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Justice in Question: Analyzing the Two-Finger Tests in Light of Lillu @ Rajesh and Another v. State of Haryana

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Abstract

The two-finger test is a kind of test that is used to determine whether the survivor of the rape or sexually assaulted is habituated to sexual intercourse which by its nature sounds very degrading. The test is an 18th-century old test where it involves determining the laxity of the vagina and the extent of the broken hymen to determine the victim's sexual records. On the face of it, such determination of a woman's sexuality is an inhuman practice that not only breaches the woman's bodily autonomy and integrity but at the same time is disrespectful to the character of a woman and hence should be banned immediately. This notion was considered after the horrific incident of the Delhi Gang Rape Case, 2013, popularly known as the Nirbhaya case, wherein the Justice Verma Committee recommended the discontinuation of the two-finger test case. However not long, in 2019, a gang rape case happened in the Singrauli district of Madhya Pradesh, the police authorities conducted the two-finger test and after the reports stated in the press media that the said girl victim was habituated to sexual activity. In this paper, we shall emphasise the need to have uniform strict guidelines where the governments should ensure that such tests should immediately be refrained for forensic examination because a mere two-finger test is not the sole manner of deciding a woman's sexual history. Moreover, such kind of tests are a direct violation of Article 21 of the Indian Constitution which grants every person in the country to live a dignified life and the Right to Privacy laws - which women is completely stripped of because of the frequent practise of such test, and which needs to have a closure.

Keywords: *Article 21, Consent, Rape and Sexual Assault Victims, Right to Privacy, Two-Finger Test*

1.0 Introduction

The Virginity Test which is also known as the "Two-finger test" is a practice which is used to determine whether a victim of a sexual assault is sexually active or not i.e., whether she had some earlier records of engagement in sexual intercourse. Such a test is conducted by a medical expert by insertion of two fingers inside the victim's vagina to determine laxity and check whether the hymen is broken or not- which ascertains the sexual activity records of the victim. Such reports are further used in courts by the defence counsel for defending their client which if barely seen, given the sensitivity of sexual assault crime, is morally wrong and unethical.

The momentum for the ban on the two-finger test increased after the nerve-jarring incident of the 2012 Delhi Gang Rape case which led to not just a worldwide outrage and protest for women's rights but caused an overhaul of laws of crime bringing a significant change in the country's criminal justice system and among it was the two-finger test. The Justice Verma Committee then recommended the discontinuation of the two-finger test practice given it is highly derogatory to a woman's dignity which was reiterated in the 2013 landmark case

of Lillu Rajesh v. State of Karnataka but was disregarded in a 2019 Madhya Pradesh gang-rape case only to be again reinstated in 2022 case about the extent of harmful this test itself carries. This test not only transgresses the boundaries of the right to privacy which includes the physical privacy of the woman but also violates Article 21 of living a dignified life. Thus, time and again the Supreme Court has frowned and looked down upon this two-finger test and has caped it as the mirror reflection of the patriarchal and sexist structure built in our society. It was in the 2013 case where the court had explicitly mentioned the repulsive nature of the two-finger test along with the 2014 guideline by the Ministry of Health on banning this test on sexually assaulted and raped victims yet to be reiterating it in 2022 implies how the sexual crimes is still being treated as a gender-biased crime against women.

2.0 Conceptualisation

2.1 A Brief Idea about the 'Two-Finger Test'

The two-finger test which is also called the '*Per Vaginum*' test is a process of testing the virginity of the female i.e., whether the female is habituated to sexual intercourse earlier or not. This test is an age-old practice around the 1800s, where the procedure is "if one finger is getting into the vagina of the woman then it is deemed that woman is not involved in sexual intercourse but if the two fingers are getting into the vagina of the woman it is deemed that the woman is involved in sexual intercourse."[1](Akash, 2022) The procedure is conducted by a medical practitioner, where the laxity of the vagina (limbs/muscles) along with the breakage of the hymen "(a small piece of skin that typically surrounds (but doesn't cover) the vaginal opening)"[2] (Gray, 2022) is determined. If the hymen is found not broken then the woman is a 'virgin' or woman having no sexual interaction but if found broken then the woman is declared to be habituated to sexual intercourse which is often implied in the rape and sexual assault victims. In medical language, there are differences in the structure of the hymen and multiple plausible non-sexual reasons for breaking the same like sports such as horse-riding, usage of tampons, masturbation etc. Hence, it is an erroneous and futile presumption that the break of the hymen is taken as conclusive proof of a woman's virginity or sexual history.

Despite living in the 21st century with such advanced technology and modernization, there are still certain communities or people who have ingrained patriarchal feelings and demand a virginity test for scrutinising the sanctity of the woman which is how this test developed.

3.0 A Legal Lens to the Two-finger Test

3.1 Violative of a Victim's Consent

The usage of the two-finger test by the medical practitioner on the rape and sexually assaulted victims is highly frivolous. In adjudicating matters related to rape and sexual assault, the interpretation of "consent" is done by placing reliance on the two-finger test report which determines a women's sexual history is nothing but a mere manipulative and immoral victim-blaming. The reports on the laxity and hymen structure of the woman have no scientific and moral explanation but a calculative way of denial of justice to a woman since it's presumed rape of a woman "habituated to sex" is consensual and doesn't qualify for any rape or sexual assault.

This misogynistic approach was taken in '*Tuka Ram v State of Maharashtra*' (1979) 2 SCC 143) or the 'Mathura Gang Rape,' by the sessions court where it denied the allegation of rape of the 16-year-old victim in police station, justifying that since the two-finger tests results clarifies that the girl was habituated to sexual intercourse, the act was initiated by victim and was consensual which was overturned in 1979 but the accused got acquitted reiterating it as consensual intercourse.

Time and again, the Supreme Court has frowned upon the two-finger test where in almost all rape cases in 2004-2005 described the test is immaterial in proving the major crucial point "consent" under the rape laws as per §63 of BNS. However, the momentum behind the prevention of this inhuman practice began with the 2012 Delhi Gang Rape case popularly known as '*The Nirbhaya*' where the Criminal justice system saw the overhaul of the criminal laws which occurred because. The incident was a wake-up call which led to the formation of the Justice Verma Committee. The committee in one of its recommendations, under the sub-heading of medical examination stated the "*discontinuation of the two-finger test which is conducted to determine the laxity of the vaginal muscles… two-finger test must not be conducted and that the previous sexual experience of the victim should not be*

relied upon for determining the consent or quality of consent given by the victim ." (Committee Report Summary, n.d.)

The egregious nature of the two-finger test was discussed again, extensively in the '*Lillu @Rajesh v State of Haryana*' (Supreme Court Cases, 2013) where a 14-year-old girl (named Raj Bala) was gang raped in the police station by two policemen where the High Court convicted both the accused. Aggrieved by the decision they appealed to the Supreme Court, during which one appellant died, hence the Supreme Court upheld the conviction order of the High Court. One of the stark points that the court has said is that a woman's past sexual records do not qualify for valid consent or guarantee a license to rape her. In rape law, consent is explained under §63 of Bharatiya Nyaya i.e., the rape laws say "*unequivocal voluntary agreement when the woman communicates a willingness to engage in the specific sexual…*" (Acts of Parliament, 2023)Thus, the woman has to have the knowledge and sufficient type for thinking and she would be the one initiating her consent through some acts but a woman's past sexual activities cannot ipso facto give rise to the presumption of implied consent. Following this case in 2014, the Ministry of Health also in its published guidelines under the heading 'Medico-legal care for survivors/victims of Sexual Violence' has provided that the two-finger test "*must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence*" (MOHFW, 2014) i.e., the reports of this test is not substantial evidence for proving rape/sexual assault case and is demeaning. However, 'the ministry's policies and procedures were not properly implemented since they were not legally enforceable so violating them did not result in criminal penalties.' (Pandey & Gupta, 2024)

3.2 Violative of Human Rights

The two-finger test which involves inspecting women's genitalia for assessing the sexual records is violative of the human rights of the victims of crime. The court in Lillu Rajesh while discussing the offensive nature of the test, in light of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985, said that any medical procedures required for the sexual assault or rape cases should have the consent of the woman and should ensure that the procedure should not under any circumstances "*violates the right of rape survivors to privacy, physical and mental integrity and dignity.*" (Supreme Court Cases, 2013) This test takes a toll on both the physical health i.e., chances of resulting in further damage of the vaginal injuries and deterioration of woman's health but also bears psychological effects where they feel re-traumatised, loss of self-esteem and severe depression because of the violation of one's privacy. In the judge's language if medical procedures for the survivor are required for the sole purpose of the case it should "*respect their right to consent….and health should be of paramount consideration while dealing with gender-based violence.*" (Supreme Court Cases, 2013) 'The World Health Organisation (WHO), UN Women, and UN Human Rights pushed for a ban on the two-finger test in 2018 to eliminate violence against women. "A practice that must end that is medically unnecessary, often painful, humiliating, and traumatic." (Kumar, 2022) Such tests are not violative of women's and girls' human rights but have the potential of causing additional pain and mimicking the actual act of sexual violence leading to re-traumatisation of the victim. Hence, there is a need "to raise awareness among health professionals and communities of the detrimental effects of performing this test on women and girls, its lack of scientific validity, and the need to eliminate its use." (WHO, 2018)

3.3 Violation of Right to Privacy: Constitutional Violation

Internationally, when the U.S. was busy deciding the matter of abortion rights of women, it was said that *"The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrit"*. Which the two-finger tests violate. The Indian constitution has granted all the persons of India to live a life with dignity and respect by inserting Article 21 in the Constitution which says that "No person shall be deprived of his life and personal liberty except according to the procedure established by law" wherein privacy with regards to bodily integrity is also included. In '*KS Puttuswamy v UOI,*' MANU/SC/1044/2017, Justice D.Y. Chandrachud has stressed the scope of the word 'privacy' in light of Article 21 of the constitution. He mentioned that "*life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between*

human beings and the quest for liberty are the foundational pillars of the Indian Constitution." (Supreme Court Cases, 2013) In the Lillu Rajesh case has mentioned that crimes like sexual violence are in itself dehumanising acts and if this test is conducted it will again be "*an unlawful intrusion on the right of privacy and sanctity of a woman… serious blow to her supreme honour and offends her self-esteem and dignity*" (Supreme Court Cases, 2013) because while conducting the virginity test, the victim woman's consent is never taken nor is she give a choice but instead this test is forced on her which involves painful testing of laxity of vagina and hymen, which affects both her physical and mental health i.e., reliving a traumatic experience altogether, thus, infringing her bodily integrity and autonomy which is a direct violation of Article 21 hence it is unconstitutional as well. It is not just a violation of someone's privacy but using these test reports as a yardstick to determine rape and sexual assault cases is discrimination based on sex since such tests are conducted without any consent of the victim irrespective of her health and status which thus deprives the victim to be treated equally in a court which violates Article 15 and 14 of the constitution respectively.

3.4 Two-Finger Test: A Feminist Lens

The two-finger test case was upheld in the '*Tuka Ram v State of Maharashtra*' wherein the Trial court allowed the conduct of the two-finger test based on which it gave the judgment that the concerned raped victim had active sexual activities and hence the sexual intimacy was consensual underlines the deep roots of patriarchal mindset then. This idea of the two-finger test aligns with what the radical feminists propagate which says that men's oppression of women is the ingrained systematic patriarchy. Within a patriarchal perspective, men's appropriation of women is demonstrated as control over the latter's body, particularly their sexuality. The two-finger test which defines the obsession for determining women's virginity reinstates the patriarchal beliefs that women's bodies and actions are controlled in social, political and economic spheres of life defined predominantly by men. In India, women have to regularly prove their virginity in every sphere whether marriage or proving sexual assault depicts the repeated domination of women in every way. While coming to know the realities of rape, it symbolises a social responsibility to remove the two-finger test from medical settings, and to ban on using "narratives of protection for 'pure and god-like Indian' women from the damages of the test." (Shrivastava & Sivakami, 2023) Such narratives impede social changes because the terms build upon that same gender power hierarchy which is why crimes like sexual assault are on the rise and such tests are allowed in the first place to say- that women are subordinate to men.

3.5 The History Repeats Again

Despite the discussion on the derogatory nature of the two-finger tests, not long in 2019, a gang rape incident occurred in the *Singrauli* district of Madhya Pradesh where two-finger tests were conducted based on which the accused of the case was acquitted saying a woman habituated to sexual intercourse is classified as a woman of "easy nature" cannot be raped because the act is impliedly consensual. This led the Court in 2022 to reiterate the position on two-finger tests in the case '*State of Jharkhand v Shailendra Rai*' where the victim was raped and murdered and during the victim's stay for treatment, the hospital authorities conducted the two-finger test. Post her death, the victim's dying declaration was taken as a valid testimony in proving the circumstances of the victim's death and the accused was convicted as his guilt was proved beyond reasonable doubt however, the Court had heavily criticised the act of medical board's decision for conducting the test on the injured victim saying it's highly degrading and has no scientific backing and anyone conducting should be guilty of misconduct. Thus, in its concluding remarks the Apex court has strictly reiterated that the usage of the 'two-finger test' is condemnable and leaves a "harmful impact on victims by blaming, humiliating, and questioning their chastity." (Ramisetty, 2024)

4.0 A Way Forward to the Two-Finger Test

The two-finger test, as said started in the 1800s, an age-old practice that had great support because the paradigm of the society was built on the patriarchal and gender-biased norms of which the women always carry the cap of an oppressed victim. The victim-blaming was so high that even in rape and sexual assault cases people believed it is the woman who perpetrates such crime.

However, such people belong to one segment of society that even today lacks the basic confidence to discuss and handle women's issues with respect, dignity and care while other progressive-minded people in the society realise how women's issues need to be given great importance and protection of their dignity and respect is required in light of the laws of the land which is why our country has shifted the tide now to women-centric laws. Nevertheless, even though laws are made in favour of women when it comes to adjudication, we see a patriarchal stereotypical approach of the Court when deciding the matter of 'two-finger tests.' It is commendable that the Court with its progressive judgments on the immateriality of a woman's sexual history, invalidating consent based on a two-finger test report yet 'by portraying the victims as women of "promiscuous character" and "easy virtue," the Court have simultaneously demonised them' (Kahle & Sharma, 2022) like in the Lillu Rajesh case itself where the court said women of easy virtue have a valid consent in engagement of sexual activities which can be qualified as rape if it's without her consent. Although such decisions are emancipatory, they are derogatory, character assassination of the victim, sexist in nature and lack of nuanced approach all of which need to be examined appropriately.

Certain sensitive cases like rape, and sexual assault set turmoil in a victim's life. The woman suffers not just physically but the incident leaves her with long-term severe depression, and anxiety attacks and reconciliation in the society is difficult. Upon that, the two-finger tests transgress the women's bodily autonomy and lead to humiliation of the dignity of the woman. However, the collection of forensic evidence is indeed an important requirement in sexual assault cases, so in that scenario, as an alternative DNA testing can be welcomed since DNA is found in every cell of a human, so profiling of the DNA samples is scientific, more accurate results proving to be an effective method in criminal cases, and assists in the proper conviction of the accused. This approach if adopted would maintain the dignity of the women as well as hold great evidentiary value in the eyes of law.

5.0 Conclusion

To conclude we have seen that the nature of crimes like rape and sexual assault is so heinous and inhumane that leaves the victim in a state of severe pain not just physically but mentally a great damage is done. Upon that, the two-finger tests just aggravate the heinous nature of the crime by re-victimisation. The reason is that the Supreme Court has repeatedly reiterated that this test needs to be stopped immediately and anyone practising it should be held guilty because this test is an extremely humiliating procedure for women's dignity and respect.

Let alone, this two-finger test is immaterial in disproving victim testimony in rape and sexual cases and above that it is unethical and degrading to the women and instead discourages the victim to participate in the criminal procedure as chances might be her testimony be discredited depending on this said test results. The medical examination is used not as proving 'consent' in rape cases but only as secondary evidence in confirmation of the occurrence of sexual intercourse while the conviction is on various other factors.

The virginity test has been forbidden and termed as an illegal practice long for years by the Court but this issue has been reiterated in recent years reflecting the gender-biasness still prevailing in the society. The two-finger test is violative not only of a women's privacy, dignity and respect in society but also of the biggest loophole of the criminal justice of repetitive use of this method to prove rape and sexual assault. Hence, the legislature should not step in and make this test a statutory illegal practice with provisions in penal laws, create awareness camps in Tier 2 cities because in remote-district such tests still be conducted so that instead of riding on the backs of piles of cases laws the society will continue to exploit the criminal justice system and women will continue to remain as the vulnerable sections of the society.

6.0 References

Akash, S. (2022). Two-Finger Test for Sexual Assault and Rape Victims. *Jus Corpus Law Journal*, *3*, 1020.

Bharatiya Nyaya Sanhita, Section 63, (2023). *Committee reports*. (n.d.). PRS Legislative Research. https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary

Gray, J. (2025, February 13). *Hymen: anatomy, function, and virginity explained*. Natural Cycles. https://www.naturalcycles.com/cyclematters/what-is-the-hymen

Kahle, A., & Sharma, A. (2022, December 7). *Two-finger test ban: The SC's judgement is lacking | IDR*. India Development Review. https://idronline.org/article/gender/two-finger-test-ban-the-scs-judgement-is-lacking/

Kumar, S. (2022, November 12). SUPREME COURT OF INDIA BANS "TWO-FINGER TEST" - JLRJS. *JLRJS*. https://jlrjs.com/supreme-court-of-india-bans-two-finger-test/

Lillu @Rajesh v State of Haryana, (2013) 14 SCC 643

Pandey, A., & Gupta, D. (2024, June 4). Two finger test: a bain to women's dignity. *Live Law*. https://www.livelaw.in/articles/two-finger-test-a-bain-to-womens-dignity-259616

Puttuswamy K.S. v UOI, MANU/SCC/1014/2017 (D.Y. Chandrachud, J., majority). Lillu @Rajesh v State of Haryana, (2013) 14 SCC 643.

Raday, F. & Working Group on the issue of discrimination against women in law and in practice. (2017). *Women's Autonomy, Equality and Reproductive Health in international Human Rights: Between recognition, backlash and regressive Trends*. https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf

Ramisetty, R. (2024, June 16). THE STATE OF JHARKHAND v. SHAILENDRA KUMAR RAI. *Jus Scriptum*. https://www.jusscriptumlaw.com/post/the-state-of-jharkhand-v-shailendra-kumar-rai

Shrivastava, S., & Sivakami, M. (2023). *Enforcing the ban on the 'Two-Finger Test.'* https://www.theindiaforum.in/sites/default/files/article_pdf/2023/01/11/1285-1673426779.pdf

Tukaram v. State of Maharashtra, (1979) 2 SCC 143

United Nations Human Rights Special Procedures, (October 2017), Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends, united Nations Human Rights Special Procedures, at https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf

Verma, L., Ministry Of Health and Family Welfare, WHO Representative to India, CEHAT, HRW, Ministry of Women & Child Development, Department of Health Research, Ministry of Home Affairs, CEHAT, HRW, Ministry of Women & Child Development, & Ministry of Health & Family Welfare. (2014). *GUIDELINES & PROTOCOLS Medico-legal care for survivors/victims of Sexual Violence*. https://health.mizoram.gov.in/uploads/attachments/2023/07/e032379ecbaf47330bec5f94e3161b4e/guidelines-protocols-sexual-haras.pdf

World Health Organization: WHO. (2018, October 17). United Nations agencies call for ban on virginity testing. *World Health Organization*. https://www.who.int/news/item/17-10-2018-united-nations-agencies-call-for-ban-on-virginity-testing