

## An End to Two-Finger Testing in Pakistan

- Divyanshi Sharma, student at Amity University, Gwalior

### Abstract

The Two Finger Test is a practice of extreme severity and brings with itself consequences including outraging the modesty of a woman. Grave concerns have been expressed across the globe time and again<sup>1</sup> in order to bring this evil and unnecessary practice to an end which includes the declaration of TFT as unconstitutional and introduction of much needed legal reforms for the same in many countries like India and now in Pakistan too. This article puts light on the gravity of this practice, its impact on human rights and life of a woman, along with the steps taken in order to bring this practice to an end. This article is divided into six parts: part I gives a brief introduction of this topic, part II stresses upon the latest judgement by the Pakistani Supreme Court, declaring this practice, unconstitutional, part III emphasises on the effects on human rights caused due to this practice, part IV brings into picture the deadly impact on the health of a woman, part V consists of all the judgements by the Indian Courts and their viewpoints and part VI highlights the changes in the laws and various other documentations. It also raises a concern and need for the change in the attitude of people and society in order to give actual justice to the entire womanhood.



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<sup>1</sup> XZY, *United Nations agencies call for ban on virginity testing*, World Health Organization (Oct. 17, 2018), [www.who.int/news/item/17-10-2018-united-nations-agencies-call-for-ban-on-virginity-testing](http://www.who.int/news/item/17-10-2018-united-nations-agencies-call-for-ban-on-virginity-testing).

## Recent Developments

The Supreme Court of Pakistan, on January 4, 2021, while deciding the case *Atif Zareef v The State*, held the “Two Finger Test” or the TFT, unconstitutional and illegal stating it to be an affront to the dignity of the survivor of assault with no forensic value. Justice Ayesha Malik, in a 30-page judgement held the virginity test contradictory to Article 4<sup>2</sup> and Article 19<sup>3</sup> of the Pakistani Constitution, which are related to the dignity and security of the person. It was also held that this test was in violation of Article 25<sup>4</sup> of the Pakistani Constitution as it was based on gender.

### What is the Virginity Test?

The Virginity Test, also known as the Two Finger Test is a physical examination of the woman’s hymen for determining the laxity of her vagina by inserting two fingers into her private part. It is used to determine whether a woman has been raped or not. It is also used to examine her past sexual activities. Hymen is basically a thin piece of skin that partially covers the entrance to the vagina. Doctors and medical practitioners have never assumed that a woman’s hymen can only be torn after a sexual intercourse. A woman’s hymen can also be broken due to the involvement in activities like cycling, swimming, horse riding etc. Science has quashed the myth of an intact hymen being a proof of a woman’s virginity.

### A Ray of Hope for Survivors- Pakistan’s Latest Judgment

The Supreme Court of Pakistan in the case *Atif Zareef v The State*<sup>5</sup> ruled that giving statements such as ‘vagina is able to take two fingers easily’ or ‘the woman has ruptured hymen’ is prima facie against the dignity of the woman and violates Article 4(2) (a)<sup>6</sup> of Pakistani Constitution which stipulates that ‘*no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law*’. The court also mentioned that expression like ‘habituated to sex’ is a direct target towards woman’s character specifying her to be of a loose and

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<sup>2</sup> Pakistan Const. art. 4.

<sup>3</sup> Pakistan Const. art. 19.

<sup>4</sup> Pakistan Const. art. 25.

<sup>5</sup> Pooja Sahoo, *Atif Zareef v. The State*, Truth and Youth Case Briefs (Jun. 18, 2021), [www.casebriefs.truthandyouth.com/2021/06/18/atif-zareef-v-the-state](http://www.casebriefs.truthandyouth.com/2021/06/18/atif-zareef-v-the-state).

<sup>6</sup> Pakistan Const. art. 4(2)(a).

immoral one. The court further made a comment that the injury report in the case was riddled with sexism and questioned the survivor's character. Moreover, the hon'ble court said that the medical evidence collected during the trial should only be done to determine whether the victim was raped or not and not decide her sexual history.

According to Section 12(3)<sup>7</sup> of the Punjab Witness Protection Act, 2018 and Article 146<sup>8</sup> of the Qanun-e-Shariat Order, 1984, questions on the victim's sexual history along with the accused or any other person present during the cross-examination are prohibited. Pakistan, also, being a signatory to the International Covenant on Civil and Political Rights, 1976, is legally bound under Article 17<sup>9</sup> to protect a survivor against baseless interference into her private life. Similar arguments can also be derived from Paragraph 20 of the CCPR General Comment No.28 under Article 3<sup>10</sup> (equal rights of men and women) which affirms that the sexual history of the victim shouldn't be taken into consideration while deciding her legal rights. Earlier, The Lahore High Court, citing Indian precedent from the *State of Gujarat v. Rameshchandra Panchal*<sup>11</sup>, ruled that two-finger test in cases of sexual assault as unconstitutional. Hence, The Supreme Court, keeping in mind the international human rights obligations, declared the two-finger test unconstitutional and illegal.

### **Gross Contravention with Human Rights**

The Two Finger Test or The Virginitiy Test is a clear assassination of Human Rights. Virginitiy testing, most of the time, is done without consent, and this can be classified as a type of legalised sexual assault when looked in from the lens of human rights<sup>12</sup>. It is a breach of girls' and women's

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<sup>7</sup> The Punjab Witness Protection Act, 2018, § 12(3).

<sup>8</sup> The Qanun-e-Shariat Order, 1984, Art. 146.

<sup>9</sup> The International Covenant on Civil and Political Rights, 1976, Art. 17, [www.ohchr.org/en/professionalinterest/pages/ccpr.aspx](http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx).

<sup>10</sup> The Center for Civil and Political Rights, Art. 3, ¶ 20, General Comment no. 28. [www.refworld.org/docid/45139c9b4.html](http://www.refworld.org/docid/45139c9b4.html).

<sup>11</sup> *The State of Gujarat v. Rameshchandra Ramabhai Panchal*, 2020 SCC Online Guj 114.

<sup>12</sup> Sondra S Crosby, Nicolette Oleng, Muriel M Volpellier and Ranit Mishori, *Virginitiy testing: recommendations for primary care physicians in Europe and North America*, BMJ Global Health, [www.gh.bmj.com/content/5/1/e002057](http://www.gh.bmj.com/content/5/1/e002057).

rights that can have a negative impact on their physical, psychological, and social well-being. Reports have proved these tests to have a psychological and social impact<sup>13</sup>.

Virginity testing is a violation of the right to be free from torture. According to The 1945 UN Charter<sup>14</sup>, it is a non-derogable human right of all women and girls not to be subjected to torture regardless of who the torturers are—State or non-State actors. And if so tragically tortured they must have legal access to just law that permits them to speak their truth of having suffered this specific criminal human right violation.

According to the UN Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power 1985, survivors of sexual assault should be treated with compassion, respecting their dignity and modesty. They are also entitled to legal aid. The United Nations have also stated that the virginity tests have been recorded in at least twenty countries worldwide and call the practice to be painful, humiliating and horrifying.

After undergoing virginity testing, several women and girls have been killed or died by suicide in the sake of "honour"<sup>15</sup>. Because school-aged children have been exposed to forced tests, virginity testing breaches the rights of minors, a population that is particularly vulnerable. All children between the ages of six and fourteen are entitled to free and compulsory education under Article 21A. The rape victims were not allowed to continue their education.

The prohibition against "cruel, inhuman, or degrading treatment" under Article 7<sup>16</sup> of the International Covenant on Civil and Political Rights (ICCPR) and article 16<sup>17</sup> of the Convention against Torture, both of which many countries have ratified, has been recognised internationally as a violation of human rights<sup>18</sup>. According to the World Health Organisation, the virginity test is not

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<sup>13</sup> Rose McKeon Olson & Claudia García-Moreno, *Virginity testing: a systematic review*, NCBI, [www.ncbi.nlm.nih.gov/pmc/articles/PMC5437416](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC5437416).

<sup>14</sup> United Nations, *Charter of the United Nations*, Oct. 24, 1945, 1 UNTS XVI, [www.refworld.org/docid/3ae6b3930.html](http://www.refworld.org/docid/3ae6b3930.html).

<sup>15</sup> Kelly Couturier, *Suicide Attempts Fuel Virginity Test Debate*, Washington Post (Jan. 27, 1998), [www.washingtonpost.com/archive/politics/1998/01/27/suicide-attempts-fuel-virginity-test-debate/b9267ef1-6dc0-4799-aab2-d6ea3bcb48e1](http://www.washingtonpost.com/archive/politics/1998/01/27/suicide-attempts-fuel-virginity-test-debate/b9267ef1-6dc0-4799-aab2-d6ea3bcb48e1).

<sup>16</sup> International Covenant on Civil and Political Rights, Art. 7, [www.ohchr.org/en/professionalinterest/pages/cat.aspx](http://www.ohchr.org/en/professionalinterest/pages/cat.aspx).

<sup>17</sup> Convention against Torture, Art. 16, [www.ohchr.org/en/professionalinterest/pages/cat.aspx](http://www.ohchr.org/en/professionalinterest/pages/cat.aspx).

<sup>18</sup> UN: WHO condemns virginity test, Human Rights Watch (Dec. 1, 2014, 9.25 p.m.), [www.hrw.org/news/2014/12/02/un-who-condemns-virginity-tests](http://www.hrw.org/news/2014/12/02/un-who-condemns-virginity-tests).

only the violation of human rights but also an additional cause to the pain<sup>19</sup>, leading to re-experience the sexual violence. Performing such medical tests violates several human rights including the fundamental principle in medicine to 'do no harm'.

### Views of Indian Courts regarding TFT Ban

While deciding the case of *Lilu @ Rajesh and anr v. State of Haryana*<sup>20</sup> in 2013, the Supreme Court held that two finger test is unconstitutional as it violates the right to privacy of rape survivors. It affects the mental integrity and dignity of women and cannot give presumption of consent if a woman does not pass the two-finger test. No woman can be subjected to this test unless she consents. In cases of assault, medical evidence is not conclusive proof as here the question is about consent<sup>21</sup>. The Supreme Court declared in the case of *State of Karnataka vs. Krishnappa*<sup>22</sup> that "sexual assault, apart from being a demeaning act, is an illegal breach of a female's right to privacy and sanctity."

The Punjab and Haryana High court ruled in *Surajit Singh Thind vs Kanwaljit Kaur*<sup>23</sup> that permitting medical testing of a woman for her virginity is a breach of her right to privacy and personal liberty guaranteed by Article 21 of the Constitution. The court ruled that permitting a woman's virginity to be medically examined violates her privacy enshrined in the Indian Constitution. Orders of such a nature would direct an inhumane investigation against a female who is already vulnerable.

In the *State of Gujarat v. Rameshchandra Rambhai Panchal*<sup>24</sup> The Gujarat High Court held that the two-finger test violates a right that must be guaranteed to the victim at any cost that is the right to privacy, mental and physical dignity and integrity. In *Mr. Aseem Sawhney vs Mohd.*

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<sup>19</sup> *supra* note 1.

<sup>20</sup> (2013) 14 SCC 643.

<sup>21</sup> Vageshwari Deswa, *Virginity Test: Why the two finger test is unscientific, illogical and illegal*, The Times of India (May 9, 2019, 10:00 pm),

[www.timesofindia.indiatimes.com/blogs/legally-speaking/virginity-test-why-the-two-finger-test-is-unscientific-illogical-and-illegal](http://www.timesofindia.indiatimes.com/blogs/legally-speaking/virginity-test-why-the-two-finger-test-is-unscientific-illogical-and-illegal).

<sup>22</sup> 1993 (4) KarLJ 680.

<sup>23</sup> AIR 2003 P H 353.

<sup>24</sup> 2020 SCC OnLine Guj 114.

*Imran Khan*<sup>25</sup>, Jammu & Kashmir High Court held that doctors must resist from doing two-finger test on survivor of assault, Courts must be responsible and sensitive while dealing with rape cases. They should not humiliate or embarrass the survivor of assault. They should not disclose the name of the victim. States should ensure their safety and avoid arbitrary interference with their privacy.

Virginity is a social, cultural, and religious construct that represents gender inequality against women and girls<sup>26</sup>. The Indian Constitution protects life with respect for all citizens by granting a "right to life" to every person. This right essentially implies that every citizen avails the right to life, which includes not only the right to live as an animal but also the right to be treated with dignity.

### **Are Changes in Documentation Enough?**

Virginity tests like the two-finger test in Pakistan were just another facet to the various ways in which survivors of assault are deterred from reaching out to or facing the court. Sensitization of doctors in hospitals is required so that survivors do not face comments highlighting the need for marks on a survivor's body to support her claims of being raped in their opinion<sup>27</sup>. Doctors who deny treatment to a survivor of rape are answerable under Section 166B of the IPC but the same goes unreported in most cases out of shame. This fallacy in implementation of laws or guidelines is evident almost everywhere. Reports show that hardly 9 states<sup>28</sup> have fulfilled the adoption of the guidelines released in 2014 on medical care for survivors of assault. Although it can be argued that many rape cases reported are false accusations<sup>29</sup> and this makes it very important to test the credibility of the reporter, one must also not forget that almost 99 % of the cases that occur remain

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<sup>25</sup> *Mr. Aseem Sawhney vs Mohd. Imran Khan*, SLA No.38/2018.

<sup>26</sup> *Maneka Gandhi v Union of India*, 1978 AIR 579 SCR (2) 261.

<sup>27</sup> *Doctors in India Continue to Traumatise Rape Survivors with the Two-Finger Test*, Human Rights Watch (Nov. 9, 2017, 11:51 a.m.), [www.hrw.org/news/2017/11/09/doctors-india-continue-traumatise-rape-survivors-two-finger-test](http://www.hrw.org/news/2017/11/09/doctors-india-continue-traumatise-rape-survivors-two-finger-test).

<sup>28</sup> Jayshree Bajoria, *Doctors in India Continue to Traumatise Rape Survivors with the Two-Finger Test*, Scroll (Nov. 9, 2017, 7: 30 a.m.),

[www.scroll.in/article/857169/doctors-in-india-continue-to-traumatise-rape-survivors-with-the-two-finger-test](http://www.scroll.in/article/857169/doctors-in-india-continue-to-traumatise-rape-survivors-with-the-two-finger-test).

<sup>29</sup> Joanna Jolly, *Does India have a problem with false rape claims?*, BBC (Feb. 8, 2017), [www.bbc.com/news/magazine-38796457](http://www.bbc.com/news/magazine-38796457).

unreported<sup>30</sup>. Under such circumstances, a very inclusive environment for a survivor of assault is required. Women all over the world have to face trials which make them feel like they have been the sole reason for the crime against them<sup>31</sup>. Courts have not shied away from labelling the behaviour of a rape victim as promiscuous<sup>32</sup> and granted bail to three men convicted of gang rape. Hilarious events like directing molesters to do social work and apologise to the 15-year-old victim classifying their act to be trivial have also occurred<sup>33</sup>. It has been rightfully expressed in the Pakistani judgment that:

*“Change can only be brought about when the people responsible for the change understand and acknowledge the reasons for changing old practices which no longer find any justification. Merely documenting change and not implementing change does not mean that the Federation or the Provincial Government have acted in accordance with the Constitution, the law and international obligations. Hence a concerted effort must be made so as to ensure that virginity tests are stopped in totality”.*<sup>34</sup>

The first step towards ensuring a protection of the sentiments of a survivor of assault during court hearings, in the opinion of the author, can be mandating the presence of at least one woman judge in the panel of judges. A guide to etiquette and court mannerisms to keep in mind can be implemented while deciding for survivors of assault. Judges need to express their understanding of the facts of the case as to whether the facts seem unconvincing or the report seems to have a different motive in their opinion but should refrain from passing remarks on the nature of the victim involved, entailed to the evaluation of facts. In numerous cases where reports do not reach the police station fearing the power of a rapist, a procedure to safeguard the victim as well as the

<sup>30</sup> Prमित Bhattacharya, *99% cases of sexual assaults go unreported, govt data shows*, Live Mint (Apr. 24, 2018, 1:30 pm), [www.livemint.com/Politics/AV3sIKoEBAGZozALMX8THK/99-cases-of-sexual-assaults-go-unreported-govt-data-shows.html](http://www.livemint.com/Politics/AV3sIKoEBAGZozALMX8THK/99-cases-of-sexual-assaults-go-unreported-govt-data-shows.html).

<sup>31</sup> Loulla-Mae Eleftheriou-Smith, *Rape victims facing 'humiliating' questions about clothing and sexual history during trials, MP reveals*, Independent (Feb 8, 2017), [www.independent.co.uk/news/uk/crime/rape-sexual-history-assault-cross-examine-trial-court-voices4victims-plaid-cy-mru-mp-liz-savile-a7570286.html](http://www.independent.co.uk/news/uk/crime/rape-sexual-history-assault-cross-examine-trial-court-voices4victims-plaid-cy-mru-mp-liz-savile-a7570286.html).

<sup>32</sup> *India court blames 'promiscuous' rape survivor*, BBC (Sep. 26, 2017), [www.bbc.com/news/world-asia-india-41383459](http://www.bbc.com/news/world-asia-india-41383459).

<sup>33</sup> *Darbhanga molestation case: Court tells accused to apologise to girl for 15 days*, ANI (Dec. 3, 2019), [www.aninews.in/news/national/general-news/darbhanga-molestation-case-court-tells-accused-to-apologise-to-girl-for-15-days20191203234631](http://www.aninews.in/news/national/general-news/darbhanga-molestation-case-court-tells-accused-to-apologise-to-girl-for-15-days20191203234631).

<sup>34</sup> Deswa, *supra* note 19.

family is required. This can be done by an integrated working of the police in the area with the representatives of the State Women Rights Commission in the area through a procedure so that original complaints are not lost or altered.

