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Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can

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Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



methodology and teaching and learning.

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

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Two- Finger Test – A Critical Analysis in Reference to India

Authored By - Srishti Khandelwal

3rd Year B.A LL.B (Hons.)

Co-Author- Sankalp Vashistha

3rd Year BBA LL.B (Hons.)

ABSTRACT

On an average, 65 rape cases are lodged daily in India. For examining the sexual habit of the victims of sexual assault, the two-finger test was practiced in India. This test takes place to cast doubt on the rape allegation, either to suggest the survivor lied about the rape or the rape was not harmful. This paper deals with “per vaginal” also known as two-finger test which is an explicitly intrusive physical examination where a doctor inserts two fingers inside the vagina of a rape survivor checking if hymen is intact or not. In May 2013, the Supreme Court banned the two-finger test on rape victims as it violates their right to privacy under Article 21 i.e Right to life and personal liberty of the Indian Constitution and also this re-traumatizes the victim and violates their physical or mental integrity and dignity. In order to eliminate violence against women, in 2018, The United Nations (UN) Human Rights, UN Women, and the World Health Organization (WHO) called for a ban on two-finger test. Even after the Supreme Court in 2013 banned two finger test this practice was being followed by many of the medical practitioners which came to light in 2018. Finally, on October 31, 2022, the apex court of India reiterated the ban on the “two-finger test and any person conducting the “two-finger test” on rape survivors shall be guilty of misconduct.

Keywords –

Two- Finger test, Per Vaginal, Physical or mental Integrity and Dignity, United nations human rights, WHO, Right to privacy.

INTRODUCTION

Unsettlingly, sexual assault is becoming more and more popular in India. According to the National Crime Records Bureau (NCRB), which is responsible for collecting and analyzing crime data in India, there has been a steady increase in the number of reported rape cases in the country over the past few years. In 2020, there were a total of 24,000 reported rape cases in India, an increase of 7.3% from the previous year. It is important to note that many cases of rape and sexual assault go unreported in India, so the actual number of incidents may be much higher than what is officially recorded. The criminal justice system, which lacks a victim and witness assistance and safety program and which can also cause additional trauma, may deter survivors and their families from presenting their cases. The "Two Finger Test," sometimes known as the "Virginity Test," is a procedure used to determine whether a victim of a sexual assault is a virgin, that is, whether or not she has ever engaged in sexual activity.

The Two finger test—an exercise in which the inspecting health practitioner notes the presence or absence of the hymen and the dimensions and so-known as laxity of the vagina of the rape survivor. The two finger test is meant to evaluate whether or not women are “virgins” or “habituated to sexual intercourse.” Yet it does none of this.

Contrary to popular belief, the hymen is a flexible membrane that partially encloses the vaginal entrance rather than completely sealing it. Therefore, it is incorrect to assume that there was no rape if there is no "broken" hymen. A hymen, on the other hand, can have a "ancient tear" and its opening might vary in size for a variety of causes unrelated to sex, thus looking at it doesn't offer any proof for inferring "habituation to sexual intercourse, Furthermore, whether a woman has previously engaged in sexual activity has no bearing on whether she gave her agreement to the sexual conduct in question. Furthermore, the finger test itself can cause trauma to the victim, whose dignity is frequently disregarded. In essence, it's a tactic that, when used without informed agreement, could amount to sexual assault.

The victim's vagina is probed with two fingers by the registered medical practitioner in order to assess its laxity and learn more about the victim's sexual activity, such as whether she engages in it or not. This test entails an examination to ascertain laxity and establish whether the hymen is broken, which would record the victim's history of sexual activity and also the medical report given in such situations are utilised by the defence attorney to defend his client, which can be unfair to the victim and unethical as well. One finger forced into the vagina

typically indicates that the victim was a virgin, whereas two fingers inserted easily indicate that she was accustomed to sexual assault.

This test was extensively utilized in India for figuring out the sexual records of women however doesn't have any medical base and it's been in reality dumped with the aid of using ministry of Health and own circle of relatives welfare Government of India in its Guidelines And Protocols Medico-Legal Care For Survivors/Victims Of Sexual Violence, In March 2014, Per vaginum exam may be carried out handiest in grown up women whilst medically indicated. The reputation of hymen is inappropriate due to the fact the hymen may be torn because of numerous motives inclusive of cycling, driving or masturbation etc. An intact hymen does now no longer rule out sexual violence, and a torn hymen does now no longer show preceding sexual intercourse. Hymen ought to consequently be handled like some other a part of the genitals at the same time as documenting exam findings in instances of sexual violence.

Equality Now has long advocated for a complete ban on 'virginity tests'. Jacqui Hunt, Global Lead – End Sexual Violence, says, *“Every day, survivors are silenced, threatened, and intimidated. They face discrimination and inaction from the police and other legal authorities and are often coerced into settling or compromising their cases even though this is not permitted under Indian law. Having to undergo a humiliating and irrelevant test only serves to discriminate against them further and makes it even more unlikely they will receive justice for rape.”* A 2020 report by Equality Now and Swabhiman Society¹ outlined how Dalit women face additional discrimination from medical professionals.

It highlights the urgent need for consistent national standards for forensic examinations that respect survivors' rights to health, consent, and dignity as well as for scientific, relevant information to be presented in court instead of dated information gleaned from textbooks or archaic medical procedures. To defend the rights of survivors, doctors, police, prosecutors, and courts should collaborate to stop the finger test from being used and to standardize evidence gathering.

¹ Swabhimaan Society, *Justice Denied: Sexual Violence & Intersectional Discrimination – Barriers To Accessing Justice For Dalit Women And Girls In Haryana, India*, , Equality Now, (November,20,2022), <https://www.equalitynow.org/resource/justicedenied/>

RIGHT TO PRIVACY

It needs to be understood that during historic India women was taken into consideration as a sacred woman of God and become reputable and guarded and such heinous crime in opposition to women like rape, molestation and other are shameful for a rustic like India and after such brutal act of any crook the sufferer ought to be protected, reputable and rehabilitated rather carrying out a test like Two Finger may be like Re- Rape for the sufferer if you want to damage her Right To Privacy.

The right to privacy, recognised as a fundamental right arising primarily from Article 21² of the Constitution of India, was recognised in Justice K.S. Puttaswamy (Retd.) v. Union of India 2017³. To give meaning to this right, it is the duty of the state to create a data protection framework that protects citizens from threats to informational self-determination posed by state and non-state actors while serving the common good. It is the understanding of the state's duty that the Committee must work with in creating a Data privacy framework.

The Supreme Court of India in this case held that the two-finger test on a rape sufferer violates the right to privacy, and requested the authorities to offer higher clinical methods to verify sexual assault.

This practice has been widely discredited and condemned by international human rights organizations and medical bodies, as it violates the right to privacy of the survivor and is medically unnecessary and unreliable. This test is;

1. **Invasive:** The test involves the insertion of two fingers into the vagina, which is an invasive procedure that violates the survivor's bodily integrity and privacy.
2. **Traumatizing:** The test is often conducted without the survivor's informed consent and can be traumatizing, re-victimizing, and stigmatizing for survivors of sexual violence.
3. **Judgemental:** The test is often used to assess a woman's sexual morality, and its results are based on subjective and culturally biased interpretations of the examiner, leading to victim-blaming and further harm to the survivor's dignity and privacy
4. **Inaccurate:** The test has no scientific basis and is not reliable in determining sexual history or virginity. The results can be influenced by various factors such as age,

² INDIA CONST. art.21

³ K.S. Puttaswamy (Retd.) vs. Union of India 2017, Writ Petition (Civil) No 494 of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161

childbirth, and sexual activity, leading to erroneous conclusions and further harm to the survivor's privacy.

The two-finger test violates the right to privacy of the survivor and is a harmful practice that should be discontinued. Medical professionals should uphold the ethical principles of informed consent, confidentiality, and non-discrimination when conducting medical examinations on survivors of sexual violence.

Keeping in thoughts the International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR) and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, the apex court said, rape survivors are entitled to prison recourse that doesn't re-traumatise them or violate their bodily or intellectual integrity and dignity.

JUSTICE VERMA REPORT

The three-member panel acquired greater than 80,000 pointers for a whole overhaul within the criminal justice system's remedy of violence towards women because it changed into installation through the authorities a month in the past to assist quell road protests sparked through the rape.

"Failure of appropriate governance is the apparent root reason for the modern risky environment, eroding the guideline of thumb of regulation and now no longer the need of knee-jerk legislation," stated retired Chief Justice J.S. Verma, who headed the panel. Justice Verma endorsed strict punishment to prevent sexual harassment and attacks towards women and sought reforms in how police deal with rape sufferers. Activists and legal professionals have criticized the prevailing legal guidelines on crimes towards girls as so archaic and riddled with loopholes that they come to be similarly traumatizing sufferers and permitting perpetrators to escape lightly.

It is critical to emphasise that the size of the introitus vaginalis has no bearing on a case of sexual assault and, therefore, a test to determine the laxity of the vaginal muscles, commonly referred to as the two-finger test, may not be administered. No observations/conclusions such as 'Habituated sexual intercourse' may be made based on this test, which is prohibited by law.

Routine attention is paid to the condition of the hymen. The "finger test" is also performed to determine the extensibility of the hymen. However, it is largely irrelevant because the hymen

may be torn for a variety of reasons. An intact hymen does not rule out sexual assault, and a torn hymen is not evidence of previous sexual intercourse. Therefore, the hymen should be treated like any other part of the genitalia when documenting examination findings in sexual assault cases. Only those findings that are relevant to the assault should be documented (findings such as fresh tears, bleeding, edema, etc.).

The committee was of the opinion that the medico-legal examination report ought to note the date and time of examination and be sent directly to the involved work officer. To avoid surplus delays, the report should be transmitted to the IO by method of, additionally to causing by method of normal government post. It's during this background that Section 164A was introduced to the CrPC. The Law Commission, in its 84th Report, counseled the insertion of Section 164A.⁴

1. In committee's opinion, the report of the examination of the victim in a case of rape should deal with-
 - i. the age of the victim,
 - ii. the question whether the victim was previously used to sexual intercourse,
 - iii. injuries to the body of the victim,
 - iv. general mental condition of the victim, and
 - v. Other material particulars in reasonable detail.

2. But Parliament enacted the said Section 164A twenty- five years later as:

“164 A. Medical examination of the victim of rape –The registered medical practitioner, to whom the woman is sent shall promptly examine her and prepare an examination report that includes the following information:-

- i. the name and address of the woman and of the person by whom she was brought;
- ii. the age of the woman;
- iii. the description of material taken from the person of the woman for DNA profiling;
- iv. marks of injury, if any, on the person of the woman;

⁴adrindia.org, https://adrindia.org/sites/default/files/Justice_Verma_Amendmenttocriminallaw_Jan2013.pdf (November,26,2022)

- v. General mental condition of the woman; and
 - vi. Other material particulars in reasonable detail
3. The report shall state precisely the reasons for each conclusion arrived at.
 4. The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained

The Criminal Law Amendment Act (CLA) 2013 broadened the definition of rape to include all types of sexual assault, including those that are non-penetrative (touching, fondling, stalking, etc.) and penetrative (oral, anal, vaginal) and use objects, weapons, or fingers. It also recognised the right to treatment for all survivors and victims of sexual assault by both public and private health care facilities. The law now makes it illegal to not receive treatment. The legislation additionally prohibits mentioning the survivor's earlier sexual behaviour.

ARGUMENTS

The possibility of being subjected to a forensic investigation is not the least of the deterrents to reporting abuse. Techniques for collecting evidence are frequently challenging and by no means standardized. Too frequently, survivors are forced to endure arduous journeys between hospitals or wards, stopping at each location for numerous exams. Evidence is routinely improperly or insensitively collected by medical personnel, and it may later be misplaced, improperly maintained, or the subject of processing delays, making it useless. Judges frequently lack the necessary knowledge to understand the medical evidence at trial.

Justices DY Chandrachud and Hima Kohli's panel upheld the conviction in a rape-murder case, saying, "The test is founded on the false presumption that a woman who is sexually active cannot be raped. Nothing could be further from the truth; it is irrelevant to whether the accused committed a rape to determine the victim's sexual history. It is regrettable that it is still being done today."

A lady is considered to be a false virgin if one, two, or more fingers may readily enter her vagina while still leaving her hymen intact, according to one of the most respected medical jurisprudences, Modi's Medical Jurisprudence. If fingers can fit through the hymeneal aperture, he contends, "A body the size of a penis in erection may very well pass through the orifice." According to Modi, the finger test becomes essential for determining a woman's virginity when

the hymen is present. As a result, the finger test—which involves sticking one, two, or even three fingers inside the vagina to gauge its pliability—becomes the accepted method for determining a woman's virginity. The finger test and the medical evaluation of the hymen are still standard practices in India today, even though they are unrelated to the issue of consent and shouldn't be raised in the context of the crime of rape. Even the most recent version of Modi requires the finger test to be performed in every case of rape.

According to forensic and medical professionals from India and elsewhere, the finger test is unreliable, demeaning, and unscientific. It also has no application in law enforcement. Additionally, it is not legally relevant: the Indian Supreme Court, whose judgments are enforceable throughout the country, has decided that a rape victim's "habituation to sexual intercourse" is irrelevant to the question of consent at trial. Indian law amendments now make it illegal to question survivors about their "general immoral character." As a result of these advances, courts are less likely to infer that a survivor has a "habituation to sexual intercourse" and the number of finger test examinations has decreased. However, finger testing is still widely used in many Indian hospitals, and more has to be done to change India's perspective on sexual abuse generally and finger testing specifically.

There are several alternative methods that can be used to collect evidence in cases of sexual assault without resorting to the two-finger test. Here are some solutions:

1. **Use non-invasive medical techniques:** Non-invasive methods such as DNA testing, swab tests, and visual inspection can be used to collect evidence in cases of sexual assault. These methods do not require physical intrusion and are less invasive than the two-finger test.
2. **Use trained medical professionals:** Medical professionals who are trained in forensic examination can collect evidence using non-invasive methods without resorting to the two-finger test. The medical professionals should be trained in a victim-centered approach and should prioritize the well-being of the survivor.
3. **Provide comprehensive medical care:** Survivors of sexual assault should receive comprehensive medical care that includes counseling, treatment for injuries, and testing for sexually transmitted infections. This approach prioritizes the health and well-being of the survivor rather than collecting evidence through an invasive and traumatic procedure.

4. **Educate legal and medical professionals:** Legal and medical professionals should be educated on the harmful impact of the two-finger test and should be trained in using non-invasive methods to collect evidence. This will ensure that survivors receive proper medical care and that the evidence collected is admissible in court.

The two-finger test's origins lie in the misogynistic assumption that a torn hymen is a sign that the survivor is habituated to sex and therefore cannot be raped or is more likely to make false claims about being raped, even though a hymen can be torn and its orifice can vary in size for many reasons unrelated to sex. This "medicalization of consent," where women's bodies are prioritised over their voices, is what legal expert Pratiksha Baxi refers to. Recognizing this as an infringement on the privacy and dignity of a survivor,

A simple two-finger test won't be able to determine a woman's virginity in such cases, and such tests put the women under mental and physical stress, which is against the law and unethical. Other causes of hymen breakage include cycling, horseback riding, and penetrative masturbation. Some women have such wide openings that their hymen stays intact even after becoming pregnant.

The Union Ministry of Health and Family Welfare⁵ advised that tests should not be performed on survivors in its 2014 guidelines and procedure on medicolegal care for sexual assault survivors. The guidelines also state that comments on sexual experience or sexual intercourse habit are not to be made because they have no bearing on a case of sexual violence.

JUDICIAL INTERPRETATION

*Prem prakash Lillu vs state of Haryana*⁶

The Court observed that the trial court had examined the issue of the age of the Prosecutrix and concluded that the Prosecutrix was 13 years 9 months and 2 days old on the date of the incident. This was affirmed by the High Court. Against this background, the court found that it was irrelevant whether the prosecutor had given her consent or not.

The court stated that "rape survivors are entitled to legal recourse that does not re-traumatize them or violate their physical or mental integrity and dignity" and cited the International

⁵ Ministry of Health and Family Welfare, Government of India, "Medico-legal care for survivors / victims of sexual violence" (19 March 2014)

⁶ Prem prakash Lillu vs state of Haryana, AIR 2011 SC 2677

Covenant on Economic, Social, and Cultural Rights of 1966 and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985 in support of its ruling. The Court stated that the rape survivors had a right to medical operations which are not cruel, inhumane, or degrading, but also respected their right to informed consent and took into account their health. The Court further stated that there should not be any arbitrary or unlawful interference with the privacy of victims of sexual abuse and that the State was required to make such services available to survivors of sexual violence.

"Undeniably, the two-finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity, and dignity," the court declared in its decision. Therefore, even if the report is positive, this test cannot ipso facto lead to a presumption of consent, and the appeal was rejected for lack of merit. The "two-finger test" violated the survivors of rapes' rights to "privacy, physical and mental integrity and dignity," according to the Supreme Court.

The two finger test, which served as a benchmark for conducting and interpreting the forensic examination of rape survivors, was thoroughly examined by the court. It cited the decision in *Narayanamma (Kum) v. State of Karnataka & Ors*⁷, which stated that "the factum of admittance of two fingers could not be considered adverse to the prosecutrix" and that the test did not clearly show whether the prosecutrix was accustomed to having sex.

State of Jharkhand vs shailendra kumar Pandav rai⁸

The "two-finger test," which establishes if a victim is habituated to sexual contact, was used by the Medical Board to examine the victim, the Court observed in its closing remarks. The court strongly recommended against conducting the investigation, calling it "regressive" and "intrusive" and failing to scientifically substantiate the allegations of rape and sexual assault.

Section 375 of the IPC states that whether a woman is "habituated to sexual intercourse" is irrelevant, and her past sexual behaviour is "wholly immaterial" in assessing whether she was raped, the court noted. It stated, "Suggesting that a woman cannot be believed when she claims that she was raped simply because she is sexually active is patriarchal and sexist."

The court also cited Section 53 A of the Indian Evidence Act, added by the Criminal Law

⁷ *Narayanamma (Kum) v. State of Karnataka & Ors* (1994) 5 SCC 728

⁸ *State of Jharkhand vs shailendra kumar Pandav rai*, 2022,

https://main.sci.gov.in/supremecourt/2018/36909/36909_2018_2_1501_39222_Judgement_31-Oct-2022.pdf

(Amendment) Act of 2013, which states that in sexual offence prosecutions, evidence of the victim's character or previous sexual experiences with someone are not relevant to the question of consent or the quality of consent. It also made reference to policies established by the Ministry of Health and Financial Affairs for medical professionals dealing with sexual assault cases, which state that such per vaginum examinations should not be performed to prove rape or sexual assault.

The Court instructed the Union and State Governments, expressing regret over the continued use of the "two-finger test," to distribute the Ministry of Health and Family Welfare's guidelines to all public and private hospitals, hold workshops for healthcare professionals to explain the proper procedure, and review the medical school curriculum to ensure that the "two-finger test" is no longer taught.

"Any person who conducts the "two-finger test" or per vaginum examination (when evaluating a person believed to have been subjected to a sexual assault) in contravention of the directives of this Court shall be guilty of misconduct," the court ruled, holding anyone who does so accountable.

CONCLUSION

After the exploration in this area we came to the conclusion that Rape is heinous inhuman act which condemns the chastity of Indian society and a Test like Two Finger Test is another inhuman and unscientific process attacking the right to privacy and it's a severe blow to her psychological, physical and ethical status and similar tests should be condemned, rigorously banned by making amended laws which are strictly applied over the country.

For a rape criminological test, medical clinics should use assault units that include packs and paper sheets for proof collection, a brush, documentation structures, envelopes, directions, supplies for blood tests, and swabs. Given the rising number of sexual assaults, each police station should have a rape cell, and a unique team of female officers, orderlies, and specialists should be designated. Trial and Appellate courts should never accept any form of clinical assessment on whether the casualty is adjusted to sex and the quantifiable past of the young woman. Specialists should not comment on whether the casualty was acclimated to sexual activity. When tests are performed by male specialists, they should only be directed by female gynecologists and assisted with the female nurses.