### Gender Workshop

National Judicial Academy Bhopal

By

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### Part I:

On Sexual/Violence

### Exercise

Divide into three groups

### **Fact Pattern I**

### (1/2)

- Karan (35 years) and Anjali (31 years) live in Delhi with their two kids. Karan works as an engineer with XYZ Ltd. and Anjali is a homemaker. In March 2015, the family relocated to Bangalore as Karan received a promotion. They found a beautiful two-bedroom apartment in a good locality in Bangalore. With her kids off to the new school, Anjali felt lonely in the new place. She decided to befriend her new neighbours. Mrs. Srivastava was Anjali's next-door neighbour and a very warm person. Anjali and Mrs. Srivastava soon became good friends. Mrs. Srivastava's son, Amar (21 years) used to study in a college near to his home. He was a sincere student and preparing for government examinations, but frustrated as women did not display interest in him. When Anjali used to visit Mrs. Srivastava, Amar would sit next to her and try to get physically close. She felt uncomfortable but never objected to him.
- On 7<sup>th</sup> June 2015, Karan had to leave Bangalore for two days and the kids were at their grandparents' house for their summer vacation. On 8<sup>th</sup> June at 11.00pm, Anjali heard a banging on the door.

- She hurriedly opened it to find inebriated Amar at the door. He forced himself in and dragged Anjali to her bedroom. He raped her and left the house around 11.45pm.
- On 9<sup>th</sup> June 2015 at 9.30 am, Karan reached his home to find things scattered all over and Anjali lying on the floor in a corner, sindoor smeared all over her face. He rushed to her and asked what happened. He was then informed about Amar and what transpired the night before. Karan then took Anjali to Police Station and an FIR was registered. Amar had no previous criminal record. In 2018, the Trial Court in Bangalore convicted Amar for rape and wrongful confinement.

### **Fact Pattern II**

(1/3)

- Radha is a young graduate from University of Kurukshetra. She had got a job as a receptionist in Delhi. On 25<sup>th</sup> January 2017, she went to a bar at Connaught Place for a party with her friends. Her friends were late, and she had to wait at the bar counter. Soon a young man came and introduced himself as Ankit. He is a consultant at a management company. Radha chatted with him for couple of minutes, she found him attractive, and left shortly after her friends arrived.
- At 11.30pm, Radha left the bar after having a fun time with her friends. As it was late and she had had a few drinks, she decided to book a cab. Suddenly, Ankit came with his car and offered her a ride. She accepted the offer and readily sat into his car, Ankit leaned over to kiss Radha and Radha kissed him back. However rather than taking the normal route to her home, Ankit took a detour. This raised Radha's alarm and she asked him to stop the car. He stopped the car in a secluded parking lot, Radha asked to be let out of the car immediately Ankit put the child lock on and she could not escape. Ankit then tore Radha's clothes off, and raped Radha. Ankit then threw her out of the car and left.

- After regaining consciousness, Radha called her friends who picked her up from the place. This incident rattled Radha and she couldn't even leave her house for a week. Her friends insisted her to file a complaint a report. An FIR was registered on 2<sup>nd</sup> February, 2017.
- During the trial, the forensic report indicated that the two finger test had been conducted on Radha, on cross examination it was revealed that Radha had engaged repeatedly in sexual intercourse with two boyfriends in the past both of whom broke up with her. She was doing well as a receptionist and her employer had given her compassionate leave. Ankit had no previous criminal record, had been an excellent student and had a bright future ahead of him. Ankit was tracked down and arrested. He was convicted for rape and wrongful confinement.

### **Fact Pattern III**

(1/2)

- Anushka (20 years) was visiting her grandmother's house for summer vacations. She was a studious, shy girl and did not like interacting with boys. She was a sincere student, ambitious and very serious about her career.
- A 21-year-old boy, Ramesh, lived in her neighbourhood. He was also a good student and had been recently selected for MBA at a top B-school in the country. Ramesh would do some odd jobs for Anushka's grandparents as they were old. On 21<sup>st</sup> May 2015, Ramesh was asked to tutor Anushka for maths while her grandmother had to visit the temple. Finding her alone at home, Ramesh locked the doors and windows, pinned her down, forced himself on Anushka and ran out. On returning, her grandmother saw Anushka lying on the floor with some blood around. She immediately called the Police and filed an FIR. Ramesh was arrested.
- During the trial, the forensic report indicated that the two-finger test had been conducted on Anushka, revealing that Anushka had been a virgin. He was convicted for rape and wrongful confinement in 2018.

Study at Yale University: 'Discretion,
Discrimination and the Rule of Law:
Reforming Rape Sentencing in India'
by Mrinal Satish

### Introduction to The Study

 Study of all the documented cases decided by Supreme Court of India and the 21 High Courts, 1984 – 2009 i.e. around 800 cases over 25-years.

#### Findings:

- Rape myths- Eg. absence of injury indicates that consent during intercourse
- Stereotypes- Eg. loss of chastity is the primary harm.

## Rape Myths & Stereotypes (1/2)

- Women make false rape allegations
- Virginity: utmost importance
  - Lower sentences on defendants when the raped woman is unmarried and sexually active
- Importance to medical examinations
  - Two finger test: Given weight while sentencing
- Perception of survivor's protests
  - Tukaram v. State of Maharashtra (1979 AIR 185)

(2/2)

Injuries on the body of the accused and woman

Reporting the offence promptly

Feeling ashamed while testifying

- Conduct post incident.
  - Raja & Others v State of Karnataka

### Findings

- Site of stereotyping shifted from the guilt adjudication to the sentencing phase of the trial.
- Proper exercise of discretion against improper exercise or "abuse" of discretion.
- Disparity in sentencing is actually essential unfair to impose the same sentence on everyone convicted of a particular offence.
- Sentencing guidelines, which would "structure" sentencing discretion, would be the right solution, not removing discretion altogether.

### Some guiding principles

- 1. What interests are violated or threatened by the standard case of the crime- physical integrity, material support and amenity, freedom from humiliation, privacy and autonomy.
- 2. Effect of violating those interests on the living standards of a typical victim- minimum well-being, adequate well-being, significant enhancement
- 3. Culpability of the offender
- 4. Remoteness of the actual harm as seen by a reasonable person.

#### Capital Punishment?

- 140 countries abolished death penalty.
- No data: death penalty deters violent crimes.
- Studies show increase in murder in US when reinstated capital punishment in 1970s and 1980s.
- Incentive Problem: death penalty in rape and murder- rapist is incentivised to kill-esp. due to importance given to survivor's testimony.
- To appease 'collective conscience'- cannot sacrifice right to life.
- Death Penalty- more likely in repeat rape than murder- drawn from patriarchal belief of women's honour.

### The Marital Rape Exception

- No. of women who experienced sexual violence by husbands forty times sexual violence by non-intimate perpetrators.
- Constitution of India: Article 21, 19, 14, 15(1)
- In Justice KS Puttuswamy (Retd) vs Union of India: women's right to bodily integrity, sexual autonomy and control over reproductive choice.
- In Nimeshbhai Bharatbhai Desai v. State of Gujarat, the Gurajat High Court has held that a wife was not the property of his husband and sexual relations should not be without her consent.

### Marital rape: Lesser offences?

- Section 354
- Section 377
- Section 498A
- Domestic Violence Act

Independent Thought vs.
Union of India

W.P. (C) No. 382 of 2013

### Justice Madan B. Lokur held,

The right to bodily integrity was initially recognized in the context of privacy in <u>State of Maharashtra v. Madhukar Narayan Mardikar</u> wherein it was observed that no one has any right to violate the person of anyone else, including of an 'unchaste' woman. It was said:

"The High Court observes that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law." (Emphasis supplied by us)

In Bodhisattwa Gautam v. Subhra Chakraborty, it was observed by this Court that rape is a crime not only against a woman but against society. It was held in paragraph 10 of the Report that: "Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects." (Emphasis supplied by us)

■ It was pithily stated in <u>State of Punjab v. Gurmit Singh</u> "We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female." (Emphasis supplied by us)

There are several decisions in which similar observations have been made by this Court and it is not necessary to multiply the cases. However, reference may be made to a fairly recent decision in State of Haryana v. Janak Singh wherein reference was made to Bodhisattwa Gautam and it was observed in paragraph 7 of the Report:

"Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. It dwarfs her personality and reduces her confidence level. It violates her right to life guaranteed under <u>Article 21</u> of the Constitution of India." (Emphasis supplied by us)

### Consent and Equality.

- It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property.
- Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

• In Anuj Garg v. Hotel Association of India, this Court was concerned with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 which prohibited employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or an intoxicating drug is consumed by the public. While upholding the view of the Delhi High Court striking down the provision as unconstitutional, this Court held in paragraphs 46 and 47 of the Report:

"No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a compelling State purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases." (Emphasis supplied by us)

 Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of the IPC. This was recognized by the LCI in its 172 nd report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the IPC inter-se.

- Justice Deepak Gupta concurred with Justice Lokur, and held as follows
- Exception 2 to <u>Section 375</u> IPC is discriminatory as it is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other offences are concerned.
- Sexual crimes against women are covered by <u>Sections</u> 354, 354A, 354B, 354C, 354D of the IPC. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with intent to disrobe; voyeurism; and stalking respectively. There is no exception clause giving immunity to the husband for such offences.
- The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to <a href="Section 375">Section 375</a> IPC.

# Nimeshbhai Bharatbhai Desai vs. State of Gujarat.

# Recently, Justice Pardiwala of the Gujarat High Court, held that:

"The government is hesitant to criminalize the marital rape because it would require them to change the laws based on the religious practices, including the Hindu Marriage Act, 1955 which says a wife is duty bound to have sex with her husband...It was, therefore, felt that if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice...

...It is high time that the legislature once again intervenes and go into the soul of the issue of marital rape. Marital rape is a serious matter though, unfortunately, it is not attracting serious discussions at the end of the Government."

## On the rights of married women, the Gujarat High Court held,

"A woman is no longer the chattel—antiquated practices labeled her to be. A husband who has sexual intercourse with his wife is not merely using a property, he is fulfilling a marital consortium with a fellow human being with dignity equal to that he accords himself. He cannot be permitted to violate this dignity by coercing her to engage in a sexual act without her full and free consent."

### Justice Pardiwala also stated as follows:

"Husbands need to be reminded that marriage is not a license to forcibly rape their wives. A husband does not own his wife's body by reason of marriage. By marrying, she does not divest herself of the human right to an exclusive autonomy over her own body and thus, she can lawfully opt to give or withhold her consent to marital coitus. A husband aggrieved by his wife's unremitting refusal to engage in sexual intercourse cannot resort to felonious force or coercion to make her yield."

### Victim Centred Justice

- Witness Protection Programs
  - Victims (socially or economically marginalised community)-at risk when the perpetrator is powerful, influential, or rich.
  - Witness protection Cell in Delhi- under the Police and report to DSLSA
  - Lack of funds- major impediment
- Support services for survivors
  - Resistance in filing of FIR
  - Free medical help to survivors
  - Training of administration in medico-legal guidelines
  - No uniform compensation scheme
  - one stop crisis centers are properly equipped

# Victims in Larry Nassar Abuse Case Find a Fierce Advocate: The Judge



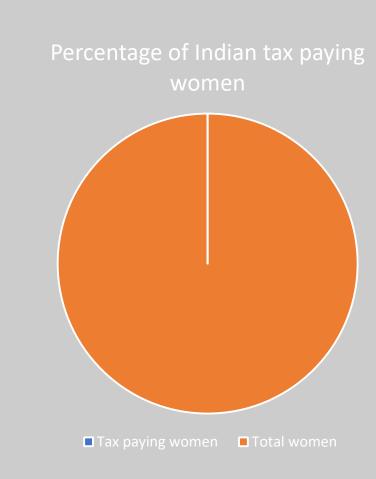
### Part III- Gender and tax: India



A close look at tax systems demonstrates how fiscal policies affect patterns of marriage, childbearing, work and education. Coupled with social norms and biases, the fiscal system can be seen to exercise coercive force, entrenching social life patterns in an endless feedback loop. The liberal feminist perspective throws light on how, amongst other factors, a regressive taxation system, many of the special tax deductions, and even tax benefits for savings, benefit women less than men. We examine how the seemingly gender-neutral provisions of Indian taxation law fulfil the aims of substantive equality, and to what extent they further the existing stereotypes favouring one-breadwinner families.

### A. Positive bias- not so much?

- It is unclear if the higher tax threshold itself really has had a positive impact on women's lives in India.
- Tax-paying women are only about 0.00001 percent of all women and 0.27 percent of working-age women. The use of 'income tax' as a means to further gender equality thus seems limited to an extent
- Eventually, the Direct Tax Code has provided for equalling the exemption limit for both men and women which is right now at Rs. 2,50,000. Whatever little relief which might have been available to women as a result of the higher exemption limit will now be lost.



## B. Instances of Implicit Bias- Ignoring individuality of married women

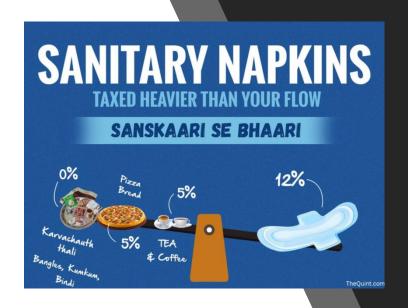
- The Finance Act, 2008 (26) inserted sub-section (26AAA) in §10 of the Income Tax Act, 1961 providing that any income which accrues or arises to a Sikkimese individual from any source in the state of Sikkim or by way of dividend or interest on securities would be exempt from taxation. This exemption, however, does not apply to a Sikkimese woman who marries to an individual who is not a Sikkimese.
- Evidently, this provision is based on a presumption, or rather, the stereotype, that the woman would "cease" to be a Sikkimese if she marries a non-Sikkimese. This provision demonstrates the existence of the stereotype that the individuality of a woman is determined by her marital status.
- It is based on the ideology that a man and woman act as a single unit after marriage, and the woman's legal relations are to be governed by the status of her husband.

Tax Exemption to Sikkimese women under IT Act:

Married to
Sikkimese men

Married to non-Sikkimese men

### C. GST and Women



- Evident gender insensitive character of Goods and Services Tax (GST)
- The new tax regime imposes 12 per cent tax on sanitary napkins, perhaps, perceiving them to be as a sort of luxury goods.
- Affordability of such menstrual protection tools is critical for women's health and are, therefore, absolutely essential commodities. Increasing the prices of sanitary napkins goes against the objective of promoting healthier menstrual hygiene practices.
- If bindi and bangles can be tax-free, why not sanitary napkins? An aid to menstrual
  hygiene cannot fall within luxury goods, and should be exempt from taxes.
- The imposition of higher GST on sanitary napkins reflects disturbing lack of gender perspective in public policy. Taxation is not a mere accounting exercise. It should be designed to encourage desirable consumption of goods and services in the society.

# Constitutionality of Gender based tax legislations

The first aspect while considering legislations which classify the subjects based on gender is whether it is violative of Article 14 of the Constitution of India. As held by the Supreme Court in *Khandige Sham Bhat v.*\*\*Agricultral Income Tax Officer (1963 3 SCR 809), the touchstone of any tax classification has to be (i) whether the same is based on a intelligible differentia; and (ii) whether the differentia has a rational nexus to the object sought to be achieved.

Secondly, Article 15(1) prohibits, inter alia, sex discrimination. Discrimination, both in its common usage, as well as in the understanding of the Supreme Court, broadly means to unequally allocate benefits and burdens among identifiable classes of people. Any tax legislation if discriminative against women, like GST on sanitary napkins would be violative of Article 15(1), hence, uncostitutional.

# Part IV- Women and Property Laws: India



Property rights of women in India remained largely an ignored and unaddressed issue. In September 2005, the courts declared that Indian women would have a right to a share in property just like a man of the family did.

### A. Indian daughters

#### Hindu

- The daughters now have equal right of inheritance to their father's estate as sons.
- The daughters have a right to receive a share in mother's property.
- The Hindu Succession (Amendment) Act, 2005 removes discriminatory gender that was in the provisions of the **Hindu Succession Act**, 1956 and now it gives the various rights to the daughters that are as follows:
- -in the context of coparcener, the daughter will have same rights as the son

☐ The daughters inherit equally with any brothers in her father's or mother's estate.

- -have to bear the same liability in the property as the son
  - -be allotted the same share as to the son
- The married daughter does not have the right to ask for maintenance or to shelter in her parent's home

# Muslim | The daughters have right of inheritance equal to one-half of the son's share to their father's estate. | She has full control over her share of property and has the legal right to control, manage and dispose of her share as per her wishes in life or after death. | The daughter can receive gifts from those whom she may inherit property, but it doesn't take away her claim as per the inheritance laws. | The daughter has the right of residence in her parent's home and to ask for support until she gets married. | If the married daughter gets divorced, the maintenance charges fall on her parents after the iddat period which is approximately three months but if she has kids who can support her then it is their duty to do so. | Christian | Christian

☐ The daughter has the right to shelter and maintenance till she gets married from her parents, but she cannot ask for it after her marriage.

☐ She has all rights to her personal property, upon accomplishing majority. Until this happens, her father is her natural guardian.

### B. Indian Wives

Hindu	<ul> <li>-A married woman has full right over her property and is the sole owner whether it is gifted, inherited or earned by her.</li> <li>She has the right to gift it to anyone whether in parts or whole.</li> <li>-The married woman has the right to maintenance and shelter from her husband. If the husband is a part of a joint family, she has the right to shelter and maintenance from the family.</li> <li>-In the case of partition of a joint family property (between her husband and his sons), the wife has the right to a share equal to as any other person. When her husband dies, she has the right to an equal share of his part, jointly with her children and his mother.</li> </ul>
Muslim	<ul> <li>-The wife has the right to maintenance as any other wife, if any, and to take action against her husband if he discriminates against her.</li> <li>-She has the right to maintain her control over her personal property and goods.</li> <li>-The wife in case of divorce has the right that the husband makes fair and reasonable provision for her future which includes her maintenance.</li> <li>-The wife has the right to mehr' as per terms of contract accepted at the time of the wedding.</li> <li>-She has the right to inheritance to the extent of one-fourth when there are no kids and if there are kids then to the extent of one-eighth.</li> </ul>
Christian	<ul> <li>The wife has the right to receive maintenance from her husband, and if he doesn't do so, she has the right to ask for the divorce.</li> <li>The wife upon the death of her husband has the right to receive a one-third share of his estate, and the rest is divided among his children equally.</li> </ul>

### C. Indian Mothers

#### Hindu

- The mother has the right to receive maintenance from her children who can support her.
   She is a part of Class I heir of Inheritance Law.
- In the case of Joint Family, the widowed mother has the right to take the share equal to the share of her son.
- She has the right to dispose of her property by sale, gift or will as she may choose.
- If the mother dies intestate, her estate will be distributed among her children equally despite their sex.

#### Muslim

- If the mother is widowed or she gets divorced, she has the right to receive maintenance from her children.
- She has the right to inherit a one-sixth share of her deceased child's property.
- The mother's property will be divided as per the rules of Muslim law.

#### Christian

- The mother doesn't have the right to receive maintenance from her children.
- She may inherit one-fourth of her children's property if her kids die without a spouse or any living child.

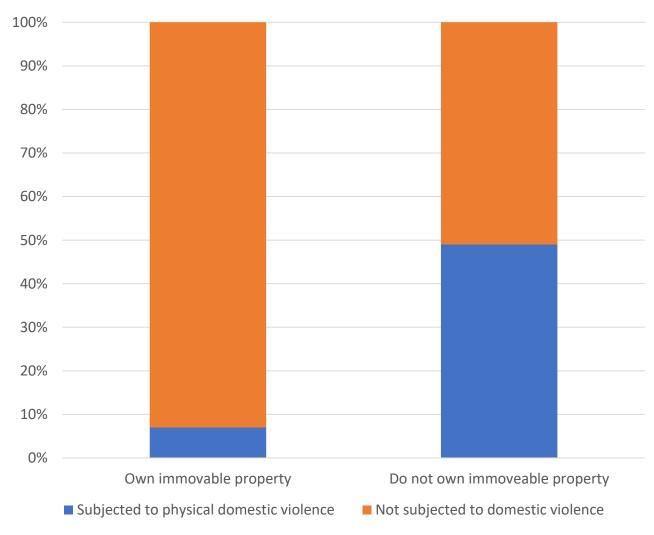
## Impact of Property rights being vested in Women

### A. Domestic Violence: Villages of Kerala

Landesa research shows that secure land rights for women can make a difference to their lives. Where women have land and/or a secure home that they own (as opposed to renting), they are empowered economically and socially. In Kerala, India, only 7% of women who owned immovable property were subject to physical domestic violence, as opposed to 49% of women who did not.

But Kerala is a strongly and comparatively matrilineal society, where, compared to the rest of India, women enjoy relatively more gender equality, autonomy, agency and freedom of movement than in the rest of India.

#### Illustration: Situation of women in Kerala



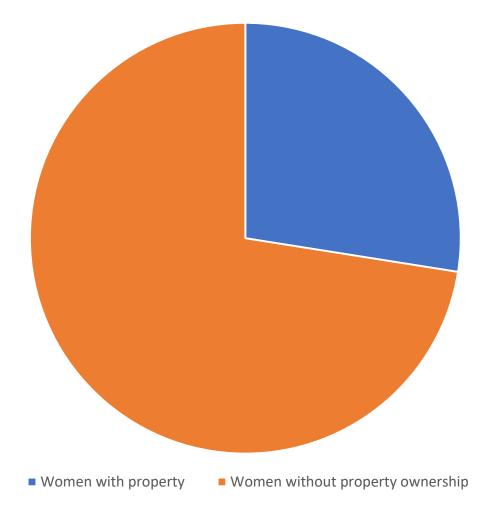
### B. Marital violence: North Indian villages

A similar study in the northern Indian state of Uttar Pradesh—where women there enjoy relatively less autonomy and freedom of movement because the society is strongly patrilineal and patriarchal compared to Kerala—found that female ownership of property increases a woman's economic security, reduces her willingness to tolerate violence, and can deter spousal violence. The research examined the link between women's participation in paid work and ownership of property on domestic violence, and unusually drew insights from the testimonies of both women and men.

The study, conducted at the micro-level in 8 villages in Uttar Pradesh, revealed that women's employment in regular paid work outside the household makes them 62-64% less likely to experience violence as compared to non-working women.

The research also showed that women's ownership of property has a large effect on reducing violence, but the study must be done on a larger scale to demonstrate what all women know intuitively – money, land, and the power that is derived from both, greatly increases protection against domestic violence.

### Illustration: Villages of UP- Women subjected to violence



### THE END

We experience world in embodied ways. If the body we inhabit is marked male, that has one kind of effect; or Dalit, or disabled, yet other effects. These affects are structural, material, phenomenological and psychological simultaneously. The business of life is living out of these identities, either reaffirming the worth and value of the subjectivity that we experience, or rejecting it and actively seeking another, or others. Ideally, once we recognise the full implications of the idea that the division of nature/culture was constituted at a particular horizontal conjuncture, we may at last be liberated from the tyranny of the "natural".