

# Testing Chastity, Evidencing Rape

## Impact of Medical Jurisprudence on Rape Adjudication in India

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Protests following the 16 December 2012 gang rape in Delhi led to reform of rape laws in India. Through a detailed analysis of the history of medical jurisprudence textbooks and their use in case law, this paper argues that these textbooks undermine legal reforms in India. It establishes that medical manuals promote the collection of prejudicial and legally irrelevant evidence and reinforce the notion that Indian women frequently bring false charges of rape. Courts regularly cite these textbooks as authority in rape cases, based on the perceived objectivity of medical science as a form of evidence. For legal reforms to be effective, this article argues that changes must be made to textbooks of medical jurisprudence, medical syllabi, and to protocols of medical examination and assessment of rape victims. Further, courts must be more critical in their use and acceptance of these medical manuals.

In this paper, we argue that the continued use of medical knowledge and evidence in rape trials requires substantial reform of medical textbooks, medical education, as well as the standard protocol for collecting medical evidence in rape cases. We trace the origins of the use of medical evidence in rape cases and critically analyse the historical and contemporary role of medical evidence in the adjudication of rape cases in India. We also examine textbooks of medical jurisprudence<sup>1</sup> that are widely used in India, which originated in the 19th century during the British colonial rule.

Through a close analysis of historical and contemporary textbooks on medical jurisprudence, we consider the significant impact that colonial textbooks have had on authoritative textbooks that circulate today, and the continued importance of the history of forensic science in the perpetuation of stereotypes of women's chastity and past sexual history in rape cases. Following a detailed reading of historical textbooks and their continued significance as scientific authorities today, we examine the application of medical jurisprudence in case law on rape from 1950 until 2011. We consider how medical evidence, which relies on these textbooks, leads to the incorporation of biased ideas into court cases that tie women's sexual history to false charges of rape, making the "scientific" assessment of women's chastity key to judgments in rape trials.

Despite recent movements calling for reforms of rape laws, there has been little attention paid to the much-needed reform of the wide range of forensic medical practices that violate women's dignity and perpetuate biased uses of women's sexual history in the adjudication of rape.<sup>2</sup> We, therefore, suggest that reform of rape law and rape adjudication requires putting an end to the "finger test" as well as substantial overhaul of many other aspects of medical jurisprudence textbooks and medical protocols in the examination of rape victims.

### Proving Rape under the Indian Penal Code

With the enactment of the Indian Penal Code (IPC) in 1860, India was brought under a uniform system of criminal law. Thomas Macaulay, the author of these laws, sought to produce a systematic criminal law that could be applied to all of India's population (Macaulay 1838: vii-viii). The code ushered in a new era of governance in India, producing a standard set of rules that governed the behaviour and bodies of people in new ways. The penal code set forth legal standards that necessitated novel approaches to rules of evidence that could systematically prove criminal activity.

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The drafting and implementation of the penal code created the substantive framework for the adjudication of rape cases, which was defined by Section 375 of the IPC. The legal definition of rape is crucial to understanding the role of medical evidence in rape cases in Indian courts. Prior to the amendment of Section 375 in 2013, a man committed rape if he had sexual intercourse with a woman under one of six circumstances enumerated in the section. Sexual intercourse was defined as penetration of the vulva by the penis to any extent, however slight; ejaculation was not required.

The amendment in 2013 broadened the definition of rape. It extended rape beyond penile-vaginal penetration, to include penetration by the penis of orifices other than the vagina of a woman, as well as penetration by objects or body parts other than the penis, into the vagina, and other orifices of a woman. Although the acts constituting intercourse were broadened, the core issue in proving rape remains establishing non-consensual penetration. In order to convict a man of rape, the prosecution has to prove that penetration had occurred without the woman's consent. Proving lack of consent thus is often the crucial element in rape cases. Since there are generally no witnesses to the act of rape, prosecutors have to rely on the testimony of the victim along with any other relevant evidence (such as medical evidence) to show that woman had not consented to penetration.

As early as 1952, the Supreme Court of India ruled that a conviction for rape could be based solely on the victim's testimony.<sup>3</sup> However, as in any other case, testing the reliability of the testimony of the witness was critical to determining guilt. In rape cases, defence counsels employed Section 155(4) of the Indian Evidence Act, 1872 which permitted them to cross-examine the victim to show that she was of a generally "immoral character". The defence could use evidence of the past sexual history of the woman to attack or create doubt about the veracity of her claim of rape, based on an assessment of her sexual behaviour as promiscuous or otherwise improper.

Alongside witness testimony about the "immoral behaviour" of the woman, medical evidence was often used as an "objective" tool to assess the past sexual history of the woman. Although Section 155(4) was repealed in 2003, the use of medical evidence to assess a woman's sexual "habitation" continues even today. Despite the change in the law excluding a woman's past sexual history, medical exams continue to assess women's past sexual history through medical tests that claim to demonstrate women's habituation to sexual intercourse.

### **Books of Medical Jurisprudence and the Determination of Rape**

New dictates of the IPC and the Indian Evidence Act led to the emergence of medical jurisprudence in colonial India, which developed as a distinct form of knowledge alongside the expanding legal and regulatory apparatuses of the colonial state. Colonial officials regularly used these books across India. Medical jurisprudence became an essential tool in the rule and assessment of colonised populations by the early 20th century.<sup>4</sup> Colonial textbooks of medical jurisprudence framed the

format and content of authoritative textbooks of medical jurisprudence that circulate today, with contemporary textbooks often containing the exact language of textbooks produced in the late 19th and early 20th centuries. The continued publication of medical jurisprudence textbooks in India and the citation of medical jurisprudence in colonial records and court cases attest to the breadth of the audience and importance of these texts as a form of scientific knowledge.

Early colonial administrators insisted that India needed a science of medical jurisprudence for use in cases that was different from the forensic science of Europe. According to the early architects of medical jurisprudence specifically for Indian subjects, Indians were untrustworthy, and medical evidence was necessary because the oral testimony of Indians could not be trusted, particularly in women's rape accusations. Norman Chevers wrote the first complete book of medical jurisprudence for India in 1856. He defined the field of medical jurisprudence around the concept of Indian difference, or what was peculiar to Indian crimes, in contrast to the West.

One section of his book dealt with the question of rape, which begins by framing medical evidence pertaining to rape through the assumption that women frequently made false accusations. As Chevers (1856: 460) asserted:

Instance of this crime appear to be of great frequency in India, and there is also reason to believe that persons are, by no means rarely, charged falsely with its commission.

Chevers's views exemplified the biases of colonial officials who felt Indians were untrustworthy, and that charges of rape were particularly questionable. He believed that medico-legal science presented the objective truth about criminal acts, including rape, in opposition to the oral testimony of people who were portrayed by him as unreliable (1856: 24). Yet this understanding that "scientific" medical evidence was more reliable than the claims of women continues in courts today, where scientific evidence of a woman's "habitation" to sex, the state of her hymen, and injuries on her body are used to undermine claims of rape.

Chevers's textbook spurred an entire field of textbooks on medical jurisprudence specific to India, textbooks that continue to be reissued and cited as legal authority today. Chevers published two formal editions of textbooks for medical jurisprudence for India in 1856 and 1870. Following Chevers, Isador B Lyon's textbook, first published in 1888, became the primary source for medical jurisprudence in India.

In 1920, an Indian doctor and professor of medical jurisprudence in Agra, Jaising P Modi, published *A Textbook of Medical Jurisprudence and Toxicology*, which heavily relied on Lyon and Chevers's textbooks as guides. Modi's textbook became the authoritative reference book on medical jurisprudence. It is now the most cited textbook on forensic medicine by Indian courts (Agnes 2005). Medical colleges use Modi alongside other treatises in their courses on medical jurisprudence, including the widely circulated *Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology* (Parikh 2011).

These textbooks, modelled after Chevers's and Lyon's original manuals, replicate the 19th century stereotypes about false

claims of rape and women's sexual character used to justify the need for scientific evidence. Textbooks like Modi's and Parikh's perpetuate these ideas through their widespread circulation and use as authoritative knowledge today.

### Medical Evidence to Contest 'False Charges' of Rape

Indian medical jurisprudence textbooks modelled after Chevers's and Lyon's influential textbooks have consistently emphasised that women falsely allege rape. Indeed, many chapters on the medical assessment of rape begin with the assertion that women often falsely bring charges of rape, necessitating medical evidence to objectively determine the crime. Today's authoritative textbooks on medical jurisprudence, including Modi and Parikh, continue to assert that women in India commonly bring false charges. Up until the most recent edition in 2011, Modi's treatise emphasised that the "principle of false charges" was commonplace in rape complaints in India. In statements of moralistic editorialising rather than of "objective" scientific fact, earlier editions of Modi identified three situations where young women typically bring false charges of rape.

First, Modi said that they allege rape to salvage their "reputation". Second, a girl would bring charges of rape to account to her "mother or other near relation" for injury to her private parts, as well as blood and seminal stains on her clothes. Hence, even if she had consensual intercourse, she would allege rape. Finally, Modi believed that in certain situations women consent to intercourse and then bring a false charge in order to blackmail a man (1957: 315-16). Although these "principles" do not find place in the latest edition of Modi, the book continues to assert that "[a] charge of rape is very easy to make and very difficult to refute" (Modi 2011: 664). These ideas about a woman's reputation and blackmail continue, however, to appear in other books of medical jurisprudence in circulation today, including Parikh (2011: 5.42-5.43).

The most recent edition of Parikh discusses false accusations by rape victims in extensive detail. Parikh claims that the veracity of the victim's version can be substantiated or otherwise disproved through medical evidence. He advises medical examiners to evaluate the victim's story and accordingly conduct the medical examination. He states that "[t]he possibility of false accusation must be kept in mind" (5.42) while examining the victim. He asserts that "[r]ape is an allegation, easily made – hard to prove and harder to disprove". To medically substantiate the belief that false charges are often made, Parikh describes "artificial" injuries, including self-inflicted vulvar and vaginal injuries, particularly the irritation of the vagina using chillies.

He goes on to say that false evidence can be fabricated using "frog's or fowl's blood" to simulate human blood, or "starch or egg albumin" to simulate seminal stains. In evaluating the victim's story, he emphasises the value of medical evidence in disproving "false charges", especially when the "statement of the victim...is neither convincing nor consistent" (5.43). For Parikh, the goal of the medical exam is to disprove false charges brought by women rather than evidencing the crime.

Although seemingly unrelated, medical jurisprudence textbooks assert that medical tests evaluating a woman's virginity are crucial to understanding the occurrence of rape. Most treatises on medical jurisprudence, including Modi's, Lyon's and Parikh's have a chapter dealing with medical evidence pertaining to rape. Additionally, each has a chapter on the determination of virginity, which at first glance, would appear to be unconnected to the chapter on rape. However, a close reading of the chapter on virginity reveals that the textbooks treat the medical assessment of virginity as closely connected to determination of rape, as both chapters assess the state of the genitalia and prescribe the use of "tests" to determine the past sexual history of a woman.

Two methods used for the determination of virginity are significant to medical evidence in rape cases. These are first, the finger test (which involves the doctor certifying whether the vagina of a woman can admit one, two, or more fingers to demonstrate sexual habituation) and second, an assessment of the state of the hymen. In contemporary India, courts regularly cite both of these methods as relevant in their rape judgments. Doctors in India today consistently employ these methods in their examination of rape victims, as the assessment of the hymen and the elasticity of the vagina is considered standard protocol for women's genital exams after accusations of rape (Nandi 2008: 193, 198).

The state of the hymen is crucial in the chapter on virginity as well as in the chapter on medical examination of a rape victim. Both chapters, on rape and on virginity, are cited in rape cases. In the chapter on virginity, Modi claimed "the hymen is the most reliable sign of virginity" (1932: 377). He noted that the hymen ruptured at the first act of sexual intercourse. He, however, recognised that this might not always happen, as he had come across married women, pregnant women, and prostitutes who had intact hymen even after repeated acts of intercourse (p 379).

He also made a distinction between what he termed "true virgins" and "false virgins". He said that if the hymen of a woman is intact, further tests need to be done to conclude whether she is actually a virgin, whom he defined as a person who has had "no sexual connection whatsoever" (p 410). If the hymenal membrane appears to have no tears and the vaginal orifice is small in dimension, then the woman is a "true virgin". Modi similarly stressed the importance of evaluating the state of the hymen in his chapter on rape, explaining that "In nubile virgins, the hymen, as a result of complete sexual intercourse, is lacerated, having one or more radiate tears" (pp 410-11). In subsequent editions, Modi's textbook continued to stress the significance of the state of the hymen in the examination of rape victims, by asserting that frequent sexual intercourse destroys the hymen (1940: 337).

Although Modi originally made these assertions in the 1932 edition of his book, the distinction between "true" and "false virgins" continues to be deployed even in the latest edition from 2011 (Modi 2011: 627). By detailing the use of the finger test and its role in assessing true versus false virgins in his chapter on virginity, while emphasising that doctors examine

the state of the hymen and the elasticity of the vagina in his chapter on rape, Modi connects the otherwise seemingly unrelated topics and makes the state of the woman's genitals central to the evaluation of the veracity of claims of rape.

Despite the assertion that the hymen is crucial to the medical assessment of rape in Indian medical jurisprudence textbooks, scientific studies have demonstrated that the hymen varies in shape, size and elasticity, and may not be present at all in women, even if they have not engaged in sexual intercourse (Underhill and Dewhurst 1978: 375-76). Yet we find that despite the variation in the size and appearance of the hymen in women, medical jurisprudence textbooks insist on the medical assessment of the state of the hymen.

In the logic of manuals of medical jurisprudence, the finger test can determine whether a woman is a virgin even if she were to have a hymen present. According to Modi, if a woman has an intact hymen, yet one, two or more fingers pass easily into her vagina, leaving the hymen intact, then she is a false virgin. He argues that if fingers can pass, then "a body of the size of a penis in erection, could perfectly well pass through the hymenal orifice".<sup>5</sup> When the hymen is intact, Modi asserts that the finger test becomes crucial to assessing a woman's virginity. Thus, the finger test, passing one, two, or even three fingers into the vagina to test its elasticity, becomes the scientific assessment of a woman's virginity. Despite the fact that a woman's virginity is irrelevant to the question of consent and should not be questioned in the medical assessment of the act of rape, the finger test and the medical assessment of the hymen remain common practice across India today.<sup>6</sup>

Even the latest edition of Modi mandates conducting the finger test in all rape cases:

It is absolutely necessary to note the distensibility of the vaginal orifice in the number of fingers passing into the vagina without any difficulty. The possibility of sexual intercourse having taken place without rupturing the hymen may be inferred if the vaginal orifice is capacious enough to admit easily the passage of two fingers (Modi 2011: 668).

Insertion of two fingers into a woman's vagina thus becomes the scientific standard to demonstrate a woman's habituation to sexual intercourse. Parikh also mandates the use of the finger test in examination of rape victims (Parikh 2011: 5.37).

Yet the test cannot determine consent, nor can it determine the occurrence of penetration at all. Further, at no point do medical jurisprudence textbooks suggest that the finger test provides any information about the question of recent penetration, and therefore, cannot determine whether the act of penetrative intercourse has occurred. Even based on the logic of medical jurisprudential science, the "test" cannot be used to conclusively determine penetration, recent or otherwise, but instead, can only be used to determine the elasticity of a woman's vagina, under the erroneous understanding that the elasticity of the vagina proves or disproves a woman's virginity. Thus, it appears to be of little use in determining whether a woman had been raped. However, the test is still regularly used to determine a woman's habituation to intercourse.<sup>7</sup> In the 2011 edition of Modi, although the editors caution against using the finger test as proof of habituation in a footnote, they

continue to mandate the use of the test in all rape cases in the body of the text (Modi 2011: 668).

In his discussion of virginity, Modi advocates using additional tests alongside the finger test to corroborate the status of the woman's virginity, in the event that her hymen is intact (p 627). This includes the examination of the external genitalia<sup>8</sup> and the breasts.<sup>9</sup> Modi's textbook in fact followed Lyon in claiming that virgins have hemispherical, plump and elastic breasts, as opposed to the pendulous breasts of women who have engaged in sexual intercourse.<sup>10</sup> The significance of breasts as a sign of virginity is starkly demonstrated in some editions of Modi, where photographs of bare-breasted women appear side by side in order to visually demonstrate the distinction in the appearance of the breasts of virgins and non-virgins (Modi 1945: 277).

In a recent case, the Supreme Court held that the finger test and its interpretation violate the rape victim's right to privacy, physical and mental integrity, and dignity.<sup>11</sup> It further ruled that even if the result of the test is "affirmative", that itself should not give an inference of consent. However, the court did not expressly prohibit doctors from conducting the "test". It only instructed courts not to consider past sexual history as an indication of consent. The finger test is a practice that is purportedly "scientific" yet cannot produce any objective conclusions about consent or the question of penetration. The test reinforces stereotypes about the untrustworthiness of the Indian woman and the relationship between chastity of a woman and the veracity of her testimony.

Yet, as we describe later, despite the fact that the finger test can be of no assistance in determining rape, it is clear from case law that the test is regularly used in medical examination of rape victims (HRW Report 2010). For instance, in 2010, out of 160 cases decided by all Indian high courts, 74 cases in the judgment expressly discussed the result of the finger test conducted on the victim.<sup>12</sup> This does not mean that the test was not conducted in the other 86 cases; the judgments simply do not expressly mention its use.

### Importance of Injuries to Prove Resistance

Colonial medical jurisprudence books viewed women as "suspicious" subjects prone to "lying" who regularly brought false charges. Another misconception perpetuated by medical jurisprudence textbooks was that a woman being raped would offer visible resistance depending on her class and social status, and that the lack of injuries on a woman "proves" she consented to the act of sexual intercourse. The definition of rape under the IPC does not require proof of maximum resistance on the part of the woman, when the rape is taking place.<sup>13</sup> Hence, it is not necessary for the prosecution to prove injuries on the body of the woman, incurred as a result of a violent struggle. Yet medical jurisprudence books emphasise the necessity of identifying injuries in the medical examination of a rape victim.

For instance, Modi stated that (2008: 898)

[i]t is necessary to prove that the resistance offered by the woman was upto her utmost capability and that every means, such as shouting, crying, biting, or beating had been tried to prevent the successful commission of the act.

Every edition of Modi's book details injuries that may result because of a struggle, including scratches, abrasions and bruises (Modi 1932: 409; Modi 1965: 331; Modi 2008: 925; Modi 2011: 666). Later editions emphasise the presence of other unusual types of injuries inflicted on the body of a woman by her attacker, like bite marks on the breasts, nipples, cheeks or lips of the woman (Modi 2008: 925; Modi 2011: 666). The latest edition of Modi, while asserting that marks of resistance offer "a measure of *normal* human conduct" does cite cases in the footnote which hold that injuries are not necessary to prove rape (Modi 2011: 639-40 emphasis added). In describing marks that may result from a "struggle", the books do not differentiate between injuries caused by the resistance of the woman to the act of rape and marks of a violent nature inflicted by the aggressor. By emphasising the importance of injuries for "normal" demonstrations of resistance, these treatises go beyond scientifically evidencing the woman's resistance to the act of rape, instead providing details that have little medical or legal relevance.

Medical jurisprudence books go as far as to claim that the ability to struggle depends on the age, class and social status of the woman accusing rape, distinctions which were then incorporated into case law. In describing marks of violence on the bodies of women, Modi asserted that marks are more likely to be found on bodies of adult women who are "able to resist" (Modi 1932: 409; Modi 2008: 925). He thus made a distinction between girls and adult women and whether medical evidence would indicate resistance. In another part of the book, in detailing "controversial medico-legal questions" that Modi claimed often arose in rape trials, he posed the question: "Can a healthy adult female be violated against her will?" (Modi 1932: 416; Modi 2008: 938). He answered "it is not possible for a single man" to have intercourse with a "healthy adult female...against her will", except under certain circumstances, like a woman being "too feeble to resist" (Modi 2008: 938-39). Modi offered further explanation of how much a woman could resist, differentiating between women on the basis of their social status. He wrote:

[I]t is necessary to take into consideration the relative strength of the parties and the community to which the victim belongs. It is obvious that a woman belonging to a *labouring class* who is accustomed to hard and rough work will be able to offer a good deal of resistance and to deal blows on her assailant and will thus succeed in frustrating his attempts at violation. On the contrary, a woman belonging to *middle class* or *rich family* might not be able to resist for long, and might soon faint or be rendered powerless from fright or exhaustion.

These ideas that medical evidence will differ between the labouring class woman and the middle class woman resisting rape continued to appear in case law, as recently as 2004.<sup>14</sup>

Though the Supreme Court has regularly ruled that the opinion of experts is a "weak type of evidence",<sup>15</sup> medical evidence has been elevated to a higher pedestal and is often treated as authoritative by courts adjudicating rape cases. Medical jurisprudence textbooks, treated as reliable authorities in Indian courts, rely on a range of unscientific practices and forms of knowledge, including but not limited to the finger

test, that perpetuate biases about the prevalence of false charges of rape and the significance of women's sexual history in rape cases. It is common for doctors testifying in rape cases to opine on whether the victim consented to intercourse and for courts to take such "medical" testimony as the primary basis of their determination of the facts in the case.<sup>16</sup>

The doctor's testimony is often treated as the crucial evidence in rape trials, trumping all other evidence, including the testimony of the victim. Doctors appear to rely heavily on opinions and methods stated in medical jurisprudence textbooks in assessing medical evidence of a crime. As we demonstrate later through case law, courts regularly cite medical jurisprudence textbooks, including the erroneous ideas of women's chastity and sexual history that circulate in these books, and rely on them in assessing evidence and determining judgments in cases of rape. In the following part, we discuss how medical jurisprudence books have influenced post-colonial rape adjudication.

### Medical Jurisprudence and Rape Trials

Medical jurisprudence textbooks are particularly influential in rape adjudication, where they are cited directly by courts in their judgments. We examine three dimensions of the use of medical jurisprudence textbooks in adjudicating rape. First, we discuss the use of medical jurisprudence textbooks as legal authority in case law. Second, we analyse the use of the finger test to determine penetration/habitation to sexual intercourse. Third, we consider how the use of medical jurisprudence textbooks by courts perpetuate rape myths and stereotypes.

### Medical Jurisprudence Textbooks as Legal Authority

Numerous courts have directly cited medical jurisprudence textbooks as legal authority in case law.<sup>17</sup> This reliance on medical jurisprudence textbooks is seemingly innocuous, especially when these books track the law's approach to rape. However, courts often turn to medical jurisprudence textbooks to supplement the testimony of the doctor when the court believes that the testimony in itself is insufficient to scientifically determine the fact of rape.<sup>18</sup> In these cases, the court, in effect, second-guesses the opinion of the expert and relies on a book, whose author, unlike the testifying medical expert, neither examined the victim, nor can be cross-examined on his/her assertions in the book.

Often, courts' use of medical jurisprudence books directly conflicts the Supreme Court's jurisprudence on rape. Because medical evidence is seen as scientific and treated as "objective", courts regularly adopt the view of medical jurisprudence textbooks without considering Supreme Court directives and insist on the necessity of the presence of a ruptured hymen and injuries on the woman's genitalia in order to demonstrate penetration and resistance, respectively.<sup>19</sup> A 2011 judgment of the Allahabad High Court reflects the continuing reliance on the state of the hymen in determining the occurrence of rape. In *State of Uttar Pradesh vs Sabir & Ors*,<sup>20</sup> the medical examination indicated that the hymen of the rape victim was intact. Noting this, the prosecution argued that the rupture of the

hymen is not a prerequisite for proving rape, citing a decision of the Supreme Court.<sup>21</sup>

Yet, the high court held: “we have already found that the medical evidence does not suggest any forcible sexual intercourse as the hymen of the prosecutrix was found intact”.<sup>22</sup> In acquitting the accused, the high court cited the Supreme Court yet continued to prioritise medical testimony over the Supreme Court’s precedent, by which it is bound, based on a false “objective”, “scientific” logic that suggested an intact hymen demonstrated the lack of forced penetration.

### Genital Injuries

One instance where medical manuals and medical evidence take precedence over the law is with regard to whether injuries are necessarily present on the genital area of the victim in cases of non-consensual intercourse. The IPC does not necessitate the presence of injuries in the genitalia of the woman to prove rape. However, medical jurisprudence textbooks instruct doctors to look for genital injuries in the determination of rape. In line with those instructions, medical experts examining rape victims regularly note the presence or absence of injuries in the genital area. Despite the assertion by medical jurisprudence textbooks that non-consensual intercourse necessarily leads to genital injuries, contemporary medical research suggests to the contrary (White and McLean 2006: 172-80). A 2011 medical study found that most complainants of rape do not sustain any genital injury through non-consensual intercourse (McLean et al 2011: 27-33).

However, court judgments often cite reports of medical examination that look explicitly for signs of injuries to demonstrate penetration. This is based on an understanding that an erect penis causes lacerations in the vulva and the labia, particularly if penetration is forceful.<sup>23</sup> Medical jurisprudence books assert that injuries are caused necessarily by non-consensual intercourse. The lack of injury is then used to demonstrate that rape has in fact not occurred.<sup>24</sup> For instance, in *State of Orissa vs Kamakshya Prasad Meher*,<sup>25</sup> the court held that:

[i]t is well settled in law that where the medical evidence was to the effect that there are no signs of recent intercourse or injury on the girl’s private part and where it is clear that the prosecutrix is not a reliable witness...it would not be safe to convict the accused on her uncorroborated testimony.<sup>26</sup>

### The Finger Test

In addition to witness testimony, the finger test and the medical evidence are used in courts to “objectively” and “scientifically” demonstrate a woman’s habituation to sexual intercourse.<sup>27</sup>

Despite the repeal of Section 155(4), past sexual history continues to be introduced into evidence through means other than direct questioning of the rape victim about her past sexual history, particularly through the report of the medical examination of the rape victim. Medical examiners in their reports frequently and explicitly note the habituation of the victim to intercourse. Court judgments frequently take note of how the medical examination demonstrates the rape victim’s habituation to sexual intercourse.<sup>28</sup> Parliament’s

objective in repealing Section 155(4) is subverted through the deferral to opinion of the medical examiner on the evidence of women’s habituation to sexual intercourse. Defence counsels across the world are known to introduce evidence about a woman’s character using her demeanor, clothing and class to demonstrate the falsity of her claims (Taslitz 1999: 83-84). In India, however, the finger test provides a scientific veneer to what actually is a prejudiced assessment of a woman’s sexual history.<sup>29</sup>

The blind acceptance and the egregious use of the finger test by the medical community and consequently by courts is starkly exhibited in several cases. In our research, we discovered many instances where the finger test was conducted on very young and pre-pubescent girls,<sup>30</sup> such as in *Syed Pasha vs State of Karnataka*,<sup>31</sup> where a five-year old girl was subjected to the test.<sup>32</sup> In most of these cases, the doctor noted that the finger test caused pain to the child and it was difficult to insert the finger/s. Even in cases where victims were adults, the medical examiner noted that the insertion of two fingers into the vagina caused the victim pain. In one case, the doctor not only inserted two fingers, but also “tested” the elasticity of the vagina by inserting three fingers into the vagina of the woman.<sup>33</sup> In another case, the rape victim underwent two medical examinations and both doctors conducted the finger test.<sup>34</sup>

The test is also conducted on married women,<sup>35</sup> for whom virginity and habituation is not contested. Pregnant women are also not spared. For instance, in *Vishram vs State of Rajasthan*,<sup>36</sup> the victim was five months pregnant when she was raped. The doctor noticed that the hymen was absent and that there was a recently stitched wound on the lower part of the vagina. In spite of this, the doctor conducted the finger test and noted “blood was coming out of the stitches”.<sup>37</sup> The routine nature of the test is apparent in *Raju @ Rajendra Prasad vs State of Uttarakhand*.<sup>38</sup> In this case, the victim was 32 weeks pregnant at the time of medical examination. Nevertheless, the doctor conducted the finger test and noted that the vagina could only admit one finger easily and that the girl was not habituated to intercourse, despite her pregnancy.<sup>39</sup>

### Rape Myths and Stereotypes

The reliance on medical jurisprudence textbooks in case law perpetuates rape myths such as the ability of women to resist rape and the supposed tendency of women to falsely allege rape. Rape myths are “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists” (Burt 1980: 217-18). These myths can be descriptive, where for instance, they describe how a typical woman would react to rape. In most cases, however, they end up being prescriptive, where they mandate how a woman *ought to react* to rape (Temkin and Krahe 2008: 32).

Medical jurisprudence textbooks tend to be prescriptive about how women should behave and suggest types of medical evidence that demonstrate a woman’s reaction to rape. Courts rely on such scientific and objective assessments of women’s behaviour and thus, these books have a strong influence on rape adjudication. For example, courts have directly cited Modi’s claims about the ability of labouring women to resist rape.<sup>40</sup> The

Supreme Court in 2009 came down strongly against the assertion that it is not possible for a single adult male to rape a healthy adult female.<sup>41</sup> Despite this decision, in assessing a rape victim from a “labouring” class, the Himachal Pradesh High Court in 2010<sup>42</sup> fully quotes a passage from an older edition of Modi that discusses the relation between the class of the rape victim and her ability to resist rape.<sup>43</sup> This led to the acquittal of the defendant, since there were no injuries on the body of the woman.

As discussed earlier, another rape myth that the textbooks perpetuate is that women often falsely allege rape. In this context, medical evidence is used as a tool to assess the truthfulness of the woman’s claim of being raped. For instance, in *Ratan Das vs State of West Bengal*,<sup>44</sup> the court held that “[f]alse charges of rape are not uncommon and medical evidence may assist in finding the truth or otherwise of the accusation”.<sup>45</sup> Even the Supreme Court of India, as recently as 2007, cautioned courts about the tendency of women to falsely allege rape, stating that “[c]ourts should...bear in mind that false charges of rape are not uncommon”.<sup>46</sup> This judgment of the Supreme Court has been regularly cited in subsequent high court decisions.<sup>47</sup> Noting the cautionary advice of the Supreme Court, high courts have tended to rely heavily on medical evidence in determining whether the woman is falsely alleging rape.

## Conclusions

In this paper, we argue that medical jurisprudence textbooks have a significant impact in the adjudication of rape cases. These textbooks prescribe methods of medical evaluation that are often unscientific and invasive. At the same time, the tests are highly prejudicial to the victim because they make value judgments about women’s sexual behaviour, the nature of her character, and the veracity of her claim. In their assessment of the woman’s body – the state of the hymen, the elasticity of the vaginal orifice, the shape and appearance of the breasts, as well as the presence or absence of genital injuries – these textbooks reinforce patriarchal conceptions of chastity and honour, making a woman’s virginity and/or her habituation to sexual intercourse relevant evidence to the determination of whether or not a rape occurred. Further, medical textbooks and prejudicial medical evidence continue to be used in court cases to evaluate the credibility of a woman’s testimony. The textbooks effectively negate the successes of legal reform movements and Supreme Court decisions that have sought to eliminate rules of evidence that are unfairly prejudicial to women.

In response to recent critiques of the finger test (HRW 2010) the latest edition of Modi (2011) while not eliminating its recommendation to conduct the test has, in a footnote, only

suggested that the test not be used to evaluate habituation. Though statements to prohibit the finger test are welcome and important, they have thus far not led to a wide scale end to the practice and do not address the root of the problem. As we have argued, the finger test is but one feature of a broader logic that pervades medical manuals, premised on prejudicial rape myths and stereotypes about women’s behaviour and character.

Medical jurisprudence textbooks must be drastically revised to eliminate tests that produce prejudicial and irrelevant evidence, such as the finger test and the assessment of the state of the hymen. Medical observations and tests should be confined to only those that are scientifically viable and legally relevant. Unfounded and unscientific assertions in these medical textbooks, such as the assertion that women often falsely allege rape, should be removed. Without these revisions in textbooks and corresponding syllabi in medical school courses, doctors will continue to perform these tests and incorporate prejudicial understandings of the prevalence of false charges and the status of women’s chastity in determining the occurrence of rape. Consequently, prejudicial evidence will continue to be introduced as evidence in courts and influence rape adjudication.

Further, with these revisions in medical jurisprudence textbooks and the nature of medical examinations, there may be a change in the way victims themselves perceive rape law. Such revisions may bring a measure of fairness and respect to the process of reporting a rape as girls and women will no longer have to undergo the duress of the finger test or other tests that scrutinise their past sexual history and violate their privacy and dignity.

Courts have also failed in their responsibility to implement the law by blindly accepting medical jurisprudence books as the primary authority on evidence of rape. Further, by permitting doctors to opine about women’s sexual history through their medical reports, courts adjudicating rape often fail to follow law, which prohibits the consideration of sexual history of the victim in determination of rape. Courts must be more critical and cautious in their usage of medical manuals and evidence based on these manuals in order to effectively safeguard constitutional rights.

For over a hundred years, medical jurisprudence textbooks for India have been extraordinarily influential in the legal process. Textbooks such as Modi’s on medical jurisprudence continue to be pivotal in legal and medical education as well as court processes, especially in rape law. The fundamental role these textbooks play in the treatment of rape victims and rape cases make their reform essential for the advancement of the fundamental rights of rape victims to privacy and dignity.

## NOTES

- 1 Medical jurisprudence is the use of medical science in the adjudication of legal cases.
- 2 The Justice Verma Committee noted in its report that the finger test must not be conducted. See, Report of the Committee on Amendments to Criminal Law, 275. Justice J S Verma (Chairman), January 2013. In May 2014, the Government of India, Ministry of Health and Family Welfare published new Guidelines and Protocols for Medico-legal Care for Survivors/

Victims of Sexual Violence. These guidelines are welcome and suggest that doctors no longer perform the finger test or use the hymen to assess penetration. However, these are non-binding guidelines and there is no policy mandate to end the finger test, the assessment of the hymen, and other issues related to medical textbooks. Further, these guidelines do not address the medical jurisprudence textbooks that continue to be published, taught in medical schools, and cited in court judgments. These guidelines do not address medical textbooks,

medical training, or protocols for medical examination still in force today in India.

- 3 *Rameshwar vs State of Rajasthan*, AIR, 1952 SC 54.
- 4 For a discussion on the use of these textbooks in rape adjudication in colonial India, see Kolsky (2010: 109-30).
- 5 Modi (1967: 314); Mathiharan and Patnaik (2008: 878); Kannan and Mathiharan (2011: 626-27).
- 6 See HRW (2010) and Report of the Committee on Amendments to Criminal Law, 275. Justice J S Verma (Chairman), January 2013 (the

- Verma Committee noted that the finger test is being conducted regularly in India).
- 7 Baxi (2005: 284); HRW (2010): *Dignity on Trial*. See also Baxi's discussion of Modi's textbook in her book, *Public Secrets of Law: Rape Trials in India* (2014).
  - 8 The state of the external genitalia, including the clitoris is adduced as evidence in courts. See, for instance, *Haresh Mohandas Rajput vs State of Maharashtra* (2011) 12 SCC 56, *Bhurji vs State of Madhya Pradesh*, 2007 CriLJ 2645 (MP).
  - 9 The shape, size and firmness of the breasts are adduced as evidence in cases. See, for instance, *Nanda vs State of Madhya Pradesh*, MANU/MP/0543/2009, *Heena vs State of Haryana*, MANU/PH/1769/2009, *State of Manipur vs Moirangthem Ningthou Singh*, 2002 CriLJ 4495 (Gau). The colour and size of the areola is noted in many cases. See, for instance, *Vijay @ Chinee vs State of Madhya Pradesh* (2010) 8 SCC 191, *State of Himachal Pradesh vs Arbind Kumar*, MANU/HP/1046/2011.
  - 10 Lyon et al (1904: 243). The size, shape and firmness of the breasts, the colour and appearance of the areola are irrelevant in rape adjudication. These were tests advocated in medical manuals ostensibly to indicate virginity.
  - 11 *Lillu vs State of Haryana*, AIR 2013 SC 1784.
  - 12 Statistic obtained using search on the online legal database Manupatra.
  - 13 See, for instance, *Joseph vs State of Kerala*, (2000) 5 SCC 197, *State of Rajasthan vs NK*, (2000) 5 SCC 30. The principle that proof of resistance is not required to prove rape has now been included in statutory law. An explanation was added to Section 375 by the Criminal Law (Amendment) Act, 2013 which states that mere proof of non-resistance should not be regarded as consent to sexual activity.
  - 14 See, for instance, *Sukru Gouda vs State of Orissa*, 2004 Cri L J 1566 (Ori) (Overruled by: *Sukru Gouda vs State of Orissa*, 2009 Cri L J 831 (SC)).
  - 15 See, for instance, *S Gopal Reddy vs State of Andhra Pradesh*, AIR 1996 SC 2184, ¶ 27.
  - 16 See, for instance, *Bhaiyamiyan @ Jardar Khan vs State of Madhya Pradesh*, AIR 2011 SC 2218, *Ambaram vs State of Madhya Pradesh*, 2009 Cri L J 1059 (MP), *Hira Lal Kalundia vs State of Jharkhand*, 2009 Cri L J 2284 (Jhar), *Punniakoti vs State*, 2008 Cri L J 97 (Mad).
  - 17 See, *Revella Sivaiah vs State of Andhra Pradesh*, 2005 Cri L J 526 (AP), *Jagdish Prasad Sharma vs State*, 1995 Cri L J 2501 (Del). Textbooks are cited as authority instead of legal provisions which state the same.
  - 18 *Mohsin vs State of Delhi*, MANU/DE/2598/2010.
  - 19 In nearly 700 cases decided by high courts and the Supreme Court and reported in the Criminal Law Journal between 1984 and 2009, the state of the hymen was expressly recorded in nearly 50% of the judgments.
  - 20 MANU/UP/0964/2011.
  - 21 *Madan Gopal Kakkad vs Naval Dubey* (1992) 3 SCC 204 (where the Supreme Court ruled that the rupture of the hymen is not a prerequisite for proving rape).
  - 22 *State of Uttar Pradesh vs Sabir & Others*, MANU/UP/0964/2011. We refer to it again in Footnote 56, as Sabir.
  - 23 See the use of medical jurisprudence on injuries in *Pappu vs State of Delhi*, 2009 Cri L J 334 (Del).
  - 24 See, *Krishan Kumar Malik vs State of Haryana*, (2011) 7 SCC 130, *AnumulaRaji Reddy vs State of Andhra Pradesh*, 2005 Cri L J 220, ¶ 25 (AP), *Jagdish Prasad Sharma vs State*, 1995 Cri L J 2501 (Del).
  - 25 2001 Cri L J 3620 (Ori).
  - 26 2001 Cri L J 3620, ¶ 9 (Ori).
  - 27 See, for instance, *Ashok Kumar vs State of Haryana*, AIR 2003 SC 777, *Dilip vs State of Madhya Pradesh*, AIR 2001 SC 3049.
  - 28 See, for instance, *Raj Kumar @ Raju vs State of Himachal Pradesh*, 2007 CriLJ 1916 (HP), *Virender Singh vs State of Haryana*, 2007 CriLJ 2459 (P&H), *Ram Lal vs State of Rajasthan*, 2006 Cri L J 2530 (Raj).
  - 29 In our research, we found that the test is conducted in Pakistan and Bangladesh as well. It is thus a reflection of the continuing influence of medical manuals specific to colonial India. See, Ahmad (2011) (discussing the use of two-finger test in Bangladesh); Koss et al (1997: 223, 225). Modi's *Textbook of Medical Jurisprudence and Toxicology*, is considered the leading legal authority on medical jurisprudence in Pakistan.
  - 30 See for instance: *Satyapal vs State of Haryana*, 2007 Cri L J 2095 (P&H) (victim was 11 years old), *Surendra Singh vs State of Uttar Pradesh*, 2006 Cri L J 700 (All) (the victim was less than nine years old), *Shatruhan vs State of Chhattisgarh*, 2006 Cri L J 1496 (CG) (the victim was 12 years old), *Thaker Rajesh Kumar vs State of Gujarat*, 2006 Cri L J 1973 (Guj) (the victim was 12 years old), *Ranbir vs State of Haryana*, 2005 Cri L J 521 (P&H) (the victim was less than nine years old).
  - 31 2004 Cri L J 4123 (Kar).
  - 32 Whether a child or adult, the medical assessment of the state of the hymen and the finger test has no ability to scientifically prove the question of penetration or consent.
  - 33 *Revella Sivaiah vs State of Andhra Pradesh*, 2005 CriLJ 526 (AP).
  - 34 *SukhdevAnand vs State of Himachal Pradesh*, 2006 Cri L J 98 (HP).
  - 35 See, *Raj Kumar @ Raju vs State of Himachal Pradesh*, 2007 Cri L J 1916 (HP), *AnumulaRaji Reddy vs State of Andhra Pradesh*, 2005 Cri L J 220, *Subtakum Ansari vs State of Bihar* (now Jharkhand), 2004 Cri L J 2137 (Jhar), The Public Prosecutor, *High Court of Andhra Pradesh vs Badana Ramayya* 2004 Cri L J 3510 (AP).
  - 36 2005 Cri L J 4443 (Raj).
  - 37 2005 Cri L J 4443, ¶ 16 (Raj).
  - 38 MANU/UC/0054/2010.
  - 39 *Raju @ Rajendra Prasad vs State of Uttarakhand*, MANU/UC/0054/2010. We refer to the case again in Footnote 76 as Raju.
  - 40 See, *Revella Sivaiah vs State of Andhra Pradesh*, 2005 Cri L J 526 (AP), *Sukru Gouda vs State of Orissa*, 2004 Cri L J 1566 (Ori).
  - 41 *Sukru Gouda vs State of Orissa*, 2009 Cri L J 831 (SC). This judgment appears to have led to the quotation being deleted from the most recent edition (2011) of Modi, though it still continues to appear in other manuals, including Parikh.
  - 42 *State of Himachal Pradesh vs Kishan*, MANU/HP/0335/2010.
  - 43 Ibid.
  - 44 2005 Cri L J 1876 (Cal).
  - 45 *Ratan Das vs State of West Bengal*, 2005 Cri L J 1876 (Cal). We refer to the case again in Footnote 84.
  - 46 *Radhu vs State of Madhya Pradesh* (2007) 12 S C C 57, ¶ 5.
  - 47 See, *State of Himachal Pradesh vs Mano*, 2011 Cri L J 1218 (HP), *Pardeep @ Sonu vs State* (Govt of NCT of Delhi), MANU/DE/2427/2011, *Hari Om vs State* (NCT), 2010 CriLJ 1281 (Del).

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