



# Virginity Test is Unconstitutional: An Analysis Based on Sr Sephy v. CBI & Ors.

**Biju Antony, Suranya S Kumar**

(Asst. Professor, BSOLS, Choondy, Kerala;

Research Scholar, JJT University, Rajasthan

(Asst. Professor, BSOLS, Choondy, Kerala;

Research Scholar, JJT University, Rajasthan

## Abstract

Fundamental rights are the rights that are innate in a human being and accepted by the international law and guaranteed by the constitution of India. The inherited rights may be restricted but it should be through procedure of law and the procedure must be fair, reasonable and just. Though it can be limited through the process of law privacy and dignified life is guaranteed through every human being in the territory of India through article 21 of the Indian Constitution. Indian criminal jurisprudence does not give legal validity to polygraph test while narco analysis test and virginity tests are considered to be unconstitutional since narco analysis violates rights to privacy and virginity test invades rights to dignified life. In the case Sr Sephy v. CBI & Ors the constitutional court of Delhi made the judgment that the test of hymn of a woman to prove her virginity is unconstitutional, inhuman, abhorrent and barbarism. The research article is a dogmatic study focusing and analyzing the verdict of Sr Sephy v. CBI & Ors. The research article is prepared with primary sources of the precedents of the Constitutional Courts of India.

**Key Words:** Virginity tests, Hymen test, Narco analysis, Human Rights, Constitutional validity, dignified life, article 21, two finger test, fundamental rights, Sr Sephy v. CBI & Ors

## INTRODUCTION

Human rights are the rights those which are inherently received by man as a human being on the planet. It is not a right that received by the copiousness of any state or sovereign. It is inherited without any distinction or discretion of cast, creed, religion, origin, sex or nationality. It is a right given to an individual to lead worth living with dignity as a human being. It is the right that is accepted in international law and the constitution of India for leading a self-esteemed life wherever a person be. Virginity test and two finger tests are barbaric which intrinsically violates the fundamental rights of a person. The tests once again victimize the victim and tear away all womanhood dignity that's enshrined in the constitution of India. The Delhi HC reiterated with strong verdict in Sr Sephy v. CBI & Ors that the tests are totally inhuman, barbaric and tatters away the vision of the Constitution of India and International law to barbaric age.

## BARBARISM OF VIRGINITY TESTS: INDIAN PRECEDENTS

In Lillu v. State of Hariyana the SC recapped that virginity test is inhuman and molesting the dignity of women where a rape victim who had to undergo "two finger test" whereafter the medical practitioner reported that there is only possibility of rape since the victim being habituated to sexual intercourse. In this case the SC of India categorically said that two finger test is barbarism and violative to the fundamental rights enshrined by the constitution of India since the mental and physical integrity and dignity of the person is tarnished to the fullest ebb. The test would not retraumatize but victimizes again the victim so any such test conducted should be with perfect consent and only in the way in which it does not tamper the self-respect of the victim or else the "interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent" (Chauhan & Kalifulla, 2011).

In **Re: Assessment of The Criminal Justice System in Response to Sexual Offences** the SC of India made the enquiry to states regarding passing of information about the status of the “two finger test” which the medical practitioners have stopped (S A Bobde CJI, 2019). In **State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai** case the court reiterated that prevaginal test and two finger tests must not be conducted if any one violating the verdict of court that would be violating the order of the court and the constitutional provisions of the country (Justice Dr. Chandrachud, 2022). In additions to the precedents the Ministry of Health and Family Welfare has issued clear instructions regarding sexual offences. In the instruction it is clearly stated that *per-vaginum* tests should not be conducted since it fails to establish sexual offences and the status of hymen. Intact hymen or torn hymen are not sufficed to proof sexual violations (Ministry of Health and Family Welfare, 2014).

The verdict of the court continued in **State of Gujarat v. Rameshchandra Ramabhai Panchal** in which the apex court categorically reiterated again that virginity test and two finger tests are unconstitutional, unscientific, non-evidentiary and violating the dignified life and privacy of the victim even done with the consent of the victim (J.B.PARDIWALA, 2020). In this case the court also quote two international treaties 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 to remind that India is part of these international covenant and the country has the obligation to observe the covenants.

In 2022 in **Rajivgandhi v State** the madras division bench has also pointed out and said it is high time to part with the practice of two finger tests are violative of the fundamental rights of victims and damages the physical and mental veracity, privacy and dignity of the rape survive (Subramanian & Kumar, 2022). **The Committee on the Amendments to Criminal Law** submitted its report in the year 2013. In the report the committee has highlighted that the two-finger test is irrelevant and forbidden by law since it does not have any evidentiary value and at the same time defaming and traumatizing the victim (Justice J S Verma, 2013).

#### **INTERNATIONAL CONCEPT OF VIRGINITY TESTS**

Indian is a member of the ‘Convention on the Elimination of All Forms of Discrimination Against Women, 1979’ the convention in its article 5 articulate clearly that ‘it is the duty of the members of international community to take all necessary action to eliminate all practices that would lead to segregate inferiority or superiority on the basis of sex or pigeonholed roles for female and men... (CEDAW, 1979)’ The UN Human Rights office, WHO and UN Woman jointly made a declaration which is captioned as *Eliminating Virginity Testing: An Interagency Statement*” exhorted the international community to ban all kinds of virginity tests for they are “unhealthy, unscientific, medically superfluous, untrustworthy and human rights violative”. The statement is issued motivate the international community and all organizations to be committed to eliminate all kinds of virginity tests which are inhuman and unethical. It clearly states that the test is useless since no trace of the past penetration can be accessed correctly from any form of virginity tests (World Health Organization, 2018).

#### **PLACE OF VIRGINITY TEST IN CRPC, 1973**

In the case the CBI made the contention that the agency has every right to make the virginity Test on an accused woman as per Section 53 of CrPC. In the context of the averment the court also analyses the statutory validity of virginity tests. Section 53 of CrPC contemplate that the police officer may seek the assistance of a medical officer for making a medical examination if it would be supportive evidence to validate the offence and also at the request of the arrestee. The statutory validity is proclaimed in *Selvi & ors. v. State of Karnataka* in which the apex court directed in the case of “extraction of bodily substances” that it should be done as per the direction of the court only not according to the whims and fantasies of the investing agency. Section 53 empowers to use ‘reasonable power’ and the power can be used only if the court has directed undergo any such tests only not otherwise. The court also further added that physical tests such as blood, semen, phlegm, nail, hair, are different from confirmative acts. The physical tests are of *ejusdem generis* which means of the same nature but testimonial tests are of different nature. Section 53 recommends modern and scientific test for the end of justice but *per-vaginum* tests are archaic and unreasonable (K G BalaKrishnan, 2004).

The honourable court also use to refer one of the authoritative medical reference books on Medical Jurisprudence named “A Textbook of Medical Jurisprudence and Toxicology” of Jaising P Modi. The book clearly states that even by the court orders if a woman is compelled to undergo virginity tests is a serious threat to her privacy that is enshrined to her as fundamental right. DNA test is scientific but virginity test is never conclusive and thus such vague test and human rights violative test must be discarded.

## CONSTITUTIONAL VISION OF VIRGINITY TEST

The constitutional vision of the virginity test is not a matter of res integra since clear verdicts are already given by the apex court of India in *Lillu v State of Haryana* and *State of Jharkhand v. Shailendra Kumar Rai @ Pandav raj*. In the verdicts the court clearly affirmed that the fundamental rights of a person should not be alienated, discarded or violated even at the time of custody or interrogation by conducting virginity tests. *SR SEPHY v. CBI & Ors* the court further made the clarification of the constitutional validity through reading the above verdicts with *D. K. Basu v. State of West Bengal* in which affirmed that person can be divested from personal liberty and life unless the procedure of law permits it. In the case the honorable court clearly made the verdict that any form of cruelty would amount to the violation of article 21 even if it is at the time of investigation or interrogation. The courts clearly warn that it is the duty and obligation of the state functionaries to honour the law of the country and if they break the law infringers have to bear the consequences of contempt of court (DR. ANAND, 1996).

In the case the honourable court also takes the precedent of *Neelabati Bahera v. State of Orissa* in which the apex court made the verdict that neither the prisoners nor the arrestees are not striped off from their fundamental rights and it is the obligation of the state to ensure that the rights are not infringed except by procedure of law (J S Verma, 1993). The court further asserted the vision of article 21 through the precedent *State of Andhra Pradesh v. Challa Ramkrishna Reddy* in which the court clearly proclaimed that whether a person be arrestee or prisoner he still remains to be a human being who has every right to enjoy the inherited fundamental rights which are concentered in article 21 of the Indian Constitution (D.P.Wadhwa, 2000). The court also binds its words with *Maneka Gandhi vs. Union of India* in which the court made the decision that the limitation of the fundamental rights of an arrestee or a prisoner should be in accordance with the process of law and it should be just, fair and reasonable (BEG, 1978). The court also reminds in the case that right to life hallowed in article 21 is the right to live with basic human dignity and it cannot be discarded with the notion of sovereign immunity, notifying the verdict *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi* (P Bhagwati, 1981). In the case the court upheld the concept of dignity of article 21 of the Indian Constitution which is regarded as essential requisite of right to life. It is quoted as irreducible core of human life even by the pens of judges but emancipates beyond the walls of prison till the last breath of a person. The honourable court made it clear in this case that the right to liberty of a person is curtailed as per the procedure of law however the right to dignified life cannot be suspended or waved even of any detainee or prisoner.

In the 'e' part of the judgment the court pondered with the caption virginity test: Victim v. accused and said that it is a violation of the fundamental right of a person to lead a dignified life. It is not a matter whether it is conducted on a victim or on accused, the question is whether the deed of virginity test itself is unconstitutional or not. The court said that it is in itself inhuman and totally against the vision of the constitution especially article 21 thus it is infringing the principle of dignified life. The court further added that the value of the constitution is intimately tied with dignity of human life though it is not expressly worded. The test is callous, infringes the dignified life and more over it creates lifelong psychological trauma and devastating health problem in the person who has undergone it.

The very 'virginity' concept through testing women hymen may itself be an absolute nonsense since even sexual intercourse would not tear it while it may slit even by bicycling or swimming. The court quoting the precedent of the apex court in *State of Jharkhand v. Shailendra Kumar Rai* the court said it is misogynistic practice an assault to the dignity of women. Physical intrusion of a woman also amounts to discrepancy on the basis of gender that is guaranteed in article 14 and 15. The court taking the precedent *Sunil Batra (II) v. Delhi Administration* reiterated that the concept of custodial dignity is absolutely infringed and tarnished here in this case. The court highlighted that it's the core duty of the constitutional court to uphold the fundamental rights enshrined by the constitution to all its citizen and in *SR SEPHY v. CBI & Ors* the rights of dignified life of the woman nun is totally torn and the investigation agency failed to protect and abide to the constitutional provision of article 21 (*The State of Jharkhand ...Appellant versus Shailendra Kumar Rai @ Pandav Rai ...Respondent*, 2022). The court also panned the Human Rights Commission who failed to act in the plea of the victim came before it regarding the constitutional violation, in the name of 'case pending in the court' whereas it is the duty of the commission to get even to prisons to recourse human rights violation of prisoners where case may be pending. The constitutional court of Delhi found place in the verdict to appreciate the councillors appeared on behalf of the victim for their pain to uphold the constitution of India and the rights of the victim.

## CONCLUSION

The fundamental rights are inherent rights of each and every human being all over the world accepted by the international law and the rights are further guaranteed in the constitution of India. The innate rights can be limited only through the procedure of law however certain rights such as right to privacy and right to live dignified life cannot be curtailed even through the ink of constitutional court. The virginity test conducted is a sheer violation and infringement of the constitutional rights and dignified life envisaged in article 21 of the Indian Constitution. The law breakers of the constitutional rights of the country even if it is state machinery has to bear the consequences of it for it is uttered by the apex court through numerous verdicts.

## REFERENCES

- BEG, M. H. (CJ). (1978). *Maneka Gandhi v Union of India*.
- CEDAW. (1979). *Convention on the Elimination of All Forms of Discrimination against Women*.
- Chauhan, M., & Kalifulla, R. (2011). *Supreme Court of India Lillu @ Rajesh & Anr vs State Of Haryana on 11 April, 2013 Bench: B.S.* <http://indiankanoon.org/doc/78844212/>
- D.P.Wadhwa, S. S. A. (2000). *Supreme Court of India State Of Andhra Pradesh vs Challa Ramkrishna Reddy & Ors on.* <http://indiankanoon.org/doc/731194/>
- DR. ANAND, J. (1996). *DK-Basu-main-judgment-18121996*.
- J S Verma. (1993). *Smt\_Nilabati\_Behera\_Alias\_Lalit\_vs\_State\_Of\_Orissa\_And\_Ors\_on\_24\_March\_1993. Supreme Court of India.*
- J.B.PARDIWALA. (2020). *State-of-Gujarat-v.-Rameshchandra-Panchal*.
- Justice Dr. Chandrachud. (2022). *The\_State\_Of\_Jharkhand\_vs\_Shailendra\_Kumar\_Rai\_Pandav\_Rai\_on\_31\_October\_2022*.
- Justice J S Verma. (2013). *Report of the committee on the amendments to Criminal Law*.
- K G BalaKrishnan, C. (2004). *REPORTABLE IN THE SUPREME COURT OF INDIA*.
- Ministry of Health and Family Welfare, I. (2014). *Medico-legal care for survivors/victims of Sexual Violence*.
- Modi (2022) A Text Book of Medical Jurisprudence and Toxicology, 27<sup>th</sup> Edition, Lexis Nexis.
- P Bhagwati. (1981). *Francis\_Coralie\_Mullin\_vs\_The\_Administrator\_Union\_on\_13\_January\_1981*.
- S A Bobde CJI. (2019). *IN THE SUPREME COURT OF INDIA CRIMINAL ORIGINAL JURISDICTION SMW (CRL.) No(s).04 OF 2019 IN RE : ASSESSMENT OF THE CRIMINAL JUSTICE SYSTEM IN RESPONSE TO SEXUAL OFFENCES Petitioner (s) VERSUS Respondent (s)*.
- Subramanian, R., & Kumar, N. S. (2022). *2022 SCC OnLine Mad 1770 : (2022) 3 Mad LJ (Cri) 265 In the High Court of Madras.* <http://www.scconline.com>
- The State of Jharkhand ...Appellant versus Shailendra Kumar Rai @ Pandav Rai ...Respondent.* (2022).
- World Health Organization. (2018). *Eliminating Virginity Testing: An Interagency Statement*.