[Aitzaz Ahsan](https://www.thenews.com.pk/writer/aitzaz-ahsan)

February 25, 2021

**Mukhtar Mai vindicated**

The writer is a senior advocate of the Supreme Court.

Two decades ago, she was a rustic, unlettered and illiterate woman in her late-20s living in a remote village in southern Punjab in the tribo-patriarchal society of District Muzaffargarh. Divorced some years back, she lived with her parents. The dominant tribe in the area was the Mastois. Mukhtar Mai belonged to the landless Gujjar clan.

Mukhtar’s young brother, Shakoor, was sexually brutalized by four Mastois. Turning the case upon its head, the Mastois locked the boy up along with their own sister, Salma, twice his age, accusing them of illicit relations – a classic case of ‘Karo-Kari’. A Mastoi jirga later the same day ruled that since her brother had violated a Mastoi girl, Mukhtar Mai must submit to the will of four Mastoi men at once. She resisted but was dragged to a room outside which the all-male jirga sat and inside which four Mastois gangraped Mukhtar.

Terror spread across the area. Mukhtar’s own family deliberated for six days whether or not to report the crime. Her uncles and brothers opposed it. Her father wavered. Then her mother took charge. They would go to the police no matter what.

It finally ended up in the Supreme Court. The majority (Justices Saquib Nisar and Shakirullah Jan) did not consider her a credible witness because she was not a virgin. It drew a distinction: “… in a case of an unmarried virgin victim of a young age, whose future may get stigmatized, if such a disclosure is made, if some time is taken by the family to ponder over the matter that situation cannot be held at par with a grownup lady, who is a divorcee for the last many years…”. Thus, a shadow was cast upon her entire statement and it was discarded by the majority.

The minority Judge Nasirul Mulk was more to the point. He appreciated the cogent evidence of widespread terror in the area; the trauma of the poor landless Gujjar family, with both a son and a daughter sexually brutalized; and the humiliatingly servile behaviour of the SHO before the Mastoi clansmen. Where the majority disbelieved the outrage, the minority judge would have nothing to do with the distinction between a raped virgin or a divorcee. Taken to its logical end, this assumption makes for a disturbing distinction prescribing a standard that would make courts cynical of a complaint of rape made by a woman who is ‘not a virgin’, more so if she is a sex worker. Let that sink in.

This distinction, one must admit, has in fact long been made by the courts in the Subcontinent by way of a cruel virginity (or ‘two-finger’) test. The rationale of the test is that if the victim is found used to sexual intercourse, the court will be less inclined to accept her allegation of rape than if she had been a virgin until the assault.

Abjectly keen to discredit Mukhtar, the patriarchal majority chose to misread the evidence in several other respects also. To take one instance, it ‘found’ that there was no proof of any injury on her body to support her assertion that she had resisted. Therefore, it assumed consent. This was blatantly contrary to explicit evidence. The minority judgment referred to the Medico Legal Report and the statement of prosecution witness Dr Safia who had examined those injuries. Both were on the record and amply corroborated Mukhtar Mai’s version. The majority had ex facie misread the record.

Incidentally, Mukhtar’s account was also corroborated by the guilty verdict against the four Mastois charged of sodomy. This put paid to their attempt to deflect the crime to a fabricated allegation that a 12-year-old Shakoor had consorted with a 26-year-old Mastoi girl, Salma, and that too without her consent. The majority called the assault on Shakoor ‘an obscure happening’. But it was anything but that.

It appears that the matter would have been simple if only Mukhtar Mai had been an unmarried woman. There would then be no hindrance in the way of the majority to believe her account. However, being a divorcee, she did not have the chance of a snowball in hell.

Clearly, as per the majority, non-virgins (married, divorcees, even sex-workers) cannot suffer the trauma of rape to the extent, nor have the protection against violence and physical harm, available to virgins. This was a sweeping generalization carrying within it wide-ranging implications of gender bias and a misogynist incapacity to take notice of the social backdrop in the context of which the horrendous crime of gang-rape was committed. The cruelty of such a view is surpassed only by its recklessness.

Mukhtar’s statement was discarded. For twenty years she bravely pursued her tormentors in the courts, but lost to a socially dominant patriarchal attitude. A review filed on her behalf was dismissed in June 2019.

But then enter Justice Ayesha A Malik. One decade after the original ‘Mai judgment’ of the Supreme Court, Justice Ayesha Malik of the Lahore High Court in the matter titled ‘Sadaf Aziz v The Federation’ has now (January 2021) held that ‘virginity’ or otherwise of a victim is irrelevant to ascertaining the crime of rape – “The conclusion drawn from these (virginity or two-finger) tests about a woman’s sexual history and character is a direct attack on her dignity and leads to adverse effects on the social and cultural standing of a victim. It is also discriminatory as the test is carried out primarily to ascertain whether or not she is sexually active, for which there appears to be no justification as being sexually active is irrelevant to the incident of rape or sexual abuse” (para 23).

The judge goes on to state: “Virginity testing is highly invasive, having no scientific or medical requirement, yet carried out in the name of medical protocols in sexual violence cases. It is a humiliating practice, which is used to cast suspicion on the victim, as opposed to focusing on the accused and the incident of sexual violence….If the victim, is found to not be a virgin, it cannot and does not suggest that she was not raped or sexually abused. What it does is place the victim on trial in place of the accused and shifts the focus on her virginity status. In this regard, the victim’s sexual behavior is totally irrelevant as even the most promiscuous victim does not deserve to be raped, nor should the incident of sexual violence be decided on the basis of a virginity test.” (para 27)

The Sadaf Aziz Judgment is not a marginal change. It brings about bold and necessary changes that will make a real and positive difference by vanquishing archaic practices. Like the late judge of the US Supreme Court, Justice Ginsberg (RBG), Justice Ayesha Malik attacks “the most pervasive” though fictional “stereotype in our law – that men are independent and women are men’s dependents”. She thus contributes immensely to making our legal system viable, responsive, and capable of addressing issues which have generally been ignored if not blindly followed to this day. By erasing the distinction between virgins and married/divorced/sexually active rape victims, Justice Malik vindicates Mukhtar Mai.

Tailpiece: After Nadeem Saeed, a brave journalist broke the story, Mukhtar Mai evoked a tsunami of sympathy. Then federal minister, Attiya Inayatullah, came with a first cheque of Rs5 lacs from General Musharraf. Mai refused. She accepted only when it was deposited in the account of the deputy commissioner to be spent on building and running a school for girls in Mirwala, her village. Today that school numbers 2000 students with pick-and-drop facility and provision of uniforms. Ironically, even Mastoi girls, including daughters of the rapists have studied in the school. Mukhtar Mai (no Canadian visa type: a la Musharaf), herself joined class 1 and has matriculated.