Regressive, Sexist, and Unconstitutional

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On 31 October 2022, a two judge bench of the Indian Supreme Court delivered a crucial order, reiterating its ban on the so called "two finger test". The continued usage of the test, the Court stated in *State of Jharkhand v. Shailendra Kumar Rai*, is professional misconduct. To enforce the ban of this practice against survivors of sexual violence the bench issued a slew of directions. In this post, I discuss the impact of this order on the constitutional rights of survivors of sexual violence. While the Court's judgment is a progressive one, it might not have the desired effect, namely the complete ban on the conduct of the 'two finger test'.

Unconstitutionality of the 'two finger test'

The 'two finger test' is a gynaecological examination wherein the medical professional inserts two fingers into the survivor's vaginal canal to study whether there is a laxity of vaginal muscles. The Committee on Amendments to Criminal Law headed by Justice Verma in its report observed that this test is conducted in order to determine the distensibility of the hymen and is used as a basis for making observations or drawing conclusions regarding the past sexual conduct of the survivor. The report highlighted that apart from being scientifically inaccurate the observations or conclusions drawn from the test are also in contravention of the law. Adding section 53A to the Indian Evidence Act the legislature decided in 2013 that evidence pertaining to previous sexual experience of the survivor will not be treated as evidence in certain cases

In 2013, the Supreme Court of India held in *Lillu v. State of Haryana* that both the application and interpretation of the 'two finger test' violates the right to privacy, physical and mental integrity and the dignity of the survivor. The Court also observed that survivors of sexual violence should not be subjected to legal procedures that retraumatise them and that medical procedures must respect their right to consent. On this point, the bench placed reliance on the International Covenant on Economic, Social and Cultural Rights and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Likewise, subsequent decisions of the Supreme Court and various High Courts in India reiterated the unconstitutionality of the test.

A step in the right direction

However, even in the aftermath of the 2013 judgment survivors of sexual violence still had to undergo the test. Legal proceedings pertaining to sexual violence and in matrimonial disputes kept relying on the test since there was a lack of legislative effort to pass effective laws that penalised the conduct of the test. There was also failure on the part of certain medical schools to update their course curriculum and to exclude textbooks that advocate for the adoption of the test while examining survivors of sexual violence. The Ministry of Health and Family Welfare issued guidelines on 'medico-legal care for survivor or victims of sexual violence' in 2014 and proscribed the test from being administered on victims/survivors of sexual violence. But since guidelines are not legally binding and there was negligible effort by many state governments to implement it, the ground reality remained unchanged. Some courts also continued to place reliance on the test while adjudicating on cases involving sexual violence.

As Vrinda Grover, a senior human rights lawyer, has pointed out, survivors are still mechanically subjected to this invasive examination. She adds that in certain instances where the survivors have refused to undergo the test, the medico legal certificates record such a refusal – which is then used against the survivor in the trial. As Neetika Vishwanathan has observed in her research on rape trials in Lucknow, the format of medico-legal certificates have changed

following the passage of the Criminal Law (Amendment) Act, 2013, but the invasive test was still administered.

This continued use of the test was the reason for the Supreme Court of India to reiterate its stance on the test, this time with much more vigour however. While setting aside an acquittal awarded to a person accused of rape and murder by the High Court the Supreme Court recorded that the 'two-finger test' had been conducted on the survivor. Deprecating the test, the Court condemned it as one that lacks any scientific basis and is an affront to the dignity of a woman. In a very pertinent observation, the court states that the test is based on the incorrect and disturbing presumption that a woman who is sexually active cannot be raped and labels it 'regressive and sexist'. The court then proceeds to issue directions with an aim to prevent the future use of this test. First, the court ordered the dissemination of information about guidelines issued by the Ministry of Health and Family Welfare to hospitals across the country, and that medical professionals should be sensitised. Second, the court directed that the curriculum in medical colleges has to be reviewed or revised in a manner that it does not authorise the 'two-finger test' to be conducted on survivors of sexual violence.

The bench then takes a significant step forward by holding that anyone conducting the 'two-finger test' on survivors of sexual violence shall be 'guilty of misconduct'. This distinguishes the judgment from those previously delivered by Indian courts as it deters medical professionals from conducting the invasive test due to fear of adverse consequences. However, it is unclear whether the term 'guilty of misconduct' used in this judgment would necessarily mean that the medical professional who performs the test will be charged with professional misconduct.

Apprehensions and the harsh reality

Yet, even though the order by the Supreme Court is a progressive one, it also has shortcomings. While the court cracks down on medical professionals who conduct the 'two-finger test', it fails to consider the role of the courts who continue to place reliance on the test in certain cases involving sexual violence. Some courts still rely on certain textbooks on medical jurisprudence which link the physical attributes of a woman's genitalia, such as the elasticity of her vagina and the condition of her hymen, to her sexual history. For example, the 27th edition of Modi's textbook on medical jurisprudence still contains a segment on the 'possible signs of virginity' in a woman's body (though it has retraced controversial remarks advocating the relevance of the 'two-finger test' in cases involving sexual violence contained in earlier editions of the book due to criticism). Courts extensively relied upon earlier editions of this textbook while handing down verdicts in criminal trials involving sexual violence as noted by Mrinal Satish in his book 'Discretion, Discrimination and the Rule of Law'. Apart from revising medical textbooks and curriculum it is thus also important that courts reconsider the reliance placed on those medical jurisprudence textbooks which reinforce harmful stereotypes.

The Supreme Court also didn't issue directions to prevent the subordinate judiciary from asking women to undergo the test in legal trials. And finally, the order also restricts itself to penalising the practitioner only if the invasive test is administered on survivors of sexual violence, disregarding the fact that the test is also practiced and materially relied upon in certain other legal proceedings arising out of matrimonial disputes.

Conclusion

Despite these shortcomings the judgment is progressive and undeniably consequential in restricting the conduct of the 'two-finger test'. It also serves as a reminder that the benefit of constitutional freedoms and progressive realisation of rights are reaped only when supported by administrative or judicial efforts to enable effective implementation.

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