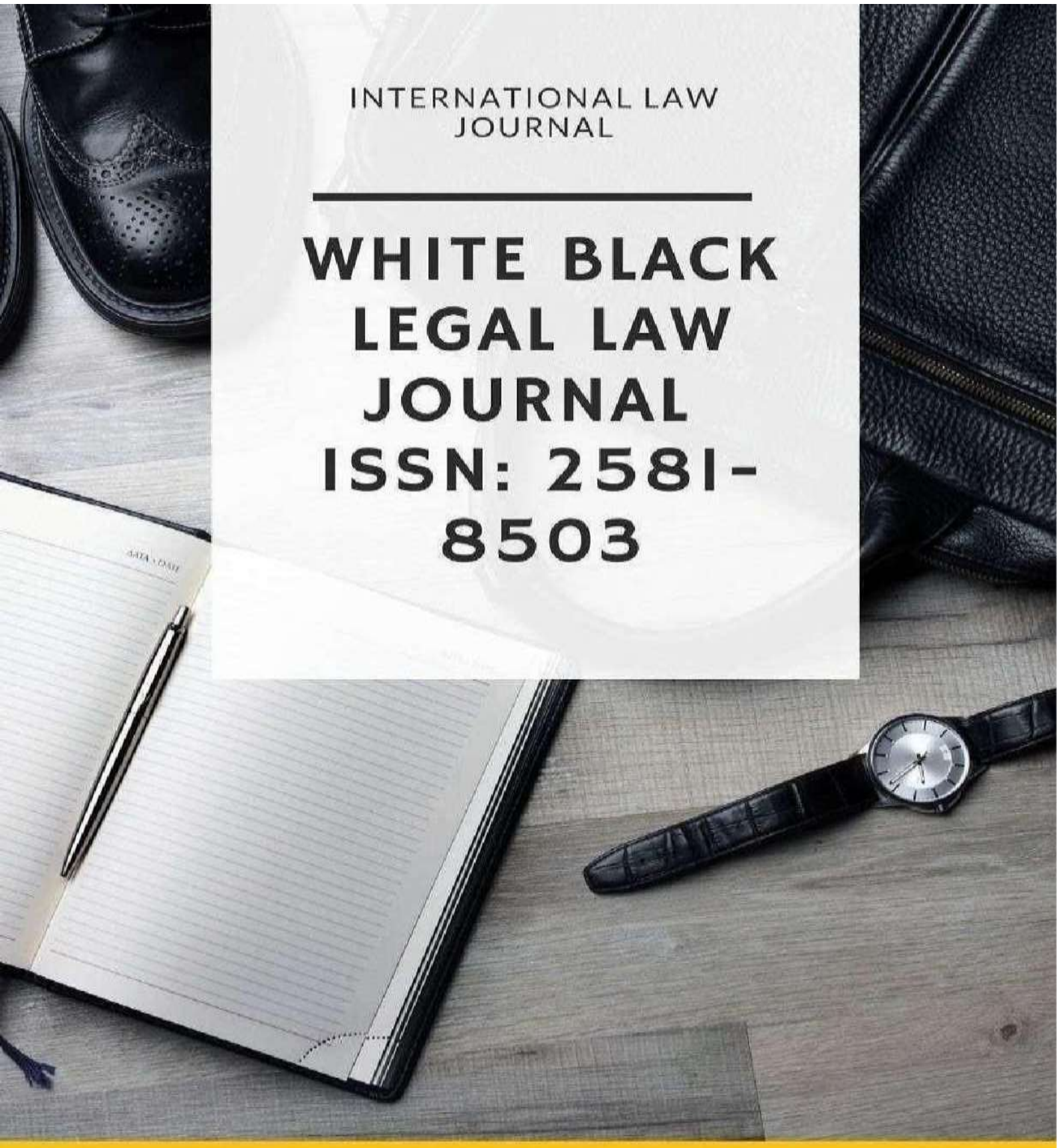

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE RAREST OF RARE DOCTRINE AND DEATH PENALTY

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Abstract

The doctrine of the "rarest of rare" is a much discussed topic now and it serves as a fundamental principle for determining the imposition of the death penalty in India. In this research article, an effort is made to study the evolution of the doctrine of “rarest of rare” and its significance in shaping the capital punishment jurisprudence. The constitutional validity and various landmark judgements of capital punishment on the basis of “rarest of rare” cases critically analyze its strengths and weaknesses. The article also discusses the contemporary discourse surrounding the death penalty and provides an overview of alternative sentencing options. Through a comprehensive study, this article aims to shed light on the complexities and controversies surrounding the doctrine of the "rarest of rare" and its impact on the administration of justice in India.

Introduction

There is no hard and fast rule for applying the "rarest of rare doctrine." The type and gravity of the offence are essential in a criminal trial. These two considerations allow for differentiation in penalty levels. The Indian Judiciary has the responsibility of weighing aggravating and mitigating factors, as well as public outcry, in order to determine whether or not the circumstances warrant the death sentence.

The oldest known codification of criminal law pertaining to the death sentence or capital punishment dates back to the reign of King Hammurabi of Babylon. In other regions of the globe, like France, nations in the Middle East, Russia, and others, the death penalty takes the form of guillotining, beheading, electrocution, and other methods. The death penalty, sometimes known as the capital punishment is the highest form of punishment allowed by any criminal legislation

in effect anywhere in the world.[1] The death penalty is a constitutionally sanctioned means by which a state may exercise its right to terminate an individual's life.

Many Indians under the British rule were given the death sentence and hung to death without receiving a fair trial. However, a new era in Indian law emerged once the country gained its independence. Compared to the legal system of the British period, in which Indians had little hope of getting fair treatment, or to the judicial systems of other empires and kingdoms, in which the ruler or monarch possesses the power to bring justice to the victim and punishment to the guilty, this one was a radical departure.

The Indian Constitution serves as the guiding principle for the country's legal system and guarantees basic rights to all Indian nationals. To quote Article 21 of the Constitution: "No person shall be deprived of his life or personal liberty except according to the procedure established by law."[2]

But in the 21st century, with codified laws and advanced ethics, it is argued by many that the death penalty really is not the most appropriate form of punishment. Still some nations continue to use the death penalty despite widespread protests and call for its abolition by human rights groups and NGOs. The United Nations has deemed the use of the death penalty to be an atrocity and a violation of human rights.[3]

Research Questions

1. How the "rarest of rare" doctrine evolved in India in the context of the death penalty?
2. What guidelines have been laid by the Hon’ble Supreme Court of India for determining the exceptional nature of a crime under the doctrine of the "rarest of rare"?
3. What are the loopholes in the application of the doctrine of the "rarest of rare" in capital punishment cases in India?
4. Whether there is any inconsistency in the application of the doctrine across different judgments?
5. To what extent does subjectivity and potential biases impact the application of the doctrine of the "rarest of rare" in death penalty cases in India?

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[1] Ritter, K., (2022). *History of the Death Penalty*. Independently Published.
[2] The Constitution of India, 1950, Art. 21.
[3] Amnesty International Global Report on Death Sentences and Executions 2015. Index: ACT 50/3487/2016

Research Objectives

1. To study the evolution of the doctrine of the "rarest of rare" in the context of capital punishment.
2. To analyse the guidelines laid down by the Hon'ble Supreme Court for determining the exceptional nature of a crime under the doctrine of the "rarest of rare."
3. To critically evaluate loopholes in the application of the doctrine, considering factors such as subjectivity, and potential biases.
4. To assess the level of consistency in the application of the doctrine across different judgments.
5. To examine the contemporary discourse surrounding the death penalty in India, including discussions on global trends towards abolition and alternative sentencing options.
6. To suggest recommendations with regard to application of the doctrine of the "rarest of rare" in capital punishment cases.

Capital Punishment or Death Penalty in India

Capital punishment is administered with baffling subjectivity in India, yet it has been officially abolished in 104 nations and de facto abolished in 29 (no executions have taken place in the previous ten years) in these jurisdictions. The death sentence is not universally upheld by Indian law, but it is not explicitly forbidden either. Sections like 121[4] (waging war against the state), 302[5] (murder), 364A[6] (kidnapping for ransom), etc., of the Indian Penal Code 1860 prescribes capital punishment as a sentence. Other laws like the Sati (Prevention) Act 1987 and the Prevention of Terrorism Act 2002 also provide for death sentence. The vast majority of high-profile execution cases include terrorist acts or rape-cum murder.

The Supreme Court has maintained the death sentence for the accused in the Nirbhaya rape and murder case, while calling it the "rarest of the rare" and acknowledging that strong punishment is required to achieve fairness. India has a "rarest of rare" threshold for ascertaining whether a death sentence is appropriate.

[4] Indian Penal Code, 1860, s.121.
[5] Ibid. s.302
[6] Ibid. s. 364A.

Rarest of the Rare Doctrine

No penal or procedural law provides a precise definition of "rarest of the rare cases," but a judge will evaluate the seriousness of the offence and other factors to determine whether a certain case qualifies for the same. The rarest of the rare may be analyzed by others in the same way that any other topic can. Many critics have pointed out that this concept seems to rely on the particular translation used.[7] According to Justice Bhagwati, who seems to have predicted this outcome, such a foundation would give rise to a greater degree of subjectivity in dynamic and would decide the option of whether or not a person would live happily based on the arrangement of the Bench.[8] He argues that the lives of criminals are so dependent on the emotions of judges, arguing that this is contrary to the Fundamental Rights protected by Articles 14 and 21 of the Indian Constitution.

It has also been argued that the options provided in accordance with this rule are arbitrary. If "extraordinary grounds exist under which the Court has no other resort but to impose as capital punishment for the continued existence of the State and society," then the death penalty must be carried out. The nature and severity of the case in the Delhi Gang Rape-cum-murder case led the Supreme Court to rule that the death sentence should be issued to the offender.

Constitutional Validity and Indian Judiciary on Rarest of Rare Doctrine and Death Penalty

The fundamental right to life has been guaranteed by the constitution of India by Article 21. However, a person can be deprived of this right subject to the procedure established by law. The death penalty has been criticized by many legal luminaries on the ground of violating the citizen's right to life. However, they overlook the fact that even right to life is not an absolute right. Lot of debate and discussion has taken place over time with regard to the constitutional validity of the death penalty and in numerous cases the concept has been challenged.

In the case of Jagmohan Singh vs. State of Uttar Pradesh[9], constitutional validity of death sentence was challenged. It was contended that it was violative of articles 19 and 21 and that the procedure prescribed under Cr. P.C. was restricted only to findings of guilt and not awarding death sentence.

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[7] Parvathy, S., (2009). Application of the Doctrine of Rarest of Rare Cases: A Critical Appraisal of the Approach of the Supreme Court of India. *SSRN Electronic Journal* [online]. [Viewed 7 June 2023]. Available from: doi: 10.2139/ssrn.1647802

[8] Ibid.

[9] Jagmohan Singh vs. State of Uttar Pradesh, A.I.R. 1973 S.C.947.

The Supreme Court held that the choice of death sentence is made in accordance with the procedure established by law. The Apex Court upheld that death penalty was not violative of Articles 14, 19 and 21 and was constitutionally valid. Further, the Hon'ble Court observed that it is upon the judge to choose between death penalty or imprisonment of life on the basis of circumstances of the case, facts and nature of crime.

In Rajendra Prasad vs. State of UP [10], it was opined by Justice Krishna Iyer that death penalty violates articles 14, 19 and 21. He came up with the following circumstances in which death penalty may be imposed:

- Special reasons to be recorded for imposing death penalty.
- Extraordinary circumstances must be present in a case to impose death penalty.

In the landmark case of Bacchan Singh v. State of Punjab,[11] the constitutional validity of the death penalty in India was examined by the Supreme Court on the ground of violation of Article 21. The Hon'ble Court upheld the constitutionality of the death penalty. But the court laid down the principle that the death penalty should only be imposed in the "rarest of rare" cases. Rarest of rare according to the Court was described as of exceptional brutality which shakes the collective conscience of society.

In order to determine the appropriateness of death penalty, the court provided a two-stage test. Firstly, it is to be seen whether a particular offence falls under the ambit of "rarest of rare" justifying death penalty. Secondly, it depends on the mitigating and aggravating circumstances. If the aggravating circumstances outweigh the mitigating circumstances, the death penalty may be imposed.

Despite this judgement, there were instances of subjective interpretation. Thus a need was felt for further clarification and guidelines. In Macchi Singh v. State of Punjab[12], further attempt was made to elaborate and specify the criteria determining the concept of the "rarest of rare." Certain factors were identified by the court which were to be taken into consideration in order to find out whether a particular crime falls under the ambit of "rarest of rare". Some of the factors were, the manner in which the crime was committed, the motive behind it, the anti-social or depraved nature

[10] Rajendra Prasad v. State of Punjab, A.I.R. 1979, S.C.p-916.
[11] Bacchan Singh v. State of Punjab, 1980, 2 .SCC 684
[12] Macchi Singh v. State of Punjab, A.I.R. 1983, S.C. 957

of the act, and lastly the impact it created on the society. Besides, the scope for reform and rehabilitation of the offender was emphasised by the court.

The case of Deena vs. Union of India[13], dealt with the constitutional validity of section 354(5) Cr.P.C., 1973 which was challenged on the ground that hanging by rope as prescribed by this section was inhuman and therefore violative of Art. 21. However, the court held that hanging by rope under section 354(5) of the Cr.P.C. is constitutional and is not violative of Article 21.

The Apex Court in the case of Triveniben vs. State of Gujarat[14], asserted that the Indian Constitution does not prohibit death penalty.

In Mithu vs State of Punjab[15], Section 303 of the Indian Penal Code[16] was struck down. It was felt by the court that the particular provision was violative of Articles 14 and 21, as it provided for capital punishment only, leaving no choice for the judges to exercise their discretion. It was observed by the court that if the death sentence is mandatory, then it is meaningless to hear the convict on the question of sentence, and it becomes superfluous to state the reasons for imposing the sentence of death.[17]

The Apex Court, in the case of Manoj Pratap Singh v State of Rajasthan,[18] emphasized that courts should not refrain from executing death penalty in cases which necessitates its imposition. It expressed that its objective is not to obviate the death penalty, despite the emergence of alternative sanctions over the years. Though in the past the court has granted commutation of death sentences to life imprisonment on the basis of various factors including the socio-economic background of the accused, their age, absence of prior criminal records, and potential for reform and rehabilitation, but the recent approach of the Court is scrutiny of aggravating and mitigating factors, as well as the guarantee of principled sentencing. The Court has tried to rationalize the legal principles governing capital punishment, with a particular emphasis on procedural facets.

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[13] Deena vs. Union of India,(1983)4 SSC 645.
[14] Triveniben vs. State of Gujarat, A.I.R. 1989, S.C.142.
[15] Mithu Singh v. State of Punjab, 1983 SCR (2) 690.
[16] Indian Penal Code, 1860, s. 303.
[17] Pratik J., CAPITAL PUNISHMENT IN INDIA - A CRITICAL ANALYSIS: PRATEEK JAIN - ILSJCCL [online], (no date). *ILSJCCL*. [Viewed 7 June 2023]. Available from: https://journal.indianlegalsolution.com/2020/04/15/capital-punishment-in-india-a-critical-analysis-prateek-jain/
[18] Manoj Pratap Singh v State of Rajasthan,2022 SCC OnLine SC 768.

In Santosh Kumar Bariyar vs. State of Maharashtra,[19] the Hon'ble Supreme Court observed, "*The rarest of rare dicta serves as a guideline in executing Section 354(3) and entrenches the doctrine that life imprisonment is the norm and death sentence is an exception.* The *rarest of rare doctrine however requires an objective assessment of the facts of the case to satisfy the exceptions ingrained in the rarest of rare dictum."*

In the case of Shankar v. State of Tamil Nadu,[20] the Supreme Court ruled that the death penalty might be an option for completely eliminating crime. Two members of an unlawful assembly attempted to dispose of their target and, when they failed, they shot and killed his two young daughters, but the highest court ruled that this was not one of the very few instances in which the death penalty would be warranted.

However, in the case of Kehar Singh,[21] the Supreme Court ruled that this was a really exceptional occurrence. This was more than just a murder. It was observed by the court that assassinating India's lawfully elected prime minister was a serious crime.

In Prajeet Kumar Singh v. State of Bihar[22], the court observed that a sentence of death can be given when a murder is committed in a very callous, unconventional, or offensive manner with the intent of eliciting extreme public outrage.

Thus, to sum up, it is clearly evident from a study of the above cited case laws that death penalty is regarded as constitutional in India. Despite several legislative attempts to abolish the death penalty, it is to this day prevalent in India as is evident from the recent case of Ajmal Amir Kasab, who was executed in 2012 and the four Nirbhaya case convicts.

Criticisms of the Application of the Doctrine:

1. Lack of Consistency in Application: There is lack of consistency in determining the "rarest of rare" cases. Often it leads to different kind of interpretation by judges, leading to disparities in sentencing outcomes. This inconsistency raises concerns about the arbitrariness and unpredictability of the death penalty.

[19] Santosh Kumar Bariyar vs. State of Maharashtra, (2009) 6 SCC 498
[20] Shankar v. State of Tamil Nadu, (1994) 4 S.C.C. 478
[21] Kehar Singh v. Union of India, (1989) 1 S.C.C. 204.
[22] Prajeet Kumar Singh v. State of Bihar, 2008

2. Arbitrary Decision-Making and Subjective Interpretations: Subjectivity in the doctrine provides greater scope to the judges to apply their discretion for determining the exceptional nature of a crime. This leads to differing interpretations and opinions, and to personal biases and individual judicial philosophies.

3. Potential Biases and Societal Influence: Decisions regarding the application of the doctrine is often influenced by societal attitudes, media influence, and public pressure. Public outrage and media sensationalism very often influence judicial decisions, compromising the objectivity and fairness of the sentencing process. Unconscious biases also play a role in the assessment of the "rarest of rare" criteria.

Keeping in view these criticisms, it is necessary that subjectivity in the application of the doctrine be replaced by objectivity and clearer guidelines and criteria to minimize subjectivity and enhance consistency in decision-making be laid down. It is also crucial to ensure that the application of the doctrine is free from external influences and biases, safeguarding the principles of fairness and justice.

Further, examination of alternative sentencing options needs to be debated and discussed to provide a more balanced and human approach to sentencing. Many countries around the world have abolished or restricted the use of capital punishment, opting for life imprisonment without parole or other restorative justice approaches.

Contemporary Discourse and Alternatives

A. Global Trends towards Abolition and Restriction: Over the years, there has been a lot of debate around the subject of death penalty, with a growing demand for its abolition or restriction. Factors such as the potential for wrongful convictions, violation of human rights and concerns regarding the effectiveness of the death penalty have led to a lot of countries abolishing capital punishment or placing a moratorium on executions. This global discourse has influenced the contemporary discourse surrounding the death penalty in India as well.

B. Alternatives to the Death Penalty:

1. Life Imprisonment without Parole: Life imprisonment without parole can be considered as a good alternative and a severe punishment with scope for rectification of wrongful convictions and reformation[23].

2. Restorative Justice Approaches: The objective of this approach is repairing the harm caused by the crime, promoting healing, and reintegrating the offender into society through dialogue, accountability, and rehabilitation, prioritizing the needs of victims and the community. It aims at addressing the root causes of criminal behaviour and prevent future offenses.

3. Rehabilitation and Reintegration Programs: Instead of addressing the issues of punishment, rehabilitation and reintegration programs, this approach aims to address the underlying factors that contribute to criminal behaviour. By offering alternatives to incarceration and promoting reformation, these programs seek to reduce recidivism rates and promote long-term societal well-being[24].

The contemporary discourse surrounding the death penalty in India thus emphasises on finding a balance between punishment, deterrence, rehabilitation, and justice. It includes discussions on the need for procedural safeguards and improvements in the criminal justice system to minimize the risk of wrongful convictions and ensure fair trials. Efforts to enhance forensic science, strengthen legal representation for accused, and address systemic biases contribute to a more informed and equitable decision-making process.

Conclusion and Recommendations

The doctrine of the "rarest of rare" has been a much discussed topic in the legal domain of the modern India. It has played a vital role in shaping the death penalty jurisprudence in India as well. Though it has adopted a restrictive framework for the imposition of capital punishment, it has raised numerous concerns regarding consistency, subjectivity, and potential biases. As the global discourse increasingly questions the efficacy and morality of the death penalty, it becomes

[23] Aksshay Sharma, Alternatives to capital punishment, iPleaders (2020), https://blog.ipleaders.in/alternatives-capital-punishment/ (last visited Jun 5, 2023).

[24] Alternatives to the death penalty Information Pack, Penal Reform International (2015) https://www.penalreform.org/resource/alternatives-death-penalty-information-pack/. (last visited Jun 5, 2023).

important to make the doctrine more objective and impartial with a more rational and scientific methodology. It also becomes important to engage in applying the alternative sentencing options.

Although the contemporary discourse on the death penalty stresses on its abolition and restriction, India must take a balanced approach by not totally abolishing death penalty per se but laying down proper guidelines and criteria explaining the doctrine of “rarest of rare” and also resorting to alternative punishments to death penalty where required.