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# **SHEBAITSHIP AS HERITABLE PROPERTY: A SUCCESSION-CENTRIC REAPPRAISAL OF DIVINE PERSONHOOD AND GENDER IDENTITY UNDER HINDU LAW**

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## **ABSTRACT**

This paper is about a doctrinal and constitutional dilemma in Hindu law: although Hindu deities are recognized as juristic persons and can own debutter property, the law around shebaitship, in which the property of the deity is handled and represented, still uses inflexible, binary, and cis-normative modes of succession. While Coparcenary rights secure a person's financial survival, Shebaitship secures their social, spiritual, and administrative identity. To exclude a transgender person from either is to perform a "Double amputation" of their rights: one economic, and one cultural. The research question is whether the exclusion or marginalization of transgender and non-binary people as shebait can be justified according to Hindu law principles, and whether it will pass constitutional test according to articles 14 and 21.

Majority of temple succession laws are based on cis - heteronormative scripts of the Hindu Succession Act. There is almost no research on how the juristic personhood of a deity (often genderless or multi-gendered in philosophy) interacts with the succession rights of transgender or non-binary individuals as Shebaits. The paper analyses the juristic personality of Hindu deities and the nature of the property owned by the deity, focusing on the doctrinal position of the shebait as the human instrument through whom the deity's rights are exercised. It analyses the statutory and customary succession rules affecting shebaitship, and examines how temple administration laws and inheritance frameworks operate when claimants do not fall within binary classifications.

The paper presents the idea of treating shebaitship as a gender-based and hereditary right does not align with the logic of deity-personhood and is a breach of constitutional morality. It suggests a doctrinal change to a gender-neutral successor model which is founded on fitness and interest of the deity.

## INTRODUCTION

The Hindu religious endowments hold a special place in the Indian law especially in the idea of acknowledging Hindu deities as juristic persons who could own property.<sup>1</sup> When property is consecrated to a god it no longer belongs to the human founder, but rather to the deity as a person in the law.<sup>2</sup> This fiction of law permits the normal operation of temples and religious institutions under the normal law of property, but still maintains the theological supposition that the deity is the real proprietor of property endowed. Since the deity is physically incapable of administering the property, the law has acknowledged a human agent referred to as the shebait who is the carrier of worship, management and administrative functions relating to the endowment which comes into play.<sup>3</sup>

The status of the shebait is not that of a trustee or manager.<sup>4</sup> Hindu law has traditionally recognised the office as having a dual nature; the shebait serves as the administrator of the estate of the deity, as well as the sole proprietor of a proprietary interest in the endowed property.<sup>5</sup> It has been restated by the courts that shebaitship may not be diminished to a mere role of a religious obligation since the position entails the aspects of property enjoyment in a beneficial way, and the entitlement to heredity.<sup>6</sup> This duality is what makes the shebait unlike other trustees in that the holder of the office has to run the estate on behalf of the deity, and still have a recognised proprietary interest in the running of the property endowed by the office within the tradition and doctrine of Hindu law historically.

This ambivalent character is critical when the institution is considered in the perspective of the succession of the Hindu personal law. The deity as the absolute proprietor of debutter property, the authority of administration and management of such property by the office of shebait, is, by the judgment of the courts, a hereditary property, and may descend through one generation after another. Similarly, the rule of succession to shebaitship tends to rely on the same principles as those governing inheritance of property by the Hindu law. The normally devoluted descent of the office, unless otherwise laid down by the founder of the endowment, is on

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<sup>1</sup> Pramatha Nath Mullick v. Pradyumna Kumar Mullick, (1925) LR 52 IA 245.

<sup>2</sup> Bishwanath v. Sri Thakur Radhaballabhji, AIR 1967 SC 1044.

<sup>3</sup> Jogesh Chandra Roy v. Dhakeswari Mata, (1942) LR 69 IA 183.

<sup>4</sup> B.K. MUKHERJEA, THE HINDU LAW OF RELIGIOUS AND CHARITABLE TRUSTS 178–82 (5th ed. 2006).

<sup>5</sup> Angurbala Mullick v. Debabrata Mullick, AIR 1951 SC 293.

<sup>6</sup> Commissioner, Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar, AIR 1954 SC 282.

familial lines, as dictated by the demands of lineage custom, and by historically gendered mode of descent in temple families as in communities.<sup>7</sup>

However, transformation in the Hindu succession law scene has been realized over the years particularly through the intervention of the legislations. The Hindu Succession Act 1956 and its after reforms were spiced with revolutionary changes in gender equity in the inheritance law through perhaps the most significant change of permission of daughters being regarded as coparceners in the joint family property. These trends are indicative of a wider trend toward abandoning strict patriarchal models of succession and toward more encompassing principles of succession. However, the issue of succession to shebaitship in most settings still shows the influence of the older assumptions, which favour the binary gender categories and established lineages hierarchies. Such continuation brings about a doctrinal conflict between the developing norms of statutory succession and the long-standing inherited practices of the governance of the temples that continue to define qualification towards succession.

The research question discussed in this article is thus the following: can the elimination or discrimination of transgender and non-binary people in terms of succession to shebaitship be justified according to the principles of Hindu personal law of inheritance? When the office of shebait possesses a proprietary character and is hereditary the normative pattern of inheritance would assume centre stage in making eligibility. It is argued in this article that due to its adherence to the logic of inheritance shebaitship has to react to the legislative change in succession based on gender neutrality denoted by reform of the Hindu Succession Act and thus must rethink gendered succession obstacles in the administration of temple property in the present day.

## **JURISTIC PERSONALITY AND PROPERTY FRAMEWORK**

### **The Idol as a Juristic Entity:**

The Indian law provides a Hindu idol with the status of a juristic person being aware of its ability to own property and engage in legal action.<sup>8</sup> A juridical person in an ideal or spiritual

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<sup>7</sup> Nandini Chatterjee, *The Gender of the Deity: Hindu Law, Inheritance, and the Shebait*, 39 OXFORD J. LEGAL STUD. 77 (2018).

<sup>8</sup> *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, (1925) LR 52 IA 245.

sense is an idol.<sup>9</sup> It has no physical ability to act.<sup>10</sup> The Judicial Committee therefore concluded that the idol has a right to be sued and to sue with a human representative and this would safeguard its legal rights.<sup>11</sup> This representation is necessary since the idol is legally incapable by nature and it needs a human agent to transact its business in the world.

### **The Role and Fiduciary Duty of the Shebait:**

The Shebait is the human manager of the property of the deity, and his post is a special combination of religious responsibility and personal. Being a fiduciary, the Shebait is an efficient trustee. This position establishes a disability of fiduciary: a Shebait is barred to become an adverse possessor of the deity's property by reason of adverse possession since their possession is properly considered to be the possession of the deity.<sup>12</sup> On the other hand, persons not in office as Shebait-and not acting under a fiduciary obligation-are, with particular conditions of an open hostile and unchallenged possession, conferred the title by adverse possession.<sup>13</sup>

### **The Proprietary Office of the Shebait:**

The courts have always identified Shebaitship as a proprietary, hereditary and partitive office and, as immovable property.<sup>14</sup> This appreciation goes back to the old writings and even judicial interpretation today which attests to the right of a family to pass on to this religious office.<sup>15</sup>

In case the founder fails to clear the office through a will, he or she passes it on to his heirs.<sup>16</sup> Since the office is the right to a share in profits or offerings (the business of usufruct), it is property, i.e. it is a beneficial interest in the usufruct. Such classification matters: since the office is a property which is heritable, devolution of the office must be consistent with Hindu Succession Act (HSA). This makes certain that there is no discrimination of the legal heirs in the inheritance of the office, as per the legal standards.

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<sup>9</sup> *Iswar Sridhar Jieu Thakur v. Keshab Chandra Ghosh*, AIR 1971 Cal 244

<sup>10</sup> *Jahor Lal Mukhopadhyaya v. Sri Sri Debidas*, AIR 1972 Cal 251.

<sup>11</sup> *Pradyumna Kumar Mullick v. Dinendra Mullick*, (1937) LR 64 IA 202.

<sup>12</sup> *Pulin Chandra Das v. Brojo Nath*, AIR 1971 Cal 513

<sup>13</sup> *Satya Charan Sarkar v. Mohant Rudrananda Giri*, AIR 1953 SC 153.

<sup>14</sup> *Ram Rattan v. Bajrang Lal*, (1978) 3 SCC 236

<sup>15</sup> *Angurbala Mullick v. Debabrata Mullick*, AIR 1951 SC 293.

<sup>16</sup> *Profulla Chorone Requitte v. Satya Chorone Requitte*, (1979) 3 SCC 409.

## **SHEBAITSHIP AS HERITABLE PROPERTY**

This legal framework in which property of the deity is managed is a key characteristic of the Hindu religious endowments. Even when the idol or deity is acknowledged to be the juristic owner of the endowed property, the day to day running of the property is with the human person referred to as the shebait. The office of shebait has always been recognized by courts to have a unique legal nature: it is a religious office and a proprietary interest. Since the shebait has a control over the organisation of the debutter property, and may acquire some beneficial interest with respect to the office, the office is in law considered as a species of property liable to an inheritance. Therefore, the issues of success to shebaitship play a significant role in the system of Hindu personal law.

### **The Will of the Founder as the Key to Succession:**

The original and the paramount rule applicable to the transfer of shebaitship is that which is founded on the will of the founder of the endowment. Once the founder devotes to a deity the property, he has a right to determine how the office of shebait will be dealt with and who will come after him to that office in the future.<sup>17</sup> It is well known that courts have always perceived that the directions of the founder of the line of succession should be followed ordinarily unless impossible to execute or against the law. It is the general rule of the doctrine that the founder of a religious endowment reserves the right of organization of the administrative system of the institution which he produces.

Based on this, the founder can dictate which line should be hereditary, which hereditary branches to be the successors, or even provide a system of managing the descendants rotating among others. These regulations are made directions that regulate the succession to the office of shebait. Many historical endowments of temples had a specific pattern of agnatic succession, with the founders specifying that heirs must be males of a specific ancestry and lineage.<sup>18</sup> The precedence of the will of the founder can thus be used as a reason as to why succession to shebaitship is often a trace of traditional family successions and inheriting practices that are inherent in the social setting wherein the endowment was established

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<sup>17</sup>Ganesh Chunder Dhur v. Lal Behary Dhur, (1936) LR 63 IA 448.

<sup>18</sup> Nirmal Chandra Banerjee v. Jyoti Prasad Mukherjee, AIR 1941 Cal 562.

**The Default Hindu Law of Succession:**

Even though it is very much governed by the intention of the founder, there are many cases when the founder has not prescribed a line of succession, or there are cases when the original scheme is not clear, and it underwent changes with time. In this situation a rule of default has grown in the courts from succession to shebaitship is subject to the ordinary rules of Hindu law with regard to succession to property. The rationale behind this strategy is that shebaitship, although having religious components, has a proprietary component that can be inherited as any other type of property.

According to this system of default, the office devolves to the heirs of the last holder in accordance with the rules of Hindu succession.<sup>19</sup> By this, it is apparent that the heirs who would otherwise have inherited property belonging to the deceased shebait can also inherit the office, unless the circumstances dictate differently. The reason why this rule exists is, that the proprietary interest, which the office attaches to the property, is part of the property of the deceased shebait, and consequently devolves to their legal successors. Consequently, the line of succession to shebaitship tends to follow the tendencies of hereditary succession in the Hindu law of succession, especially when the position has traditionally belonged to the lineage of one family.

**The Hindu Succession Act and the Character of Shebaitship:**

In 1956 the Hindu Succession Act was passed, which brought in a statutory law regarding the inheritance of Hindus. The Act was aimed at codification and reforming of the traditional rules of succession though much of the Hindu structure of personal law was still maintained. The main issue that comes out of such a legislative framework is whether shebaitship comes under the concept of property that is considered by the Act. The property rights of the Hindu women are also acknowledged in section 14 of the Act which states that all property owned by a female Hindu becomes her absolute property.<sup>20</sup> The provision is a broad definition of property to cover both movable and immovable property or any interest that is capable of being owned.

Since it has always been accepted that shebaitship is proprietary in nature, the question arises of whether the office might be included within this broad definition of property. In case

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<sup>19</sup> *Kanhaiya Lal v. Hamid Ali*, (1933) LR 60 IA 263.

<sup>20</sup> *V. Tulasamma v. Sessa Reddy*, (1977) 3 SCC 99.

shebaitship has a proprietary part, which may be inherited and enjoyed, then it may be treated logically as property to apply principles of succession. The interpretation would support the fact that the office is not created as an office of spiritual duty but the office is a legalised interest in regard to the management of the endowed property. It suggests a possibility that the development of the law of statutory inheritance ought to affect how the law of succession to shebaitship is applied.

### **The Impact of the 2005 Amendment:**

Another major change in Hindu succession law was made by the 2005 amendment of Hindu succession Act. This reform gave daughters the same coparcenary rights in joint family property, which considered them to be born as coparceners just as the sons. The amendment marked a turning point towards gender-neutral inheritance, by breaking down the previously gender-based restriction on coparcenary status, which was one of the barriers to gender-neutral inheritance in the Hindu personal law.

This reform has far reached implications even beyond the context of joint family property. With daughters now having, in coparcenary property, a birthright comparable with that of sons, it seems more and more hard to sustain by any justification the still clung-on agnatic, or male-line, succession to shebaitship. In historical contexts, agnatic preference in the inheritance of shebaitship was a more general patriarchal inheritance. But when such norms are seriously distorted by statutory change the rationale behind male preference in the succession to shebaitship is considerably undermined.

### **Shebaitship and the Concept of Apratibandha Daya:**

The fact that shebaitship is hereditary is another reason that it can be compared to classical Hindu law ideas about inheritance. Among such ideas is the notion of Apratibandha Daya (unobstructed heritage) the rights to property which an individual acquires by birth and not when the previous owner passes away. The traditional example of this category is coparcenary property since the members of the joint family become interested in the property immediately after being born.<sup>21</sup>

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<sup>21</sup> MULLA, HINDU LAW 450 (23d ed. 2018).

This brings up a serious dogmatic question, namely, is the succession to shebaitship analogous to unobstructed heritage? As a matter of fact, shebaitship is not completely operated like Apratibandha Daya since the right to take up the office is often brought into existence only by the death or ineligibility of the former office bearer. However, the fact that the office is hereditary to a particular family head to structural similarity to birth-based systems of inheritance. The conflict between the two models indicates the legal ambiguous nature of shebaitship as the hereditary proprietary interest and a religious office associated with the management of divine property.<sup>22</sup>

### **CONSTITUTIONAL OVERLAY: THE SUPPORTIVE LAYER**

As the judicial system of India shifts its focus away from the historical doctrine of personal law immunity towards the idea of constitutional supremacy, the constitutional validity of the Hindu Succession Act (HSA) is losing its viability more and more. This change demands that succession legislations long held by the veil of tradition to secure their safety must now comply with the fundamental rights in the Constitution. The Act excludes the non-binary and transgender individuals and consequently they have neither the coparcenary rights nor the right to Shebaitship, this type of discrimination is unsustainable and can no longer be justified in the constitutional review.

#### **The violation of Articles 14, 15, and 21:**

The HSA classification of heirs should meet the test of intelligible differential and rational nexus that were created in *Darvinder Singh* case.<sup>23</sup> At the present, the Act does not pass this test; its persistence of binary gender categories does not serve any valid legislative purpose. The Act does not satisfy the gender-based differentiation justification of tight tailoring since it leaves out transgender heirs.<sup>24</sup> Moreover, the right to dignity and livelihood guaranteed by Article 21 is connected to inheritance. By arbitrarily depriving an heir his or her proper place in the line of succession, the state infringes his or her constitutional personhood.

#### **Overcoming Patriarchal Inertia: From Women to Non-Binary Inclusion:**

The 2005 Amendment to the HSA was a crucial change since it acknowledged daughters as

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<sup>22</sup> *Bijoy Gopal Mukherjee v. Krishna Mahishi Debi*, (1907) ILR 34 Cal 329.

<sup>23</sup> *Darvinder Singh v. State of Punjab*, AIR 2010 SC 1652.

<sup>24</sup> *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1.



coparceners, which essentially undermined the patriarchal principles of the Act. Likewise, although the office of Shebaitship was traditionally patriarchal, judicial interpretation has changed to acknowledge women as competent Shebaites. This development indicates that personal law is not a fixed haven of sexism but a set of rules that is subject to change and thus needs to adjust to constitutional morality.

The need that now exists is to extrapolate this development to non-binary and transgender individuals. Although exclusion under non-binary heirs as coparceners under the HSA is considered as an issue, similarly their exclusion in the office of shebaitship is also a pressing issue that must be addressed. In addition to inheritance of the property, Shebaitship is a kind of spiritual and cultural guardianship. By admitting non-binary persons to this office, the agency of non-binary people is respected, their connection to family tradition remains intact, and the rightful successors are not pushed out, since they are uniquely placed to manage the estate of the deity.

#### **Secularization of Property management: Article 25/ 26 vs. Constitutional Morality:**

The defense of succession based on religiosity relies upon Articles 25 and 26, which is protection of religious freedom. Nonetheless, the courts have categorically drawn the line between the practice of religion, that is fundamental, and that of the use of property, that is secular and administered in a secular manner. The administration of property, however closely connected with a religious office such as Shebaitship, is a civil matter, as is testified in the case of Vineeta Sharma and Manni Devi case.<sup>25</sup>

The mandate of the Supreme Court is quite accurate: the law of equality as mandated by the Constitution is more dominant than customary law. The Court can make the HSA, an instrument of patriarchal stagnation, into a boat of modernity by disabling or amputating discriminatory lines to make the administration of religious estates available and professionally valid.

#### **SUCCESSION AND GENDER: DOCTRINAL INCONSISTENCIES**

##### **The Hindu Succession Act, 1956 and its impact on gender rights:**

The existing system of the Hindu Succession Act (HSA) portrays a very patriarchal and

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<sup>25</sup> Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1; Manni Devi v. Sita Ram, AIR 1970 All 403.

inflexible system that finds it hard to balance its 19th century roots with the contemporary constitution. Although the 2005 Amendment was a positive move of taking daughters onboard the sons, the Act still relies on the strict dichotomy of Hindu males and Hindu females. This solution assumes that gender is a fixed biological reality instead of an entity in flux and puts everyone in a binary trap where non-binary and transgender individuals do not have any rights to succession. Thus, making them legally undefined and subject to arbitrary interpretation by the judiciary.

### **The conflict with the NALSA mandate:**

The Supreme Court, in *NALSA v. Union of India*, held that the right to self-identification is essential and constitutionally recognized the “third gender”.<sup>26</sup> This transformative mandate however, has never been incorporated in the HSA. The Act is still stuck in the essentialist definitions and this has resulted in a state of invisibility in case of the transgender heirs. Lacking clear legislation, it is not clear where a transgender person would place in the established Table of Heirs. As a result, courts often focus only on the sex assigned at birth, which directly invalidates the gender identity of the person that is constitutionally guaranteed and subjects them to marginalization.

### **The double exclusion:**

This structural failure leaves transgender heirs in twofold exclusion, which essentially marginalizes them in two realms of inherent inheritance:

- **Exclusion on Coparcenary:** The law excludes transgender people by not allowing them to inherit ancestral property as coparceners. This causes heirs to enter expensive and emotionally draining lawsuits and, in many cases, the heirs are forced to assert their own identity in opposition to the demands of the family.
- **Not to be seen in the Managerial Office:** The effect spreads to the office of Shebaitship. Since the legal status of Shebaitship is that it is a property, that is, it is hereditary and proprietary, its succession is firmly based on the HSA. The inability of acknowledging the transgender as a possible successor leaves a legal vacuum.

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<sup>26</sup> *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 SCC 438.

When the law does not recognize a transgender heir in regard to the blood, it excludes this individual in the management of the deity. This obstinacy compels a decision between relinquishment of the estate of the deity or ousting a competent and capable successor, simply because the extant legal system is so fragile, that it cannot acknowledge the humanity and lineal status of the successor.

### **CUSTOM VS STATUTE IN SHEBAITSHIP**

A common defence to exclusions in succession on the basis of gender is the fact that the temple custom of immemorial antiquity.<sup>27</sup> Most of the temple institutions argue that only members of a certain hereditary lineage can be appointed to be shebait, in most cases, one of the male descended.<sup>28</sup> These assertions are normally justified based on the fact that the practice has been going on since time immemorial and thus part of the internal religious administration of the institution. As a matter of fact, such dependence up on custom serves as a kind of customary shield, whereby temple authorities or hereditary families manage to maintain restrictive succession patterns even as the rest of Hindu succession law more generally begins to commit to gender equality.<sup>29</sup>

The power of custom in Hindu law is, however, limited. It has always been the decision of the courts that a custom must meet some well-founded preconditions before it can be recognised as a legal one.<sup>30</sup> First, the tradition should be old, that is, the practice should be so old that no one can remember its beginning.<sup>31</sup> Second, it should be definite and a continuous one, showing a definite and consistent tendency of practice and not occasional performance. Third, and lastly, the practice should not be in opposition to the statutory law or policy. Such a practice, which does not meet these requirements, is not allowed to override the general principles of the Hindu law or the provisions of a legislature enacted.<sup>32</sup> This theory of doctrine becomes vital in that custom serves solely as an auxiliary source of law but not as an agency of enforcing a practice that is inconsistent with the changing law.

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<sup>27</sup> Gokul Chand v. Parvin Kumari, AIR 1952 SC 231.

<sup>28</sup> Shibessouree Debia v. Mothooranath Acharjo, (1869) 13 MIA 270.

<sup>29</sup> Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125.

<sup>30</sup> Deivanayaga Padayachi v. Muthu Reddi, AIR 1921 Mad 326.

<sup>31</sup> Saraswathi Ammal v. Jagadambal, AIR 1953 SC 201.

<sup>32</sup> Pujari Lakshmana Goundan v. Subramania Ayyar, (1924) 51 IA 62.

These conditions are especially important considering the recent changes in laws that changed the structure of Hindu personal law. The Hindu Succession (Amendment) Act 2005 is a paradigm shift towards gender equality by including daughters of a joint family property as birth coparceners. This reform did not only break the traditional patriarchal assumptions that existed in the traditional inheritance institutions but also reaffirmed the fact that gender is not a basis on which one cannot enjoy property rights. On the same note, the Transgender Persons (Protection of Rights) Act, 2019 acknowledges 'the legal identity and dignity of transgender individuals and outlaws' discrimination of transgender individuals in a variety of fields of social and legal activities. Collectively, these laws indicate a more general shift in the legal concept of equality and identity in the Indian legal system.

On the basis of such developments, the idea of the public policy in Hindu law cannot be localized. The values that are reflected in the underlying values that the legal system tries to safeguard at a particular time are public policy. When laws explicitly state that there is equality between the genders and the rights of transgender individuals are acknowledged, the practices that are based on confined gender exclusion are becoming more and more incongruent with the modern legal system. A temple tradition which refuses to allow shebaitship succession based on gender identity alone may thus find it difficult to meet the doctrinal condition that a valid custom should not be contrary to the policy of the population.

This has a significant implication concerning doctrine. In cases where a custom is directly contrary to the principles that are found in a codified Hindu law, the statute should dominate.<sup>33</sup> The Hindu Succession Act is an intentional governmental initiative to revamp hereditary regulations and to destroy gender obstacles in passing on property. Legalizing the customary practices to weaken this goal would water down the intent of the reform. Therefore, the conceptual positions of codified Hindu law must serve in the interpretation of the succession to shebaitship where the office has a proprietary nature in the law of inheritance.

In addition to the doctrinal factors, Hindu philosophical traditions make it difficult in themselves to justify strict gender exclusions. The divine in Hindu theology is usually understood as having an existence above defined gender division. The image of Ardhanarishvara, the embodiment of both Shiva and Shakti, is a representation of the

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<sup>33</sup> *Sivagnana Tevar v. Periasami*, (1878) LR 5 IA 61.

interrelation of male and female values in one God.<sup>34</sup> When the deity, who is the juristic owner of the property of the temple in law, is symbolically gender-blended, then there is a problem of justification to the administrative arrangements which demand strict gender lines as to who can rightfully be the human guardian of the latter.

Even the modern temple practices make the further adherence to strict gender-based traditions more complicated. Some Hindu religious traditions have always tolerated gender diversities in a manner that undermines binary assumptions in practices of succession.<sup>35</sup> As an example, temples of Bahuchara Mata, especially in Gujarat, traditionally were linked to the transgender (hijra) community, where members of the binary gender dichotomy actively lead a ritual and devotional life.<sup>36</sup> More modern examples have also identified transgender individuals as a priest, as the concept of religious authority and involvement has become slightly changed, albeit slowly but gradually.

Although these developments might not be yet evenly institutionalised, they indicate that inclusion in the religious spaces is by no means necessarily incompatible with the Hindu practice.<sup>37</sup> This carries significant consequences to succession to others like shebaitship. When people of all genders can handle religious and managerial roles in temple institutions, the fact that such people are not allowed to succeed in hereditary succession seems to be more of a social norm than a necessary part of a doctrine. In this regard, the change of religious practice in itself subverts the validity of the customs that practice strict gender division in the process of succession.

Such excluding practices become hence more and more hard to maintain, when pushed against both the dogmatism of valid custom, and even the larger predecessor-tradition of Hindu personal law. In the domain where there has been religious practice which is flexible and accommodative, the continuation of succession restrictions tradition seems not only legally doubtful, but also, inconsistent with teachings of Hindu endowments.<sup>38</sup>

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<sup>34</sup> DIANA L. ECK, *DARSAN: SEEING THE DIVINE IMAGE IN INDIA* 54–57 (3rd ed. 1998).

<sup>35</sup> J. DUNCAN M. DERRETT, *RELIGION, LAW AND THE STATE IN INDIA* 450 (Oxford University Press 1999).

<sup>36</sup> SERENA NANDA, *NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA* 24 (2d ed. 1998).

<sup>37</sup> Bijoe Emmanuel, *Gender, Religion and the Law of Endowments*, 12 *J. INDIAN L. & SOC'Y* 45, 52 (2024).

<sup>38</sup> *Raj Kali Kuer v. Ram Rattan Pandey*, AIR 1955 SC 493.

## REFORM WITHIN THE PERSONAL LAW FRAMEWORK

The proposed reformation of Hindu law must first rectify the "double amputation" of rights by bringing shebaitship within a modernized framework of inheritance that is gender neutral. The first thing to do is to amend the Hindu Succession Act (HSA) so that it is no longer based on cis-heteronormative stereotypes. The Amendment in 2005 gave a lot of power to daughters, but the act still does not say anything about those who are outside the gender binary. One of the biggest changes would be to provide for a "Gender-Neutral Succession Clause" that would eliminate the use of gender-specific words like "son" or "daughter" and instead use "Lineal Descendant." Not only would this statutory reform give transgender and non-binary individuals the economic survival coparcener status, but it would also make them the legitimate heirs to the shebaitship office, thereby maintaining their social and spiritual identity. Had the HSA become the primary legislation, the "traditional shield" - a weapon that temple authorities frequently cite as a reason to exclude non-binary heirs and refer to as "immemorial antiquity" - would be legally non-functional. Simply put, the law would not accept it as a reason.

Besides, the reform must also bring in line the various fragmented state-level laws that at present govern temple administration. Several codes like the Tamil Nadu HR&CE Act (1959)<sup>39</sup>, the Andhra Pradesh Act (1987)<sup>40</sup>, and the Kerala Travancore-Cochin Act (1950)<sup>41</sup> are fraught with gaps and in some cases biased explicitly such as the preference of "adult male members" in Kerala, which lead to facilitation of discrimination. Even though these state-level legislations ensure that the customary practices of a particular institution are upheld, they must in the end be subjected to a reformed, gender-neutral HSA. Such hierarchical alignment would make sure that local "usage and custom" are not treated as independent "zones of exclusion" but, on the contrary, are made to comply with Constitutional Morality. By making the HSA the paramount interpretative instrument for inheritance, the law thwarts the scenario of rights being a "postcode lottery" in which a transgender person's recognition depends on the state border where they happen to live.

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<sup>39</sup> Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, No. 22, Acts of Tamil Nadu State Legislature, 1959 (India).

<sup>40</sup> Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987, No. 30, Acts of Andhra Pradesh State Legislature, 1987 (India).

<sup>41</sup> Travancore-Cochin Hindu Religious Institutions Act, 1950, No. 15, Acts of Kerala State Legislature, 1950 (India).

The reform also proposes that the next in line to succeed should be assessed based on their qualification and loyalty to the deity rather than their sex. Since a deity is a juristic person and can have gender-fluid or be transcendent, like Ardhanarishvara, the human medium of the deity should be in harmony with the theological truth and not the opposite of it. By naming transgender and non-binary persons explicitly in both the HSA and the temple codes at the state level, it will be certain that the constitutional rights under Article 14 and Article 21 are extended to all religious endowments in India, thereby any custom based on the strict gender binary would be automatically disregarded.

Finally, the judiciary should implement a "Deity-Centric" approach to the interpretation of succession. Here, a custom that disallows a transgender heir purely on the basis of gender would be seen as not only going against Constitutional Morality but also against the interests of the deity. So, if a transgender individual is deemed most able to handle property of a deity, keep up temple rites, etc. their denial would be a "rational nexus" missing in reference to the wellbeing of the deity. Also, through characterizing shebaitship as a type of heritable property that is by nature gender-neutral, the legal system can distance itself from male-centered lineages. Overall, this method guarantees that the law of religious endowments is not only consistent with but also helps further the comprehensive realignment of Indian jurisprudence to the recognition of legal personality and dignity of all persons, irrespective of their gender identity.

## CONCLUSION

The designation of Shebaitship as property was originally aimed at providing a stable and continuity of the estate of a deity. But in the modern law of our time this proprietary office has turned into an enclave of the rights of exclusion, which is not subject to the gradual development of human rights. Although the inclusion of non-binary and transgender persons in coparcenary rights has been the subject of more than enough concern among numerous leading legal theorists, who include but are not limited to Bina Agarwal, who has fundamentally changed our perspective on the rights of women to property<sup>42</sup> and the necessity to transform the conventional system into the gender-neutral method, and Upendra Baxi, who has consistently championed the cause of the socially vulnerable and the ability of

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<sup>42</sup> BINA AGARWAL, A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA 18–25 (1994).

constitutional law to transform the world,<sup>43</sup> it is also of paramount importance that we place Shebaitship in the same spot. To most families, the governance of the divine estate is not just a duty, but a deep-rooted manifestation of the family identity, religious obligation and respectable social status that are as vital to family as the physical land possession.

### **The reason why Shebaitship is a crucial frontier of inclusion of non-binaries:**

To consider a Shebaitship subsidiary to coparcenary rights is the mistake of seeing its burden. Although Coparcenary rights guarantee financial security, Shebaitship grants agency and social affiliation. To a non-binary heir, the deprivation of the right to administer the family god is a structural and symbolic deletion out of both the family history and its future.

Provided that legally Shebaitship is a property (*Ram Rattan v. Bajrang Lal*), it cannot be kept insulated against the transformative requirements of the Constitution. By depriving a non-binary non-blood heir of a right to be a Shebait, the law subjects them to a legal vacuum in which they are denied the role of the custodian of their own ancestral heritage. This exclusion is not an administrative obstacle, it is an act of displacement that requires giving up the property of the god, which could bring to a halt a tradition that has been in place for centuries, just because the law does not acknowledge the personality of the heir.

### **Bridging the Gap: The need to align the constitution:**

The binary trap that requires succession to run through limited avenues of either male or female does not represent the inclusive reality that the NALSA mandate envisions. When we are concerned about the dignity of all persons, the law is obliged to see the heirs the deity actually possesses, as opposed to the binary-coded heirs envisioned by the courts of the 19th century.

This refusal to incorporate non-binary heirs into the stewardship of religious properties puts in place the forces of archaic, patriarchal stagnation that determine who is fit to manage the divine. Historians such as Madhu Mehra have continued to point to the fact that the private realm of personal law is made to shield the patriarchal power against constitutional scrutiny.<sup>44</sup> Custodianship of the sanctity of a religious estate must under no circumstances be a pretext to the systematic exclusion of equal citizens. Finally, the administration of the property of a deity

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<sup>43</sup> UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 112–15 (3d ed. 2012).

<sup>44</sup> Madhu Mehra, *The Limits of Law: Women's Rights and Personal Laws in India*, 23 NAT'L L. SCH. INDIA REV. 1 (2011).



is a secular, proprietary duty (Vineeta Sharma; Manni Devi), and, therefore, is required, like any other property, to be governed by the constitutional norms of equality. The next thing to do, in the way to make the stewardship of the divine as inclusive and contemporary as the Constitution itself, is to raise the battle against Shebaitship alongside the struggle against coparcenary rights.

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