

# **Discrimination in the Veins: A Critical Examination of India's Transphobic Blood Donation Policies**

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## **Abstract**

*The primary responsibility of a blood transfusion service (BTS) is to ensure a safe, sufficient, and timely supply of blood and blood products while guaranteeing safe blood donation for donors. The BTS must build a pool of voluntary non-remunerated donors and take necessary measures to ensure that blood products are effective and have minimal infection transmission risks for recipients. The Supreme Court's ruling in Navtej Singh Johar's case decriminalized Section 377 of the Indian Penal Code, marking a significant recognition of the LGBTQ community. However, despite this legal progress, individuals within this community continue to face numerous atrocities related to their sexual orientation and gender identity. Additionally, the Court's judgment in the NALSA case emphasized that transgender persons should be treated as equal citizens with full rights.*

*One such deprivation is the ban imposed on them from blood donation due to the stereotypical myth by the government as well as the society which are highly intolerant towards them. Due to the AIDS epidemic in the 1980's prevailing all over the world, the minuscule groups were permanently banned globally from blood donation. Though the lifetime ban has been removed in other nations i.e. United States of America, United Kingdom, Canada and France subjected to fulfillment of a certain criteria but India is lagging behind in such clause which has been raised in the judgment of Thangjam Santa Singh Khurai case where a Public Interest litigation was filed challenging certain provisions of Guidelines on Blood Donation Selection and Blood Donation Referral, 2017 violative of the fundamental rights of the community under Article 14, 15 and 21 of the Constitution of India, 1950. Therefore the current article focuses on discrimination particularly the ban on blood donation by the community adhering to the landmark decisions for recognition and upliftment of the community and further concluding the paper with some suggestions to lift the lifetime ban on the community from blood donation in India.*

**Keywords:** LGBTQ community, AIDS epidemic, lifting of the ban on blood donation in India, Violation of Constitutional Right.

## I. Introduction

Blood donation plays a vital role in saving lives and supporting medical treatments, making it a critical component in the healthcare system. The blood, which has been donated, can be separated into individual components such as red blood cells, plasma, and platelets.<sup>1</sup> Therefore, each blood donation can benefit up to three recipients, which can address the needs of emergency patients such as trauma victims, cancer patients, women facing childbirth complications, etc.<sup>2</sup> Donors can contribute blood by visiting blood banks or participating in blood donation camps, organised by hospitals, NGOs, and other organisations. The Central Drugs Control Organisation is the body responsible for regulatory oversight of blood donation to maintain quality and safety standards.<sup>3</sup>

## II. History of Blood Donation in India

Blood donation in India notably started during the Second World War in the year 1942. The blood donated was required to treat wounded soldiers. The First Blood Bank in India was started in the year 1949 in Kolkata, and was managed by the Red Cross.<sup>4</sup> While initial donors mainly consisted of government employees and people from the Anglo-Indian Community, the amount of voluntary blood donations slowly declined, leading to a practice of paying donors for blood.<sup>5</sup> In the year 1954, a major cultural shift began with the help of a social reformer named Leela Moongaokar. She initiated the first voluntary blood donation drives in Mumbai. This movement spread to other cities such as Ahmedabad, Kolkata, Delhi, and Chandigarh.<sup>6</sup> In

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<sup>1</sup> Directorate General of Health Services, Blood Transfusion Services, Ministry of Health and Family Welfare, Government of India, "Blood Transfusion Services" (<https://dghs.mohfw.gov.in/bts.php>, last visited on 09 October 2025).

<sup>2</sup> Dr. Meet Kumar, "Why blood donation on a regular basis is a healthy practice," Times of India, June 16, 2023, available at: <https://timesofindia.indiatimes.com/life-style/health-fitness/health-news/why-blood-donation-on-a-regular-basis-is-a-healthy-practice/articleshow/110985822.cms> (last visited on 09 October 2025).

<sup>3</sup> Central Drugs Standard Control Organization, "Regulatory Requirements of Blood and/or Its Components Including Blood Products" ([https://cdsco.gov.in/opencms/resources/UploadCDSCOWeb/2018/UploadBloodBank/guidelines\\_for\\_blood\\_bank.doc](https://cdsco.gov.in/opencms/resources/UploadCDSCOWeb/2018/UploadBloodBank/guidelines_for_blood_bank.doc), last visited on 09 October 2025).

<sup>4</sup> Neelam Marwaha, "Voluntary blood donation in India: Achievements, expectations and challenges" 9 Asian J Transfus Sci. Suppl 1 (2015), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC4455102/> (last visited on 09 October 2025).

<sup>5</sup> Ibid

<sup>6</sup> Ibid

1971, Professor. J.G. Jolly, who was the founder-president of the Indian Society of Blood Transfusion and Immunohematology (ISBTI), helped further elevate this movement. Under his leadership, ISBTI declared the 1<sup>st</sup> of October as National Voluntary Blood Donation Day, which was later accepted by the government.<sup>7</sup>

The blood donation in India was fundamentally revamped by two major events. The first event was the HIV pandemic.<sup>8</sup> The HIV pandemic in the 1980s increased the risk of infections transmitted through blood transfusion.<sup>9</sup> This led to the establishment of the National AIDS Control Organisation (NACO) in the year 1992 as the apex autonomous body for the prevention and control of HIV/AIDS. Currently, the NACO and respective State AIDS Control Societies (SACS) are provided with the responsibility of ensuring access to safe blood by planning appropriate strategies and programs in the country.<sup>10</sup>

The second major event was the landmark Public Interest Litigation of *Common Cause v. Union of India*.<sup>11</sup> The petitioners in this case challenged the validity of professional blood donation, as professional blood donation is widely discouraged because it introduces a higher risk of transfusion-transmitted infections (TTIs), as compared to non-remunerated voluntary donors.<sup>12</sup> In this case, the Supreme Court of India banned professional blood donation, directing the Central government to establish National and State Blood Transfusion Councils, and mandated licensing of all blood banks.<sup>13</sup> Based on this judgement, the DCGI issued a notification banning the collection of blood from paid donors, which became effective from January 1998.<sup>14</sup>

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<sup>7</sup>Parmita Uniyal, "National Voluntary Blood Donation Day: Significance and benefits of voluntary blood donation," Hindustan Times, October 1, 2023, available at <https://www.hindustantimes.com/lifestyle/health/national-voluntary-blood-donation-day-significance-and-benefits-of-voluntary-blood-donation-101696077903800.html> (last visited on 09 October 2025).

<sup>8</sup> AM Kadri and Pradeep Kumar, "Institutionalization of the NACP and Way Ahead" 37 Indian J Community Med. 83–88 (2012), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC3361806/> (last visited on 09 October 2025).

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> Common Cause v. Union of India and Ors. 1996 (1) SCC 753

<sup>12</sup> SC Nair and JJ Mammen, "Repeat voluntary non-remunerated blood donor is the best quality indicator for blood safety" 141 Indian J Med Res. 749–752 (2015), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC4525398/> (last visited on 09 October 2025).

<sup>13</sup> Ibid

<sup>14</sup> Joy John Mammen, Edwin Sam Asirvatham, Charishma Jones Sarman, Varsha Ranjan and Bimal Charles, "A review of legal, regulatory, and policy aspects of blood transfusion services in India: Issues, challenges, and opportunities" 15 Asian J Transfus Sci. 204–211 (2021), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC8628249/> (last visited on 09 October 2025).

Despite the infrastructure for blood donation in India, the current blood supply in India remains inadequate to meet the healthcare demands.<sup>15</sup> India faces a shortage of approximately 3 million blood units annually.<sup>16</sup> Around 12,000 deaths are caused every day in India due to a shortage of blood supply.<sup>17</sup> The shortage in supply becomes more severe during health emergencies, as seen during the COVID-19 pandemic. The COVID-19 pandemic severely hit voluntary blood donations in India. Due to fears of infection, many voluntary blood donation camps were cancelled. Further, the mobility restrictions also affected blood donations. This led to the blood collection declining by 26% to 40% in various areas.<sup>18</sup> The inadequacy of India's blood transfusion services, coupled with the heavy dependence on replacement donors, who are either relatives or known persons of the individual in need of blood, makes the system especially vulnerable during public health emergencies.

### **III. Legal Framework for Blood Donation in India**

The Drugs and Cosmetics Act, 1940, recognises human blood components as "drugs" under Section 3(b) due to its internal administration, thereby necessitating comprehensive regulatory oversight for the purposes of collecting, storing, processing and distributing blood.<sup>19</sup> The act was subsequently amended through the Drugs and Cosmetics Rules, 1945, with Part X-B and Schedule F Part XII-B specifically providing for rules which blood banks have to follow such as licensing requirements, technical specifications, and operational standards for blood banks. This amendment also mandated licensing for all blood transfusion facilities.<sup>20</sup> The government of India adopted the National Blood Policy in April 2002. It mandates 100% voluntary, non-renumerated blood donations, mandatory licensing requirements for all blood banks under the Drugs and Cosmetics Act, overall quality management, and the establishment of the National Blood Transfusion Council (NBTC) and State Blood Transfusion Councils (SBTC) to oversee

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<sup>15</sup> Seema Muley, "Ways to address India's blood donation and supply crisis," Economic Times Healthworld June 29, 2023, available at <https://health.economictimes.indiatimes.com/news/industry/ways-to-address-indias-blood-donation-and-supply-crisis/101351499> (last visited on 09 October 2025).

<sup>16</sup> Joy John Mammen et.al., "The clinical demand and supply of blood in India: A National level estimation study" 17 PLoS One e0265951 (2022), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC8986005/> (last visited on 09 October 2025).

<sup>17</sup> Ibid

<sup>18</sup> Paramjit Kaur, Ravneet Kaur Bedi, Kshitija Mittal, and Tanvi Sood, "Exploring the unseen effect of COVID 19 pandemic on blood transfusion services: Experience from a tertiary care centre," 62(2) Transfus Apheresis Sci. 103569 (2022), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC9444304/> (last visited on 09 October 2025).

<sup>19</sup> The Drugs and Cosmetics Act, 1940, § 3(b) (India).

<sup>20</sup> Supra note 16

standards and training.<sup>21</sup> Under the current legal framework, the Central Drugs Standard Control Organization (CDSCO) serves as the central licensing authority along with state drug controllers.<sup>22</sup> The violations of licensing requirements can attract severe penalties under Section 27(b) of the Drugs and Cosmetics Act, which includes imprisonment between one to five years and fines depending on the nature of the offense.<sup>23</sup> On 11<sup>th</sup> of October, 2017, NBTC and NACO issued the Guideline on Blood Donor Selection and Blood Donor Referral, 2017, to ensure donations from low-risk donors.

#### IV.

#### Law

#### **Restricting Transgender, Sex Workers and Other High-Risk Individuals from Donating Blood**

Clause 12 of the Guideline on Blood Donor Selection and Blood Donor Referral, 2017 issued by NBTC and NACO, categorises "*Transgender, Men who have sex with men, female sex workers, injecting drug users, persons with multiple sexual partners, or any other high risk as determined by medical officers deciding fitness to donate blood*" as high risk category of being infected by HIV/AIDS.<sup>24</sup> Clause 51 of the guidelines permanently defers them from donating blood.<sup>25</sup>

In the 21st century, evolving sexual mores and non-monogamous behaviors complicate the assessment of sexually transmitted disease risks. Thus, excluding gay men, female sex workers and otherwise from blood donation appears unjustifiable in today's context<sup>26</sup> and such discrimination is a the stigmatisation that persisted over the past century's AIDS or acquired immunodeficiency syndrome outbreak<sup>27</sup>. In the 1980s, when the AIDS epidemic spread across all five major continents and infected around 1 million people, the early detection of HIV was

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<sup>21</sup> Ministry of Health and Family Welfare, Government of India, "National Blood Policy," April 2002, available at [https://naco.gov.in/sites/default/files/National%20Blood%20Policy\\_0.pdf](https://naco.gov.in/sites/default/files/National%20Blood%20Policy_0.pdf) (last visited on 09 October 2025).

<sup>22</sup> Shivaram Chandrashekhar and Ambuja Kantharaj, "Legal and ethical issues in safe blood transfusion," 58(5) Indian J Anaesth. 558-564 (2014), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC4260301/> (last visited on 09 October 2025).

<sup>23</sup>Supra Note 19, § 27(b) (India)

<sup>24</sup> National AIDS Control Organization, Ministry of Health and Family Welfare, Government of India, "Letter regarding guidelines for blood donor selection & referral," 2017, available at <https://naco.gov.in/sites/default/files/Letter%20reg.%20%20guidelines%20for%20blood%20donor%20selection%20%26%20referral-2017.pdf> (last visited on 09 October 2025).

<sup>25</sup> Ibid

<sup>26</sup> P.H. Thrall, J. Antonovics and A.P. Dobson, "Sexually Transmitted Diseases in Polygynous Mating Systems: Prevalence and Impact on Reproductive Success" 267 Proceedings of the Biological Sciences 1555-1563 (2000), available at: <https://doi.org/10.1098/rspb.2000.1178> (last visited on Oct. 07, 2025).

<sup>27</sup> H. Kokko, E. Ranta, G. Ruxton and P. Lundberg, "Sexually Transmitted Disease and the Evolution of Mating Systems" 56 Evolution 1091-1100 (2002), available at: <https://doi.org/10.1111/j.0014-3820.2002.tb01423.x> (last visited on Oct. 07, 2025)

linked to Males who had Sex with Males, and was seen as punishment for unnatural forms of intimacy.<sup>28</sup> These days, the stigma is covered up by the "scientific" justification that these populations are more susceptible to HIV and other transfusion-transmitted diseases (OTTI)<sup>29</sup>. During the HIV epidemic in the 1980s, numerous countries, including the United States, Canada, Australia, and most of Europe, implemented bans on blood donations from gay men and other groups considered "high risk."<sup>30</sup> Early epidemiological studies during the 1980s and 1990s, when India was facing the HIV epidemic, showed that commercial sex workers and transgender communities were most infected with HIV.<sup>31</sup> This led to the policy makers to policy makers to broad exclusion criteria. Moreover, limited data, inadequate outreach programmes, and social stigma have impeded the research in the area of blood donation by "the high-risk" communities.<sup>32</sup>

Despite the advancement in screening technology and global shift towards accepting blood donations from Transgender, men who have sex with men, and sex workers, Indian law has still banned blood donation from "*high-risk category*" individuals, relying upon a blanket ban on blood donations based on the identity of individuals.<sup>33</sup>

## V. Constitutional analysis of Blood Donation in India

British India enacted Section 377 in 1861<sup>34</sup>, criminalizing Unnatural Sex in form of "sodomy" and otherwise. Activists, including the Naz Foundation<sup>35</sup>, challenged its constitutionality, leading to a series of significant legal battles. The Delhi High Court decriminalized homosexuality in 2009, a decision later overturned by the Supreme Court in 2012. *The Shashi*

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<sup>28</sup> Niteesh Kumar Upadhyay, Sangeeta Taak, Ardyllis Alves Soares and Pyali Chatterjee, "Challenging the blood donation ban of LGBTQ+ individuals in India: a medico-legal and public policy analysis" 13 Revista Eletrônica Direito e Sociedade e11934 (2025).

<sup>29</sup> A.P. Mahajan, J.N. Sayles, V.A. Patel, R.H. Remien, S.R. Sawires, D.J. Ortiz, G. Szekeres and T.J. Coates, "Stigma in the HIV/AIDS Epidemic: A Review of the Literature and Recommendations for the Way Forward" 22 AIDS S67–S79 (2008), available at: <https://doi.org/10.1097/01.aids.0000327438.13291.62> (last visited on Oct. 07, 2025).

<sup>30</sup> Georgios Athanasios Karamitros, Kitsos Nikolaos, and Ioanna Karamitrou, "The ban on blood donation on men who have sex with men: time to rethink and reassess an outdated policy," 27 Pan Afr Med J. 99 (2017), available at <https://www.panafrican-med-journal.com/content/article/27/99/full/> (last visited on 09 October 2025).

<sup>31</sup> S. Solomon, S.S. Solomon, and A.K. Ganesh, "AIDS in India," 82 Postgrad. Med. J. 545–547 (2006), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC2585722/> (last visited on 09 October 2025).

<sup>32</sup> Niteesh Kumar Upadhyay, Sangeeta Taak, Ardyllis Alves Soares and Pyali Chatterjee, "Challenging the blood donation ban of LGBTQ+ individuals in India: a medico-legal and public policy analysis" 13 Revista Eletrônica Direito e Sociedade e11934 (2025).

<sup>33</sup> Georgios Karamitros, Nikolaos Kitsos and Ioanna Karamitrou, "The ban on blood donation on men who have sex with men: time to rethink and reassess an outdated policy" 27 Pan African Medical Journal 99 (2017).

<sup>34</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 377

<sup>35</sup> Naz Foundation v. Government of NCT of Delhi, 2009 SCC OnLine Del 1762

*Tharoor Privacy Act*<sup>36</sup> sought to amend the law, but attempts to decriminalize homosexuality were impeded. By 2016, petitions to the Supreme Court argued that Section 377 violated fundamental rights. The Supreme Court's eventual decision to decriminalize Section 377<sup>37</sup> marked a significant victory for the LGBTQIA+ community<sup>38</sup> but highlighted ongoing issues such as lack of complete freedom and discrimination in various legal contexts. Discriminatory laws affecting same-sex relationships and LGBTQ rights remain in place, necessitating further reforms and public awareness to ensure equal treatment for all citizens<sup>39</sup>.

However, the prohibition of blood donation from sexual minorities contradicts the constitutional principles of equality, non-discrimination, Privacy, Sexual autonomy and otherwise as outlined in Articles 14, 15 and 21.

The current need of testing each blood unit is not truly met by the duty of classifying gay men, female sex workers and other individuals from LGBTQIA+ in the "*high-risk category*." Instead of denying them the chance to assist people in general, it is far simpler and more sensible to test donated blood that falls into the designated category. If done properly, donated blood testing can even save lives by saving the lives of both the donor and the recipient<sup>40</sup>.

Through the classification of MSM and otherwise as a whole it violates the fundamental rights of individuals as this is unreasonable classification and violative of Article 14 as recognised in *Anwar Ali Sarkar*<sup>41</sup>. These guidelines of 2017 as mentioned in Clause 12 and 51 are part of the rapidly changing legal landscape, where the idea that "*exclusion is discrimination under article 14*"<sup>42</sup> is prevalent<sup>43</sup>.

On the surface, the ban on blood is an instance of direct discrimination as in *E.P. Royappa*<sup>44</sup>, court has recognised that "*arbitrariness is antithetical to equality*."<sup>45</sup> In *Navtej Singh Johar*<sup>46</sup>, the Supreme Court ruled that discrimination based on sexual orientation was illegal under Article 15. The court expressly identifies transgender people, gay males and otherwise as

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<sup>36</sup> Shashi Tharoor, "The Data Privacy and Protection Bill, 2017" (Private Member's Bill, Parliament of India, 2017).

<sup>37</sup> Supra note at 31

<sup>38</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

<sup>39</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

<sup>40</sup> Adrian Lomaga, "Are Men Who Have Sex With Men Safe Blood Donors?" (2007) 12:1 Appeal 73 (available at: <https://journals.uvic.ca/index.php/appeal/article/view/5455/3398>) (last visited Oct. 07, 2025).

<sup>41</sup> *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75

<sup>42</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212

<sup>43</sup> Gautam Bhatia, "Equal Moral Membership: Naz Foundation and the Refashioning of Equality under a Transformative Constitution" 1 Indian Law Review 135 (2017), available at: <https://doi.org/10.1080/24730580.2017.1396529> (last visited on Oct. 07, 2025).

<sup>44</sup> *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

<sup>45</sup> *Ibid*

<sup>46</sup> Supra Note at 38

"sexual minorities." Furthermore, it was decided that "sex" under Article 15 encompassed sexual orientation rather than just the biological sex of males and females<sup>47</sup>.

This discrimination is a statistical discrimination, where individuals are judged based on stereotypes of their historical background on Sexual behaviour and their orientation, comparing it to excluding them based on scientific temperament<sup>48</sup>.

In a similar vein, the court said unequivocally in *NALSA*<sup>49</sup> that "discrimination based on gender identification is forbidden by Article 15. Therefore, discrimination on the basis of gender identity is included in the sex discrimination covered by Articles 15 and 16."

Additionally, Article 21 grants the right to live with dignity which manifests ideas of self-worth and self respect and safeguards the interests of female sex workers and all the individuals in LGBTQIA+.<sup>50</sup> <sup>51</sup> The Supreme Court expanded the interpretation of article 21 in *Maneka Gandhi case's*<sup>52</sup> and in *Francis Coralie v. Union Territory*<sup>53</sup> court encompassed that actions and functions of state represent the most basic manifestation of the human being and it shall be duly adhered without discrimination.

Prohibiting female sex workers and all the individuals in LGBTQIA+ from donating blood limits the ability to save lives within their communities and exacerbates their struggle for rights and dignity.<sup>54</sup> There are no justifiable societal, medical, or legal reasons for such restrictions, making it important to assess their constitutional validity<sup>55</sup>.

In *Justice K.S. Puttaswamy*<sup>56</sup> court Established the right to privacy as a fundamental right. Identity-based exclusions, especially if forced to disclose, violate privacy and decisional

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<sup>47</sup> Ibid

<sup>48</sup> L.S. Casey, S.L. Reisner, M.G. Findling, R.J. Blendon, J.M. Benson, J.M. Sayde and C. Miller, "Discrimination in the United States: Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Americans" 54 *Health Services Research* 1454–1466 (2019), available at: <https://doi.org/10.1111/1475-6773.13229> (last visited on Oct. 09, 2025)

<sup>49</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

<sup>50</sup> S. Weiss Goitiandia, A. Agarwal, S.C. Banerjee, N. Bhoo-Pathy, C. Bose, M. Chittem, R. Gursahani, L. Ramakrishnan, S. Rana, N. Salins, M.V. Segarmurthy, A. Thiyam & W.E. Rosa, "Beyond the Bench: LGBTQ+ Health Equity After India's 'No Same-Sex Marriage' Verdict" 30 *The Lancet Regional Health – Southeast Asia* 100494 (2024), available at: <https://www.thelancet.com/journals/lansea/article/PIIS2772-3682%2824%2900144-6/fulltext> (last visited on Oct. 07, 2025).

<sup>51</sup> *Supriyo v. Union of India*, (2023) 10 SCC 1.

<sup>52</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

<sup>53</sup> *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746

<sup>54</sup> R. Bayer, "Science, Politics, and the End of the Lifelong Gay Blood Donor Ban" 93 *The Milbank Quarterly* 230–233 (2015), available at: <https://doi.org/10.1111/1468-0009.12114> (last visited on Oct. 07, 2025).

<sup>55</sup> S. Gasparovic Babic, A. Krsek and L. Baticic, "Voluntary Blood Donation in Modern Healthcare: Trends, Challenges, and Opportunities" 5 *Epidemiologia* 770-784 (2024), available at: <https://doi.org/10.3390/epidemiologia5040052> (last visited on Oct. 07, 2025).

<sup>56</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

autonomy. The proportionality test as recognised in *Puttaswamy* and summarized as a four-tier test by the Supreme Court in *Modern Dental College*<sup>57</sup> holds that a right can be restricted if ,

- “(i) it is designated for a proper purpose;
- “(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose;
- “(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally
- “(iv) there needs to be a proper relation (‘proportionality stricto sensu’ or ‘balancing’) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.”<sup>58</sup>

Moreover, data may indicate that transgender individuals are at a higher risk for sexually transmitted diseases, but a blanket ban on blood donation is unjustifiable. This prohibition fails to differentiate between individuals based on their number of sexual partners, penalizing even those in stable, low-risk relationships.<sup>59</sup> The ban relies solely on group data rather than individual assessment.<sup>60</sup> Alternative measures should be considered to assess the risk of infectious diseases rather than imposing a blanket ban on sexual minorities. The state's justification for restrictions based on the high transmission risk among this group is insufficient and violative under Article 14, 15 and 21.

Accurate testing for HIV and other infections is a less intrusive method, with technology achieving nearly a hundred percent reliability. Reliance on outdated blanket bans, established prior to advancements in testing, poses significant issues.<sup>61</sup> Consequently, the state must

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<sup>57</sup> *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353.

<sup>58</sup> *Ibid*

<sup>59</sup> G. Karamitros, N. Kitsos and I. Karamitrou, “The Ban on Blood Donation on Men Who Have Sex with Men: Time to Rethink and Reassess an Outdated Policy” 27 Pan African Medical Journal 99 (2017), available at: <https://doi.org/10.11604/pamj.2017.27.99.12891> (last visited on Oct. 09, 2025).

<sup>60</sup> Jaishree Kumar & Aman Singh, “FEATURE – LGBTQ+ Indians demand end to ‘discriminatory’ blood donation ban,” Reuters (Oct. 3, 2023), available at: <https://www.reuters.com/article/business/healthcare-pharmaceuticals/feature-lgbtq-indians-demand-end-to-discriminatory-blood-donation-ban-idUSL8N3AH4HI/> (last visited on Oct. 09, 2025).

<sup>61</sup> D. Daskalakis, “HIV Diagnostic Testing: Evolving Technology and Testing Strategies” 19 Topics in Antiviral Medicine 18–22 (2011), available at: <https://pmc.ncbi.nlm.nih.gov/articles/PMC6148855/> (last visited on Oct. 09, 2025).

demonstrate a compelling need for permanent bans<sup>62</sup>, challenging the assertion that no alternative, less intrusive measures<sup>63</sup> could be effectively implemented<sup>64</sup>.

Furthermore, this prohibition reinforces negative stereotypes about excluded groups, assuming that all sexual minorities have multiple partners or are more susceptible to infections.<sup>65</sup> This view positions them as inferior to the heterosexual majority, rendering them less credible in the context of blood donations. A parallel can be drawn with a hypothetical ban on men in bars, based solely on data suggesting they pose a risk for sexual assault, which raises questions about the validity of such a prohibition even if the data were accurate.<sup>66</sup>

A match can be drawn as in *Anuj Garg*<sup>67</sup>, the court addressed stereotypes preventing women from working in bars, ruling the law unconstitutional for “*invidious discrimination perpetrating sexual differences.*” The decision highlighted that the prohibition stemmed from paternalistic assumptions rather than statistical evidence regarding women's roles and behavior. A legally robust approach would respect individual rights, indicating that current guidelines unfairly stereotype a specific group<sup>68</sup>. A more precise restriction could align with constitutional standards by minimizing undue focus on sexual orientation or gender identity<sup>69</sup>. As awareness of voluntary blood donation increases<sup>70</sup> and much needed, it is becoming crucial for societal

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<sup>62</sup> Anuradha Bhasin v. Union of India, (2020) 3 SCC 637

<sup>63</sup> Ankush Rai, “Proportionality in Application: An Analysis of the ‘Least Restrictive Measure’” India Constitutional Law and Philosophy (May 8, 2020), available at: <https://ssrn.com/abstract=3732905> (last visited on Oct. 09, 2025).

<sup>64</sup> Vann R. Newkirk II, “The Bigotry of Gay-Blood-Donation Bans,” The Atlantic (June 13, 2016), available at: <https://www.theatlantic.com/politics/archive/2016/06/homophobia-hiv-blood-ban-orlando-shooting/486818/> (last visited on Oct. 07, 2025).

<sup>65</sup> L. McGarrity and D. Huebner, “Is Being Out About Sexual Orientation Uniformly Healthy? The Moderating Role of Socioeconomic Status in a Prospective Study of Gay and Bisexual Men” 47 Annals of Behavioral Medicine (2013), available at: <https://doi.org/10.1007/s12160-013-9575-6> (last visited on Oct. 09, 2025).

<sup>66</sup> Thulasi K. Raj, “‘We Don’t Want Your Blood’: Exclusion of Sexual Minorities from Blood Donation,” RGNUL Student Research Review (Feb. 16, 2021), available at: <https://www.rsrr.in/post/we-don-t-want-your-blood-exclusion-of-sexual-minorities-from-blood-donation> (last visited on Oct. 07, 2025).

<sup>67</sup> Anuj Garg & Ors. v. Hotel Association of India & Ors., (2008) 3 SCC 1.

<sup>68</sup> Devrupa Rakshit, “It’s Discriminatory to Ban Blood Donation Based on Gender Identity, Sexual Orientation: PIL Before SC,” The Swaddle (Mar. 8, 2021), available at: <https://www.theswaddle.com/its-discriminatory-to-ban-blood-donation-based-on-gender-identity-sexual-orientation-pil-before-sc> (last visited on Oct. 09, 2025).

<sup>69</sup> A. Den Exter, “Homosexuals and Blood Donation: A Delicate Issue for the European Union Court of Justice” 14 Blood Transfusion 500–503 (2016), available at: <https://doi.org/10.2450/2015.0155-15> (last visited on Oct. 07, 2025).

<sup>70</sup> World Health Organization, “Towards 100% Voluntary Blood Donation: A Global Framework for Action” (WHO, Geneva, 2010), available at: <https://www.ncbi.nlm.nih.gov/books/NBK305666/> (last visited on Oct. 07, 2025)

welfare, especially in the context of pandemic like Covid-19 where blood plasma is needed for treatment<sup>71</sup>.

## VI. Recent Developments

### a) Judicial Challenge: The Thangjam Santa Singh Khurai Case

In 2021, through *Thangjam Santa Singh v Union of India*<sup>72</sup>, a Public Interest Litigation was filed to challenge the clauses 12 and 51 of the general criteria under the Guidelines on Blood Donor Selection and Blood Donor Referral of 2017<sup>73</sup> that barred Sex workers and individuals from LGBTQIA+ from donating blood.

This PIL raises a substantial legal question regarding the imposition of a prohibition on transgender persons, men engaging in sex with men, and female sex workers as blood donors under the impugned Guidelines.

It questions whether this exclusion violates the right to equality under (Article 14 and non-discrimination Article 15 based solely on gender identity, sexual orientation, and sex, without a valid justification. It challenges whether such exclusions are arbitrary, unreasonable, and based on stereotypes, particularly when blood donations are tested for infectious diseases. The PIL further asks that this discrimination denies equal dignity, perpetuates stigma, and infringes upon rights under Articles 14, 15, and 21, especially in light of the *NALSA v. Union of India*<sup>74</sup> ruling, which expanded the interpretation of "sex" to include gender identity. It questions whether the guidelines are grounded in scientific evidence, ethical consideration or driven by negative stereotypes, potentially violating the right to life and autonomy as given that all blood units are tested for infectious diseases like Hepatitis B, Hepatitis C, and HIV/AIDS. It argues that such exclusion constitutes a violation of the right to equal treatment among blood. This guideline does not assume that heterosexual individuals are equally likely to contract HIV, irrespective of their number of sexual partners or types of sexual activity,<sup>75</sup> suggests that the

<sup>71</sup> A. Dorle, U. Gajbe, B.R. Singh, O. Noman and P. Dawande, "A Review of Amelioration of Awareness About Blood Donation Through Various Effective and Practical Strategies" 15 Cureus e46892 (2023), available at: <https://doi.org/10.7759/cureus.46892> (last visited on Oct. 07, 2025)

<sup>72</sup> Thangjam Santa Singh @Santa Khurai V Union of India & Ors, Case No.W.P.(C) No. 000275 /2021 (Pending)

<sup>73</sup> National AIDS Control Organisation, "Guidelines on Blood Donor Selection and Blood Donor Referral" (Government of India, 2017)

<sup>74</sup> Supra note at 46

<sup>75</sup> Ajay Dutta & Ajay Murmu, "Prevalence and Determinants of HIV Testing Among Men in India: Insights from NFHS-5" Clinical Epidemiology & Global Health 30 101855 (2024), available at: <https://doi.org/10.1016/j.cegh.2024.101855> (last visited on Oct. 09, 2025).

exclusion in the disputed Guidelines is discriminatory and violates Article 14 of the constitution.

Furthermore, this guidelines excludes female sex workers in blood donation and that such exclusion denies them equal dignity under Article 14<sup>76</sup> and relegates them to a subordinate status in terms of healthcare and social participation<sup>77</sup>.

Justice Surya Kant expressed concern about the discriminatory nature of the guidelines, asking, “*Are we going to brand all transgenders as risky and thus indirectly stigmatize these communities?*”<sup>78</sup>

He emphasized that blanket bans are unjustified without concrete medical evidence linking transgender identity or sexual orientation to higher risk. The Court noted that such guidelines perpetuate stigma and infringe upon the dignity and rights of affected communities, recommending that the Union consult medical experts to revise the guidelines to ensure medical safety while eliminating discriminatory elements targeting specific identities at the earliest and submit the report to court<sup>79</sup>.

### **b) International Shifts Toward Risk-Based Models**

The NBTC and NACO guidelines have not been revised since 2017, despite mounting criticism. The government maintains that the policy is grounded in “*public health safety*,” yet fails to produce epidemiological data justifying the exclusion of entire groups.<sup>80</sup> Globally, several countries have transitioned from lifetime or time-based deferral systems to ***behavior-based screening***. These reforms are grounded in scientific advancement, particularly in HIV detection technology, and an evolved understanding of equality and non-discrimination in health governance.

In several countries, including the United States, United Kingdom, Canada, France, and Australia, lifetime bans on men who have sex with men (MSM), enacted during the AIDS crisis of the 1980s, have been gradually removed. These bans were based on limited understanding

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<sup>76</sup> Budhadev Karmaskar v. State of West Bengal, 2022 SCC OnLine SC 704.

<sup>77</sup> Common Cause v. Union of India, (2018) 5 SCC 1 [

<sup>78</sup> Thangjam Santa Singh, *supra* note 72, daily order dated 14 May 2025

<sup>79</sup> “Thangjam Santa Singh @Santa Khurai v. Union of India & Ors.,” Centre for Law & Policy Research (Mar. 6, 2021), available at: <https://clpr.org.in/litigation/thangjam-santa-singh-santa-khurai-vs-union-of-india-ors/> (last visited on Oct. 09, 2025).

<sup>80</sup> “Explained: Constitutionality of Blood Donation Guidelines in India,” ABC Live (Aug. 14, 2025), available at: <https://abclive.in/2025/08/14/constitutionality-blood-donation-guidelines-india/> (last visited on Oct. 09, 2025). (abclive.in)

and technology for HIV detection. Advances such as Nucleic Acid Testing (NAT), which can identify HIV within a two-week window, have made these blanket deferrals unnecessary.<sup>81</sup>

In 2023, the FDA in the United States established a new policy that replaces time-based deferrals for blood donation with an individualized risk assessment questionnaire applicable to all donors, regardless of sexual orientation or gender identity. This method focuses on recent sexual behavior and risk factors rather than identity.<sup>82</sup> Likewise, the UK adopted the FAIR system in 2021, crafted with input from LGBTQ+ advocacy groups and medical experts, which determines donor eligibility based on specific sexual behaviors, such as partner count and condom use consistency, promoting equitable donor assessment<sup>83</sup>.

Likewise in 2022, Canada and France removed discriminatory deferral periods for MSM blood donors, shifting towards behavior-based screening that aligns with WHO guidelines advocating evidence-based, non-discriminatory practices. This evolution reflects a broader global shift, with countries like Israel<sup>84</sup>, Brazil<sup>85</sup>, and South Africa<sup>86</sup> revising their blood donation criteria amidst civil pressures, moving away from outdated associations of queerness with contagion. The reforms emphasize that risk should be assessed based on individual behavior rather than identity, highlighting the compatibility of safety and equality in health policies<sup>87</sup>.

## VII. A Way Forward Towards Reform: Recommendations

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<sup>81</sup> Dr Dana Rosenfeld, “The AIDS Epidemic’s Lasting Impact on Gay Men” The British Academy (Feb. 19, 2018), available at: <https://www.thebritishacademy.ac.uk/blog/aids-epidemic-lasting-impact-gay-men/> (last visited on Oct. 09, 2025)

<sup>82</sup> B.I. Whitaker, Y. Huang, D. Gubernot, A.F. Eder, D. Herbenick, T.C. Fu, R.A. Forshee and S.A. Anderson, “Modeling US Blood Donor Deferrals Under a Policy of Individual Risk Assessment for HIV Risk Sexual Behavior” 64 Transfusion 1459–1468 (2024), available at: <https://doi.org/10.1111/trf.17916> (last visited on Oct. 09, 2025)

<sup>83</sup> Department of Health and Social Care, “Landmark Change to Blood Donation Criteria” GOV.UK (14 Dec. 2020), available at: <https://www.gov.uk/government/news/landmark-change-to-blood-donation-criteria> (last visited on Oct. 09, 2025).

<sup>84</sup> S. Cahill and T. Wang, “An End to Lifetime Blood Donation Ban in Israel for MSM Would Be a Major Step Toward a Science-Based Policy That Reduces Stigma” 6 Israel Journal of Health Policy Research 15 (2017), available at: <https://doi.org/10.1186/s13584-017-0139-2> (last visited on Oct. 09, 2025)

<sup>85</sup> E.Z. Martinez, G. Galdino and M.L. Zucoloto, “Should Men Who Have Ever Had Sex with Men Be Allowed to Donate Blood in Brazil?” 46 Hematology, Transfusion and Cell Therapy 549–552 (2024), available at: <https://doi.org/10.1016/j.jhtct.2024.03.005> (last visited on Oct. 09, 2025)

<sup>86</sup> E. Avera, “‘Blood Has No Colour’: Racialized Donor In/Ex-clusion in the South African National Blood Service” 42 Medical Anthropology 207–221 (2023), available at: <https://doi.org/10.1080/01459740.2023.2187295> (last visited on Oct. 09, 2025)

<sup>87</sup> S.F. O’Brien, L. Osmond and M. Goldman, “Compliance with Gender-Neutral Sexual Behavior-Based Blood Donor Screening Questions” 65 Transfusion 1451–1459 (2025), available at: <https://doi.org/10.1111/trf.18302> (last visited on Oct. 09, 2025)

The gradual global movement away from categorical bans provides India with a blueprint for reform. Adopting an individualized behavioral risk assessment, combined with advanced screening technologies, would reconcile public health safety with constitutional equality. Moreover, aligning the Guidelines on Blood Donor Selection with the principles of NALSA and Navtej Johar would signal India's commitment to inclusive health governance. At the conclusion of this study, the following measures are proposed to ensure an inclusive, scientific, and constitutionally compliant blood donation framework in India:

- 1. Amend the 2017 Guidelines:** The Guidelines on Blood Donor Selection and Blood Donor Referral, 2017, particularly Clauses 12 and 51, should be immediately revised to remove the categorical ban on transgender persons and MSM, replacing it with scientifically grounded eligibility criteria.
- 2. Adopt a Risk-Based Screening Model:** India should emulate the FAIR (UK) and FDA (US) frameworks by assessing donors on individual behavioral risk rather than identity, aligning with WHO's evidence-based approach.
- 3. Enhance Diagnostic Infrastructure:** Expand Nucleic Acid Testing (NAT) and introduce rapid antigen testing nationwide to ensure early detection of transfusion-transmissible infections.
- 4. Capacity Building and Sensitization:** Train medical staff in gender sensitivity and technical competence for inclusive and stigma-free screening processes.
- 5. Confidential and Accessible Donor Centres:** Establish dedicated, non-discriminatory screening units that guarantee privacy and dignity to all donors, irrespective of gender identity or sexual orientation.
- 6. Legislative Oversight and Research:** The Ministry of Health should commission periodic epidemiological studies to evaluate infection risk objectively and update policies in line with constitutional and international obligations.
- 7. Inclusive Emergency Protocols:** During public health crises like COVID-19, community-based blood drives should actively include transgender and LGBTQ+ persons as voluntary donors to offset national shortages, with appropriate safety measures.

### **VIII. Concluding Remarks**

India's continued exclusion of transgender persons, MSM, and other marginalized groups from blood donation reflects a failure of both constitutional morality and scientific reasoning. As a *parens patriae* welfare State, India bears a positive obligation to protect all citizens from systemic discrimination and to foster inclusion within public health systems. The existing guidelines rooted in outdated AIDS-era fears contradict the transformative jurisprudence of *NALSA* and *Navtej Singh Johar*, which mandate equality, dignity, and autonomy for gender and sexual minorities.

Furthermore, under Article 253 and Article 51(c)<sup>88</sup>, India is bound to harmonize domestic law with its international commitments which prohibit discrimination in access to health and participation in civic life. Global best practices now rely on individualized, behavior-based donor screening rather than identity-based exclusion, reflecting the scientific consensus that safety and equality can coexist.

To fulfill its constitutional and international obligations, India must urgently revise its 2017 guidelines to adopt a rights-based, evidence-driven framework. Only then can it uphold the true spirit of its Constitution, one that values every citizen's blood as equally capable of saving life.

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**Word Counts ~ 3,545**

**Word Counts (Footnotes) ~1,940**

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<sup>88</sup> The Constitution of India, arts. 51(c), 253