible only in exceptional circumstances, and only where the accused was summoned in a timely manner and informed of the proceedings); *Soering v. United Kingdom*, (1989) 11 EHRR 439 (holding that extradition and international cooperation must be consistent with respect for fundamental human rights standards, including fair trial guarantees).

⁵⁹ *R v. Jones*, *supra* note 5 (requiring strict judicial satisfaction that absence is deliberate and voluntary, and that a decision to proceed in the accused's absence rest on a clear evidentiary assessment rather than mere inference of abscondment).

Verified receipt may be relevant evidence, but should not be treated as the only constitutionally acceptable form of notice.

- Prescribed minimum standards of engagement for the advocate already made available under Section 356(3), including guaranteed access to the case diary and charge material, a minimum period for preparation, and a recorded obligation to attempt contact with the accused's relatives or last known address, so that the representation is not merely nominal.⁶⁰
- Converting the discretionary evidence-reopening proviso in Section 356(4), which allows a reappearing offender to examine evidence taken in his absence only where the court considers this to be 'in the interest of justice', into a guaranteed statutory right. Comparative practice under Article 6 ECHR jurisprudence and the ICCPR indicates that such a right need not be unconditional in every case, but a scheme resting entirely on judicial discretion, with no reciprocal remedy the accused can invoke as of right, is difficult to reconcile with the proportionality standard read into Article 21 by *Maneka Gandhi*: a provision permitting an absolute and irreversible deprivation of the right to be heard, with no reciprocal remedy once the abscondment ends, is unlikely to survive scrutiny on that ground alone.⁶¹ Parliament should accordingly calibrate the precise contours of this right, for instance by reserving an unconditional retrial for cases where notice was defective, while confining reappearing accused persons who received effective notice to a more limited right to reopen specific contested evidence.⁶²
- A statutory guarantee that the reasons already required under Section 356(1) remain amenable to appellate or constitutional review notwithstanding the Section 356(7) bar, for instance through a carve-out permitting challenge to the adequacy of notice or of the abscondment finding by a representative or family member acting on the proclaimed offender's behalf, rather than leaving judicial review of that satisfaction contingent on the offender's own surrender.
- Relaxation of Section 356(7), which conditions the statutory appeal on presentation before the appellate court and extinguishes that statutory right after three years from the

⁶⁰ *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*, (1980) 1 SCC 98 (recognising free legal services as an essential ingredient of reasonable, fair and just procedure under Article 21, and therefore supporting State-funded representation for accused persons who cannot afford counsel).

⁶¹ *Colozza*, *supra* note 37, ¶¶ 27–29 (establishing that a denial of justice occurs where a person convicted *in absentia* is unable subsequently to obtain a fresh determination of the merits from a court which has heard him, absent an established waiver or an established intention to escape trial).

⁶² *Sejdovic v. Italy*, App. No. 56581/00, ¶¶ 81–87 (Eur. Ct. H.R. [GC], 1 March 2006) (indicating that the scope of the retrial safeguard may properly be calibrated to whether the accused had actual notice of the proceedings, with a more exacting standard applying where notice was defective or unproven).

date of judgment. The provision should be reconsidered so that a person who lacked effective notice is not deprived of the statutory appellate mechanism solely because apprehension or reappearance occurs after the limitation period.

- Specific statutory protections for vulnerable accused persons lacking digital or financial access to proceedings.⁶³
- Periodic judicial review of continuing absence during proceedings.⁶⁴
- Clear evidentiary safeguards relating to witness testimony and cross-examination conducted in the accused's absence.⁶⁵
- Parliamentary clarification regarding execution of sentence and appeal rights upon the accused's subsequent apprehension.

XXII. APPLYING THE PARTICIPATORY FAIRNESS FRAMEWORK: DOES SECTION 356 SATISFY THE FIVE MINIMUM ELEMENTS?

Having traced the statutory architecture, the comparative baselines, and the constitutional doctrine, the paper can now answer the question posed at the outset directly: does Section 356 BNSS satisfy the five minimum elements of the Participatory Fairness Framework?

On Effective Notice and Opportunity to Know, Section 356 is constitutionally uncertain and requires a context-sensitive application. Section 356(2) prescribes a detailed sequence of notice steps, but none requires verified receipt by the accused personally, and the statute leaves unresolved whether compliance with these steps is conclusive of knowledge or merely a rebuttable indicator of it, a difficulty compounded where notice is attempted through electronic or digital means.

On Deliberate Abscondment, Section 356 contains a purposive statutory requirement, abscondment 'to evade trial', but does not specify the evidentiary factors or standard by which that purpose must be established. The constitutional issue is therefore one of application and structured judicial reasoning rather than the complete absence of a statutory mental element.

On Representation, Section 356 formally satisfies the requirement by providing State-funded counsel, but the substantive adequacy of that representation depends on the quality of access to case materials, preparation, and efforts to obtain relevant information. Section 356(3)

⁶³ *Anuradha Bhasin, supra* note 48 (recognising that unequal digital access can create structural disadvantage, supporting protections for technologically or economically vulnerable accused persons in digitalised proceedings).

⁶⁴ *Maneka Gandhi, supra* note 3 (requiring that procedural fairness under Article 21 be continuing, and not reducible to one-time formal compliance).

⁶⁵ *Zahira Habibullah Sheikh, supra* note 12 (affirming that a fair trial includes an effective opportunity to confront evidence, cross-examine witnesses and maintain adversarial balance even in constrained procedural settings).

guarantees State-funded counsel, but counsel without instructions from the accused cannot verify facts, identify alibi witnesses, or make the tactical decisions that ordinarily depend on client contact, leaving the formal guarantee largely hollow in precisely the cases where it matters most.

On Evidentiary Participation, Section 356 provides, in the proviso to sub-section (4), a discretionary mechanism permitting a proclaimed offender who is arrested or appears during the trial to examine the evidence taken in his absence, but the scope and accessibility of that remedy remain dependent on the court's assessment of the interests of justice. The constitutional question is whether that mechanism is sufficiently effective in cases where the accused lacked meaningful participation during the trial.

On Corrective Remedy, Section 356 raises serious constitutional concerns. Section 356(7) conditions the statutory appeal on presentation before the appellate court and extinguishes that statutory right after three years from judgment. The concern is particularly acute where the accused lacked effective notice and is apprehended or reappears only after that period.

Section 356 therefore contains a partial procedural architecture corresponding to all five elements, but the degree to which each element is constitutionally satisfied varies. The most serious concerns relate to the evidentiary standard for deliberate abscondment, the substantive adequacy of representation, the effectiveness of post-appearance evidentiary remedies, and the time-limited statutory appeal. This is the precise sense in which the paper's thesis should be understood: the constitutional vulnerability of Section 356 lies not in the fact that it permits trials *in absentia*, but in the cumulative failure of its architecture to secure the participatory minimum that Articles 14 and 21 require.

XXIII. CONCLUSION

Section 356 BNSS represents one of the most consequential procedural innovations introduced within India's contemporary criminal justice reforms. While the provision seeks to address legitimate institutional concerns relating to absconding accused persons and prosecutorial delay, it simultaneously raises substantial questions regarding compatibility with Articles 14 and 21 of the Constitution and renders itself susceptible to constitutional challenge in its present form.⁶⁶

⁶⁶ *Maneka Gandhi*, *supra* note 3, ¶ 56 (holding that any procedure affecting life or personal liberty must be 'fair, just and reasonable' and not arbitrary, thereby forming the foundational standard for evaluating the constitutional validity of criminal procedural provisions under Articles 14 and 21).

The constitutional difficulty posed by Section 356 does not arise merely because it permits trials *in absentia*. Rather, the deeper concern, tested throughout this paper against the Participatory Fairness Framework's five minimum elements of knowledge, deliberate abscondment, representation, evidentiary participation, and corrective remedy, lies in whether criminal adjudication can retain democratic legitimacy when the accused's participatory role is substantially diminished without adequate procedural compensation.⁶⁷ As the comparative analysis and domestic jurisprudence both demonstrate, the principle that trials *in absentia* are not inherently impermissible has deep roots in Roman law, common law traditions, and modern constitutionalism. However, that principle has always been accompanied by a parallel insistence upon procedural architecture that preserves the essential character of adversarial fairness.⁶⁸

The constitutional challenge posed by Section 356 is therefore best understood not as an argument against any form of trial *in absentia*, but as an argument for the minimum procedural conditions under which such proceedings may be constitutionally conducted. In its present form, the provision is insufficiently equipped with such protections.⁶⁹

Section 356 BNSS presents a genuine constitutional problem, but the problem is narrower and more precise than the proposition that trials *in absentia* are inherently incompatible with fair trial rights. The constitutional question is whether the statutory scheme preserves a meaningful opportunity for participation and an effective means of correcting prejudice when participation was absent. The Participatory Fairness Framework developed in this article identifies five related dimensions of that inquiry: knowledge, deliberate abscondment, effective representation, evidentiary participation, and corrective remedy.

XXIV. ACKNOWLEDGMENTS

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⁶⁷ *Maneka Gandhi*, *supra* note 3, ¶ 56 (establishing that procedural legitimacy under Article 21 requires fairness, reasonableness and non-arbitrariness, thereby implicating concerns where participation rights are significantly curtailed without adequate safeguards).

⁶⁸ *Colozza*, *supra* note 37, ¶¶ 27–29 (holding that trials *in absentia* are compatible with fair trial guarantees only where accompanied by safeguards ensuring knowledge of the proceedings and the possibility of a fresh determination upon reappearance); *R v. Jones*, *supra* note 5 (permitting trial in the accused's absence in limited circumstances, subject to strict judicial satisfaction of voluntary absence and preservation of fairness).

⁶⁹ *Maneka Gandhi*, *supra* note 3, ¶ 56 (holding that 'procedure established by law' under Article 21 must be fair, just and reasonable, thereby requiring adequate procedural safeguards where State action affects life or personal liberty); *Colozza*, *supra* note 37, ¶¶ 27–29 (recognising that trials *in absentia* are permissible only where accompanied by safeguards such as effective notice and the possibility of a fresh determination upon reappearance).

XXV. DECLARATION OF INTEREST STATEMENT

The authors report that there are no competing interests to declare.
