

TWO FINGER TEST IN INDIA: A BLACK STAIN ON JUSTICE

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INTRODUCTION

In the pursuit of justice, societies often grapple with archaic practices that not only defy scientific reasoning but also violate the very principles upon which a fair legal system should stand. One such practice that has cast a dark shadow over the judicial landscape in India is the infamous "two-finger test."

This test has been widely criticized for its invasion of privacy, reliance on outdated assumptions, perpetuation of harmful stereotypes and degrading nature.

This controversial and outdated practice has long cast a dark shadow over the pursuit of justice in India. It has primarily been used in cases of sexual assault. In this article, we delve into the origins of the Two-Finger Test and explore its implications and the persistent call for its complete abolition in the face of evolving global standards.

WHAT IS THE 'TWO-FINGER' TEST?

The unscientific and traumatizing "Per-Vaginum Examination" also known as the Two-finger test has been in use for the purpose of medical examination in a number of South Asian countries, India being one of them.

This test involves a medical practitioner inserting two fingers into the vagina of a rape survivor in an attempt to determine if the hymen is broken, as well as to "test the laxity of the vagina". The test is often used to declare rape survivors as "habituated to sex".¹

The hymen is a ring of fleshy tissue that sits just inside the vaginal opening. Normal variations range from thin and stretchy to thick and somewhat rigid. It is a misconception that the hymen always tears during first intercourse or that intercourse is required to rupture the hymen.²

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¹ Mishori, R. et al. (2019a) The little tissue that couldn't - dispelling myths about the hymen's role in determining sexual history and assault, Reproductive health. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6547601/> (Accessed: 19 May 2024).

² The hymen (no date) UCSB SexInfo Online - The Hymen. Available at: <https://web.archive.org/web/20100619150625/http://www.soc.ucsb.edu/sexinfo/article/the-hymen> (Accessed: 19 May 2024).

The medical evidence of past intercourse is used to cast doubt on the rape allegation, either to suggest a survivor lied about the rape, to imply that the rape wasn't harmful, or to suggest the moral impropriety of the survivor and therefore her lack of entitlement to justice.

HISTORICAL CONTEXT

The Two-Finger Test traces its roots to a time when archaic beliefs about a woman's chastity were deeply ingrained in societal norms. Initially intended to determine a woman's virginity, the test involves a medical examiner inserting two fingers into the victim's vagina to assess its laxity.

Despite being debunked by medical experts worldwide, the test found its way into forensic examinations in India. However, it's crucial to note that the test has been widely discredited, and human rights organizations, medical professionals, and legal experts strongly oppose its use.³

CONTROVERSIAL IMPLICATIONS

1. Violation of Dignity:

The use of the Two-Finger Test raises significant ethical and human rights concerns. It perpetuates harmful stereotypes, reinforcing victim-blaming narratives and violating a survivor's right to dignity. The invasive nature of the test often leads to secondary victimization, traumatizing survivors further during an already challenging legal process.

2. Scientific Inaccuracy and Unreliable Conclusions :

Medical experts and human rights advocates universally condemn the two-finger test for its lack of scientific merit. The assumption that vaginal laxity can provide insights into a woman's past sexual activities or consent is not only outdated but also fundamentally flawed. The medical community asserts that such laxity can result from various factors unrelated to sexual history, rendering the test unreliable and inconclusive. Moreover, a female can undergo a surgical procedure, called hymenorrhaphy or hymenoplasty, to repair or replace a torn hymen, to "pass" a virginity test.

3. Stigmatization and Harmful Stereotypes :

³ LawBhoomi (2023) Two finger test, LawBhoomi. Available at: <https://lawbhoomi.com/two-finger-test/> (Accessed: 19 May 2024).

Beyond its scientific shortcomings, the two-finger test perpetuates harmful stereotypes surrounding sexual assault survivors. By insinuating that a survivor's past sexual experiences are relevant to determining the authenticity of her assault claim, the test further stigmatizes victims. This contributes to a culture of victim-blaming and undermines efforts to create a supportive environment for survivors seeking justice.

4. Violation of Human Rights:

Beyond its scientific shortcomings, the two-finger test raises serious human rights concerns. Shockingly, the results of the Two-Finger Test have been historically used in courtrooms to question the credibility of survivors. This further victimizes the already traumatized individuals, perpetuating a cycle of injustice. Moreover, marital rape and accusations of it would be dismissed under this test.

The examination is invasive, humiliating, and retraumatizing for survivors of sexual assault. In many cases, survivors have undergone this test without their informed consent, exacerbating the violation of their rights to dignity, privacy, and bodily autonomy. The emotional toll on survivors subjected to such an examination can impede their ability to seek justice and recover from the trauma of the assault.

LEGAL LANDSCAPE

In 2004, a bench of the Supreme Court stated that “whether a woman is ‘habituated to sexual intercourse’ or ‘habitual to sexual intercourse’ is irrelevant for the purposes of determining whether the ingredients of Section 375 (rape) of the IPC are present in a particular case.”⁴

The court further asserted that it was patriarchal and sexist to assume that a woman could not be believed to have been raped or sexually assaulted simply because of the fact that she was sexually active.

In May 2013, the Supreme Court bench comprising Justice DY Chandrachud and Hima Kohli, in *Lilu Rajesh and Anr v. State of Haryana* held that the two-finger test was violative of a woman's right to privacy and requested the Government to provide improved medical procedures to verify sexual assault.⁵

⁴ Ramkirat Munilal Goud v. The State of Maharashtra (2021) S.C.C. Online Bom 4562 (2021).

⁵ Lillu v. State of Haryana A.I.R. 2013 S.C. 1784 (India) (2013).

The Court further asserted that rape survivors should have the right to legal action that does not cause them physical or mental harm and uphold their dignity. Invoking the International Covenant on Economic, Social, and Cultural Rights 1966 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 legal recourse that does not re-traumatise them or violate their physical or mental integrity and dignity.

On December 23, 2012 a three-member Committee headed by Justice J.S. Verma, former Chief Justice of the Supreme Court, was constituted after the infamous Nirbhaya Gang Rape case took place on 16th December 2012 to recommend amendments to the Criminal Law so as to provide quicker trial and enhanced punishment for criminals accused of committing sexual assault against women.⁶

The report submitted by this committee in January 2013 recommended the discontinuation of the two-finger test which is conducted to determine the laxity of the vaginal muscles. The report mentioned that "It is crucial to underscore that the size of the vaginal introitus has no bearing on a case of sexual assault and therefore a test to ascertain the laxity of the vaginal muscles which is commonly referred to as the two-finger test must not be conducted. On the basis of this test observations/ conclusions such as 'habituated to sexual intercourse' should not be made and this is forbidden by law."

In March 2014, India's Ministry of Health issued Guidelines for the care of survivors/victims of sexual violence. The Guidelines specifically state that 'Per-Vaginum examination commonly referred to by laypersons as '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.

Per vaginum examination can be done only in adult women when medically indicated and an unroken hymen doesn't necessarily rule out the chances of sexual violence.⁷

Even after passing the guidelines for banning the two-finger test, on April 20th, 2014, just after the Delhi Gang Rape Case where a Dalit girl was gang raped and thrown out of a moving bus

⁶ Justice Verma Committee report (2024) PRS Legislative Research. Available at: <https://prsindia.org/policy/report-summarries/justice-verma-committee-report-summary> (Accessed: 19 May 2024).

⁷ Guidelines and protocols medico legal care for survivors victims of sexual violence: Ministry of Health and Family Welfare: GOI (no date) Available at: <https://main.mohfw.gov.in/reports/guidelines-and-protocols-medico-legal-care-survivors-victims-sexual-violence> (Accessed: 19 May 2024).

in Singrauli. Having conducted the two-finger test, the Madhya Pradesh police concluded and gave the statement in press media that the girl was habituated to sexual activity. This is a general assumption that the women habituated to sex may also lie about sexual assault.

Similarly in the 2021 IAF rape case wherein a woman IAF officer in Coimbatore was raped by her colleague, was also subjected to the intrusive two-finger test by the doctors of the Indian Air Force.⁸

A Human Rights Watch report of 2017, noted that by that year only nine states had adopted the guidelines & that even states that have adopted the guidelines, do not always follow them.⁹

A division bench of the Gujarat High Court, in January 2020, observed that the practice was "archaic and outdated" & violated a survivor's right to privacy, physical and mental integrity and dignity.¹⁰

On October 31, 2022, the Supreme Court of India (SC) in the State of Jharkhand vs Shailendra Kumar Rai reiterated its opposition to the use of the 'two-finger test' in rape and sexual assault cases. The bench also directed the Union and state governments to make efforts to remove mentions of the test from the medical curriculum and stated that the doctors found to be conducting the test would be held guilty of misconduct.¹¹

While the Supreme Court of India has issued guidelines emphasizing the need to avoid such invasive tests, the Two-Finger Test continues to be in use. The lack of a categorical ban has allowed its persistence in certain regions, contributing to a fragmented legal response. The absence of a unified stance across states compounds the challenges faced by survivors seeking justice.

However, in recent years, there has been a growing awareness and pushback against the Two-Finger Test in India. Legal professionals, activists, and medical practitioners have joined forces

⁸ Ray, M. (2021) 'IAF officer alleges she was subjected to two-finger test. What does Supreme Court say?', The Hindustan Times, 1 October. https://www.hindustantimes.com/india-news/iaf-officer-alleges-she-was-subjected-to-two-finger-test-what-does-sc-say-101633075988623-amp.html#amp_tf=From%20%251%24s&aoh=17128288853204&referrer=https%3A%2F%2Fwww.google.com

⁹ Bagcchi, S. (2017) 'Doctors in India still carry out "Two finger test" on rape victims', *BMJ* [Preprint]. doi:10.1136/bmj.j5337. <https://www.hrw.org/news/2017/11/09/doctors-india-continue-traumatise-rape-survivors-two-finger-test#:~:text=However%2C%20Human%20Rights%20Watch%20has,them%20to%20be%20further%20traumatized>

¹⁰ State of Gujarat vs Rameshchandra Ramabhai Panchal (2020).

¹¹ State of Jharkhand v Shailendra Kumar Rai (SCC Online SC 1494)

to challenge its use. Public discourse on the matter has gained momentum, prompting a reevaluation of the test's place in the pursuit of justice.

THE ROAD AHEAD

Legal reforms: Efforts have been made to eliminate the Two-Finger Test from legal proceedings. In 2013, the Ministry of Health and Family Welfare issued guidelines expressly prohibiting the use of the test, emphasizing the need for sensitivity and respect for survivors.

Awareness and Sensitization: Public awareness campaigns and training for law enforcement and medical professionals are crucial to eliminate the ingrained reliance on the Two-Finger Test. A shift in societal attitudes toward survivors of sexual assault is essential for meaningful reform.

Use of Modern Forensic Techniques: Emphasizing the use of modern and scientifically sound forensic techniques is imperative. Advanced methods such as DNA analysis and forensic evidence collection offer more accurate and reliable information without compromising the survivor's dignity.

“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 and this casts a black stain on the justice that the survivor hopes to receive.

To eradicate the black stain cast by the Two-Finger Test on India's justice delivery system, a multipronged approach is necessary. Legislative measures must be enacted to explicitly prohibit the test, accompanied by comprehensive training for medical professionals and law enforcement agencies. Public awareness campaigns can contribute to shifting societal attitudes, fostering a more supportive environment for survivors.

CONCLUSION

The Two-Finger Test stands as a stark reminder of the challenges faced by survivors of sexual assault in India. Its continued use perpetuates harmful narratives, hindering the path to justice. As the nation strives for a more equitable and compassionate legal system, the abandonment

of this archaic practice is not just a legal imperative but a moral one, signaling a commitment to the principles of dignity, justice, and human rights.

Eliminating this test from legal proceedings is a crucial step towards ensuring justice, upholding human rights, and fostering an environment where survivors feel supported rather than stigmatized. The ongoing efforts to reform legal practices must be sustained, with a collective commitment to building a justice system that truly serves all citizens.

The government must now act properly and definitively to institutionalize the SC's findings to ensure that irrelevant two-finger tests are no longer used and that any medical professional found to have conducted such tests is formally held accountable.

