ARREST, DETENTION, AND CRIMINAL JUSTICE SYSTEM: A STUDY IN THE CONTEXT OF THE CONSTITUTION OF INDIA (2012). By B. Uma Devi.Oxford University Press, YMCA Library Building, 1 Jai Singh Road, New Delhi.Pp. xviii + 386. Price Rs. 895/-.

THE BOOK under review builds a comprehensive narrative of arrest and detention provisions in the Indian legal system, and seeks to critically analyze them in the light of the mandate of the Indian Constitution. The central argument of the book is that there is an urgent need for a genuine departure from the imperial legal regime by a radical revision of IPC, Cr PC, and the Police Act. It further envisages amendments to certain parts of the Constitution for the legal system to uphold the letter and spirit of the Constitution of India. The author builds her argument on the foundational premise of taking individual liberty seriously in the contemporary constitutional setting. She further provides a clarion call for imposing checks and limitations on the might and power of the state with respect to the individuals by revamping of police structures,[1] use of scientific, technological and managerial developments to ensure speedy investigation[2] and making the criminal justice system fair and just for the most affected and marginalized, the impoverished, illiterate and ignorant.[3]

While the call for reform is not in itself a novel thesis, the approach of critique adopted in this book provides a marked distinction from the mainstream structural criticism. In an interesting attempt of constitutionalizing substantive as well as procedural criminal law, the author re-visits the post-independence juridical discourse on detention, pre-trial, preventive and punitive, and develops a unique critique of the legal provisions as well as judicial interpretation thereof. The main premise of the book is that since detention *per se* is not constitutionally valid (owing to the protection of articles 19 and 21), the preventive detention laws which form a part of Constitution need a fresh look so that their application and implementation stands in consonance with the overall constitutional scheme. Pre-trail detention as well as punitive detention has to be restricted to only those cases which fall under the grounds on which individual liberty can be restricted.

In part I, the author traces the paradigmatic shift in the interpretation of article

1 B. Uma Devi, *Arrest, Detention, and Criminal Justice System: A Study in the Context of the Constitution of India* 76-82 (2012).

2 *Id.*,ch 6.

3 *Id.* at 125, 262.

21 (from *A.K. Gopalan*[4] to *Maneka Gandhi*[5]) and affirms that despite judicial recognition of the inter-relationship between articles 14, 19 and 21, the judges never considered it necessary to test the validity of detention *per se* on the touchstone of these articles. Owing to "the dogmatic convictions of the judges as to punitive detention",[6] the court has consistently avoided the question of constitutionality of detention laws by holding that a law which attracts article 19 must be such *as is capable of being tested to be reasonable* on the touchstone clauses (2) to (6) of article 19.[7] This approach of the court, in author's own words, "would boil down to saying that it is the scope of the legislation which has to determine whether the constitutional precepts have to be applied, rather than the constitutional precepts being the yardstick of testing legislation. The absurdity of such an approach is obvious- it would be like putting the cart before the horse".[8]

Further, relying on the "composite code approach" enunciated in *R.C. Cooper*[9] and elaborated in *Maneka Gandhi*, the author develops a scheme of reading articles 19, 21, 22 along with entry 9 of list I, schedule VII[10] and entry 3 of list III, schedule VII[11]. Such a reading requites that a preventive detention law should *only* be made for the reasons mentioned in above lists of schedule VII; it can be held to be constitutionally valid *only* if detention is justifiable on the grounds of sovereignty and integrity of India and/or public order under article 19;[12] and the procedural safeguards in article 22 are duly provided. In her account of preventive detention provisions in part III of the book, the author argues that enactment of preventive detention laws in peace times violates the scheme of the Constitution. Building on her reading of articles 19, 21 and 22 with the relevant entries in the VII schedule (set forward in part I), another ground is added for the enactment of preventive detention law: existence of war or war-like situation. The author observes thus:[13]

> [T]he justification for a preventive detention measure could be available only when India's sovereignty and integrity and/or public order is at stake

4 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27.

5 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

6 *Supra* note 1 at 22.

7 *Hardhan Saha* v. *State of West Bengal*, AIR 1974 SC 2154.

8 *Supra* note 1 at 28.

9 AIR 1970 SC 564.

10 Preventive detention for reasons connected with defence, foreign affairs, or the security of India.

11 Preventive detention for reasons connected with security of a state, the maintenance of public order, or the maintenance of supplies and services essential to the community.

12 Sovereignty and integrity of India and public order are the two common grounds which feature in cls. (2) to (6) and thus, are the only grounds on which there can be a restraint on all the freedoms of the citizens guaranteed by art. 19.

13 *Supra* note 1 at 138.

> and the gravity of the situation warrants subserving the fundamental freedoms…Such is the situation which obviously prevails only during wartime or war-like contingencies. During peacetime, it is ridiculous for the omnipotent government with the tremendous paraphernalia at its disposal, to feign that without being armed with preventive detention measures, it cannot ensure effective execution of laws.

If Constitution is so interpreted and preventive detention laws are confined to war or war-like situations, the author asserts that the emergency provisions of the Constitution - articles 358 and 359 - become redundant and hence these should be deleted. Quoting Seervai, N.C. Chatterjee and P. ParameswarRao,[14] she affirms that repealing these two provisions would be advantageous for the democratic ideals as this would extensively curtail the possibility of abuse of power by the state. Even in the time of emergency, there is no need for the suspension of right to freedom of speech and expression or right to freely profess or practice religion. As Seervai points out, "(n)ot only is free discussion and debate necessary for effective direction of the war, it is also necessary for maintaining civilian morale".[15] It is believed that this amendment to the Constitution would impose legitimate checks on the power of the state in emergency situations as the state would only have the recourse to preventive detention measures and would have to ascribe to the procedural mandates of article 22

The author must be applauded for bringing to light the much forgotten and still unenforced section 3 of the 44th Amendment Act that deletes article 22 (7) (a) and make changes to the composition of the advisory board and the time limit within which the board's opinion ought to be taken for continued detention. Under the existing article 22 (7) (a), the Parliament has been vested with unbridled power whereby it can prescribe the circumstances under which and the class or classes of cases in which a person may be detained for more than three months *without* obtaining the opinion of an independent advisory board on the question of sufficiency of such extended detention. The draconian nature of this provision has the potential of spitting the Constitution into two conflicting and antagonistic Constitutions, what Upendra Baxi refers to as "Constitution of peacetime and Constitution at war"[16] where the latter reposes extraordinary powers in the state to the detriment of personal liberties of "we, the people". And thus, section 3 of the 44th amendment to article 22 needs to be effectuated on an urgent basis.

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14 *Id* at 144-147.

15 H.M. Seervai, *The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism* (1987). *Supra* note 1 at 144.

16 Upendra Baxi, Interview with Rainmaker, *available at* http://www.youtube.com/watch?v=WUPC78DtSj4 (last visited on 18 Sep, 2013).

The aforementioned understanding of constitutional provisions, not only confines the exercise of the state power in framing of preventive detention laws but this is bound to have "a tremendous unsettling effect on the existing criminal justice system".[17] In such a situation the state is required to adopt "constitutionally viable and scientifically effective methods"[18] to address crime and criminals. Part II of the book is devoted towards arrest and pre-trial detention and makes some curious suggestions. For instance, it is observed that justification for the state's exercise of the powers to arrest and pre-trail detention should also be only on the grounds of sovereignty and/ or public order.[19] This recommendation no doubt is rooted in the analysis of article 19 restrictions[20] but here the author seems to be unwittingly suggesting that no arrest can justifiably be made in cases of individual crimes which do not fall in the category of violations of interests of sovereignty or public order. Such a conceptualization is not merely over enthusiastic but borders on naïve constitutional praxis.

Part IV of the book deals with punitive detention where the author in a bold attempt puts into question effectiveness as well as infallibility of imprisonment as the normative form of punishment in the existing criminal justice system.[21] Tracing the history of modern penal laws, she points out that in pre-modern times the concept of punishment was very different from what we understand today. Punishment was in the form of fine, mutilation, annihilation or banishment. As the social contract theory gained acceptance, the objective of punishment transformed from exaction of vengeance to deterring an individual from unacceptable conduct. The shift to imprisonment as the primary form of punishment was to put an end to the reckless, unwarranted and despotic use of corporal punishment by the kings, the author contends that it was done "without considering its pros and cons in the new context".[22] Though imprisonment as form of punishment was adopted with the hope of deterrence, prevention and reformation, it is actually "nothing but an admission of inability to fight crime".[23] This method of punishment is of doubtful constitutional validity and thus, should be given up for more effective and permissible methods.[24]

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17 *Supra* note 1 at 36.

18 *Ibid.*

19 *Id.* at 41-49. Also see, chs. 6 and 7.

20 *Id.* at 42. The author asserts that "arrest *per se* must be constitutionally justifiable on the grounds which reasonably justify detention and the restrictions it consequently imposes on Article 19 guaranteed freedoms."

21 IPC, 1860, s. 53.

22 *Supra* note 1 at 232.

23 *Id.* at 236.

24 *Id.* at 240-245.

While there is merit in her case when she strongly argues that prisons are not the places for reformation,[25] her thesis takes a rather regressive turn from thereon. There is pervasive pathologization of criminality in her approach as she argues that criminality is a "symptom of insanity" and "criminals should be treated as sick people". The call for a shift from imprisonment to therapeutic treatment, from crime to criminal, from punishment to prevention assumes dangerous proportions as the author makes a case for increased surveillance: "computerized register of potential delinquents", "routine supervision", "therapeutic measures for potential delinquents"[26]; compulsory state service: "all offenders who refuse obedience to these measures…vagabonds, willful idlers…should be enrolled in a corps of State workmen"[27]; and absolute medicalization: sentence based on the advice of doctors, psychologists, sociologists which can take the form of actual hospital treatment, medical drill *etc.*[28] The inherent fascism of these suggestions completely destroys the benignity of her whole project. The ideas of liberty and equality that are claimed to be the bedrock of this book are completely annihilated by the solutions that the author offers. In the name of scientific developments and modern approaches to crime and criminality, the author leaves us with solutions based on anachronistic research studies done half a century back, and a model that can possibly displace law and justice with the monstrosity of state paternalism, compulsory "therapy","correction" and robs the citizens of agency and free will.One is left to wonder how these suggestions can meet the constitutional mandate of the protecting and preserving the dignity of every individual. The haunting question that this book leaves the reader with is whether the final solution offered here not more perilous than the problem itself.

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25 *Id.* at 233-235.

26 *Id.* at 248-249.

27 *Id.* at 253.

28 *Id.* at 255-256.

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