अराजकेशि लोकेशिविमुख सर्वत्रे शिरुते भयादृः ।
रक्षाधृतम्भ सर्वस्य राजानमस्तुक्लपशुः ॥
स राजा पुरुषो दण्डः स नेता शासिता च सः ।
विष्णुवम्य ब्रम्हणव धर्मस्य प्रतिभः स्मृतः ॥
दण्डः शासित प्रजाः सताः दण्डं एवाभिरखति ।
दण्डः सुप्रलेख जागरित दण्डं धर्मं विदुःध्याः ॥

Manu-VII/17-19

He translation should have been written.
CHAPTER I

INTRODUCTION
INTRODUCTION

Penalty to death almost in every country of the world has been in existence from the time immemorial. Its retention as well as abolition has been advocated with equal earnestness and vehemence for its expediency or justification. In some or other forms it is still in continuance. The word 'punishment' denotes infliction of some pain for the wrongs done. It is a suffering, loss or social disability as a direct consequence of some action or omission on the part of the person punished.

The word "punishment" is used for "Danda" in sanskrit. 'Danda' is identified with 'Dharma' and the state being the protector of the society was rightly empowered to vest with some powers to regulate 'Dharma' among the people. Thus the state was armed with the power to deter or restrain people from violating rules of Dharma or doing misconduct. The power vested with the king (state) to punish a person found guilty of an offence has been praised in Dharmashastras as a great gift given to mankind because, without the creation of Kingship (state) and without the enforcement of power by the king (state) to punish the criminal there would have always been chaos and human beings would have been tormented by fear, insecurity to life and property and consequential misery.1

Punishment in fact, leads to the eradication of bad practices and that the king should administer punishment for the furtherance of morality and religion. Kamandaka justifies punishment for the purpose of justice. The whole world is ractified by 'Danda' and even the Gods and demigods are subject to its authority.²

The object and reasons for enforcing 'Dandanitis' since ancient period have been to deter the wrong doers from committing wrongs against the subjects for which the Kingship institution had been established. It has been as a warning to intending offenders that they would also be punished if they were to commit the offence. Another object of inflicting the punishment other than death penalty was to make the guilty person realise the crime he had committed and reform herself and live thereafter as a law abiding citizen. It was the general view of the people that the offender, after getting due punishment for his misdeeds was purged and became pure and he could go to heaven as the saints. It means that after getting punishment from the King (state) an offender was as pure as a saint.³ Punishment gave him an opportunity to reform him and to open a fresh leaf in his life.

3. See Manu VIII/318.

राजभि: धृष्टिज्ञातरु कुल्सा पापानिः मानः।
निमित्ताः: रघुमायांतिः रुतः: भक्तिन्तोग्यः।
The important feature of punishment is checking the miscreant and wrong doers from doing any crime. Punishment leads to the eradication of bad practices and as such the state should administer punishment for the furtherance of morality and religion.⁴

The term "capital punishment" has antiquarian past in the history of penal law when neither imprisonment had come into existence nor the value of expiation had been recognised or criminal and his Criminality were not looked upon separately. The capital punishment was surer and certain method for getting riddance of the offender and his offensiveness. The death of the criminal satisfied the individual of the group which had been his victim.⁵

The term "capital punishment" is taken to mean death penalty. It is institutional killing by punishment involving loss of life. The word capital has been derived from the latin word "Capit" which means 'head'. The word capital is used to show the principal, main or very important and the offences before which the word 'capital' is prefixed are known 'capital offences'.⁶ The word 'capital' when prefixed with punishment

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⁴ Supra Note 2.

Capital offences: Murder, rape, kidnap, arson, robbery
assault by life imprisoner, burglary etc. have been considered capital offences.
stands for the execution or carrying out of the sentence of death inflicted on an accused found guilty and convicted of a capital offence. This word 'capit' in its abstract noun is 'capitation' and in verb it become 'capitate'. 'Capitate' being prefixed by the word 'De' becomes 'Decapitate' which means to cut off the head or to "behead". The primitive form of capital punishment was the decapitation of the culprit.\(^7\)

In early Romans the term "capital punishment" was used to cut the limbs, hands and other organs which included beheading also. But subsequently the term was narrowed only to mean beheading of the accused for capital offences. Originally death sentence was mendatory but later on there was a novel departure from this ruling on two counts: Introduction of discretion in any capital sentencing and the introduction of degrees of murder.

Living beings have some natural rights and human beings having natural consciousness are more susceptible for these rights. In the recorded history of mankind, man has been fighting for these rights whenever they have ever been challenged. As the king has always been considered to be a representative of his subjects, it was his paramount duty to look after the welfare of his people and bestow them with some rights. These rights were mainly by the moral and spiritual dictates of man and from the concepts of natural law which was the ruling law of the time.

From time to time in almost every progressive country of the world efforts have been made for the freedom from civil and unusual punishments and inalienable rights. Bill of Rights of 1689, American Declaration of Independence 1776, French Declaration on Rights of Men 1789, Universal Declaration of Human Rights and the Genocide convention passed by the General Assembly in December, 1948, Geneve convention of 1949 etc. are the glaring examples for these efforts.

During the period of Renaissance and Enlightenment (1550-1750) there was a great decline in exclusively religious foundation for moral principles. Philosophers and jurists increasingly lent their support to the doctrine of "the rights of man" as the foundation for constitutional law and public morality. John Locke, Jean Jacques Rousseau, Cesare Baccaria, William Blackstone Emmanuel Kent and Thomas Jefferson etc. all agreed that the first and foremost of these rights necessary for human life are "right to life". They argued that since each person is born with a natural right to life, murder must be viewed as a violation of that right. Accordingly executing the murderer is not wrong since the murderer has forfeited his own right to life because of his crime. Baccaria, however, opposed the principle of inflicting death penalty.

The recognition of certain human rights necessary to all human beings for their existence was primarily limited to domes-
tic level or national level. The dignity of human person and the humanity of man were recognized in every country. But violations occurred and were wide ranging. Consequently great popular upheavals took place and gave birth to charters in some states such as Magna Carta, the France Declaration of the Rights of Man and the Citizen of 1789, American Bill of Rights, 1791. These instruments were however, limited in contents and focus and were not perceived as being of universal application.

No permanent institutional machinery for the regular discussion of matters of common concern could not be made on international basis. Only international meetings at Ad-hoc diplomatic conferences with well defined and limited mandates took place, for example, Vienna Conference, 1815; Berlin Conference 1855, Hague Conference of 1899 and 1907. These instruments were by modern standard. They undoubtedly inspired and influenced reform in many countries in the field of human rights. 8

The league of Nations was established in 1920 with the object to protect and maintain the dignity of human life and human rights just after the First World War was over however, this beginning of universality was still restricted in content and scope. It emerged for peace treaties in the treatment of

minorities. But it was not until the aftermath of the Second World War that the international community became dramatically convinced of the real and pressing need to protect and promote human rights. The promotion and protection of human rights were seen as an integral and essential element for the preservation of world peace and co-operation, not only within the confines of particular states but universally. To achieve this end the need was also felt to create the necessary mechanism to deal with the highly complex questions that would inevitably arise in the systematic quest for generally acceptable norms and their implementation within all national jurisdictions.  

Following the problems of the Second World War which humanity had inflicted upon itself and possibly, as well, the need was felt to extend provisions of peace treaties of The League of Nations. The promotion and the protection of human rights were felt as an indispensable part of the principal objectives which states set for themselves. To achieve this end they pledged themselves "to take joint and separate action in co-operation with the organization", for the achievement of that objective later on for the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The General Assembly in 1948 proclaimed the Universal

9. Ibid p.3.
Declaration of Human Rights as a common standard of achievement for.

The penalty to death, in fact, in every country of the world has been in existence from the time immemorial. Its retention as well as its abolition has been advocated with equal earnestness and vehemence. All the more it is still continued, and opinions are still divided for its expediency or justifiability. History reveals that death penalty had been the last resort as a means to solve the crux, we also fund some well reasoned arguments against the wisdom of inflicting death sentence as the extreme penalty of law. In the Buddhistic era, when Ahimsa was the rule of conduct, the moral consciousness as to the inequity of capital punishment was not wanting. But the death penalty in diverse forms has continued throughout the ages. So in every country, at some time or other, public opinion has found itself divided into two hostile camps, one ready to approve and the other ready to condemn its abolition. Modern scientific opinion is by no means agreed as to its retention or its total abolition. A question that has, through the ages, thus presented serious difficulties in the way of a satisfactory solution must necessarily be complex. 10

The views that death penalty should be abolished emanates from humanitarian societies. It emphasises the view that human

life is too sacred to be lightly sacrificed at the alter of law and that the defence of society may effectively be secured by means other than the death sentence. On the other hand, the advocates of the death penalty denounce such views as dangerous, void of scientific foundation and indicative of a type of mawkish sentimentality. 11

It is clear, therefore, that the question as to its abolition must be approached after a dispassionate analysis of the causes and conditions, past and present, that underlie the institution of capital punishment. Only after doing so one will be in a position to enquire into the valid grounds, if any, for its abolition: and the means, if any, available in modern society for its replacement.

In the primitive societies, death by violence was an ordinary phenomenon. War was often the very condition of existence with the gradual humanizing of society, no doubt, greater value came to be placed on the desire of living and the will to live. Nevertheless, it took long time to evolve the idea of the sanctity of human life with all its modern contents. The death penalty in primitive societies was considered nothing extraordinary. It was the best and quick method of retribution as well as of deterrence. For the purpose of deterrence, when deterrence entered into the scheme of punishment, as well as for the purpose

of retribution, mere death was often found insufficient, it being so common. Hence peculiar forms of death, attended with torture were improvised. The problem then was how to make the extreme penalty of law severe enough to strike terror into the minds of hard-core criminals. At times when elimination become the ruling idea, there being no transport-ation and no organised police system, the surest and speediest method of cutting the male factor off from the body politic was to inflict the death penalty.  

In the contemporary society we have excluded abnormal conditions from our hypothesis, such as the state of war where spies and traitors receive death sentence in the quickest and most summary fashion. This can easily be stopped by stopping the war itself. Jealousy, sex feeling, fear, hatred combined with epilepsy, psychoneurosis and diverse other kinds of mental infirmity, though apparently premeditated, may on scientific examination appear to be the inevitable product of prolonged emotional reaction upon a diseased mind and body. These conditions take away from the so-called murderer the full share of the responsibility foisted on him by law. In the modern society, however, from the days of Beccaria onwards the tendency has been to reduce capital punishment to the limits of indispensable necessity. The change has been gradual but steady. The altered and still altering attitude of society towards the death penalty

is due to two main reasons: an increasing consciousness of the sanctity of human life and a decreasing faith in the efficacy of the death penalty as an effective deterrent. A variety of scientific considerations has gradually undermined the settled faith which preceding generations had in the deterrent value of the death sentence. Scientific opinion now is more than ever conscious of the fact that despite the deterrents of any description, those mental subjects are likely to commit depredations on society. While, therefore, in their case, elimination is essential as a measure of safety for the state, they cannot with any justice be penalised for acts of irresponsibility.

The most important aspect which the law has to consider is whether offenders drawn from these classes of abnormal or subnormal people will in any way be deterred from commission of similar offences. The theory of deterrence rests on the supposition that not only the criminal concerned but others of his class, who may be potential criminals, will take the lesson to heart and when exciting conditions favourable to the commission of a similar offence present themselves in their lives, they will remember the case of the condemned criminal who paid the penalty with his life, and refrain from the act. It, thus, presupposes the power of raising in the mind the requisite memory pictures at the critical moment and of reasoning out from them
the proper course of action or inhibition.

The mentally subnormal individuals being often incapable of it, with them the death sentence fails to be deterrent. However, it is difficult to establish with any degree of certainty how far the death penalty acts as a more powerful deterrent than such punishment as imprisonment. When murder is committed, obviously the deterrent has failed.

There are other potent reasons also why scientific opinion condemns death penalty. Having regard to the fallibility of human justice, it is considered inexpedient to put a man's life in the hands of jurors and judges. Of all murders judicial murder is the most revolting, and there is no reliable safeguard against judicial murder, no more than there is against any human error. The penalty of death is irrevocable. Hence it can only be tolerated when there is absolute certainty about the guilt of the accused.

Now the conviction is shifting from deterrent retribution and to reformative as the purpose of the punishment. It is believed that reform and rehabilitation of the offender is possible now a days, the death penalty is found to be entirely out of keeping with the spirit of the new penology. Death penalty destroys all possibility of correction, or conversion. A section of the people may say that there may be some criminals so hardened and inveterate as not to give much hope of reformation, but is it
possible to make a positive forecast without trial that a particular offender is irredeemable? If not, is there any justification for sending him to his doom without making a serious attempt to rehabilitate him? This argument applies with special force to crimes committed in a state of passion or frenzy which appears as quickly as it disappears, leaving the criminal a victim of capital punishment. The abolition of the death penalty will allow the principle of penal individualization to be applied at least to murders of a certain class, if not all. At least it should be available to all in the first instance. If it be found that in particular cases there is no hope of any response to reformative treatment, other methods may be tried.

My endeavour here has been to investigate the chances of abolition of capital punishment from the country. The whole hypothesis for this purpose has been divided into eight chapters. The thesis starts with the opening chapter of introduction wherein. The present work has covered all aspects of the death penalty including its historical background, existing position, the basic principles of imposing punishment, its impact in the changing socio-legal, socio-economic and socio-political environment of the country, and judicial outlook. Thus, the present research design consists of eight chapters each dealing with a separate and independent aspect of the general theme.
In the first chapter my efforts have been to explain the meaning of the term used not only in India alone but in other countries also. The basic purpose for imposing such a kind of penalty has been well examined. Emphasis has also been given to the reasons for which new special laws are being enacted wherein capital punishment has been provided continued for awarding death sentence.

The second chapter of this work deals with the legislative development of this great penalty of death. The death sentence has been in operation from time immemorial and almost in every part of the world. Most of the nations have used death as their ultimate penalty for grave offences and some have done so on a lavish scale. In the twentieth century some advanced countries have deliberately abandoned it. But still there are many countries which are retaining it. Amazingly there are countries which previously abandoned it but they have again reinforced it now. The question here raised is whether such abandonment can be an example for others to follow? and if so in what conditions is this practicable or does it imply some deficiency in realism and virility.

In this part of thesis I have discussed in detail how the death penalty was executed in ancient India and what were the principles for exercising this ultimate penalty on the accused. Not only this, but the form of execution of death penalty has
also been exhaustively discussed. The emphasis has been given to the circumstances in which the ruler had to impose this punishment. Classifying the different forms of punishment Yajya Valkya Smriti says that death sentence may be given when the King deems it necessary.

In the third chapter my efforts have been to find out the different purposes so far argued for imposing death penalty on the accused. For obtaining certain goals of society such as maintenance of law and order, social security and stability, protection and preservation of social as well as individual rights, criminal law employs coercive strategies. These coercive strategies have always been based in certain principles of punishment throughout the world. In Indian context punishment has been known as "Trivargarupa" the symbol of Dharma, Artha and Kama. It is a great gift to human race because punishment alone governs all created beings. It protects them. It watches over them when they are asleep.13

However, it is the king (state) alone who can award penalty to a wrongdoer. The state in doing so has to follow certain prescribed norms for punishment. The king should not leave an offender unpunished whatever may be his relationship with him.14

13. See, Manu Smriti, VI/19.
King himself is also liable to be punished more severely then what would be inflicted on an ordinary person.

The principles of punishment have sometimes caused much confusion. This is because those who have advocated or attempted to counter opposite "theories" have generally not argued on common grounds. They have been arguing only for answering "why do we punish"? I have endeavoured to answer the purpose of punishment, justification of punishment and what punishment should be awarded.

The fourth chapter of the thesis may be called 'the heart of this work'. It relates to the constitutionality of the capital punishment. The efforts have been made to investigate whether any imposition of death sentence is violative of any provision of our Constitution. Violation of any of the fundamental rights under any law or procedure enacted so far is null and void and it will have no force in law. Here I have also perused the other provisions of the Constitution if any of them is infringed. The other laws and procedures dealing with capital punishment have also been taken into consideration wherever they are found in contravention of our Constitutional provisions.

The judiciary being the custodian of legislation, it protects our rights guaranteed by the Constitution. It is to ensure that no right is violated by any executive action or by any wrong or misinterpretation. That is why the High Courts/Supreme Court
has been entrusted with this great confidence that social as well as individual rights are property maintained and protected. The greatest wealth that a human being has on this earth is that of his life. However, this life does not mean a mere existence like an animal or a bare skeleton adhered with flesh and bones but attached with thousand of diseases or pain or sufferings. In the beginning my endeavours have been to find out whether there is any right of any person or authority to take life of any person? Whether right to life is not manhandled or curtailed if a person is cruelly, inhumanly or barbarously treated or punished by any provision of law.

Existing legal position in connection with death penalty has been elaborately discussed in chapter V of this thesis. The rapid increase in every aspect of human progress in fact started only after independence of the country. Before the independence Government's main objectives were only to earn money and rule over the country. Then the only substantive criminal law in the country was the present Indian Penal Code, 1860. The Special laws were only meant for maintaining law and order. The Britishers were never interested in the well being of the people of the country. After independence the concept of government from "laizes fare" has changed to a welfare state. Consequently, numerous Acts for socio-economic and socio-welfare legislation were enacted.

However, retaing the capital punishment for all the offences
laid down under Indian Penal Code except that of one are still existing as usual. Many other offences have also been created in Special Acts in which capital punishment has been provided. By way of reference it will not be out of place to mention in addition to these offences wherein capital punishment can be awarded, there are other forms of punishment also which are also in no case less severe than death penalty. Those punishments are cruel, inhuman and barbaric such as flogging, feltering and solitary confinement.

The sixth chapter of this work scrutinizes the judicial trend in India relating to the capital punishment. The circumstances under which the court would or would not award capital punishment have been taken into account. It has been tried to show that even the apex court is not uniform in its policy to choose cases of capital punishment. This has injected the sense of uncertainty in the rather certain law.

The Constitution has created judicial institutions in the name of Supreme Court and High Courts which are entrusted to act as the interpreter and guardian of the Constitutional provisions. Judicial discretion in the sense of judicial power of the State is vested in its judiciary and interpretation of the Constitution is one of the main functions of the Supreme Court and it is the fitness of things that provision has been made there in the Constitution for appointment of eminent jurists.
The judiciary undoubtedly is the vehicle of administration of justice. It, therefore, while discharging its duties, takes into considerations the Supreme Court's guidelines for enhancing and mitigating circumstances for sentences. However the judiciary has declined to lay down any guideline for imposing punishment. The "rarest of the rare" doctrine for imposing capital punishment has been widely idiscussed. Its impact has also been taken into account.

Judicial attitude towards cruel, inhuman and barbaric sort of treatment or punishment has also been Constitutionally tested in this chapter of the thesis. The courts have been found reluctant to these sentences.

The seventh chapter of this work is divided into two parts. In the first part, the discussion is confined to the provisions of international conventions on death penalty. Relevant provisions with regard to death sentence in the Universal Declaration of Human Rights and in other various international conventions have been elaborately discussed in this part. The second part of this chapter is devoted to prove that this capital punishment also falls in the category of cruel and unusual punishment if it is executed in the manner not prescribed under any procedure established by law.

Though an attempt has been made to make each chapter selfsufficient in regard to the discussion of a particular
aspect of the total theme, a conclusion to the entire discus-
sion has been incorporated in chapter eight. Apart from
reviewing the highlights of the chapters preceding this last
chapter includes a reference to recent developments in judicial
judgements and in legal enactments elsewhere which may prove
useful in dealing with the execution of or abolishing death
sentence.

The conclusions found by the members of Law Commission in
their 35th Report have been thoroughly gone through. The ground-
ds suggested by abolitionists as well as of retainists of capi-
tal punishment have been minutely examined. It is difficult to
rule out the validity of, or the strength behind many of the
arguments for abolition. I have also not treated lightly the
arguments based on the irrevocability of the sentence of death,
the need for a modern approach, the severity of capital punishment,
and the strong fecting shown by certain sections of public opinion
in stressing deeper questions of human values. In the end sugges-
tions have been given for re explaining the meaning of the term
"rarest of the rare" for death penalty.