



# Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820  
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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## Blood Donation by Gay and Transgender People - Reason for the Imposition of Ban and Measures to Overcome the Problem

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Received 01 July 2023; Accepted 28 July 2023; Published 31 July 2023

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*Human immunodeficiency virus/ acquired immunodeficiency syndrome (HIV/ AIDS) which was largely unknown in the 1980s, instilled terror in the minds of people and demonized the gay community as the source of the issue. The Food and Drug Administration (FDA) enforced a lifelong prohibition on blood donation for any male who has had intercourse with another man (MSM) at any time to combat the threat presented by the illness and safeguard the country's blood supply. This practice still prevails in Indian society as the healthcare system of India is still in the development stage and allowing blood donation by the LGBTQ community can have adverse on the health of the Indians. The article will give a brief insight into the History of the LGBTQ community in India, the history of the prohibition of blood donation by Gay and Transgender people, cases that gave recognition to the community in the country, and the changes that were brought after the historical Justice KS Puttaswamy Judgement, reasons why the community was restricted from donating blood, issues raised by them, and a better and clear plan for the future which can be adopted by the Government. The objective of the article is to make readers aware of the impact and implications that society will have to face if blood donations by transgender and Gay people are allowed at the national level. Society would face several health issues and implications on their health as these persons have a high probability of HIV/ AIDS, and Hepatitis B and C. The health care system of India is still developing and is not so modernized, advanced, and developed to stop the spread of such diseases if it spreads to the general public through any member of the community. To start with this practice firstly India must have an advanced and sophisticated health care system and technology such as NAT which detects TTI so that India can stand at the world level.*

**Keywords:** *equality, lgbtq, rights, article, bill, transgender, blood.*

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## INTRODUCTION

A well-known proverb states that blood is thicker than water. In India, prejudice against homosexual and transgender people takes many different forms. Their inability to donate blood is one example of this prejudice. The Indian government used scientific data to support their exclusion of the transgender and LGBT community as being more at risk for contracting HIV, Hepatitis B, and C diseases. The Supreme Court was presented with a petition contesting this ban.

Thangjam Santa Sing, represented by attorneys Jayna Kothari and Thulasi K. Raj, filed a petition, claiming that the ban hurt these communities during the pandemic because its members were unable to give or receive blood, a healing substance, during the public health emergency. The petition was given notice by a bench under the leadership of Chief Justice of India Sharad A. Bobde. The restriction is due to clauses 12 and 51 of the Guidelines for Blood Donor Selection & Blood Donor Referral, 2017 which was released by the National Blood Transfusion Council (NBTC) and the National Aids Control Organization on October 11, 2017.<sup>1</sup>

## HISTORY OF THE RIGHTS OF THE LGBT COMMUNITY IN INDIA

India has its writings detailing the practice of homosexuality and same-sex relations before the establishment of colonial-era regulations under British authority. The Indian philosopher Vatsyayana is credited with writing the Kama Sutra, which dates back to 400 BC and contains clear directions on how to execute gay practices. It describes bisexuals, transgender people, and intersex people in addition to both men and women who engage in intergalactic sex. For instance, the Khajuraho temples show same-sex and bisexual couples as well as other instances

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<sup>1</sup> Ariba, 'Blood Donations by Gay, transgender People: Why was the ban imposed? What are the rules across the world' *The Indian Express* (New Delhi, 14 March 2023) <<https://indianexpress.com/article/explained/explained-health/blood-donation-gay-transgender-people-ban-global-rules-8495750/>> accessed 25 June 2023

of what was once referred to be unnatural intercourse.<sup>2</sup> During the Mughal era, the Fatawa' Alamgiri, a uniform code of morality based on Sharia law, forbade unnatural intercourse throughout India. Lashings and other forms of punishment for having gay relations were among them. After the downfall of the Mughals and the arrival of the British in the year 1600, a completely codified law on Homosexuality was framed by Lord Thomas Babington Macaulay and incorporated under Section 377<sup>3</sup> of the Indian Penal Code of 1860. The law gave the judiciary the power to punish LGBT people with a fine and a sentence of up to 10 years in prison.<sup>4</sup>

## HISTORY OF THE PROHIBITION ON GAYS AND TRANSGENDER PEOPLE DONATING BLOOD

In the 1980s, when knowledge of HIV/AIDS transmission and detection was still in its infancy, it was made illegal for homosexual and transgender people to donate blood. People did not fully understand how the sickness was spread at the time, and there was no accurate test to identify HIV in blood donations. Blood donation by homosexuals and transgender individuals is prohibited in many nations, including India, due to the danger of HIV transmission. According to the Indian government, there is a higher chance of HIV, Hepatitis B, and C infections in the population, which is supported by scientific research. However, Protesters assert that the restriction discriminates against certain groups and transgresses their basic right to equality. They contend that the government's strategy is based on obsolete precepts and is at odds with the most current advancements in medical knowledge on HIV transmission and prevention.<sup>5</sup>

The National Blood Transfusion Council (NBTC), which identifies the demographic group that is to be prohibited from donating blood, is founded on scientific facts, the Centre claims in its submission to the Supreme Court. According to the preliminary affidavit submitted by the

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<sup>2</sup> Vishnu Gopinath, 'Explained | How We Got Here: A Brief History of LGBT Rights and Laws in India' *The Quint* (06 September 2022) <<https://www.thequint.com/explainers/lgbt-queer-rights-india-section-377-homosexuality-history>> accessed 25 June 2023

<sup>3</sup> Indian Penal Code 1860, s 377

<sup>4</sup> Aditi Yadav, 'A Brief History of LGBTQ+ in India' (*The CBS Post*, 18 November 2021) <<https://newsletter.sscbs.du.ac.in/a-brief-history-of-lgbtq-in-india/>> accessed 25 June 2023

<sup>5</sup> 'India's ban on Blood Donations By Gay and Transgender People' (*GK Today*, 15 March 202) <<https://www.gktoday.in/topic/qa-indias-ban-on-blood-donations-by-gay-and-transgender-people/>> accessed 25 June 2023

Union Ministry of Health and Family Welfare, Transgender people, men who have sex with men, and women who work in the sex industry are at risk for HIV, Hepatitis B, or C infections.

## CASES THAT RECOGNIZED THE THIRD-GENDER COMMUNITY

**1. NAZ Foundation V Union of India**<sup>6</sup> - The Foundation filed a PIL before the Delhi High Court in 2001 to challenge section 377<sup>7</sup>. The Delhi High Court determined in 2009 that section 377<sup>8</sup> directly violated the basic freedoms of life, liberty, and equality guaranteed by the Indian Constitution. This indicated that although homosexual intercourse was no longer illegal, it was also no longer a crime.<sup>9</sup>

**2. Suresh Kumar v Naz Foundation**<sup>10</sup>- In the case, the Supreme Court restored Section 377 of the Indian Penal Code<sup>11</sup> after overturning the decision which was delivered in the previous judgment.<sup>12</sup>

**3. NALSA Foundation v Union of India**<sup>13</sup>- In this case, the Supreme Court bench ruled in favour of transgender people's constitutional rights under Articles 14<sup>14</sup>, 15<sup>15</sup>, and 21<sup>16</sup> of the Constitution,

The arguments that the Court had earlier rejected in Suresh Koushal were substantially adopted in NALSA by the court. The federal and state governments were told to acknowledge gender

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<sup>6</sup> *NAZ Foundation v Union of India* WP (C) No 7455/2001

<sup>7</sup> Indian Penal Code 1860, s 377

<sup>8</sup> *Ibid*

<sup>9</sup> Moksha Sanghvi, 'History of Pride Movement in India' *Deccan Herald* (26 June 2019)

<<https://www.deccanherald.com/specials/history-of-the-pride-movement-in-india-742950.html>> accessed 25 June 2023

<sup>10</sup> *Suresh Kumar v Naz Foundation* (2014) 1 SCC 1

<sup>11</sup> Indian Penal Code 1860, s 377

<sup>12</sup> 'Challenge to Transgender Person' ( *Supreme Court Observer*, 29 May 2019)

<<https://www.scobserver.in/cases/swati-bidhan-baruah-union-of-india-challenges-to-transgender-persons-act-case-background/>> accessed 25 June 2023

<sup>13</sup> *NALSA Foundation v Union of India* AIR 2014 SC 1863

<sup>14</sup> Constitution of India 1950, art 14

<sup>15</sup> Constitution of India 1950, art 15

<sup>16</sup> Constitution of India 1950, art 21

identities like male, female, or the third gender in legal papers. The court supported a transgender person's freedom to choose their gender.

**4. Justice KS Puttaswamy v Union of India<sup>17</sup>**- In this decision, the Supreme Court's nine judges unanimously declared in 2017 that one of the most important constitutional rights is the right to privacy. The Supreme Court said in its ruling that the rights of the LGBT community are legitimate rights based on good constitutional principles. They have a natural right to life. They are the very foundation of liberty and freedom and live in peace and dignity.<sup>18</sup>

#### **GOVERNMENT AFTER JUSTICE KS PUTTASWAMY JUDGEMENT**

Following the ruling, the 2014 Rights of Transgender Persons Bill<sup>19</sup> (hence referred to as the '2014 Bill') was approved by the Rajya Sabha. The 2014 Bill, however, was never presented to the Lok Sabha and finally expired.<sup>20</sup>

Two years later the Transgender Persons (Protection of Rights<sup>21</sup>) Bill, 2016 (also known as the '2016 Bill') was introduced in the Lok Sabha. In comparison to the 2014 Bill, the 2016 Bill diverged greatly from NALSA So much so that the Parliamentary Standing Committee on Social Justice found several instances where the 2016 Bill conflicted with NALSA which was presented to the Lok Sabha on September 21, 2017. However, when the Lok Sabha passed the Bill, the Standing Committee's recommendations were not taken into account. On December 5, 2019, the Transgender Persons (Protection of Rights<sup>22</sup>) Act of 2019 (hereafter referred to as the '2019 Act') took effect, replacing the 2016 Bill.

By this bill, a transperson is someone whose gender identity differs from that assigned at birth. It outlawed discrimination against them in the workforce, in healthcare, in the classroom, and in other areas. However, it was opposed by the gay groups in India since it required that each

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<sup>17</sup> *KS Puttaswamy v Union of India* AIR 2017 SC 4161

<sup>18</sup> Ariba (n 1)

<sup>19</sup> Right to Transgender Bill 2014

<sup>20</sup> Aditi Yadav (n 4)

<sup>21</sup> Transgender Persons (Protection of Rights) Bill 2016

<sup>22</sup> Transgender Persons (Protection of Rights) Act 2019

transgender person be recognized based on an identity certificate given by the district magistrate upon the presentation of documentation of surgery for changing one's sex. The focus was mostly on hijras or transwomen, with little attention paid to intersex, genderqueer, or transmen.<sup>23</sup>

**5. Navtej Johar V Union of India<sup>24</sup>** - A corrective petition challenging the Koushal decision was considered before the SC in August 2018. The portion of IPC Section 377 that criminalized homosexuality was overturned by a five-judge Constitution Bench. The 'Navtej decision effectively declared that LGBTQ people have the same rights as other citizens and emphasized the fact that sexual orientation and gender are not factors that may be taken into account while enforcing the law.

## CONTRADICTIONS FOR DONATING BLOOD IN INDIA FOR GAY AND TRANSGENDER PEOPLE

The LGBTQ+ community has come to be recognized for its conservative treatment in India. The nation's laws and practices have frequently come under fire for being regressive and discriminatory. The prohibition on homosexual and transgender persons donating blood is an example of such a regulation. This rule has been in effect since the Indian government implemented regulations banning blood donations from homosexual and transgender people in 2014.

## ISSUE RAISED BY THE TRANSGENDER COMMUNITY

The main issue with the community was that they were discriminated against on the grounds of sex which says that gay and trans people cannot donate blood as per the provisions or rules of 2017 drafted by NBTC. The provision was formed during its 26th meeting, and the NBTC's governing board accepted the guidelines to introduce a blood transfusion service on June 1, 2017. This service provides a reliable, ample, and providing individuals in need of blood and

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<sup>23</sup> Ishikaa Seth, 'Transgender Person (Protection of Rights) Act, 2019' (*iPleaders*, 19 December 2021) <<https://blog.iplayers.in/transgender-persons-protection-rights-act-2019-impact-third-gender/>> accessed 25 June 2023

<sup>24</sup> *Navtej Johar v Union of India* AIR 2018 SC 4321

blood products as soon as possible. The rules were created to encourage the finest blood transfusion techniques and to guarantee that donations were from the lowest-risk donors as possible.<sup>25</sup>

The affidavit was submitted in response to a PIL brought by Thangjam Santa Singh, a resident of Manipur and a member of the transgender community, who claimed that the NBTC and the Centre's Blood Donor Guidelines were unlawful because they prejudice people based on their gender identity and sexuality. In March 2021, the court requested a response from the Centre, National Aids Control Organization, and NBTC.

According to the advocate for the community, the ban on transgender people, MSM, and female sex workers is the result of assumptions based on unfavourable stereotypes, which violates Articles 14<sup>26</sup> and Article 15<sup>27</sup> of the Constitution because these groups are seen as less deserving and inferior in social involvement and medical treatment.

As a result, the centre informed the Court in an affidavit filed by the Union Ministry of Health and Family Welfare that making sure blood was safe and accessible was a vital public health responsibility. It then compared this with the situation in industrialized nations, noting that these countries had used NAT, which shortens the window time for TTIs. However, it claimed that only a small portion of the 3,866 accredited blood banks in India used NAT technology. According to the government, NAT technology was highly pricey, needed skilled labour and sophisticated equipment that needed careful handling and ongoing maintenance. The Government also added that as per the reports and scientific evidence, it is visible that the prevalence of HIV and other TTIs is greater among the population groups of transgender people, MSM, and female sex workers across the world.<sup>28</sup>

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<sup>25</sup> Kadija Khan, 'Trans and Gay People, women's sex workers can't Donate Blood: What the Centre Said in SC' *The Indian Express* (New Delhi, 14 March 2023) <<https://indianexpress.com/article/explained/explained-law/trans-gays-female-sex-workers-blood-donation-8494145/>> accessed 25 June 2023

<sup>26</sup> Constitution of India 1950, art 14

<sup>27</sup> Constitution of India 1950, art 15

<sup>28</sup> Abraham Thomas, 'To Instil Confidence': Centre on excluding transgender, gays from blood donation' *Hindustan Times* (09 March 2023) <<https://www.hindustantimes.com/india-news/to-instil-confidence-centre-on-excluding-transgender-gays-from-blood-donation-101678380873842.html>> accessed 26 June 2023

## **BAN AND ITS IMPACT ON THE SOCIETY**

On the premise that they have a higher risk of HIV/AIDS transmission, homosexual and transgender persons cannot donate blood. The restriction has significantly affected India's LGBTQ+ community. This community now faces further marginalization as a result of the stigma and prejudice that have been reinforced owing to the restriction, many potential donors are unable to donate blood owing to their sexual preference or gender identification, which has led to a scarcity of blood in blood banks.

## **CRITICISM OF THE BAN ON BLOOD DONATION**

Human rights groups, healthcare professionals, and members of the LGBTQ+ community have all strongly denounced the law that prohibits homosexual and transgender persons from donating blood. They contend that the prohibition violates the Indian Constitution's assurances of equality and inclusivity and is discriminatory. The restriction has also drawn criticism for being predicated on outmoded and unfounded theories regarding the spread of HIV/AIDS. Many nations have eliminated their restrictions on homosexual and transgender persons donating blood after realizing that such restrictions are both unnecessary and discriminatory which includes modern countries like the United States, Canada, and Australia.

## **WAY FORWARD**

The Security of the blood supply must still be the primary consideration when establishing rules for blood donations. Threats to such safety must, however, be regularly reevaluated in light of the hazards that are now present and the scientific developments that are thwarting those risks. These variables must be rationally related to the rule, which must also reduce any discriminatory consequences. A proper and elaborative study can be carried out about blood donation by the LGBTQ community and full proof or conclusive evidence should be shown that there are chances of spread of vulnerable disease to the common man. If the report is negative then the restrictions should be uplifted as it breaches their right and liberty guaranteed under the Constitution. The country then has to reevaluate its prohibition on homosexual and transgender persons donating blood. Based on a person's gender identification or sexual



orientation, the restriction breaches their fundamental rights and is discriminatory. The prohibition should be lifted by the Indian government, which should realize that it is founded on obsolete and unscientific presumptions and follow the lead of other nations.

## **CONCLUSION**

The nation should have the capacity to overthrow the law which seems to be discriminatory or which prohibits the rights of any community. As the nation is progressing there is a need for reformation or change in the old or decrepit law with changing times. It is rightly stated that society changes with the law therefore proper legislation or statutes should be passed which can uplift these orthodox practices which are running in the country. There are many countries in the world which has from time to time recognized the need of uplifting this ban and give the community the rights they deserved. If modern and developed societies can adapt to this law then our nation should follow the path of modern countries. The nation as a whole is progressing and the contribution of the LGBTQ community should be also taken into consideration and proper and equal rights should be guaranteed to them. But on the other hand, it has to be kept in mind the current condition of our nation's health departments. As already stated, India is a developing nation and the health sector is also evolving with the nation. Therefore, the development or setting up of the necessary and requisite labs (as per international standards) for testing the blood of members of the LGBTQ community before donation to prevent the spread of such venerable disease. A proper balance between public safety and individual liberty will only guarantee the establishment of an egalitarian society.