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Supreme Court of Pakistan delivers landmark judgement on sexual violence

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Rida Tahir analyses the judgement of the Supreme Court of Pakistan in the recent case of [Atif Zareef v. The State](#) and the re-victimisation faced by female survivors of sexual violence in the criminal justice system of Pakistan.

Across Pakistan, the conviction rate in sexual violence (SV) cases stands [at less than 3](#) per cent, despite their high level of prevalence. Rape is a [severely under-reported crime](#) in Pakistan and there are no reliable statistics due to under-reporting and [no centralised data collection](#). An [analysis](#) reveals that the causes of the under-reporting of SV crimes and a large number of acquittals by the courts is due to, among other things, the re-victimisation of female survivors of SV by the criminal justice system (CJS).

This includes the use of the [two finger test \(TFT\)](#) and the impeachment of the chastity and morality of female survivors by questioning their prior sexual activity and maligning their character in their cross- examination by the defence.

On 4th January, 2021, the Supreme Court of Pakistan (SC) delivered a landmark judgement in [Atif Zareef v. The State](#), which held that recording the sexual history of the

survivor by carrying out the TFT and questioning the survivor on her sexual history or character in order to discredit her credibility is unconstitutional and illegal.

Two finger test (TFT)

The TFT, also known as the virginity and hymen test is an [old practice](#) and has [long been a routine part](#) of criminal proceedings in Pakistan. It is conducted on female survivors/victims of rape and SV in Pakistan. It is a [practice whereby two fingers are inserted inside](#) the female genitalia by a medico-legal officer to check its size and elasticity. The TFT is based on the [unscientific](#) and misogynist assumption that a woman who engages in sexual intercourse is less likely to have been raped hence she lacks the moral authority to make an accusation of rape or SV.

Art. 14 of the [Constitution of Pakistan](#) (Constitution) grants the right to dignity. In *Atif Zareef v. The State*, the SC held that reporting and recording the sexual history of a survivor by conducting the TFT is contrary to Art. 14 as it amounts to degrading her human worth by discrediting her independence, identity, autonomy and free choice. It was also held that the TFT has no scientific value. The TFT was previously held unconstitutional and illegal by the Lahore High Court (LHC) in *Sadaf Aziz v. Federation of Pakistan*. However the LHC's judgement [only applies to the province of Punjab](#) whereas the SC's judgement applies as a binding precedent across Pakistan.

Moreover, Art. 4(2) (a) of the Constitution stipulates that, "...no action detrimental to the life, liberty, body, reputation...of any person shall be taken...". The SC held that mentioning the sexual history of a survivor by making observations about her body, such as, "the vagina admits two fingers easily" is contrary to the reputation and honour of the survivor and violates Art. 4(2) (a) of the Constitution.



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Mentioning the sexual history of female survivors

During SV trials, the accused is often defended on the basis that the survivor/victim had a promiscuous background and that she was a woman of immoral character and on that basis, she must have consented to the alleged act of rape or her testimony is less worthy of belief. Art.151 (4) of the [Qanun-e-Shahadat Order](#) 1984 (QSO) stipulated that, “when a man is prosecuted for rape... it may be shown that the victim was of generally immoral character to impeach her credibility.” It was omitted by [the Criminal Law \(Amendment\) \(Offences Relating to Rape\) Act 2016](#).

However, the practice of questioning survivors on their sexual history and chastity continued. The SC referred to [Mukhtar Ahmad v. Govt. of Pakistan](#), wherein a full bench of the Federal Shariat Court (FSC) of Pakistan had earlier declared that the provisions of Art. 151(4) of the QSO was repugnant to the Injunctions of Islam.

The SC stated at paragraph 14 of the judgement that, “evidence relating to sexual history should not be admitted in order to draw inferences supporting the ‘twin myths’, namely, that by reason of that sexual history, it is more likely that the complainant may have consented or become less worthy of belief.”

The SC held that the omission of Art. 151(4) of the QSO leaves no doubt in discovering and ascertaining the intention of the Legislature that in a rape case, the survivor cannot be questioned about her alleged general immoral character. Further, the SC held that the declaration of the FSC of Pakistan as to the provisions of Article 151(4) of the QSO, since omitted, also bars such questions.

Often, expression such as, habituated to sex, woman of easy virtue, woman of loose moral character, and non-virgin are used to describe survivors of SV. The SC held that such expressions are unconstitutional and illegal. The SC directed that the courts should discontinue the use of inappropriate expressions even if the charge of rape is not proved.

The judgment in *Atif Zareef v. The State* is being celebrated across Pakistan. However, in order to cease the re-victimisation of SV survivors in courts, meaningful transformations in the CJS’s response to SV need to be made. First, gender sensitisation trainings should be provided to judges, lawyers, prosecutors, medico-legal officers, police officers and all responders to SV crimes in the CJS.

Second, lawyers and prosecutors should be provided with ethical training on advocacy and education on the existing laws on SV along with specialised sexual and gender-based violence mechanisms, such as video-link evidence of survivors/victims and after court hour hearings, for example.

Third, the government should provide standard operating procedures for prevention and response to SV based on international good practices, such as, [the framework](#) issued by the World Health Organization (WHO) and UN Women on preventing violence against women and girls. Lastly, the government and civil society organisations should act in harmony and devise appropriate strategies, based on extensive research, in order to bring reforms to the CJS.

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