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Two-Finger Test on Minors

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Two fingers are inserted into the vagina to assess the flexibility of the vaginal muscles and the integrity of the hymen, which is how medical professionals determine whether or not rape or sexual assault has occurred. The entire idea of virginity tests is based on patriarchal and societal conditioning that says if a woman engages in sexual activity, she must be loose or have given her permission to the assault. The Supreme Court (SC) in India has prohibited the two-finger test, and in several of its rulings, it has supported the same position that “two-finger testing is illegal and undermines a woman's basic rights.” This article aims to analyse the developments and lacuna in the system regarding the status and application of the two-finger test, especially in the case of minors.

Keywords: *two-finger test, patriarchy, sexual assault, virginity.*

INTRODUCTION

A form of normative restriction on girls and women rooted in patriarchy, virginity testing is performed to determine their chastity has been in news with the release of research about the condition of the child protection system in the state of Rajasthan which has discovered that two-finger tests (a form of virginity test) were mentioned in several cases when child sexual abuse

victims were being examined by doctors.¹ The alarming findings force one to ponder over various types of virginity tests being performed especially on minors through various societal and institutional structured mechanisms. The virginity test takes different forms in various cultures and countries. Vaginal examination by traditional practitioners before cultural festivities in rural KwaZulu Natal in South Africa to celebrate maidenhood is one such example.² In some places, bedsheets are checked for signs of blood. In one Canadian province, an adolescent girl was forced to go under such tests by her family at a clinic. In South Sumatra, there was a proposal by the government to conduct virginity tests on high school girls in 2013.³

As can be deduced from such cases, virginity tests are performed through various mechanisms based on such cultural notion. The patriarchal mindset is the main driving force behind such tests. The virginity tests are performed to determine the virginity of girls considered crucial for the “honour” of the family. Many patriarchal cultures view women as the men's personal property (their fathers or their husbands). In addition, a woman's “purity” determines how valuable she is. Chastity before marriage is considered a requirement in many societies. This is a form of normative restriction as there is the internalization of misogynistic values meant to control and regulate a woman’s freedom. This is done by exhorting one to behave like a “lady” or a “nice girl”.⁴ The latter implies being kind, clean, non-controversial, and above suspicion of any sort.

¹ Deep Mukherjee, ‘Mention of ‘two-finger test’, ‘victim habituated to sex’ in medical examination reports of POCSO cases: Study’ (*The Indian Express*, 30 November 2022)

<<https://indianexpress.com/article/cities/jaipur/mention-of-two-finger-test-victim-habituated-to-sex-in-medical-examination-reports-of-pocso-cases-study-8297147/lite/>> accessed 23 December 2022

² Ebenezer Durojaye, ‘The Human Rights Implications of Virginity Testing in South Africa’ (2016) 16(4) *International Journal of Discrimination and the Law*

<<https://doi.org/10.1177/1358229116641242>> accessed 23 December 2022

³ ‘Virginity test proposed for Indonesian students’ (*The Jakarta Post*, 20 August 2013)

<<https://www.google.com/amp/s/www.thejakartapost.com/amp/news/2013/08/20/virginity-test-proposed-indonesian-students.html>> accessed 23 December 2022

⁴ Greer Litton Fox, ‘“Nice Girl”: Social Control of Women through a Value Construct’ (1977) 2(4) *The University of Chicago Press* <<https://www.jstor.org/stable/3173211>> accessed 23 December 2022

EFFECTS OF VIRGINITY TESTS

The effects of such tests are two folds.⁵ First, the invasive tests especially those related to physical examination of genitalia cause emotional stress related to the violation of bodily autonomy leading to the manifestation of fear in various forms in the victims such as inability to sit on the examination chair, as well as sobs, screams, pushing, freezing up, being silent, and other such behaviours. WHO has described these tests as “painful, humiliating, and traumatic.” Secondly, regardless of the result of the virginity tests, violence, and abuse don’t stop. Women who “fail” a virginity test often face sexual or physical abuse as well as murder, in societies where virginity is highly valued and connected with moral purity. It is known that so-called “honour killings” take place. Shaming, ostracization, and humiliation are some other consequences. And those who “pass” the tests are at increased risk of rape because of certain beliefs in some communities that having sex with a virgin will cure diseases. Although these tests have been proven to be unscientific, they continue to be performed.

PATRIARCHAL JUDGMENTS CONCERNING MINOR VICTIMS

The patriarchal attitude of society has been reflected in certain court judgments including those related to that minors. For example, gender stereotypes have shaped how some rape cases have been decided and these prejudices are based on a set of patriarchal ideals defining what a victim of sexual abuse should be. Such patriarchal beliefs made their way in the case of *Musauddin Ahmed v State of Assam 2009*.⁶ Here, the appellant was accused of kidnapping a young girl and taking her to a hotel where she was raped. A medical examination was conducted on the minor girl where it was found that “she was used to sexual intercourse and that there was no injury of any kind on her body or private parts.” The court described the minor girl in the following words, “The prosecutrix appears to be a lady used to sexual intercourse and a dissolute lady. She had no objection to mixing up and having free movement with any of her known persons, for enjoyment. Thus, she appeared to be a woman of easy virtues.” When the victim's sexual

⁵ Kevin Gary Behrens, ‘Why physicians ought not to perform virginity tests’ (2015) 41(8) Journal of Medical Ethics <<https://www.jstor.org/stable/44014185>> accessed 23 December 2022

⁶ *Musauddin Ahmed v State of Assam* AIR (2010) SC 3813

history is taken into consideration and it is shown that the victim engaged in sexual activity outside of marriage, courts have reduced the sentence meted out to the perpetrator.⁷

The patriarchal system also appears to believe that the only appropriate response of a victim to rape that supports the charges is violent physical resistance. Suspicion is aroused when fear results in acquiescence or passivity since no chaste lady would allow herself to be raped. *Dilip v State of Madhya Pradesh*⁸ is one such example where even a minor was not spared from such misogynistic notions. The trial court in this case held the appellant not guilty. It stated that “the prosecutrix was supposed to attack the appellant like a wild animal, but she didn't even resist. Thus, her conduct suggested only and only, her consent and will.” *Tukaram v State of Maharashtra*⁹ is another such infamous case. The judges acquitted the police officers who had gang-raped the 16-year-old girl, a victim of many forms of marginalization because she had to have given her consent because there were no signs of harm on her body. Instead of the harm done to her, her sexual behaviour took the spotlight, and it was revealed that she had eloped with her lover in the past. This outrageous verdict resulted in major amendments brought up by the legislature in the “Indian Evidence Act” and IPC in 1983. While many decisions made after the 1983 Amendment Act have been effective in providing victims with justice, an equal number have been written absurdly, along the lines of this case.

Likewise, the institution of marriage is treated as one that decides the value and worth of victims of sexual abuse. The courts take the victim's marriage after the rape into consideration when determining the appropriate sentence. One recent example is the case of *K Dhandapani v State by the Inspector of Police, in 2022*.¹⁰ The accusation against the man was that he engaged in sexual activity with the girl when she was 14 years old while promising to marry her. In the end, he married her. She gave birth to her first kid at age 15 and her second at age 17. 2018 saw his

⁷ Samiksha Kandya, ‘Sentencing in Rape Cases in India: An Analysis’ (2021) 26 *Supremo Amicus* <<https://supremoamicus.org/wp-content/uploads/2021/10/samiksha-kandya-WW.pdf>> accessed 23 December 2022

⁸ *Dilip v State of Madhya Pradesh* (2013) 14 SCC 331

⁹ *Tukaram v State of Maharashtra* (1979) SCR (1) 810

¹⁰ Pranshi Agarwal, ‘Supreme Court sets aside POCSO conviction; TN custom is of marriage of girl with maternal uncle’ (*The Daily Guardian*, 14 May 2022) <<https://thedailyguardian.com/supreme-court-sets-aside-pocso-conviction-tn-custom-is-of-marriage-of-girl-with-maternal-uncle/>> accessed 23 December 2022

conviction and ten years of hard labour in jail from the Sessions Court. The next year, the Madras High Court maintained the conviction. The SC acquitted the man based on the “custom of avunculate marriage” between maternal uncles and nieces in Tamil Nadu and said that it just “cannot shut its eyes to the ground reality and disturb the happy family life of the appellant and the prosecutrix.” Patriarchal notions like those regarding what a “perfect rape victim” continues to creep in from time to time. The patriarchal mindset of the masses has been reflected in certain court judgments denying justice to girls and putting them on such a platform that does character assassination by society at large.

FORMS OF VIRGINITY TEST

The virginity test is one of the worst forms of humiliation women face in society. In India, there are four types of virginity test that takes place.¹¹ Namely-

- Pani ki dheej - A married woman is subjected to agony and humiliation in this test where she is required to hold her breath underwater while a person walks 100 steps.
- Kukri ki rasam (stained bedsheet) - In this test, a bedsheet of the white colour is put on the bed where the newlyweds officially consummate the union. The next day, the groom must display the same white bedsheet in front of senior family members, who will then be able to see the blood and determine the girl's virginity. The Maharashtrian kanjarbhat community is where this practice is most prevalent.
- Agnipariksha (trial by fire)- The lady must hold a hot iron in her hand at all times; if she drops it or is unable to finish the task, it is thought that she has had past sexual encounters before marriage, and she is compelled to reveal the names of her lovers.
- Two-finger test - One of the most demeaning and unscientific medical exams, this one is typically done on rape and sexual assault victims. A medical professional checks the flexibility of the vaginal muscles and the integrity of the hymen by inserting two fingers into the victim's vagina.

¹¹ Nithya Nair, '4 Types Of Traumatizing 'Virginity Tests On Women' Still Prevalent In Many Parts Of India' (*India.com*, 7 June 2016) <<https://www.india.com/viral/4-types-of-traumatizing-virginity-tests-on-women-still-prevalent-in-many-parts-of-india-1234499/>> accessed 23 December 2022

MEDICAL STATUS

A medical professional frequently perform a two-finger test per vaginum examination to determine the laxity of the vaginal muscles and inspect the hymen of a woman, typically a victim of sexual assault or rape, to evaluate whether or not she is accustomed to sexual activity. This test is purely based on the belief and societal conditioning that a woman who has been habituated to sexual intercourse has probably consented to the assault inflicted on her and she is loose because of the taboo that sexually active women can very easily give consent.

There is no scientific reason behind this practice and medical professionals all over the world have clarified that there is no proper way to determine the laxity of the vagina and it has no scientific validity. In its instructions and guidelines for the victims of sexual assault, the “Ministry of Health and Family Welfare” of the Government of India has also fully denounced it. The process also has no scientific background. Aruna Kayshap and Human Rights Watch, in the book¹² “Dignity on Trial: India's Need for Sound Standards for Conducting and Interpreting Forensic Examination of Rape Survivors” detail and rebut this patriarchic presumption by pointing out three facts:

- Rather than entirely shutting off the vaginal entrance like a door, the flexible vaginal membrane known as the hymen only partially covers it. As a result, it is untrue to say that there was no rape if there was no hymen rupture.
- It is made clear that if the hymen has already torn, its opening may change in size for causes unrelated to sexual activity. Therefore, a vaginal exam of this nature cannot establish a victim's “habituation to sexual intercourse.”
- According to medical literature, a person with a hymen that shows no signs of injury may also have gone through sexual intercourse.

¹² Hassan A. Niazi, ‘Human Dignity and Rights of Women in Pakistan: The Problem of Virginity Testing’ (2019) 10 Pakistan Law Review

LEGAL STATUS

India has seen a disturbing growth in the cases of sexual assault in the past years. Victims of sexual violence face shame, humiliation, and discrimination daily in society in their own homes, workplace, and colleges, in fact in hospitals after they are taken for treatment after the assault where they are made to go through inappropriate and traumatic tests. Ex- two-finger test. The Apex Court ruled in 2004 that the presence of the elements of “Section 375 (rape) of the IPC” in a given instance is entirely independent of whether or not the victim is sexually active.

The Court also ruled in the historic 2013 case of *Lillu Alias Rajesh and Others v State of Haryana*¹³ that “the two-finger test should no longer be used because it violates the victim's fundamental rights and that the victim's prior sexual activities should not be taken into account when determining the victim's consent.” The court also urged the authorities to develop improved medical ways to confirm sexual assault. The court upheld in *Narender Kumar v State (NCT of Delhi), 2012*¹⁴ that a victim's sexual past is immaterial in circumstances of sexual assault. The victim's character cannot be inferred to be loose or immoral based on the same.

Following the barbaric *Nirbhaya rape case*¹⁵, the Justice Verma committee was set up to recommend amendments in criminal law for faster trials and stricter punishments for sexual assault. After the submission of committee reports, early in 2014, the Ministry of Health published comprehensive guidelines for the physical evaluation of sexual assault victims. These guidelines were made after consulting with WHO. The guidelines were as follows –

- As of present, the two-finger test cannot be used to prove rape or sexual assault.
- A case of sexual assault is unaffected by the size of the vaginal introitus.
- Adult females can only undergo a per vaginum examination when it is medically necessary.

¹³ *Lillu Alias Rajesh and Others v State of Haryana* (2013) 14 SCC 643

¹⁴ *Narender Kumar v State (NCT of Delhi)* (2012) 7 SCC 171

¹⁵ *Mukesh v State of NCT of Delhi* (2017) 6 SCC 1

- To conduct a medical examination, the rape victim's (or the victim's guardian, if the victim is a minor or mentally ill) permission is required. The victim cannot be denied medical care even if permission is not given.

The Ministry of Health's instructions must be communicated to all public and private hospitals, according to the court order. The court has also requested that the central government and the state governments provide workshops for medical professionals to inform them of the proper protocol to be followed when assessing victims of sexual assault and rape. The Madras High Court's bench of Justices N.S. Kumar and R. Subramanian instructed the state to outlaw the two-finger test on April 22, 2022, and stated that the practice persisted despite the ministry of health's drafting of guidelines and specific directives.

According to a bench of Justices D Y Chandrachud and Hima Kohli in November 2022, "The alleged test is based on the incorrect assumption that a sexually active woman cannot be raped. Nothing could be further from the truth: a woman's sexual history is irrelevant when determining whether the accused raped her." The statements were stated by the judges in a restorative ruling that upheld the man's conviction and sentence for the 2004 rape of a minor girl in the state of Jharkhand who was administered "two-finger test" by a hospital medical board.

The court stated that "section 53A of the Indian Evidence Act" was added in the year 2013 as a result of changes made to the criminal law by the legislature. The court ruled that, by Section 53A, "evidence of a victim's character or her prior experiences with any person must not be relevant to the question of consent or the quality of consent in the prosecution of sexual offences." Apart from this, Section 33(6) of the POCSO Act makes the special court responsible to ensure that the dignity of minors is uncompromised during the trial. But the sad reality is that the two-finger test is still widely used in many medical facilities across India.

WAY FORWARD

Sentencing guidelines: India currently lacks standardised guidelines concerning rape cases. As the maximum sentence for rape is life in prison, the minimum sentence is seven years. And in

"the rarest of rare" circumstances, the accused may even receive the death penalty. This demonstrates the stark contrast between the minimum and maximum punishment, which depends on the judge's discretionary power to impose the sentence on their sense of justice. This leads to an unjustified discrepancy in sentencing, and in some situations, as previously indicated, judges will take into account legally irrelevant facts such as the victim's virginity, chastity, and previous sexual history. According to the SC, there are significant discrepancies in sentencing¹⁶ and legally irrelevant considerations are made when imposing sentences.¹⁷

Biases within the medical fraternity: Medical practitioners have been trained for years to use the "two-finger test" on rape victims to ascertain their sexual history and assess their "chastity." This has long been utilised in rape trials as medical evidence. The SC only recently ruled that professionals who perform invasive virginity tests on sexual assault victims are "guilty of misconduct" and ordered that the two-finger test should not be covered in medical school textbooks. But due to decades of such tests being a part of the curriculum, the medical community needs to completely revise its ingrained belief about virginity tests. Declaring the practice of such testing of virginity as guilty of misconduct is only one step in the right direction. Medical boards with statutory authority and independent professional organisations ought to forbid doctors from checking their virginity.

Training of Medical professionals for new and scientific protocols: Medical professionals need to be trained to provide medical evidence necessary for trials without violating the dignity of the victim, especially in cases where certain assaults like those of non-penetrative nature do not leave any evidence over the body of the victim. The Government of India must provide SAFE kits and ensure that all hospitals are equipped with these kits. A network of forensic labs needs to be developed too for better data collection in a scientific manner collect physical evidence.

Social awareness: Social awareness campaigns to inform the masses of the scientific and unreasonable basis of virginity tests need to be organised. Such programs of necessary

¹⁶ *Sangeet v State of Haryana* (2013) 2 SCC 452; *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra* (2009) 6 SCC 498; *State of Punjab v Prem Sagar* (2008) 7 SCC 550

¹⁷ *Ruli Ram v State of Haryana* (2002) 7 SCC 691, 703

awareness must be run for everyone. The egregious violations of rape laws and standards by different stakeholders like police, lawyers, etc., reveal their ignorance of crimes involving sexual violence. Sensitizing and giving them the necessary training are critical needs. The patriarchal mindset of people to distinguish girls as pure and impure based on their sexual history needs to be addressed as well.

CONCLUSION

The two-finger test is an offshoot of patriarchy based on unscientific norms that violate the dignity of those upon whom it is administered. This patriarchy has also been reflected in various court judgments in various instances. Although in recent years the SC has again and again reiterated the futile usage of this test and strongly suggested against it, cases continue to come by where this test is administered even on minors. Not only this reflects the failure of both the legislature and judiciary to pave way for such measures against such tests at ground level through proper legislation and directives to trial courts respectively, but also shows the engrained patriarchal mindset dominating various institutions which have shown resistance to the change in the status quo. A sensitization program for various stakeholders like doctors, judges, and lawyers is the need of the hour. Union legislation explicitly banning the usage of such tests in cases of rape and sexual violence will aid in bringing the needed change as guidelines only have a limited impact.