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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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THE LEGALITY OF TWO-FINGER TESTS

AUTHORED BY - SWETHA MARIAM SAJI

Designation - LLM Student, Faculty of Law, University of Delhi

Abstract

The “Two-Finger Tests” are a controversial and outdated medical examination that was historically used in some jurisdictions to assess the laxity of a woman's vaginal muscles. This test was often conducted as part of medical examinations on survivors of sexual assault to determine if they had engaged in sexual activity or to assess the likelihood of consent. The procedure involved inserting two fingers into the woman's vagina to evaluate its size and elasticity. The virginity tests are conducted on women to ascertain the pre-conception that women should be pure. It is the product of cultural and social perceptions and lacks medical evidence. The “Two-Finger Tests” are practised in various nations. The World Health Organization and international non-governmental organization Human Rights watch considers the test as discriminatory and derogatory. In India, the Ministry of Health and Family Welfare released guidelines to ban the practice of per-vaginum tests. The Supreme Court and various High Courts pronounced the tests as violative of rights of privacy, physical and mental honour and self-esteem. Every individual holds the right to live with dignity and right of non-interference with their private affairs. Rape is an act of violence and previous indulgence in sexual intercourse should not be considered a decisive factor in discrediting the character of victim. The tests were held unconstitutional by the supreme court and directed the central and state governments to prohibit the same. But still the practice of conducting of “Two-Finger Tests” continues. This paper focusses on the impact of “Per-Vaginum Test” on victims, the international and national perspectives on the subject matter and discusses the judicial interpretations.

Keywords: Per-Vaginum test, Two-finger test, Dignity, Integrity, Derogatory etc.

I. Introduction

The “Per-Vaginum Test” commonly referred to as the “two finger test” or “Virginitiy Test”, is the procedure used to determine the virgin status of a woman. It is most commonly used on the survivors of sexual assault for the purpose of indicating whether she has previously engaged in sexual intercourse or not. The notion that girls and women should maintain their "virginity" is socially constructed. It is important to note that the concept of virginity is a social and cultural construct, and there is no reliable medical or scientific method to determine a person's sexual history through a physical examination. The test is frequently employed to label survivors of rape as "accustomed to sexual activity." Medical proof of prior intercourse is utilized to raise scepticism regarding rape allegations. This may involve insinuating that the survivor fabricated the rape, implying that the assault was not harmful, or suggesting moral impropriety on the part of the survivor, thereby questioning her right to justice.

The per vaginum test, being invasive and potentially demeaning, goes against the principles of human dignity and the right to privacy. The test not only infringes the privacy and dignity of the individual but also have negative effects on the mental well-being of the individual. It is an act of retraumatizing the survivor. Rape victims have the right to seek legal and medical recourse without causing any injury to the dignity of the survivor. The Supreme Court through its various pronouncements condemned the practice of discrediting the morale of the survivors of sexual assault by performing the act of two finger test on them. The ministry of Health and Family Welfare provided guidelines for the prohibition of per-vaginum test. Such practices derogatory to the self-esteem and well-being of women are to be prohibited.

A complaint can be lodged with the Medical Council of India against any doctor attempting to conduct the two-finger test during the medical examination of rape victims. Rape is a grave form of violence and creates mental and physical suffering to the victims. Conducting two-finger tests will further alleviate their misery. The Per-Vaginum test was condemned by courts across the nations on various occasions. The government institutions as well as experts also advocates that such practices should be prohibited. Even though guidelines and regulations has been provided, in India, in some remote areas, this procedure is conducted by the medical practitioners even now.

The rape victims face limited access to support services, and doctors at the facility continues to perform the two-finger test. Without giving importance to the Mental well-being, the survivors are exposed to vulnerabilities and it creates trauma within themselves. They even

refuse to acknowledge the process of justice as their rights are being violated. Two-finger tests should be strictly prohibited in India considering the mental well-being and sufferings of survivors.

II. Per Vaginum Test

The virginity status of a woman is determined through this process. The test involves a physical examination in which a doctor inserts fingers into a woman's vagina to assess the laxity of the vaginal muscles and to check for the presence or absence of an intact hymen. According to the Oxford Dictionary, the definition of laxity is "(of the limbs or muscles) relaxed" and the definition of hymen is "A membrane that partially seals the vaginal membrane and whose existence is historically seen as a sign of virginity"¹. Typically, if inserting one finger into the vagina faces resistance, it is suggested that the individual is a virgin. On the other hand, the effortless insertion of two fingers implies a familiarity with sexual intercourse. This test lacks scientific and medical evidence and is mostly based on cultural and social perceptions.

Intact hymen is not a proof for discrediting the dignity of the survivors. Women engaging in athletic activities, undergoing heavy and vigorous exercise have the chance of rupturing their hymen. In sexual assault cases, the concept of consent has to be analysed more critically than such tests that lack proper medical proof.

III. Impact of Per-Vaginum tests on Victims

The "Two-Finger Tests" discriminate against women and is unethical. A pre-conception that the sexually active women cannot be raped is derogatory. The "Two-Finger Tests" that analyse the virginity status of a woman is creating more misery in the minds of victims. The two-finger test has been widely criticized for its lack of scientific validity. It does not provide reliable evidence regarding consent, sexual activity, or the likelihood of sexual assault. The tests are deeply offensive and create re-traumatizing experience for survivors of sexual assault. Being subjected to such an examination can worsen the emotional distress and suffering that victims may already be experiencing.

These tests infringe upon the survivor's right to privacy and dignity. The invasive nature of the examination can make survivors feel vulnerable and violated, potentially hindering their

¹ Suzanne Leclerc-Madlala, "Virginity testing: managing sexuality in a maturing HIV/AIDS epidemic" 15 *Medical Anthropological Quarterly* 533 (2001)

willingness to cooperate with the legal and medical processes. Medical experts argue that as the test is not based on sound scientific principles, it can lead to inaccurate and misleading conclusions.

The use of such tests can contribute to societal stigmatization and victim-blaming. If the results are misinterpreted or misused, they may perpetuate harmful stereotypes and undermine the credibility of survivors, potentially influencing legal proceedings. The two-finger are violative of human rights, and its use has been condemned by international human rights organizations. Many countries and jurisdictions have moved away from this practice, acknowledging the importance of respecting the rights and well-being of survivors.

IV. International Perspectives

The practice of "virginity testing" has been documented in various countries globally. In 2004, Naboth Makoni, a village chief in Zimbabwe, announced plans to implement virginity tests as a measure to safeguard his community against HIV. In 2014, the Human Rights Watch reported that female candidates applying to the Indonesian Police force undergo routine physical virginity tests as part of the job application process. Additionally, in Afghanistan, authorities routinely subject women and girls accused of "moral crimes," such as "running away," engaging in consensual sex outside of marriage to undergo "virginity tests." Moreover, practices were conducted to include virginity tests among girls in schools in Indonesia.

“Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” adopted by the United Nations General Assembly, in Article 4 provides that “Victims should be treated with compassion and respect for their dignity”². The victims should be treated with utmost respect and dignity. Survivors of rape are entitled to legal remedies that do not cause further trauma or compromise their physical, mental, or integrity. They have the right to undergo medical procedures only after giving their consent and ensuring that such procedures avoid any form of cruel, inhuman, or degrading treatment. Prioritizing health is crucial when addressing gender-based violence. The State bears the obligation to provide accessible services for survivors of sexual violence, incorporating measures to guarantee their safety. Additionally, there should be no arbitrary or unlawful intrusion into their privacy.

² UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, GAOR, UN Doc A/Res/40/34 (November 29 1985)

As per prohibition against "cruel, inhuman, or degrading treatment" outlined in Article 7 of the International Covenant on Civil and Political Rights (ICCPR)³ "virginity tests" face condemnation and is considered to be in violation of human rights of individuals. The UN Human Rights Committee, overseeing covenant compliance, underscores in a General Comment that Article 7 aims to safeguard the dignity and physical and mental integrity of individuals. Coerced virginity testing not only compromises the dignity of women but also infringes upon their physical and mental well-being. Furthermore, the Convention on the Elimination of All Forms of Discrimination against Women⁴, along with other human rights treaties, expressly prohibits discrimination against women. The practice of "virginity testing" is deemed discriminatory as it purposefully or effectively denies women their rights on an equal basis with men.

The 2014 World Health Organisation, "Health care for women subjected to intimate partner violence or sexual violence,"⁵ advises against the use of "virginity tests." Emphasizing the importance of respecting women's rights and comfort, the handbook underscores that any physical examination must be carried out with informed consent and solely for the purpose of determining necessary medical care. It explicitly states that the offensive and humiliating "virginity test" or "two-finger test," employed in certain regions to falsely ascertain a woman's virginity, lacks scientific validity. The commonly held medical opinion that "virginity tests" are useless is supported by the WHO guidelines. The using of virginity tests is dehumanizing and discriminatory to the dignity of women.

A collective statement from several United Nations agencies has been released, during the World Congress of Gynaecology and Obstetrics (FIGO) in Rio de Janeiro advocating for a prohibition on tests aimed at assessing the virginity of girls or women. The statement emphasizes that such tests are both scientifically unfounded and causes violation of human rights. As part of a global initiative to eradicate violence against women and girls, the UN Human Rights Office (OHCHR), UN Women, and the World Health Organization (WHO) jointly assert that this medically unnecessary practice, often marked by pain, humiliation, and

³ UN General Assembly, *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), GAOR, UN Doc A/Res/2200A(XXI) (adopted December 16 1966, entered into force on March 23 1976)

⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 34/180, GAOR, UN Doc A/Res/34/180 (adopted December 18 1979, entered into force on September 3 1981).

⁵ World Health Organisation, *Health care for women subjected to intimate partner violence or sexual violence: a clinical handbook*, A clinical handbook published by WHO, WHO/RHR/14.26, (October 8 2014).

trauma, must come to an end. Human Rights Watch also condemns the practice of per vaginal tests and continuously provides measures for permanently prohibiting such acts.

Many of the Nations declared “Two-Finger Tests” as insulting. The decision by the Lahore High Court, as outlined by Justice Ayesha A. Malik, marks a significant and progressive stance against the use of so-called 'virginity tests,' including the 'two-finger test' and the hymen test, on victims of rape and sexual assault. The court's ruling deeming these tests unconstitutional reflects a commitment to protecting the fundamental rights of individuals, particularly the right to life and dignity enshrined in the constitution of Pakistan⁶.

V. National Perspectives and Guidelines

Previously, the Indian Evidence Act contained a provision that allowed a victim's sexual history as a defence for the accused⁷. Consequently, medical reports were employed to undermine the credibility of the victim during the trial. When the defence claims consent to sexual intercourse, they often seek support from medical evidence. If the medical report mentions the two-finger test, and if it is proved, they present it in court, asserting that she was 'habituated' and gave consent, and is falsely implicating the accused. The said clause of the section was removed. Presently, judges cannot permit lawyers to use sexual history during cross-examination since it is no longer considered relevant.

A Human Rights Watch report published in Mumbai in 2010 sheds light on the utilization of this practice, deeming it "unscientific, inhuman, and degrading." The test is characterized as a second assault on already traumatized women, raising serious concerns about Indian courts incorporating views on the general moral character of rape victims into their rulings. In January 2012, the Planning Commission's working group, led by the secretary of the Women and Child Development Ministry, recommended the elimination of this test to shield victims of sexual abuse from additional mental trauma.

A government-appointed panel, led by former Chief Justice of India J.S. Verma, submitted its report on January 23, 2013, after 50 days of deliberation⁸. The report aimed to expedite trials

⁶ *Atif Zareef v The State*, (2021) SCC Online Pak SC 1

⁷ The Indian Evidence Act, 1872 (Act No.1 of 1872), s. 155 sub-cl. (4), omitted by Act 4 of 2003, s.3 (w.e.f. 1-1-2003)

⁸ Justice J.S. Verma Committee, “Report of the Committee on Amendments to Criminal Law”, (2013)

and impose stricter penalties for criminals accused of committing sexual assault against women. The committee made crucial recommendations on various issues, including rape, sexual assault, verbal sexual assault, sexual harassment, acid attacks, offenses against women in conflict areas, trafficking, child sexual abuse etc. Regarding the medical examination of rape victims, the committee advocated discontinuing the Two Finger Test, citing its infringement on the victim's right to privacy deeming such a test ethically questionable. It was provided that the prevalence of the Two Finger Test indicates a lack of understanding among professionals, including doctors, police officers, lawyers, judges, and others, about what constitutes rape. The Supreme Court, in various judgments, has emphatically asserted that the Two Finger Test should not be conducted, and the past sexual experiences of the victim should not be relied upon to determine consent or the quality of consent given by the victim. Following the 2013 amendments to criminal law, the definition of rape underwent substantial expansion to encompass various forms of penetrative violations of a female's anatomy. Consequently, the two-finger test could potentially be considered a form of rape, unless it falls under exception 1 to Section 375 IPC. This exception stipulates that "A medical procedure or intervention shall not constitute rape." By the same amendments, the Evidence Act was amended to include Section 53A. According to Section 53A, evidence of a victim's character or previous sexual experiences is irrelevant to the issue of consent or the quality of consent in prosecutions of sexual offenses.

The Government of Maharashtra passed a resolution banning the practice of "Two-Finger Tests" and provided that the test is non-scientific. It further indicated that the test interfered with investigations and denied the justice to survivors of sexual assault. The Delhi government initially issued an advisory to its hospitals allowing for the Per Vaginal (PV) examination, also known as the 'two-finger test,' for rape survivors with their consent. The advisory, based on a 14-page document from an expert panel, argued against a complete ban on this examination, stating that it could be detrimental to the survivor's health and may lead to injustice. However, following criticism and controversy, the Delhi government decided to retract the circular, banning the two-finger test entirely for sexual assault victims in Delhi.

The Ministry of Health and Family Welfare, Government of India, has released Guidelines and Protocols for Medico-Legal care for survivors/victims of sexual violence in 2014. According to these guidelines. The "two-finger test," is prohibited. It was provided that the size of the vaginal introitus is considered irrelevant in cases of sexual violence, and the per -vaginum

examination is only suitable for adult women when medically necessary. The status of the hymen is also regarded as irrelevant, and provided that an intact hymen does not exclude the possibility of sexual violence, and a torn hymen does not confirm sexual intercourse. The guidelines stress that, in cases of sexual violence, greater weight should be given to the testimonies of the victim and witnesses rather than relying solely on physical examinations to assess injuries to the genital area.

VI. Judicial Interpretations

The Supreme Court of India and High Courts of various states condemned the practice of two-finger test and held it as violative of the privacy of rape survivors. The Supreme court in the case *Lillu @ Rajesh v State of Haryana*⁹, pronounced that the “Two-Finger Tests” are violative of rights of privacy, physical and mental integrity and dignity of rape survivors. It was held that such practices are derogatory and thus adversely affected the right to dignity. Therefore, even if the report is affirmative, the test cannot give rise to the presumption that the victim consented to the act.

This case condemned the discriminatory and humiliating practice of pre- vaginum test. Right to privacy and live with dignity comes under the purview of right to life¹⁰. The right to privacy refers to an individual's entitlement to keep certain aspects of their life, personal information, and activities private and free from unauthorized interference. A survivor of a sexual assault undergoing the two-finger test is again re-victimised and re-traumatized. It is the act of interfering with the individual's preferences and choices which she considers to be private. Every individual possesses the right to lead a life with dignity, free from both physical and mental stress. The criteria that a person is sexually active cannot rule out the fact that she has not consented to the sexual act.

The supreme court in the case of *State of Jharkand v Shailendra Kumar Rai @ Pandav Rai*¹¹, also observed that, the conducting of “two-finger test” by the Medical Board to ascertain whether she was accustomed to sexual intercourse was demeaning the dignity of the woman. The flawed assumption that a sexually active woman cannot be raped, was deemed inappropriate. The Court emphasized that the probative value of a woman's testimony should

⁹ (2013) 14 SCC 643

¹⁰ *Id.* at 10

¹¹ 2022 SCC OnLine SC 1494

not hinge on her sexual history. It was considered patriarchal and sexist to cast doubt on a woman's credibility simply because she is sexually active. The court further directed union government and state government to adopt adequate measures for the implementation of prohibition on two finger tests.

In the case of *Narayanamma (Kum) v. State of Karnataka & Ors*¹² the Court established that the mere acknowledgment of the insertion of two fingers and the rupture of the hymen does not necessarily imply that the prosecutrix is accustomed to sexual intercourse. It was emphasized that the doctor's opinion is crucial in determining whether the hymen had ruptured much earlier or if the tear was of an older nature. The admission of two fingers should not be automatically construed as adverse to the prosecutrix, as the impact could vary depending on the size of the fingers inserted. The doctor is required to provide a clear opinion on whether the experience was painful and resulted in bleeding upon touch, particularly as these conditions directly pertain to the condition of the hymen.

The Court in *State of Uttar Pradesh v. Munshi*¹³ expressed its concern and asserted that even if the victim of rape had engaged in sexual intercourse previously, it should not be the decisive factor. The pivotal question remains whether the accused committed rape during the alleged incident. The loss of the victim's virginity in the past does not grant permission for anyone to commit rape. The focus of the trial is on the accused, not the victim. Therefore, the issue of the victim's promiscuity is entirely irrelevant in a rape case. Even a woman with a liberal lifestyle has the right to refuse consent to sexual intercourse with anyone, as she is not an object or target for sexual assault. It was emphasized that a prosecutrix holds a higher standing than an injured witness because while an injured witness suffers physical harm, the prosecutrix undergoes psychological and emotional distress.

In the case of *Re: Assessment of the Criminal Justice System in response to Sexual Offences*¹⁴, the court expressed strong disapproval of the non-implementation of criminal law provisions, including the 2013 and 2018 amendments following the Nirbhaya case, concerning rape cases and other sexual offenses. It was provided that: "Section 53A explicitly states that any evidence pertaining to the victim's character or past sexual encounters with any individual shall be

¹² (1994) 5 SCC 728

¹³ AIR 2009 SC 370

¹⁴ (2020) 18 SCC 540

deemed irrelevant in matters concerning consent or the nature of consent. This provision signifies that those previous sexual experiences and, consequently, familiarity with sexual activities are now considered inconsequential for medical examinations. Despite this, there are still instances where medical opinions claim that "the victim is accustomed to sexual intercourse" and imply the potential for consent based on her prior sexual history."¹⁵. A division bench consisting of then-Chief Justice of India S.A. Bobde and Justices B.R. Gavai and Surya Kant requested a status report from all states and union territories in the country, inquiring, among other things, whether medical experts have discontinued the use of the 'two-finger test.'

The High Court of Tamil Nadu issued a crucial directive in the case of *Rajiv Gandhi v State*¹⁶. The Madras high court held that the practice of "Two-Finger Tests" cannot be continued and directed the State Government to immediately ban such procedures. In the case of *State of Gujarat v Rameshchandra Ramabhai Panchal*¹⁷, the high court ruled that the obsolete practice of the two-finger test, conducted to ascertain the virginity or consent of a rape victim, violates the victim's rights to privacy, mental integrity, and dignity, and rendered it unconstitutional. In the case *Sr. Sephy V CBI and Ors*,¹⁸ the Delhi High Court pronounced that the virginity test conducted on the female captive, was unconstitutional and in violation of Article 21 of the Constitution which includes right to dignity.

The courts through its various pronouncements held that the per vaginum test violates the basic human rights of survivors of sexual assault. The traumatized victim is forced to undergo interference with her privacy and dignity. The practice of virginity test is greatly condemned and steps are taken to ban the practice.

VII. Conclusion

The two-finger test is a contentious medical examination that was once employed in certain areas to evaluate a woman's vaginal muscle laxity. In order to ascertain whether or not survivors of sexual assault had engaged in sexual activity, or to gauge the possibility of consent, this test was frequently used as part of medical evaluations. Through such practices, the self-esteem and the privacy of a victim should not be allowed to be undermined. Like any other individuals,

¹⁵ *Id.* at para 9

¹⁶ 2022 SCC OnLine Mad 1770

¹⁷ 2020 SCC OnLine Guj 114

¹⁸ 2023 LiveLaw (Del) 127

they also possess the right to live with dignity. There should not be unfettered intervention with the survivors' private affairs.

The procedure of “per-vaginum test” is still ongoing in India. Jan Sahas, examined records from 200 group rape trials and discovered that the two-finger test was employed in 80% of cases to determine rape. A micro-survey conducted in Lucknow revealed that, out of 10 reported rape cases, including 5 involving minors, all victims had undergone the two-finger test. In a report released by Human Rights Watch, it was highlighted that rape victims in a hospital in Rajasthan faced limited access to support services, and doctors at the facility continued to perform the two-finger test. Despite the provision of guidelines by governments and persistent emphasis on prohibition by the judiciary, the practice continues unabated.

Stringent provisions are to be adopted along with including guidelines in the curriculum of the medical practitioners regarding the prohibition of performing “Two-Finger Tests” on the survivors of sexual assault. Awareness must be provided to medical practitioners, experts, government authorities, police officials regarding the ban on such tests. A deviation from the rules and regulations should be strictly punished. Moral character and sexual history should be disconnected from the necessity of conducting internal examinations. There is an urgent requirement for consistent nationwide guidelines for forensic examinations that uphold survivors' rights to health, consent, and dignity. It is crucial for courts to receive scientific, relevant, and accurate information rather than relying on outdated material derived from textbooks or antiquated medical practices. Collaboration among doctors, the police, prosecutors, and judges are essential to cease the administration of such tests and to standardize evidence collection, thereby safeguarding the rights of survivors. It is essential to organize workshops for healthcare providers to discourage the administration of the test on survivors of rape. Effectively addressing this issue requires comprehensive sensitization and training initiatives for both medical professionals and police personnel.