A fatal margin of error

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The inconsistent and arbitrary application of the death penalty remains a matter of great concern

- On March 5, 2019, a three-judge bench of the Supreme Court headed by Justice A.K. Sikri found Khushwinder Singh guilty and befitting of the death sentence (Khushwinder Singh v. State of Punjab).
- The last time the death penalty was upheld by the Supreme Court was in July 2018 in the Delhi gang rape case.
- Since then, the court has acquitted 10 death row prisoners and reduced the sentence to life imprisonment of 23 others.
- As Singh's case moves closer to the gallows, the judgment highlights the processes that cause cases to slip through the cracks of the 'rarest of the rare' doctrine, which mandates a consideration of both the crime and the criminal.
- The judgment exemplifies the varied standards of legal representation that impacts the imposition of the death penalty.

A contrast

- In late 2018, another three-judge bench of the Supreme Court reversed its own finding in M.A. Antony v. State of Kerala, involving the murder of six relatives of the accused.
- The court chose to commute the death penalty factoring the 'lack of evidence' to show that the convict was a hardened criminal or that he was beyond reform.
- The similarities in the nature of the crime between the cases of Singh and Antony are unfortunate and uncannily similar.
- While in Antony's case, his socio-economic conditions and lack of criminal antecedents were considered by the court in deciding that there was a probability of his reformation, in Singh's judgment, there is a complete silence on this aspect, providing yet another instance of the arbitrary imposition of the death penalty.

Eliciting information

- The irreversibility of the death penalty has fundamentally affected the jurisprudence around it.
- It is commonly accepted that a judge in adversarial proceedings cannot go on a 'truth searching exploration' beyond what is presented.
- Yet, death penalty jurisprudence is rife with examples where duty has been placed upon the courts to elicit information relating to the question of sentence, even if none is adduced before it.
- Unlike Khushwinder Singh's case, in the past few months the Supreme Court has rightly considered evidence about the criminal by calling for medical records, reports of prison conduct, including poetry written by a convict post-incarceration to ascertain the appropriate sentence.
- At the core of the arbitrariness in death penalty sentencing is the inconsistent approach to mitigating factors.
- The Supreme Court has, unfortunately, not developed any requirements that guide the collection, presentation and consideration of mitigating factors.
- Very often, barely any mitigating factors are presented on behalf of death row prisoners; if they are, they are of poor quality.
- Judges are often left only with information concerning the crime to determine the punishment.
- The quality of legal representation continues to affect the administration of the death penalty, even when cases are decided by pro-active and sensitive judges.
- The inconsistent and arbitrary application of the death penalty remains a matter of great concern to the judiciary.
- Justice Kurian Joseph's parting words in Chhannu Lal Verma v. State of Chhattisgarh, calling for the gradual abolition of the death penalty, require serious introspection from the court and the body politic, and for us to recognise that the efforts to make the administration of the death penalty fairer are like chasing the wind.
- Our institutions may persist with attempts to 'tinker with the machinery of death' until there is a collective realisation that the death penalty is untenable in a fair criminal justice system.
- Till such time, the setting of established benchmarks for practice, and a system of oversight are necessary to ensure that the quality of legal representation does not become the difference between a sentence of life and death.