

## Artigos

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## Challenging the blood donation ban of LGBTQ+ individuals in India: a medico-legal and public policy analysis

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**Abstract:** This paper both historicizes and contextualizes the contemporary US Food and Drug Administration (FDA) blood donation policy banning men who have sex with men and transgender individuals although in 2023 they have changed their old policies and made new recommendations where MSM and LGBTQ+ community can donate blood but coming to India we are still following the age-old policies. These policies found their roots in the 1980s at the outset of the HIV/AIDS crisis, when fear and misinformation coupled the disease first and foremost with homosexual men, leading to lasting stigmatization and discriminatory practices. Yet, with all the strides made in blood testing technology and a better understanding of the HIV transmission process, such archaic policies thrive not just in India but in several other countries also. The paper contributed to this area while summarizing the evolution of knowledge on HIV, the window period for HIV detection, and international blood donation guidelines and argued that the blanket ban is not only lacking in scientific basis but also constitutionally unsound and violated basic human rights. It discriminates against gay men in monogamous relationships wherein heterosexual men who have multiple sexual partners are given the chance to be blood donors. These policies, upon updating, shall massively add to the potential blood donor pool that would save

thousands of lives. This could best be crowned by the replacement of stigma with science on the road to a safe, inclusive blood donation.

**Keywords:** Blood Donation; LGBTQ+; Gender Identity; Discrimination; Stigma.

## **Contestando a proibição de doação de sangue de indivíduos LGBTQ+ na Índia: uma análise médico-legal e de política pública**

**Resumo:** Este artigo historiciza e contextualiza a política contemporânea de doação de sangue da Food and Drug Administration (FDA) dos EUA que proíbe homens que fazem sexo com homens e indivíduos transgêneros, embora em 2023 eles tenham mudado suas políticas antigas e feito novas recomendações onde a comunidade MSM e LGBTQ+ pode doar sangue, mas chegando à Índia ainda estamos seguindo as políticas antigas. Essas políticas encontraram suas raízes na década de 1980, no início da crise do HIV/AIDS, quando o medo e a desinformação associaram a doença principalmente aos homens homossexuais, levando a uma estigmatização duradoura e práticas discriminatórias. No entanto, com todos os avanços feitos na tecnologia de testes de sangue e uma melhor compreensão do processo de transmissão do HIV, essas políticas arcaicas prosperam não apenas na Índia, mas também em vários outros países. O artigo contribuiu para essa área ao resumir a evolução do conhecimento sobre o HIV, o período de janela para detecção do HIV e as diretrizes internacionais de doação de sangue e argumentou que a proibição geral não só carece de base científica, mas também é constitucionalmente infundada e viola os direitos humanos básicos. Ela discrimina homens gays em relacionamentos monogâmicos, nos quais homens heterossexuais que têm múltiplos parceiros sexuais têm a chance de serem doadores de sangue. Essas políticas, ao serem atualizadas, devem aumentar enormemente o pool de doadores de sangue em potencial, o que salvaria milhares de vidas. Isso poderia ser melhor coroado pela substituição do estigma pela ciência no caminho para uma doação de sangue segura e inclusiva.

**Palavras-chave:** Doação de sangue; LGBTQ+; Identidade de gênero; Discriminação; Estigma.

### **Research methodology**

Researchers have used both doctrinal and non-doctrinal methods for the collection of data related to this research. In non-doctrinal research, researchers have used open interview methods with unstructured questions.

### **Acknowledgement**

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## Introduction

According to a report in The Atlantic by Vann R. Newkirk II, an incident occurred in 2016 where a gay nightclub in Florida was subjected to an attack. This tragic event resulted in the deaths of 49 individuals and multiple injuries. In response, members of the gay community stepped forward to assist the wounded by donating blood. However, they soon discovered that they were prohibited from donating blood as per the regulations set by the United States Food and Drug Administration. Banning MSM for blood donation has a long story back to the 1980s<sup>1</sup>.

Blood is vital for saving the lives of thousands of people every day who are battling for their lives; most of them are accident victims or patients undergoing certain surgeries. NGOs, influencers, and government bodies are working day and night to make people aware of the benefits of blood donation. Thousands of youths are connected through social media like WhatsApp, etc., in different groups to volunteer for blood donations and help people in need. On one hand, the blood is scarce, and thousands and lakhs of people, NGOs, and governments are working for it. On the other hand, a substantial number of people are kept outside the circle of blood donation because of their sexual orientation<sup>2</sup>.

During COVID-19, a blood crunch was felt throughout the world, and some reports also suggested the smuggling of blood during COVID-19<sup>3</sup>. Due to the scarcity of blood and plasma, many patients passed away who could have been saved if blood donation was possible in their case. India also faced the problem of blood scarcity during COVID-19, leading to the deaths of thousands of people, and still, India kept its policy of a blood donation ban on gays and bisexuals intact throughout COVID-19<sup>4</sup>.

Under this research, the researcher will understand the stereotypes, myths, and history behind why, in India, the blanket ban on blood donation is there for people who are MSMs, TRANSGENDER, and sex workers and whether this ban is legal, ethical, and morally correct or not.

## History of HIV and initial assumptions related to MSM

In the 1980s, acquired immunodeficiency syndrome, popularly known as AIDS, left the world in fear and stigma. Until 1980, the number of cases and causes of HIV were greatly unknown<sup>5</sup>. During the 1980s, HIV reached around 5 continents (Australia, South America, North America, Europe, and Africa), covering around 1 million people affected by it. The early detection of HIV was linked to males who have

<sup>1</sup> They ensure blood banks always have supply. The Times of India. Available on: <https://timesofindia.indiatimes.com/city/bengaluru/they-ensure-blood-banks-always-have-supply/articleshow/103115435.cms>. Access on: 12<sup>th</sup>, August 2024.

<sup>2</sup> WHO. Blood Products: Blood Donation. Available on: <https://www.who.int/news-room/questions-and-answers/item/blood-products-why-should-i-donate-blood>. Access on: 12<sup>th</sup>, August 2024.

<sup>3</sup> THAKUR, Sanjay K.; SINHA, Anil K.; NEGI, Dinesh K.; SINGH, Sompal, Effect of COVID-19 pandemic on blood transfusion service: an experience from a regional blood transfusion center. **Blood science**, v. 5, n. 3, 2023. p. 209-217. Available on: [https://journals.lww.com/bls/fulltext/2023/07000/effect\\_of\\_covid\\_19\\_pandemic\\_on\\_blood\\_transfusion.8.aspx](https://journals.lww.com/bls/fulltext/2023/07000/effect_of_covid_19_pandemic_on_blood_transfusion.8.aspx). DOI: 10.1097/BS9.0000000000000161. Access on: 12<sup>th</sup> August 2024.

<sup>4</sup> CHOWDHURY, Fateha; ESTCOURT, Lise; MURPHY, Michael F.. Mitigating the impact of blood shortages in England. **British Journal of Haematology**, v. 204, n. 5, 2024. p. 1660-1671. Available on: <https://onlinelibrary.wiley.com/doi/10.1111/bjh.19344>. Access on: 12<sup>th</sup>, August 2024. DOI: <https://doi.org/10.1111/bjh.19344>

<sup>5</sup> Origin of HIV and AIDS. (n.d.). Be In the KNOW. Available on: <https://www.avert.org/professionals/history-hiv-aids/overview#:~:text=It%20is%20widely%20believed%20that,with%20HIV%20or%20developed%20AIDS>

sex with males (MSM). In 1982, many gay men in southern California were diagnosed with HIV, and because of this, HIV at that time was called gay-related immune deficiency.<sup>6</sup> In 1982, the CDC used the term “AIDS”<sup>7</sup>.

According to the WHO, around 30 million people around the globe will be living with HIV by 2019<sup>8</sup>. National Blood Transfusion Guidelines 2017 under Point 51 prohibit the donation of blood by people who have male-to-male sex and are transgender<sup>9</sup>. The same kind of prohibition on blood donation can also be seen in the USA and India.

Knowledge about HIV was very limited when it was first discovered. After research, it was found to be a blood-borne and sexually transmitted disease. In the beginning, most of the HIV patients were homosexual men, and because of this, many hypotheses were formed about it, the most important of which is that homosexuality leads to HIV. HIV was called a curse for people who get involved in MSM, whereas modern research has proved that it can be transmitted in many ways, not just through unprotected sex. In the 1980s, it was discovered that individuals other than gays were also testing positive for AIDS, including drug users, Haitians, hemophiliacs, and recipients of blood transfusions who were not homosexuals. This initial discovery caused fear among states and governments, resulting in the prohibition of blood donation by MSM and transgender individuals in many countries until the year 2000<sup>10</sup>. However, as scientific research on HIV and homosexuality progressed, many countries reconsidered their stance and allowed blood donation by homosexual and transgender individuals. Nevertheless, countries like the United States of America, along with several European and Asian countries, continue to uphold the blood ban that has been in place for decades<sup>11</sup>. In India, there is a compulsory ban on blood donation by people who are MSM, transgender, or involved in commercial sex work. Recently, the center has been informed that there are specific grounds according to which blood donation by these classes of people should also not be allowed shortly, as a public interest litigation filed against the 2017 notification, calling it unconstitutional.

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<sup>6</sup> HALKITIS, Perry. Discrimination and Homophobia Fuel the HIV Epidemic in Gay and Bisexual Men. **Psychology & AIDS Exchange**, 2012. p. 1, 4-11.

<sup>7</sup> HALKITIS, Perry. Discrimination and Homophobia Fuel the HIV Epidemic in Gay and Bisexual Men. **Psychology AIDS Exchange**, 2012. p. 1, 4-11.

<sup>8</sup> WORLD HEALTH ORGANIZATION. HIV and AIDS. Available on: <https://www.who.int/news-room/fact-sheets/detail/hiv-aids>. Access on: 12<sup>nd</sup>, August 2024.

<sup>9</sup> AGNIHOTRI, Naveen; CHATURVEDI, Yatendra Mohan; AGNIHOTRI, Ajjun. Impact Analysis of the National Guidelines for Blood Donor Selection in India: A Single Center Study. **Indian Journal of Hematology and Blood Transfusion**, v. 35, n. 4, 2019. p. 726–730. DOI: <https://doi.org/10.1007/s12288-019-01100-1>.

<sup>10</sup> Nabajyoti Choudhury, Ankit Mathur, Cees Th Smit Sibinga, COVID-19 Pandemic – blood supply challenges and approaches in AATM member countries. **ISBT Science Series**, v. 15, n. 4, 2020. Available on: <https://onlinelibrary.wiley.com/doi/full/10.1111/voxs.12578>. Access on: 12<sup>th</sup>, August 2024. DOI: 10.1111/voxs.12578.

<sup>11</sup> KARAMITROS, Georgios; KITSOS, Nikolaos A.; KARAMITROU, Ioanna. The ban on blood donation on men who have sex with men: Time to rethink and reassess an outdated policy, **Pan African Medical Journal**, v. 27, article 99, 2017. Available on: <https://panafrican-med-journal.com/content/article/27/99/full/>. DOI:10.11604/pamj.2017.27.99.12891.

<sup>12</sup> Centre cites scientific proof for refusing blood donation from trans, gay and sex workers. Deccan Herald. Available on: <https://www.deccanherald.com/india/centre-cites-scientific-proof-for-refusing-blood-donation-from-trans-gay-and-sex-workers-1199259.html>. Access on: 12<sup>nd</sup>, August 2024.

## Statutory ban on msm and transgender community for blood donation: implications and challenges

The current blood donation policy imposes a discriminatory double standard. While a heterosexual man can donate blood and engage in unprotected sexual encounters with multiple partners, a gay man who practices safe sex with his partner is still prohibited from donating. The FDI (Food and Drug Administration) restrictions state that men who have had sexual relations with other men within the past 12 months are not eligible to donate blood, and this deferral policy was implemented in 2015<sup>13</sup>.

The Union Health Ministry of India, in response to a PIL (public interest litigation) filed in the Supreme Court<sup>14</sup>, has expressed support for the 2017 guidelines that prohibit transgender individuals, men who have sex with men (MSM), and female sex workers from donating blood<sup>15</sup>. The ministry justifies this prohibition by categorizing these groups as “at risk” and prioritizing public health concerns over individual rights. The petition seeks the removal of clauses in the Blood Donor Selection Criteria that permanently exclude these populations due to their increased vulnerability to HIV, hepatitis, and other transfusion-transmissible infections (TTIs). The prevalence of HIV among these marginalized groups is significantly higher than the overall adult HIV prevalence rate in India, as reported by the Department of Health and Family Welfare. The government argues that despite advancements in testing technologies, no method can be considered completely reliable, as there is always a “residual window period” for detecting infections. The ministry further highlights the limited use of nucleic acid testing (NAT) in the country's blood banks<sup>16</sup>.

The UNAIDS Prevention Gap Report<sup>17</sup> highlights that marginalized groups, such as sex workers, drug addicts, transgender individuals, gay men, etc., face significantly higher risks of HIV infection. Studies reveal that people who inject drugs have a 24-fold higher likelihood of contracting HIV compared to the general population. Sex workers face a tenfold increased risk, while gay men and other men who have sex with men have a 24-fold higher likelihood of acquiring HIV. Transgender individuals are found to be 49 times more likely to be living with HIV, and prisoners are five times more likely to have HIV compared to the general adult population<sup>18</sup>.

Some states, like South Africa (the South African National Blood Service), have a policy that states that if any gay man has been in a monogamous relationship for the last six months, he is eligible to donate blood. In South Africa, a questionnaire is the first level of screening, but that depends more or less on the honesty of the donor. South Africa also conducts individual testing, which means even if you are a regular

<sup>13</sup> WILLIAMS, Cole; QUARTETTI, Maelle; ROCHA, Cindy; HARRIS, Skylar. Request for Revision of MSM Blood Donation Deferment Policy, 2022. Available on: <https://www.fda.gov/media/163742/download>. Access on: 12<sup>th</sup>, August 2024.

<sup>14</sup> Health Ministry backs 2017 guidelines that exclude transgender persons, MSM, female sex workers from donating blood. **The Hindu Bureau**. Available on: <https://www.thehindu.com/sci-tech/health/health-ministry-supports-2017-guidelines-that-exclude-transgender-persons-msm-and-female-sex-workers-from-donating-blood/article66607022.ece>. Access on: 12<sup>th</sup>, August 2024.

<sup>15</sup> ZUCOLOTO, Miriane Lucindo et al. Blood donation deferral policies among men who have sex with men in Brazil. **Hematology, transfusion and cell therapy**, v. 41, n. 2, 2019. p. 164-168. Available on: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6517649/>. Access on: 12<sup>th</sup>, August 2024.

<sup>16</sup> Health Ministry backs 2017 guidelines that exclude transgender persons, MSM, female sex workers from donating blood. **The Hindu Bureau**. 2023. Available on: <https://www.thehindu.com/sci-tech/health/health-ministry-supports-2017-guidelines-that-exclude-transgender-persons-msm-and-female-sex-workers-from-donating-blood/article66607022.ece>. Access on: 12<sup>th</sup>, August 2024.

<sup>17</sup> UNAIDS. **Prevention gap report**. 2016. Available on: <https://www.unaids.org/en/resources/documents/2016/prevention-gap>. Access on: 12<sup>th</sup>, August 2024.

<sup>18</sup> ZUCOLOTO, Miriane Lucindo et al. Blood donation deferral policies among men who have sex with men in Brazil. **Hematology, transfusion and cell therapy**, v. 41, n. 2, 2019. p. 164-168. Available on: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6517649/>. Access on: 12<sup>nd</sup>, August 2024.



donor, your blood will also be tested. In Italy and Spain, the policy is to assess the high-risk donor individually, not as a whole group or community. For example, if a guy is in a monogamous long-term relationship with another guy, he is less prone to the risk of HIV (safe donor) and hence can donate blood, whereas a straight person can be categorized as high-risk if he or she is living in a polygamous relationship and has sex with more than one partner. This individual screening protects the rights of the whole MSM and transgender community and removes blanket assumptions based on sexual orientation<sup>19</sup>.

If the ban is lifted, more blood will be available for people, and the number of lives lost because of a blood shortage will reduce. A team of scientists determined that if a one-year deferral<sup>20</sup> is done instead of a lifetime ban on blood donation by MSM, this will save many lives. Here, it is important to know and understand the reasoning behind keeping a one-year deferral period for blood donation by MSM. For this one must know about the window period.

## Window period

When anyone suspects potential exposure to the AIDS-causing virus and wishes to undergo testing for it, the timing of the test is crucial in that case. Following the entry of the human immunodeficiency virus (HIV) into one's system, there is a specific duration known as the HIV window period during which a test becomes capable of detecting it. Familiarising oneself with the HIV window period is essential for obtaining the most precise test results<sup>21</sup>. While awaiting the test, it is imperative to refrain from engaging in unprotected sexual activities and avoid sharing needles. In the event of having HIV, there is a high risk of being highly infectious and transmitting the virus to others. HIV window periods vary among individuals<sup>22</sup>. For instance, if someone engages in unprotected sex on a Sunday night and undergoes an HIV test on Wednesday morning, then the test may not identify the presence of HIV or an immune response to the virus. This is because insufficient time has elapsed for a positive result, even if the virus is present in our body. If someone knows the date when he might have encountered the virus, it is recommended to undergo an HIV test three months after that specific date. Tests conducted three months after exposure are considered to be approximately 99% accurate<sup>23</sup>. This waiting period allows sufficient time for the virus to replicate and for the immune response to develop, increasing the reliability of the test results.

<sup>19</sup> ARMSTRONG, P.J. et al., A mixed methods investigation Of the relationship between blood donor policy, interest in donation, and willingness to donate among gay, bisexual, and other men who have sex with men in Ontario, Canada, **BMC Public Health**, v. 22, article 849, p. 1-13. 2022. Available on: <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-022-13229-2>. Access on: 12<sup>th</sup>, August 2024. DOI: <https://doi.org/10.1186/s12889-022-13229-2>.

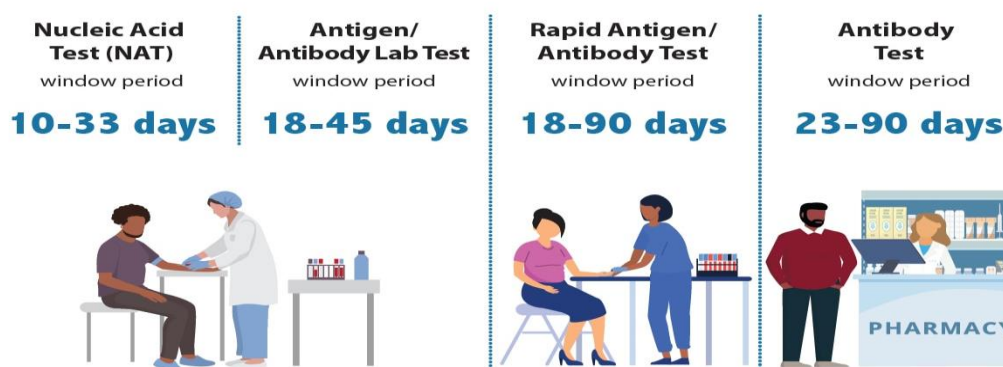
<sup>20</sup> KARAMITROS, Georgios; KITSOS, Nikolaos A.; KARAMITROU, Ioanna. The ban on blood donation on men who have sex with men: Time to rethink and reassess an outdated policy, **Pan African Medical Journal**, v. 27, article 99, 2017. Available on: <https://panafrican-med-journal.com/content/article/27/99/full/>. DOI:10.11604/pamj.2017.27.99.12891.

<sup>21</sup> DEHAAN, Elliot et al.. *PEP to Prevent HIV Infection*, 2022. Available on: [https://www.ncbi.nlm.nih.gov/books/NBK562734/pdf/Bookshelf\\_NBK562734.pdf](https://www.ncbi.nlm.nih.gov/books/NBK562734/pdf/Bookshelf_NBK562734.pdf). Access on: 12<sup>th</sup>, August 2024.

<sup>22</sup> Sethi, Adhish Kumar et.al. Low awareness but high acceptability of pre-exposure prophylaxis for HIV among men who have sex with men and transgender persons in Delhi, India, Sage Journals. Available on: [journals.sagepub.com/doi/abs/10.1177/09564624231174936](https://journals.sagepub.com/doi/abs/10.1177/09564624231174936). Accessed on 14<sup>th</sup> August, 2024

<sup>23</sup> Farnsworth, Carolyn, Early detection of HIV: Signs and symptoms, 2022. Available on: [www.medicalnewstoday.com/articles/early-detection-of-hiv](https://www.medicalnewstoday.com/articles/early-detection-of-hiv) Accessed on 14th August, 2024  
AIDSMAP. What is the window period for HIV testing?, 2021. Available on: <https://www.aidsmap.com/about-hiv/what-window-period-hiv-testing>. Access on: 12<sup>th</sup>, August 2024.

According to the Centers for Disease Control and Prevention (CDS)<sup>24</sup>, there are three main types of HIV tests: antibody tests, antigen/antibody tests, and nucleic acid tests (NAT). When exposed to viruses like HIV, our immune system produces antibodies. Antigens, on the other hand, are foreign substances that trigger our immune system. In the case of HIV, an antigen called p24 is produced even before antibodies develop. HIV tests are typically conducted on blood or oral fluid, and in some cases, on urine. It's important to note that no HIV test can immediately detect the virus after infection due to the window period- the time between HIV exposure and when a test can identify HIV in our body<sup>25</sup>. The duration of the window period depends on the type of HIV test used. Nucleic acid tests (NAT) are usually the most sensitive, capable of detecting HIV as early as 10 to 33 days after exposure.



Pic:<sup>26</sup> Window period for different HIV Tests

Thus window period is the time between HIV infection and when a test can accurately detect it<sup>27</sup>. Different tests have varying window periods: 45 days for 4th generation tests, 60 days for third-generation tests, and 90 days for point-of-care tests. The 4th generation HIV test<sup>28</sup>, which combines the detection of both antibodies and p24 antigens, indeed allows for earlier identification of HIV compared to previous testing protocols. The p24 antigen is a viral protein produced early in the course of HIV infection. The detection of p24 antigens in the blood is a direct indication of the presence of specific HIV proteins, providing more immediate evidence of infection. In terms of accuracy, the 4th generation HIV test is highly reliable. It is capable of detecting HIV as early as two to three weeks after exposure, making it one of the most sensitive tests available. During this period, a person can be highly infectious but still receive a negative test result. UK guidelines recommend a six-week window period for 4th generation tests, detecting 99% of infections. Testing after four weeks detects 95% of infections, but a negative result requires confirmation with a second test.

<sup>24</sup> Fanfair, Robyn Neblett, et.al., Human Immunodeficiency Virus / HIV, **CDC Yellow Book 2024**, Centre for Disease control and prevention. Available on [wwwnc.cdc.gov/travel/yellowbook/2024/infections-diseases/hiv](http://wwwnc.cdc.gov/travel/yellowbook/2024/infections-diseases/hiv). Access on 14<sup>th</sup> August, 2024..

<sup>25</sup> Fanfair, Robyn Neblett, et.al., Human Immunodeficiency Virus / HIV, **CDC Yellow Book 2024**, Centre for Disease control and prevention. Available on [wwwnc.cdc.gov/travel/yellowbook/2024/infections-diseases/hiv](http://wwwnc.cdc.gov/travel/yellowbook/2024/infections-diseases/hiv). Access on 14<sup>th</sup> August, 2024.

<sup>26</sup> Fanfair, Robyn Neblett, et.al., Human Immunodeficiency Virus / HIV, **CDC Yellow Book 2024**, Centre for Disease control and prevention. Available on [wwwnc.cdc.gov/travel/yellowbook/2024/infections-diseases/hiv](http://wwwnc.cdc.gov/travel/yellowbook/2024/infections-diseases/hiv). Access on 14<sup>th</sup> August, 2024.

<sup>27</sup> Delaney, Kevin P et. al., Time Until Emergence of HIV Test Reactivity Following Infection With HIV-1: Implications for Interpreting Test Results and Retesting After Exposure. **Clinical Infectious Diseases**, 2017. Available on: [academic.oup.com/cid/article/64/1/53/2194435](http://academic.oup.com/cid/article/64/1/53/2194435), access on 14<sup>th</sup> August, 2024..

<sup>28</sup> DR. SAFE HANDS. 4th Generation HIV test Accuracy | How To Get Tested For HIV/AIDS. 2024. Available on: <https://drsafehands.com/topic/4th-gen-test-accuracy-how-to-get-tested-for-aids-faq>. Access on: 12<sup>th</sup>, August 2024.

Based on this study, a deferral period of up to 90 days after the last sexual encounter or potential exposure to HIV is sufficient for MSM and transgender communities. Maintaining a one-year deferral specifically for MSM is unnecessary<sup>29</sup>. Honesty is crucial for both high-risk groups when donating blood, considering their potential HIV exposure. Exercise caution if not in a monogamous relationship.

### Blood donation and lifespan of components

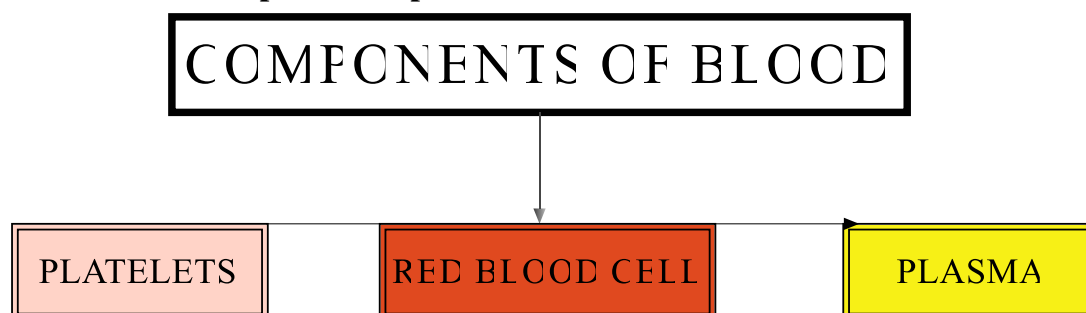


Fig: Compiled by the authors

Here, it is equally important to understand that after a blood donation, one cannot store it for an extended duration, as per the information obtained from the Shana Blood Bank. Each blood component has its lifespan, beyond which it becomes unusable. For PRBC (packed red blood cells), the lifespan is 42 days. The lifespan of whole blood is also 42 days. Platelets can be stored for 5 days, while plasma can be stored for up to 1 year. For the safety of individuals belonging to high-risk groups, they need to wait for the window period before donating blood. This is because even after HIV exposure, a test may still yield a negative result. There could be a policy of checking the blood of MSM people more than other heterosexuals, and this will reduce the chances of HIV as every time it is tested, it eliminates all doubt about the blood being infected with HIV. This will increase the pool of eligible blood donors, protect the right to equality, and remove the discriminatory practice of banning blood among MSM people<sup>30</sup>.

Based on the above study and scientific data concerning HIV, it can be stated that technology and medical science have significantly advanced compared to the 1980s. With accurate information regarding the last sexual encounter, which is an important factor in diagnosing HIV in high-risk groups, not in monogamous relationships, HIV can be detected within 90 days of initial exposure. Hence, if someone belonging to this group wishes to donate blood, they should wait 90 days after their last sexual encounter or HIV exposure to obtain accurate test results. Every human life holds value, and by donating blood, one can, directly and indirectly, save many lives.

Reports suggest that only in the USA if the life ban on MSM people donating blood is lifted, then approximately 75,190 new blood donors will be added to the pool of blood donors. According to the Red Cross Society of the United States, every pint of blood has the potential to save the lives of three people

<sup>29</sup> Delaney, Kevin P et. al., Time Until Emergence of HIV Test Reactivity Following Infection With HIV-1: Implications for Interpreting Test Results and Retesting After Exposure. **Clinical Infectious Diseases**, 2017. Available on: [academic.oup.com/cid/article/64/1/53/2194435](https://academic.oup.com/cid/article/64/1/53/2194435). Access on 14<sup>th</sup> August, 2024.

<sup>30</sup> PRINTZ, Heather. Some MSM Blood Donors Move from a Lifetime Deferral to a One Year Ban “Finally” or “Not Good Enough”? **Journal of Health Care Law and Policy**, v.21, n. 1, 2018. p. 71-114. Available on: <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1359&context=jhclp>. Access on: 12<sup>th</sup>, August 2024.



who need blood, and hence, if the ban is lifted, it will help around 225,570 people, and their lives could be saved<sup>31</sup>.

The reason to ban transgender people from donating blood seems unjustified on the ground because the Indian blood banks lack of resources to find out the infection present in the blood of the donating person. The Central government has also submitted that the ban on blood donation by gay and transgender individuals is at a “high-risk” group for HIV/AIDS<sup>32</sup>.

Even if there is a high risk of transmitting HIV/AIDS from transgender persons, the blanket ban is arbitrary. A case-to-case basis decision may be taken<sup>33</sup>. Further, in the case of same-sex marriages, even the partner won’t be able to save the life of a fellow partner. Blood donation is a life-saving gift and without any justification blanket ban would affect the suffering person in case of need.

If we see the global shift that has happened in the past few years and due to this, the United States has revised its policy and at present the ban on blood donation by transgender persons is removed. Moreover, in the UK, “members of the LGBTQ+ community are allowed to donate blood if they have had the same sexual partner for the past three months”. Further, in 2021, Israel also lifted the restriction on blood donations from homosexuals<sup>34</sup>.

### **Blood donation by the LGBTQ+ community in India: challenges and legal perspectives**

During the year of 1980, HIV/AIDS occurred widespread in various nations and then the ban on blood donations was implemented as a precaution. Various methods were applied, the transgender persons may not donate blood as there are more chances of spreading HIV aids. These measures were taken to restrict the spreading of HIV/AIDS due to blood transfusion. However, there are various ways in which this epidemic can be transferred from one person to another. However, a blood transfusion was the easiest way to stop spreading HIV/AIDS through blood<sup>35</sup>. The rule came and everyone started following because there was pressure to reduce the number of cases of HIV as well as to reduce deaths due to HIV/AIDS. No one looked into the scientific reasons and asked for it as it was an epidemic in the 1980s. However, let's look at this lifetime ban on blood donations by the transgender community. It seems a dishonor and taboo attached to this community where if a man had sex with a man (MSM), he wouldn’t ever be allowed to donate blood<sup>36</sup>.

<sup>31</sup> MIYASHITA, Ayako; GATES, Gary J.. UPDATE: Effects of Lifting Blood Donation Bans on Men who Have Sex with Men, **The Williams Institute**, 2017. Available on: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Blood-Donation-Ban-MSM-Sep-2014.pdf>. Access on: 12<sup>th</sup>, August 2024.

<sup>32</sup> Thangjam Santa Singh v. Union of India, Writ Petition, 2021. Available on: [https://www.scobserver.in/wp-content/uploads/2021/09/PIL\\_Blood\\_Donation1.pdf](https://www.scobserver.in/wp-content/uploads/2021/09/PIL_Blood_Donation1.pdf). Access on: 12<sup>th</sup>, August 2024.

<sup>33</sup> India’s government opposes blood donations by LGBT+ community by citing ‘scientific evidence’. Independent. 2023. Available on: <https://www.independent.co.uk/asia/india/india-transgender-lgbt-blood-donation-b2301274.html>. Access on: 12<sup>th</sup>, August 2024.

<sup>34</sup> Landmark change to blood donation eligibility rules on today’s World Blood Donor Day. Give blood. 2021. Available on: <https://www.blood.co.uk/news-and-campaigns/news-and-statements/landmark-change-to-blood-donation-eligibility-rules-on-today-s-world-blood-donor-day/>. Access on: 12<sup>th</sup>, August 2024.

<sup>35</sup> HOCHBERG, Francine A.. HIV/AIDS and blood donation policies: a comparative study of public health policies and individual rights norms. **Duke Journal of Comparative & International Law**, v. 12, n. 1, 2021. p. 231-280. Available on: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1194&context=djcl>. Access on: 12<sup>th</sup>, August 2024.

<sup>36</sup> Olivia S. Kates, Epidemic Familiarity, **AMA Journal of Ethics**, Available on: [Journalofethics.ama-assn.org/article/epidemic-familiarity/2021-05](https://journalofethics.ama-assn.org/article/epidemic-familiarity/2021-05), Access on 14<sup>th</sup> August, 2024.

In the case of **Thangjam Santa Singh v. Union of India**<sup>37</sup>, a public interest litigation was filed to allow transgender persons to donate blood. The petition also challenged clause 12 of the general criteria under the blood donation guidelines that states that transgender persons, men having sex with men, and female sex workers are excluded as being donors. This clause makes it seem violative of the constitutional provisions of Articles 14, 15, and 21. Further, this writ also challenges the extent of deferral and that is permanent it means if a man is having a sex with man he cannot donate blood in India. Although the center informed the Supreme Court through an “affidavit filed by the Union Ministry of Health & Family Welfare”, that since transgender, gay people and female sex workers are more prone to be “at risk” category for HIV/AIDS infection that’s why they are being excluded<sup>38</sup>. It was further stated that the exclusion is made for scientific reasons.

If this argument is to be taken then the option available to every blood unit is to go for test in case of any doubt for infectious diseases, before it is transmitted to any person. It means, that if a transgender person donates the blood, the right to test and make use of this blood is the exclusive right of the hospital authorities. Then not allowing someone to donate just to segregate them or discriminate against a person based on identity is against the provisions of the constitution as well as against the NALSA judgment delivered in 2014<sup>39</sup> and the case decided by the Supreme Court in *Navtej Singh Johar v. Union of India*<sup>40</sup>.

If we look towards developed nations like the United Nations<sup>41</sup>, it has lifted the ban on donation restrictions on gay men to donate blood. Other countries have also lifted the ban like the United Kingdom, Canada, and Germany have lifted such restrictions on members of the LGBTQ+ community.

In Brazil, the Supreme Federal Tribunal, the Highest and Constitutional Court, judged a case related to the prohibition of blood donation by LGBTQ+ individuals, with judgement concluded in May 2021.

The action, called Direct Action of Unconstitutionality (ADI 5543)<sup>42</sup>, questioned the constitutionality of specific parts of Resolution RDC No. 34/14 of Anvisa (the Brazilian Health Surveillance Agency) and Ordinance No. 158/16 of the Ministry of Health. In both regulations, blood donation was prohibited by men who had had sexual relations with other men in the last twelve months.

It was argued that these rules were unconstitutional because they violated fundamental rights,

<sup>37</sup> Thangjam Santa Singh v. Union of India, Writ Petition, 2021. Available on: [https://www.scoobserver.in/wp-content/uploads/2021/09/PIL\\_Blood\\_Donation1.pdf](https://www.scoobserver.in/wp-content/uploads/2021/09/PIL_Blood_Donation1.pdf). Access on: 12<sup>th</sup>, August 2024.

<sup>38</sup> Trans and gay people, women sex workers can’t donate blood: What the Centre said in SC. The Indian Express. 2023. Available on: <https://indianexpress.com/article/explained/explained-law/trans-gays-female-sex-workers-blood-donation-8494145/>. Access on: 12<sup>th</sup>, August 2024.

<sup>39</sup> NALSA v. Union of India, A Writ Petition Supreme Court of India. 2014. Available on: [main.sci.gov.in/jonew/judis/41411.pdf](http://main.sci.gov.in/jonew/judis/41411.pdf), Access on 14<sup>th</sup> August, 2024.

<sup>40</sup> Navtej Johar v. Union of India, Writ Petition in Supreme Court, 2016, Available on [main.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](http://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf), Access on 14<sup>th</sup> August, 2024.

<sup>41</sup> FDA relaxes blood donation rules for gay and bisexual men: What are the new changes and why they have been introduced. The Indian Express. 2023. Available on: <https://indianexpress.com/article/explained/explained-global/fda-relaxes-blood-donation-rules-for-gay-and-bisexual-men-what-are-the-new-changes-and-why-they-have-been-introduced-8605879/>. Access on: 12<sup>th</sup>, August 2024.

<sup>42</sup> Santiago, Giselle Feliz et. al., Direct Action for Unconstitutionality by Omission (ADO): In Generality, **International Journal of Advanced Engineering Research and Science** Available on: [www.researchgate.net/publication/362235408\\_Direct\\_Action\\_for\\_Unconstitutionality\\_by\\_Omission\\_ADO\\_In\\_Generality](http://www.researchgate.net/publication/362235408_Direct_Action_for_Unconstitutionality_by_Omission_ADO_In_Generality), Access on 14<sup>th</sup> August, 2024.

especially the right to equal treatment and, consequently, were discriminatory against these individuals, creating a false “risk group” that did not exist at the time of the trial of the action that would justify such stigmatizing conduct towards this group. They insisted that the concern of these individuals donating blood was the same as that of any other person.

The rapporteur of the case, Justice Edson Fachin, based on an Epidemiological Bulletin on AIDS in Brazil, which indicated that the percentage of heterosexuals infected in Brazil was higher than that of homosexuals and bisexuals combined, acknowledged the claim of the plaintiff, considering this prohibition on blood donation from a specific group without due justification for such prohibition to be unjustifiably discriminatory. Therefore, he considered the specific sections of the aforementioned rules that mentioned this prohibition to be unconstitutional, and not the full text of the resolutions.

The result of the judgment was seven votes in favor of the unconstitutionality of the sections of the rules for being discriminatory and harming a specific group (Justices Luís Roberto Barroso, Rosa Weber, Luiz Fux, Gilmar Mendes, Carmem Lúcia, and Dias Toffoli). Thus, they argued that due diligence regarding the quality of blood for donation should be extended to all potential donors, and that there should not be a conduct of absolute rejection of blood donation from this specific group. The other four votes (Justices Alexandre de Moraes, Ricardo Lewandowski, Celso de Mello, and Marco Aurélio) indicated that the existence of a scientific basis for the existence of these standards must be assumed, believing, but not questioning, that these institutions that created the standards had a scientific basis to create and maintain these standards in force.

Reports suggest that only in the USA if the life ban on MSM people donating blood is lifted, approximately 75,190 new blood donors will be added to the pool of blood donors. According to the Red Cross Society of the United States, every pint of blood has the potential to save the lives of three people who need blood, and hence, if the ban is lifted, it will help around 225,570 people, and their lives could be saved. Last year in 2023 FDA<sup>43</sup> issued a fresh recommendation in the US for blood donation by MSM and LGBTQ+ thereby lifting the previous ban and making a fresh recommendation so that people from this group can donate blood.

## **Issues and challenges**

From the discussions above we assume that the lack of resources in India is also one of the reasons for a ban on blood donation for transgender people, MSM, and LGBTQ+ persons. The nucleic acid test (NAT) is not used by all the blood banks uniformly. Some blood banks use different technologies or methods to detect the infection in blood donated by a person. This practical issue is also a reason why India banned blood donation for transgender people.

If we look at another aspect that is the total ban on the donation of blood lacks justification under Indian laws as well as judicial decisions<sup>44</sup>. Further the argument may be taken as if the transgender person,

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<sup>43</sup> Winn, Kirby. U.S. Food and Drug Administration issues Final Guidance on changes to donor eligibility, Impact Life, 2023. Available on: [www.bloodcenter.org/about/news/news-releases/us-food-and-drug-administration-issues-final-guidance-on-changes-to-donor-eligibility/](http://www.bloodcenter.org/about/news/news-releases/us-food-and-drug-administration-issues-final-guidance-on-changes-to-donor-eligibility/), Access on 14<sup>th</sup> August, 2024.

<sup>44</sup> NALSA v. Union of India, A Writ Petition Supreme Court of India. 2014., Available on: [main.sci.gov.in/jonew/judis/41411.pdf](http://main.sci.gov.in/jonew/judis/41411.pdf), Access on 14<sup>th</sup> August, 2024.

gay person are donating blood, and not forcing anyone to use the blood. It is process to include blood to the stock that can be proved to be a life savior in case of emergency. The reason to exclude someone's blood on suspicion is not a fair policy. The need is to amend these exclusions so that the sanctity of the Constitution may be maintained and discrimination must be removed<sup>45</sup>.

We can see around the world that many countries have changed their law on blood donation by MSM people for example Argentina has removed the restrictions on blood donation based on sexual orientation<sup>46</sup>. Itlay lifted its lifetime blood donation ban on gay and bisexual men and imposed a one-year deferral period<sup>47</sup>. Same as Italy Spain also removed the complete ban on blood donation by gay and bisexual people and imposed a one-year deferral for the same<sup>48</sup>. South Africa's blood donation policy is very equitable as it is based on individual risk assessment rather than a blanket ban on blood donation by gay and bisexual people<sup>49</sup>.

Thus, researchers would like to state here that restrictions on MSM for blood donation are crucial for ensuring human safety. However, a complete ban is not necessary. The key aspect required here is awareness regarding the window period. This can be easily achieved by the blood bank through the use of questionnaires to be filled out by MSM or individuals belonging to HIV risk groups.

The researchers should not be misunderstood through this paper that we are submitting to donate a fundamental right for the transgender, gay, and LGBTQ+ community people, however, it is an argument in favor of not hurting the sentiment and discriminating against them just because someone is different in identity. This paper is an attempt to provide solidarity for those who wish to donate blood considering themselves as a noble citizen and the right to use or to discard the blood is still with the hospital authorities. Moreover, if it has to be rejected the reason must be mentioned and explained with the scientific reason. The data must be displayed or published regarding the number of patients suffering from HIV/AIDS, after receiving the blood from transgender, gay, or LGBTQ+ community. Since no data has ever been published, the rejection of one community based on the stigma attached to them would be against the provisions of law in India. Moreover, in a situation when one of the donors does not know the background of a sexual partner, who is heterosexual. For example, in a society like India, where the parents hide the identity of their children and people do not wish to reveal their identity for being gay or LGBTQ+ because 'heterosexual' is not accepted by society today, it would bring unnecessary bar upon the other partner for not donating the blood. Further in countries like Canada<sup>50</sup> where "the ban against blood donation by men

<sup>45</sup> CULHANE, John G. Bad Science, Worse Policy: The Exclusion of Gay Males from Donor Pools. **Saint Louis University Public Law Review**, v. 24, n.1, 2005. p. 129-148. Available on: <https://scholarship.law.slu.edu/plr/vol24/iss1/10>. Access on: 12<sup>th</sup>, August 2024.

<sup>46</sup> Argentina Lifts Ban on Gay Men Giving Blood. Time. 2015. Available on: <https://time.com/4038742/argentina-gay-blood-donation/>. Access on: 12<sup>th</sup>, August 2024.

<sup>47</sup> Which countries prohibit gay or bisexual men from donating blood?. The Economist. 2021. Available: <https://www.economist.com/graphic-detail/2021/06/14/which-countries-prohibit-gay-or-bisexual-men-from-donating-blood>

<sup>48</sup> Parliamentary question. Blood donations by sexually active gay men. 2024. Available on: [https://www.europarl.europa.eu/doceo/document/E-9-2019-002845\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2019-002845_EN.html). Access on: 12<sup>th</sup>, August 2024.

<sup>49</sup> FOOD AND DRUG ADMINISTRATION. FDA Finalizes Move to Recommend Individual Risk Assessment to Determine Eligibility for Blood Donations, FDA News Release. Available on: <https://www.fda.gov/news-events/press-announcements/fda-finalizes-move-recommend-individual-risk-assessment-determine-eligibility-blood-donations>. Access on: 12<sup>th</sup>, August 2024.

<sup>50</sup> WAINBERG, Mark A. et al, Reconsidering the lifetime deferral of blood donation by men who have sex with men, **Canadian Medical Association Journal**, v. 182, n. 12, 2010. p. 1321-1324. Available on: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2934798/>. Access on: 12<sup>th</sup>, August 2024.

who have had sex with men without the knowledge has been challenged for being discriminatory as it no longer has scientific rationale”, must be considered in India. It is not possible to say that blood donation in India by gay transgender and LGBTQ+ community is causing HIV/AIDS and only India has the scientific reason to ban it.

The authors thus here submit that scientific research needs to be done to find out how many people are at risk of getting HIV/AIDS due to blood transfusion from the gay, LGBTQ+ community and how many have been saved safely. Further, the need is to find out the reason whether HIV/AIDS is transmitted today from the blood of gay, LGBTQ+ community through the use of injections in case of drugs, or through the disease of dementia<sup>51</sup>, etc. if that is happening too much then why to ban just one community to donate the blood.

Instead of following the old 1980s method<sup>52</sup> of just banning the person from donating blood for convenience has changed at the international level however, India chose to remain in 1980 by banning the donors to limit the disease that does not have even scientific proof in 2024. Further, as per the research “Nowadays the screening methods have advanced and the possibility of a transfusion-related HIV infection is extremely low<sup>53</sup>”.

Finally, the data speaks more than words, research is needed and the data needs to be published to prove the scientific study in India rather than words, After all, it is just the data that must be analyzed to find the truth in the contemporary era. Mere staunch feelings should not debar one community or person from performing their duty<sup>54</sup>. No doubt the performing of fundamental duties also constitutes a valid ground for every citizen to feel proud. It is necessary to find the truth in the matter through more research and transparency to further prove whether gay, transgender, and LGBTQ+ blood donors are in reality a threat to the cause of HIV/AIDS or not. They also need to know the risk they possess in reality.

## Suggestion and conclusion

Thus, researchers would like to conclude their paper by stating that restrictions on MSM for blood donation are crucial for ensuring human safety. However, if we go through the scientific advancement of medical study from the 1980s to now then we can find that a complete ban is not necessary. The key aspect required here is awareness regarding the window period. This can be easily achieved by the blood bank through the use of questionnaires to be filled out by MSM or individuals belonging to HIV risk groups. Also one should use Nucleic acid tests for the detection of HIV/AIDS as it has a high accuracy rate and that too in a short duration in comparison to other tests available in the market.

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<sup>51</sup> Creutzfeldt–Jakob disease also known as CJD, is a rare brain disorder that leads to dementia.

<sup>52</sup> KARAMITROS, Georgios; KITSOS, Nikolaos A.; KARAMITROU, Ioanna. The ban on blood donation on men who have sex with men: Time to rethink and reassess an outdated policy, **Pan African Medical Journal**, v. 27, article 99, 2017. Available on: <https://panafrican-med-journal.com/content/article/27/99/full/>. DOI:10.11604/pamj.2017.27.99.12891.

<sup>53</sup> KARAMITROS, Georgios; KITSOS, Nikolaos A.; KARAMITROU, Ioanna. The ban on blood donation on men who have sex with men: Time to rethink and reassess an outdated policy, **Pan African Medical Journal**, v. 27, article 99, 2017. Available on: <https://panafrican-med-journal.com/content/article/27/99/full/>. DOI:10.11604/pamj.2017.27.99.12891.

<sup>54</sup> FOOD AND DRUG ADMINISTRATION. FDA Finalizes Move to Recommend Individual Risk Assessment to Determine Eligibility for Blood Donations, FDA News Release. Available on: <https://www.fda.gov/news-events/press-announcements/fda-finalizes-move-recommend-individual-risk-assessment-determine-eligibility-blood-donations>. Access on: 12<sup>th</sup>, August 2024.



In the end, researchers want to say that we need science, not stigma, to fix the eligibility for blood donations.

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Full content of the decision may be found at:

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