

UNMASKING THE CONCLUSION OF ARTICLE 21: INVESTIGATING THE DIVISIVE TWO-FINGER TEST

Harshita Jain *

INTRODUCTION

The Two-Finger Test, a long-standing medical procedure, has sparked significant controversy within the domain of forensic medicine, particularly in cases involving allegations of rape and sexual assault. This practice entails the insertion of two fingers by a medical professional into a woman's vagina to determine her virginity and sexual history. Its widespread criticism stems from its perceived inhumane and dehumanizing nature. Medical experts, human rights advocates, and legal scholars have questioned its legitimacy and validity, contending that it reflects outdated patriarchal norms that perpetuate victim-blaming and social stigma.

Article 21 of the Indian Constitution, which guarantees the right to life and personal liberty, has played a pivotal role in legal challenges to the Two-Finger Test. Its continued use is viewed as a violation of this fundamental right, subjecting sexual assault survivors to additional trauma, shame, and exploitation. In recent years, a movement to eliminate the Two-Finger Test has gained momentum, with numerous countries and jurisdictions issuing guidelines and mandates to prohibit the practice. Esteemed medical organizations including the World Health Organization and the International Federation of Gynecology and Obstetrics have condemned the test, citing its lack of scientific foundation and potential to inflict physical and emotional harm. The discourse on the Demise of Article 21: A Discourse on the Gruesome Two-Finger Test presents a comprehensive examination of the test's historical context, impact on sexual assault survivors, and the legal and societal obstacles leading to its eventual eradication. Through a nuanced analysis of the intersections between law, medicine, and society, this discourse aims to contribute to the ongoing discourse on the rights and dignity of women and marginalized communities. Despite the Supreme Court ruling that the two-finger test is inhumane and should be banned, it is still being used to assess whether a victim of rape or sexual assault is accustomed to such activities, determine laxity, and indicate the victim's sexual history. Even after the Delhi gang rape case in

*BA LLB, SECOND YEAR, AMITY UNIVERSITY, NOIDA.

December 2013, the Justice Verma Committee recommended discontinuing the two-finger test, stating that it is akin to another assault on the victim, yet the test is still in use. The test violates the victim's right to privacy under Article 21 of the Indian Constitution and is useless in determining the credibility of the victim's claims. This practice highlights the need for changes in laws and forensic procedures related to sexual assault, as well as addressing loopholes in medical education that indirectly reinforce discriminatory practices against women's bodies. It is crucial to prioritize survivors' health, dignity, and consent.

WHAT IS THE TWO-FINGER TEST?

The two-finger test, also known as the virginity test, is a controversial practice involving the insertion of two fingers into a woman's vaginal canal to assess the flexibility of her muscles and examine the integrity of her hymen.¹ This test has been used to "confirm" the claims of rape survivors, but it is widely criticized for its lack of scientific basis and the lack of relevance to determining rape claims. Instead, the recommended approach for a woman who has experienced sexual assault is to undergo a comprehensive medical evaluation focused on her overall health and medical needs. According to a guidebook published by the World Health Organization (WHO),² virginity testing has no place in the treatment of sexual assault victims.

The two-finger test is an unscientific method utilized to assess a woman's virginity by examining the intactness of the hymen and the laxity of the vagina. The two-finger test sometimes referred to as the per-vaginal examination in medical parlance, entails looking into her vagina to see if she has developed a sexual behavior habit.

The practice of inserting two fingers in the vaginal muscles and examining the hymen to check if she is habituated to sexual intercourse.

According to medical experts, the two-finger test is unscientific and does not provide any definite information. The hymen is to blame for this, and laxity in the vaginal opening can happen for non-sexual purposes as well. Additionally, a claim of rape is unaffected by such knowledge. Defense attorneys in rape trials in India frequently use the results of this test,

¹ DNA web team, "What is the 'two-finger test' for rape survivors? Why was it banned by Supreme Court?", (Nov 07, 2022), {<https://www.dnaindia.com/explainer/report-dna-explainer-what-is-the-two-finger-test-for-rape-survivors-why-was-it-banned-by-supreme-court-2997531>}

² No to two-finger test, (02-11-2022), {<https://indianexpress.com/article/opinion/editorials/no-to-two-finger-tes8243541/>}

which is widely used there, to assess the sexual history and character of a female survivor. It is possible to argue that the lady gave her agreement to sexual relations, which would disprove allegations of rape if the practitioner finds evidence of previous sexual contact. It is assumed that women may fabricate allegations of rape, which is why the two-finger test is used as required by court orders. This assumption puts survivors in a hostile environment and requires them to carry the emotional and physical weight of proving the cases. In addition, it makes the possible consequences of coming forward with information about rape worse. These consequences include fear of violence and retaliation from partners, as well as rejection and mockery from their families and communities.

WILL WOMEN WHO TESTIFY ABOUT BEING RAPED NEED TO BE RE-RAPED?

The Supreme Court, on October 31, strongly criticized the two-finger test, a discredited practice still being used on sexual assault victims to determine their sexual history. Justices DY Chandrachud and Hima Kohli emphasized that the test perpetuates patriarchal and sexist attitudes, and violates medical ethics. They condemned the test as intrusive, unscientific, and distressing for survivors,³ further exacerbating their suffering. This ruling acknowledges the need to protect the dignity and well-being of survivors of sexual violence. Even though this test does not play any role in the testimony of women who have been raped.

THE CURRICULUM OF MEDICAL EDUCATION IN INDIA.

The Bachelor of Medicine and Bachelor of Surgery undergraduate curricula were changed by the National Medical Council in 2019. However, despite the progress made in legal and policy developments for the treatment of sexual assault survivors, it seems to be a case of old practices in a new form. The traditional medical systems have historically aimed to control women's bodies, leading to the development of deeply biased medical knowledge.⁴ An updated set of competencies explicitly acknowledges that "signs of virginity," such as the two-finger test, are unscientific and discriminatory. The ongoing use of this test, despite

³ Sohini Chowdhury, "Supreme Court Bans Two-Finger Test; Says It's Based On Patriarchal Mindset That Sexually Active Women Can't Be Raped", (31 Oct 2022), {<https://www.livelaw.in/top-stories/breaking-supreme-court-bans-two-finger-testsays-its-based-on-patriarchal-mindset-that-sexually-active-woman-cant-be-raped-212806>}

⁴ Mukul Bhowmick, "How insensitive medical education allows the banned two-finger test for rape survivors to persist" (Nov 08, 2022), {<https://scroll.in/article/1036458/the-banned-twofinger-test-continues-because-medical-education-remains-blind-to-its-gender-biases>}

multiple court rulings declaring it illegal, raises concerns about whether these improvements are being implemented in medical schools.

PROBLEMATIC OF TWO-FINGER TEST

In the medical field, it is recognized that the laxity of the vaginal muscle is influenced by an individual's psychological state. In instances where an individual has experienced distress, such as in the case of a survivor of sexual assault, the muscle may exhibit tension. The utilization of such a test aims to assess a woman's level of sexual activity, with the implication that a woman with a history of sexual experiences may be discredited if she claims to have been raped.

From a moral and ethical standpoint, this testing procedure represents a clear infringement upon a woman's privacy and dignity. It subjects her to physical discomfort, further violating her autonomy, particularly in the aftermath of a traumatic experience.

JUDICATURE & TWO-FINGER TEST

The 2012 gangrape and subsequent death of a 22-year-old woman in New Delhi prompted legislative changes aimed at addressing sexual violence against women. In response, the Criminal Law (Amendment) Act of 2013 was enacted to modify Section 53A of the Indian Evidence Act, rendering any material intended to assess the survivor's character or past sexual experiences irrelevant. Furthermore, following the Nirbhaya rape case, the Union Ministry of Health and Family Welfare revised the proforma for the medical examination of rape victims to eliminate the two-finger test.

The Verma Committee, chaired by former CJI JS Verma, recommended the prohibition of the two-finger test soon after the Nirbhaya case in 2012. The committee emphasized that the size of the vaginal introitus is immaterial in a sexual assault case and therefore the two-finger test, aimed at ascertaining the laxity of the vaginal muscles, should not be conducted. The Supreme Court's ruling in May 2013 deemed the two-finger test a violation of a woman's right to privacy and urged the government to provide improved medical procedures to confirm sexual assault.

Subsequently, a Supreme Court bench ruled against presuming consent based on a woman's sexual history, emphasizing that the two-finger test should not lead to such presumptions.

Referring to international covenants and declarations, the Court underscored rape survivors' right to a remedy that respects their privacy and dignity.⁵

Although the Supreme Court banned the two-finger test in 2013, its common usage persists, partly due to its inclusion in medical education syllabi. Defense attorneys often utilize the test to question the victim's character and challenge claims of non-consensual sex, significantly impacting court cases.

In 2014, the Union Ministry of Health and Family Welfare advised against conducting the two-finger test and prohibited comments on a victim's sexual experience or habits, highlighting their irrelevance in cases of sexual violence. Despite the Supreme Court's critique of the test in 2022, citing its violation of medical ethics and potential for misconduct among practitioners, questions remain about the delayed declaration of the test as misconduct and the absence of stringent laws to prohibit its practice. Research indicates that the education system in India plays a role in perpetuating this practice. The Indian Supreme Court expressed concern over the ongoing practice of considering a woman's sexual history in cases related to sexual offenses. The court emphasized that a woman's past sexual conduct should not be a determining factor in establishing the elements outlined in Section 375 of the Indian Penal Code, 1860 within a specific case.

In 2014, the Union Health Ministry released comprehensive guidelines and protocols titled "Guidelines & Protocols Medico-legal Care for Survivors/Victims of Sexual Violence". These guidelines stressed that previous sexual experience should not be relevant to the issue of consent or the quality of consent in cases involving sexual offenses, as per Section 53A of the Indian Evidence Act, 1872.

The guidelines also explicitly addressed the controversial two-finger test, stating that it should not be performed as the size of the vaginal introitus (orifice) is irrelevant in determining sexual violence. Additionally, the guidelines outlined a detailed proforma for medico-legal examinations of survivors/victims of sexual violence, with an emphasis on health providers' compliance.

Despite the clear guidelines, there have been cases where some doctors did not follow the

⁵ Mukul Bhowmick, "How insensitive medical education allows the banned two-finger test for rape survivors to persist" (Nov 08, 2022), <https://scroll.in/article/1036458/the-banned-twofinger-test-continues-because-medical-education-remains-blind-to-its-gender-biases>

instructions. Moreover, the guidelines emphasized the necessity of obtaining the consent of the rape victim or their guardian for any medical examination. However, it was underscored that even without consent, medical treatment should not be denied to the victim. It is important to note that these guidelines are advisory and not legally binding.

OTHER RECENT BAN OF TWO-FINGER TEST

In April of this year, in response to continuing concerns, the Madras High Court took action by directing the state to ban the two-finger test. This test, which has been the subject of controversy, was highlighted as still being conducted, even on minors, despite the Supreme Court's 2013 observations.

Then, in August, the National Medical Commission (NMC), the country's top medical education regulator, made significant changes by modifying the modules for forensic medicine. These changes included revising the guidelines for the two-finger test. Of note, the modified virginity testing module now includes provisions for students to receive training on how to report to the courts the unscientific basis of these tests if the court deems it necessary.

SOCIETY IS NOT YET IN TERMS OF WOMEN'S AGENCY

In a society yet to come to terms with women's agency — economic, sexual, or social — sexual violence is often accompanied by victim shaming, a shift of the culpability of the woman for the transgressions of the perpetrator. Repeatedly, women have been told that boys will be boys, that they were asking for it, and that women ought to have been more careful, more demure, less visible, and less out there.⁶ Medical education in India places a lot of emphasis on treating patients as merely a juxtaposition of pathologies even though the field of medicine is concerned with treating people. Understanding gender as a system of power that affects vulnerabilities, health-seeking behaviors, doctor-patient relationships, and ensuing health outcomes is crucial for clinicians. One of the many gender-biased practices still prevalent in Indian medical colleges is the two-finger test. For a very long time, social scientists and gender specialists have criticized medicine as being androcentric, or male-centered. Incorporating viewpoints from this extensive body of knowledge could be the

⁶ No to two-finger test, (02-11-2022), {<https://indianexpress.com/article/opinion/editorials/no-to-two-finger-test-8243541/>}

solution to getting rid of many gender-blind medical practices in health systems.

CONCLUSION

The recent legal ruling holds significant implications as it specifies that individuals found engaging in a two-finger test on a victim in cases of rape or penetrative sexual assault will be held accountable for misconduct. This addresses the issue of impunity among medical practitioners who persist in conducting this procedure. The recent ruling by the Supreme Court necessitates a revision of medical school curricula to exclude the two-finger test. However, this adaptation may only serve as a temporary solution to the larger challenge of the absence of social perspectives in medical education. The Center for Enquiry into Health and Allied Themes has conducted several training sessions for educators, revealing that medical education excessively prioritizes the biomedical health paradigm at the expense of social realities. The biomedical health paradigm asserts that only medical factors can account for an illness, which is an incomplete perspective. Medical educators should exhibit a willingness to unlearn and acquire knowledge from diverse stakeholders, including social scientists, legal professionals, civil society organizations, and most significantly, the public. Furthermore, the ruling underscores that the two-finger test is predicated upon the erroneous assumption that a sexually active woman cannot be subjected to rape. It explicitly denotes that a woman's sexual history holds no relevancy in ascertaining whether she has been subjected to sexual assault. Consequently, this communicates a clear message that the commonplace practice of impugning survivors' character during trials, particularly through reference to their sexual or relationship history, is no longer acceptable.