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A COMPARATIVE ANALYSIS: THE TWO-FINGER TEST IN INDIA AND U.S.A

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Abstract :

This research article delves into the concept of bodily autonomy and its connection to the outlawed practice of the two-finger test in India and the reasons for its absence in the USA. The two-finger test, a discredited virginity assessment with no scientific basis, has been a violation of bodily autonomy for sexual assault survivors. This research aims to highlight the crucial link between bodily autonomy and ending the degrading practice of the two-finger test. The two-finger test is invasive and unscientific practise conducted on female rape survivors to assess their sexual history, has been a contentious issue in India for decades. This practice, rooted in outdated and harmful stereotypes, has been repeatedly condemned by medical experts, human rights organizations, and the Indian judiciary. Despite these strong condemnations, the two-finger test has persisted, re-traumatizing countless victims and reinforcing harmful gender norms. In a landmark decision in 2013, the Supreme Court of India declared the two-finger test unconstitutional, highlighting its violation of the right to privacy, bodily integrity, and dignity of rape survivors. This ruling marked a significant step towards protecting the rights of survivors and ensuring that justice is served in cases of sexual violence. However, challenges remain in ensuring that the two-finger test is eradicated and that survivors receive appropriate medical care and support. This paper explores the history, context, and implications of the two-finger test in India, focusing on the Supreme Court's ruling and the ongoing efforts to eliminate this harmful practice.

KEYWORDS : two finger test , rape cases , right to privacy of women.

Introduction :

The two-finger test, also known as the virginity test, is a medically outdated and inaccurate procedure that has been widely condemned by human rights groups and medical professionals. The test involves inserting two fingers into the vagina to assess the hymen, a thin membrane that is often ruptured during sexual activity, even non-penetrative sexual activity. The test is based on the false belief that an intact hymen is indicative of virginity.

In addition to prohibiting the two-finger test, there are a number of other things that can be done to prevent and address sexual violence these include :

Comprehensive sex education: Sex education should teach young people about consent, healthy relationships, and how to protect themselves from sexual violence.

Support for survivors: Survivors of sexual violence need access to support services, such as Counselling and medical care. Perpetrators of sexual violence must be held accountable for their actions. This includes prosecution and appropriate punishment. Many girls are raped, and they never even come forward to report it for fear of being defamed. Rapists occasionally utilize blackmail as a tactic, and their victims keep this information to themselves out of fear. Additionally, girls occasionally succumb to familial pressure and keep the issue quiet out of concern for defamation. Crimes are increasing in severity these days, ranging from raping an 8-month-old girl to raping an 84-year-old mother. However, rape victims also have certain rights under our Indian laws.¹

History Of Two Finger Test :

Tests for virginity are not limited to Indian or rape survivors in a medical context. There is ample historical and geographical evidence of women having been put through various virginity tests, as historian Hanne Blank points out in her book *Virgin: The Untouched History*. These tests are conducted worldwide, but their employment When the British immigration authorities feared an Indian application could be married and was entering the nation without a visa under the pretense of marrying their fiancé, they tested the applicant's virginity on the ladies from India during the 1970s. Virginity tests are still used today for a variety of reasons, including preventing school-age girls from having sex before marriage, aiding women in their job applications, and testing female protestors (Olson and García-Moreno 2017, Behrens 2015).stems from a patriarchal idea that women's bodies and behaviour should be subjugated

in social, political, and economic domains, as well as a fixation with women's virginity. In India, women frequently have to show they are virgins before being married, which is a deeply casteist custom. In order to preserve caste systems, it is customary for women to bleed after mating in order to demonstrate their chastity. This practice promotes intra-caste sexual interactions and subsequent procreation. Media attention was drawn to this Kanjarbhat community ritual a few years ago, as young people from the community protested the 400- year-old custom. However, what appears to be a custom unique to a few Indian communities

¹*Saibu Evade* , Doctrine of two-finger test, <https://www.legalserviceindia.com/legal/article-9725-doctrine-of-the-two-finger-test.html> Last seen 11/04/2024

actually reflects the deeply ingrained essence of patriarchy and caste. Even young boys and girls in Mumbai have similar ideas about the value of a "wife's virginity".²

Meaning Of Two-Finger Test :

In order to comprehend the need for action against this practice, we must first have **an understanding of rape**, the predicament of rape victims, and the dehumanizing nature of subjecting a survivor to this test in order to confirm the same.

RAPE – A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

- Against her will.
- Without her consent.
- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
- With or without her consent, when she is under sixteen years of age. Explanation.— Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.³

As we can see, rape is a heinous act, which makes it a more serious crime than murder. According to Justice Krishna Iyer, A murderer kills the body whereas a rapist kills the soul. (Rafiq Vs State of U.P.) This explains the gravity of the need to develop measures for the protection of the victims from the aftermath of the incident, be it physical or mental. In another case of State of Punjab v. Ramdev Singh, court dealt with the issue and held that rape is

² Abraham, L. (2001) Gender differences and cultural constructions in youth sexuality in

³ Section 375, The Indian Penal Code ,1860



violative of victim's fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution. Article 21 of the constitution says that – No person shall be deprived of his life or personal liberty except according to procedure established by law.

The per vaginum examination, colloquially known as the two-finger test, has been used in rape cases to check for signs of sexual intercourse, especially to establish if the victim is 'habituated' to sexual intercourse. On October 31, 2022, the Supreme Court in *State of Jharkhand vs Shailendra Kumar Rai*, reiterated the ban on the two-finger test, adding onto dozens of similar judgements. In the judgement, the court observed that the test is scientifically inaccurate, patriarchal, and an affront to the dignity of sexually assaulted women. The court further underlined that "the probative value of a woman's testimony does not depend on her sexual history". The court also directed the Union and state governments to ensure that medical professionals who continue to conduct the test be held guilty of misconduct.⁴

This test is used to refute the veracity of the rape survivor's allegations because it allows for the medical report of past, regular sexual activity. The medical evidence of past, regular sexual activity is frequently used to cast doubt on the veracity of the rape victim's allegations, suggesting that the victim may have lied, that the rape may not have caused full harm, or that the victim is morally improper or does not deserve justice.

Methodology for scientific validity:

The Two-Finger test lacks scientific validity because it is based on an antiquated theory that the hymen is intact or not. The test involves inserting two fingers into the vagina, and research

⁴ *Shreya Basak* , Explained: What Is Two-Finger Test On Rape Survivors And Why Has SC Banned The 'Unscientific' Practice, <https://www.outlookindia.com/national/explained-what-is-two-finger-test-on-rape-survivors-and-why-has-sc-banned-the-unscientific-practice-news-234114> Last seen 11/04/2024



has shown that even in cases of young girls being raped, the hymen is so deeply ingrained that it remains intact even after penetration. Additionally, research has shown that the hymen can break during play, exercise, and other physical activity that stimulates the vagina.

Challenge with the Two-Finger Exam:

The two-finger test measures how loose a woman's vagina is; this laxity varies depending on her psychological state and how tense her environment is. The test also establishes a history of sexual activity, which is used to determine whether to reject an appeal from the rape victim. Even after going through the horrifying experience of being raped, the test violates a person's privacy and dignity on a moral and ethical level. She is nevertheless put through the test of insertion and her allegation is called into doubt in court.

Violation of a person's privacy, dignity, and integrity:

The freedom to live in privacy and with dignity is guaranteed by Article 21 of our Indian constitution. Rape is a heinous crime for which there are no adequate words; the victim suffers from physical and psychological trauma as a result. The victim is then put through a test to verify the veracity of her claims, which violates her right to privacy in two main ways:

1. Even after such a traumatic incident, her claims and words regarding the crime are questioned. She is tested for habitual sexual activity, and her personal life and activities are questioned based on this test, influencing her activities and personal life.
2. According to this test, if a woman engages in sexual activity frequently, her permission to the sexual activity is questioned, her individual dignity and choices are questioned, and the rape charges are not as valid or would not be disputed.⁵

Landmark Cases Related to Prohibiting Two-Finger Test:

Despite the lack of scientific evidence and the potential for harm, the two-finger test has been used for decades in India. The Supreme Court's ruling was a landmark decision that helped to protect the rights of rape survivors in India. However, the two-finger test is still used in some parts of the world, and it is important to continue to raise awareness about the dangers of this harmful practice.

⁵ *Tushar Jain* ,Empowering women against violence, <https://sayfty.com/do-you-know-about-the-two-finger-test/>Last seen 11/04/2024



The Supreme Court ruled in **Narayanamma (Kum) v. State of Karnataka & Ors** (1994) that the “fact of admission of two fingers and the hymen rupture does not give a clear indication that prosecutrix is habitual to sexual intercourse”. Whether the hymen stood ruptured much earlier or carried an old rip is a matter for the doctor's opinion.

Since it would also depend on the size of the fingers inserted, the prosecutrix could not be held adversely affected by the factum of admittance of two fingers. Given that such problems undoubtedly pertain to the hymen, the doctor must express his clear view regarding whether the condition was painful and bleeding upon touch.

The State of Uttar Pradesh v. Munshi (2004) case expressed their sorrow and concluded that even if the rape victim had previously engaged in sexual activity, this could not be the deciding factor. Conversely, it is still unclear if the accused sexually assaulted the victim at the time the complaint was made. Even if the victim has already lost her virginity, that does not, in any case, mean that anyone can rape her. The accused, not the victim, was the one on trial. Therefore, in a case of rape, it is completely irrelevant whether or not the victim is a promiscuous person. Because she is not a helpless object or target for sexual abuse by anyone, even a lady of easy virtue has the right to decline to submit to sexual relations with anyone. A prosecutrix is seen more highly than an injured witness since the former suffers physical harm while the latter has psychological and emotional distress.

State of Haryana v. Lilu Rajesh and Anr (2013) Raj Bala, the prosecutrix, was examined by Dr. Malti Gupta, who testified that there was no visible sign of harm on any area of her body. It is not impossible to rule out the likelihood that the prosecutrix has a history of sexual activity. No blood was seen. Because of this, the prosecutrix's claim that she was under 16 years old, single, and had never had intercourse with anybody could not be trusted in this particular factual scenario. Mr. J.P. Singh has actually debated the two-finger test quite a bit. Fairly acknowledging that, should she have been a minor, it would not have mattered whether or not she had a history of sexual activity when determining whether or not she gave consent. Regarding the two-finger test, the court needs to give it careful thought because there is a need for forensic examinations of rape survivors to be conducted and interpreted in accordance with established standards.

The erroneous premise that a woman who is sexually active cannot be raped is the basis of the so-called test. Nothing could be further from the truth: whether or not the accused raped the

woman depends entirely on her past sexual behaviour. Furthermore, a woman's sexual past has



little bearing on how credible her evidence is. To imply that a woman's claims of having been raped cannot be taken seriously just because she engages in sexual activity is both patriarchal and sexist. Even though the "two-finger test" in this instance was carried out more than ten years ago, it is unfortunate that it is still carried out today.

Shailendra Kumar Rai v. State of Jharkhand (2022) The deceased "may have engaged in intercourse prior to the date of the alleged crime," according to medical examiner Dr. Minu Mukherjee, and "the admission of two fingers in her vagina meant that she was habituated to sexual intercourse."

"This Court has consistently condemned the application of this intrusive and regressive criteria in rape and sexual assault cases. This "test" has no scientific foundation and does not support or refute rape allegations. Rather, it is an insult to their dignity and re-victimizes and re-traumatizes women who may have experienced sexual assault. Pre-vaginal testing, sometimes known as the "two-finger test," is not appropriate⁶

The hon'ble Supreme Court also gave some directions to the Government :

Ensuring that all public and private hospitals receive the guidelines created by the Ministry of Health and Family Welfare;

Hold workshops for medical professionals to explain the proper approach to take when assessing victims of sexual assault and rape; and

To ensure that the "two-finger test" or per vaginum examination is not one of the methods to be used while assessing survivors of sexual assault and rape, review the curriculum in medical schools.

Two Finger Test in U.S.A:

The two-finger test is not a recognized medical procedure in the United States. It has been widely criticized by medical professionals for being inaccurate and insensitive.

⁶ *K.Manognya Reddy*, Law Insider, <https://www.lawinsider.in/columns/landmark-judgements-that-shaped-the-rape-laws-in-india> Last seen 11/04/2024

There are no federal laws in the United States that specifically prohibit the two-finger test. However, some states have laws that address the issue. For example, California has a law that prohibits the use of the two-finger test in sexual assault examinations.

The American College of Obstetricians and Gynaecologists (ACOG) and the International Association of Forensic Nurses (IAFN) both recommend against the use of the two-finger test. The ACOG states that the virginity of a woman cannot be determined by a physical exam. The IAFN states that the two-finger test is not a reliable indicator of whether a woman has been sexually active.

Here's why the two-finger test isn't used in the USA:

- **Medically irrelevant:** The test relies on the mistaken belief that the hymen proves virginity, which isn't true. The hymen can break through many activities besides sexual intercourse.
- **Focus on evidence:** Sexual assault examinations in the US focus on collecting forensic evidence to identify the perpetrator and provide medical care to the survivor.
- **Survivor-centered approach:** The two-finger test can be re-traumatizing for survivors. US medical practices prioritize a supportive and dignified approach to examinations.

Conclusion:

In recent years, there has been a growing movement to prohibit the two-finger test in rape cases. In 2012, the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) called for the abolition of the two-finger test, stating that it is "a form of torture and cruel, inhuman or degrading treatment."⁷ The latest ruling is noteworthy because it stipulates that anyone caught giving a victim of rape or penetration sexual assault a two-finger test will be found guilty of misconduct. This initiates the process of addressing the impunity of medical practitioners who carry out this activity.

Highlighting that "the two-finger test is based on the incorrect assumption that a sexually active woman cannot be raped," the verdict was equally important. When evaluating whether the accused assaulted the victim, her past sexual behaviour is completely unimportant. It makes it



clear that survivors will no longer be subjected to the frequent and ongoing attacks on their character that occur during trials—especially when such attacks are motivated by their past sexual relationships.

Thus, in view of the above cases, undoubtedly, the two- finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. This test, even if the report is affirmative, cannot Ipso facto, be given rise to presumption of consent.

