EXPLORING THE CONTOURS OF STIGMA, POWER AND DISCRIMINATION IN THE LIVES OF SEXUAL MINORITIES IN INDIA: FROM THE LENS OF BLOOD DONATION REGULATION

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INTRODUCTION

The lives of sexual minorities have long been a hush-hush aspect across the globe. Yet, in recent years, their battle for gaining a space of visibility in the society has gained a significant momentum. The establishment of practices like pride month and pride marches exemplifies this progress. Despite these positive strides, there are yet miles to be covered to achieve the desired visibility and acceptance in the society.

In this context, the significant challenge lies in the triad of Stigma, discrimination and Power which is shaping the everyday lives of sexual minorities. State power is an active influence in perpetuating the stigma associated with sexual behaviour, which in turn, dictates the discrimination against even the basic rights guaranteed under the Constitutional ethos.[2] This triad sometimes remains invisible and even unacknowledged.

One clear demonstration of this triad is the blanket ban on blood donation by the sexual minorities. In 2016, The Atlantic reported an incident which affirm this assertion. Following an attack in a Gay night club in Florida, whereby 49 were killed and several were left injured, members of Gay community came forward in solidarity to help the victims through blood donations. However, they were left baffled on finding out that they were banned from doing so vide the United States Food and Drug Administration (FDA) rules. This ban has its 'epicenter in the HIV panic of the mid-80s' leading to FDA's 1983 guidelines asking the sexual minorities, particularly the men having sex with men, to refrain from blood donation. This transformed into a mandatory exclusion in 1986 and finally, a lifetime ban in 1992.

However, amidst the growing LGBTQIA+ rights movement, this ban was reduced to a year deferral period without sexual contact with another man. Yet, the original American stance became a norm in at least 20 other nations over a time. Hence, this

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[2] Tonia Poteat *et al., Managing uncertainty: A grounded Theory of Stigma in Transgender health care encounters*, 84 SOC. SCI. & MED. 84 (2013) 22-29.

form of in-built homophobia in public health extends beyond America, with India closely following behind.

In India, this blanket ban went largely unnoticed until was challenged during the pandemic via a Public Interest Litigation (PIL) in the Supreme Court.[3] The 2017 Guidelines on Blood Donor Selection and Blood Donor Referral, issued by the Ministry of Health and Family Welfare, permanently prohibits permanently prohibits transgender people, gay men and female sex workers from blood donation .[4] The plea's contention remained that these exclusions based on gender and sexual orientations were 'arbitrary, unreasonable, discriminatory and also unscientific'.

The apex Court, though issued the notices to the relevant authorities yet, refused to put an interim stay on the operation of such circular, deferring to medical expertise. But why is it important to evaluate such legislative and judicial action? Most importantly, how will it impact the LGBTQ's movement around the realisation of their rights in India? For answering this, the lived experiences, such as those Smile Vidya's autobiography "I am Vidya", reveal pervasive narratives and stereotypes surrounding HIV/AIDS and broader health and socio-economic challenges. For instance, when she went for SRS in a clinic, the only test conducted over her was related to HIV/AIDS. [5] Also, the extended fact of overcharging was also dependent solely on the finding of such report as Positive one.[6] Furthermore, when she went on to look for employment in NGOs working for LGBTQ+ community, mostly they dealt with HIV/AIDS based awareness programs.[7] So, these small yet unnoticed narratives can be inferring following aspects:

Firstly, there is a disorientation from addressing the real needs of the LGBTQ+ community. Clinics and NGOs focus primarily on HIV/AIDS awareness rather than broader socio-economic and health needs, like ensuring safe and hygienic SRS procedures and providing better opportunities related to skill development and employment. This disorientation extends even to the blood donation agencies, which

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[3] Thangjam Santa Singh @ Santa Khurai v. Union of India and Ors., IA No. 30125/2021.
[4] Ministry of Health and Family Welfare, *Guidelines on Blood Donor Selection and Blood Donor Referral,* GOVERNMENT OF INDIA (October, 2017), available at http://naco.gov.in/sites/default/files/Letter%20reg.%20%20guidelines%20for%20blood%20donor%20selection%20%26%20referral%20-2017.pdf.
[5] LIVING SMILE VIDYA, I AM VIDYA: A TRANSGENDER'S JOURNEY 1284 (Rupa Publications, Kindle ed., 2013).
[6] *Ibid.*
[7] *Ibid.* at 1599.

prefers blood collection over ensuring safe blood practices, rooted in those guidelines imposing blanket bans and perpetuating stigma and labellings.

Secondly, the guidelines majorly impact the identity of LGBTQ+ community. Blood donation, often seen as a noble cause, plays a crucial role in community-based services and philanthropy. Participation in such activities entails a possibility of societal acceptance for LGBTQ+ individuals, important for securing broader outcomes like employment opportunities and better health services. Historical parallel like feminist movements in non-western contexts reveals that active-participation in nation-building and community services entails a promise of their demands' recognition. Similarly, the blanket ban curtails an opportunity for the LGBTQ+ community towards the community service and identity recognition.

In this light, exploring the interplay of stigma, discrimination, self-identification, governmentality and biopower. Stigma, characterized by the facets of "othering, blaming and shaming", leads to identity loss and discrimination, fuelled by socio-politico-economic dynamics. In context of rights of the LGBTQ+ community in the current context, stigma intensifies power imbalances with healthcare providers, resulting into risky health beahviors. This, in turn, affects even the scientific findings associated with LGBTQ+ community. So, there exists a cycle even between the stigma-induced power exercise, its impact on certain set of behaviours and its final depiction on fact finding processes, especially the scientific ones which in turn again reinforces stigma. Traditional stigma theories often overlook this cyclical form of power dynamics and its interplay with stigma. However, certain scholarships like that of Margaret Davies has noted this interplay by pointing out the role of knowledge in structuring law and authority. This significantly stresses on the interrelationship between masculinity, law, and knowledge. This is significant in addressing the impact of stigma and power dynamics on LGBTQ+ individuals' access to healthcare facilities and associated societal attitudes towards them. Moreover, theory of self-identification adds a unique set of challenges to this issue. It creates an internal domain of self for an individual and in this context, for an LGBTQ+ individual. This adds an extra layer to external form of stigma and internal form contemplation involving self. This emphasises upon policy formulations that counters both these external and internal factors that influences the creation of LGBTQ+ identities. In context of this double layering, the tools of governmentality and biopower keep on playing their silent yet

powerful role. These tools lift the veil to an extent whereby governance and policies like India's blood donation ban for LGBTQ+ individuals could be revealed to be directly ruling the personal set of behaviours within the garb of public health motives, thereby reinforcing discrimination and stigma. Governmentality and biopower demonstrate the role of state mechanisms in shaping societal norms and individual behaviours, impacting the LGBTQ+ community's claims of access to resources and societal inclusions. A close integration of these theories provides a comprehensive structure to reveal and analyse certain systemic yet invisible forces perpetuating inequality and exclusions for the LGBTQ+ community.

In the light of aforementioned points, it is crucial to enquire the philosophical and practical positions of the said guidelines in order to avoid disorientations and non-recognition of identity of LGBTQ+ community, which, in turn, might have a greater impact over their claims on fundamental rights. The current research would be a crucial addition as it critically analyses the invisible but significant factors contributing to the perpetuation of stigma and stereotyping in the everyday lives of the LGBTQ+ community in India. For the said purpose, the research work is divided into four parts. Part 1 briefly explores the themes of discrimination, stigmatisation, and power within the context of Indian legal regime, investigating the interplay of knowledge and governmentality impacting the lives of LGBTQ+ community. It also discusses Constitutional rights like privacy, dignity and freedom of expression, setting tone for subsequent chapters. Part 2 seeks to explore the intersectionality of stigma, power and sexuality in health research, in social and historical context. It analyses role of the policies in regulating an individual's sexuality, stressing the role of governmentality and state knowledge, setting the tone for further discussions on power dynamics involving LGBTQ+ community, state machinery, and the judiciary. Part 3 seeks to ground the themes of autonomy, sexuality and self-identification rights through the investigation of negotiation processes between the LGBTQ+ community and state machinery, and the judiciary's contextual role. It employs legal and statistical analysis to answer as to how biased form of scientific knowledge impacts LGBTQ+ community's interactions with healthcare personnel and perpetuates negative stereotyping. Part 4 seeks to present appropriate solutions to issues addressed in the research, focusing on balancing alternative claims and providing cogent

recommendations to address discrimination, stigmatization, and power dynamics impacting LGBTQ+'s lives in India.

THEORETICAL UNDERPINNINGS

Part I: Theory of Stigma

The concept of "stigma" is commonly characterised as a phenomenon that engenders "othering, blaming and shaming", consequently leading to a loss of identity and the perpetuation of discrimination.[8] This is often induced by certain socio-politico-economic factors of power.[9] In this context, Deacon has noted that structural discrimination is the major restriction in access to opportunities for stigmatised individuals.[10] In context of LGBTQ community, certain scholarships highlight that stigma perpetuates power imbalances between healthcare agencies and LGBTQ+ community, which in turn, induces scepticism in the LGBTQ community towards latter's competency.[11] This pushes them to resort to risky health behaviours. This form of interpersonal stigma theory is more relevant as traditional stigma theory often overlooks power dynamics. Furthermore, this constant interplay between stigma and power has its roots in the knowledge. As argued by Margaret Davies, knowledge underpins authority, and law derived from such knowledge is inseparable from its social meaning.[12] This emphasizes the significant interplay between masculinity, law and knowledge. Therefore, it is crucial to understand this interplay in order to address the overarching issue of how stigma and power dynamics influence access to health and societal attitudes towards the LGBTQ+ community in India.

The theory of self-identification further enlightens the comprehension of the interplay between stigma, power and knowledge in the lives of LGBTQ+ community. The self-identification theory explores the process as to how an individual perceives and defines self in relation to legal structures and societal norms. Simultaneous examination of the processes involving the recognition of internal processes of self-creation and

[8] *Supra* Note 2.
[9] *Ibid.*
[10] H. Deacon, *Towards a sustainable theory of Health-related stigma: lessons from the HIV/AIDS literature*, 16 J. COMM. & APPL. SOC. PSYCHO. 418-425 (2006).
[11] See B.G. Link & J. C. Phelan, *Stigma and its public health implications*, LANCET 367, 528-29 (2006). See also R. Parker & P. Aggleton, *HIV and AIDS-related stigma and discrimination: a conceptual framework and implications for action*, SOC. SCI. & MED. 57, 13-24 (2003).
[12] MARGARET DAVIES, ASKING THE LAW QUESTION 225 (Thomson Reuters Publications, 4th ed., 2017).

addressing of external stigma and discrimination is crucial in fostering more inclusivity and equitability in the society for the LGBTQ+ community.

Part II: Theory of Self-Identification

As per self-identification theory, an individual reflects on their self, their actions and their relationship with society[13] and this is relevant as it unpacks the narratives as to how individuals explore their sexual orientation and gender identity within the boundaries of social and legal framework. As self is an intersecting point which is based on the collection of identities occupying contextual roles, exploring them would reveal as to how LGBTQ+ individuals perceive and define themselves and the challenges faced by them in the processes which often marginalise them. This insight is significant in developing supportive policies and practices that acknowledge and respect the complexities inherent within the LGBTQ+ community's identities. Law plays an important role in this respect. There are certain researches which highlights law's role in structuring the scrutiny concerning the sexual orientation and gender classification, often stressing on the immutability and innateness of sexual behaviour.[14] In this respect, there are two types of scrutiny employed by law- strict scrutiny and intermediate scrutiny.[15] These kinds of scrutiny are the prime structuring elements behind the self-identification processes of the LGBTQ+ community. In the given context, as highlighted by Edward Stein, constructing legislation solely based on scientific discoveries could be an ineffectual endeavour. [16] This is because individual liberty, which underpins human moral agency and independence, is crucial for self-identification in matters of sexuality.[17] Therefore, it is crucial to understand how self-identification related to sexuality influences an individual's perception of self as governed by the law. Basing law solely on scientific findings may prove a futile exercise.

Moving ahead from the self-identification theory, it becomes crucial to explore the concepts of governmentality and biopower, which would reveal the interplay between

[13] S. Stryker & A. Stratham, *Symbolic Interaction and Role Theory, in* G. LINDZEY & E. ARONSON (EDS.) 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY (Random House, 3rd edn., 1985).
[14] HALL D. DONALD, QUEER THEORIES (Pallgrave, 2002).
[15] *Ibid.*
[16] Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay and Bisexual Rights*, 89(2) CHI.- KENT L. REV. 597 (2014).
[17] Jennifer Ung Loh, *Transgender Identity, sexual versus Gender 'Rights' and the Tools of the Indian State,* 119(1) SAGE PUB. 39-55 (2018).

power dynamics and governance. This is crucial as it would reveal its influences in shaping individual identities and societal norms. It would seek to answer the major issue as to how legal and governmental frameworks impact the self-identification of LGBTQ+ individuals and societal attitudes, providing insights into the mechanisms perpetuating stigma and discrimination. Through their thorough examination, an understanding could be developed over the impact of blanket ban on blood donation by the LGBTQ+ community in India. This would reveal the invisible forces behind the processes whereby power dynamics affects their rights, reinforce stigma and obstruct their opportunities for social participations.

Part III: Theory of Governmentality and Biopower

Foucault's conception of governmentality illustrates how governance mechanisms and policies shape and impact the behaviors and experiences of the LGBTQ+ community, often dictating them towards confirmation to certain societal norms or ideals.[18] For instance, policies like blanket ban on blood donation by individuals from the LGBTQ+ community reflects the government's efforts in regulating and controlling behavior vide public health measures, influencing the processes through which LGBTQ+ individuals explore their identity and access resources. This approach, in turn, could further perpetuate stigmatisation and discrimination, stressing the necessity to critically analyse how such policies affect the everyday lives and chances of societal inclusion of LGBTQ+ individuals.

In this context, the idea of 'governmentality' involves tools like knowledge, objectivity and biopower which touches on the ubiquity of government affecting the social relationships. It includes both discursive field (i.e., identification of governmental issues and proposition of solutions to it) and interventionist practices (i.e., governing of programs based on political rationality).[19] This interplay of these two aspects, in context of the current research, involves the entanglement of biopower and sovereignty. Biopower notes the expansion of state power from mere territorial control to the management of populations through the aspects of health, sanitation, and

[18] Michel. Foucault, Security, *Territory and Population*, *in* P. RABINOW AND N. ROSE (EDS.), THE ESSENTIAL FOUCAULT: SELECTIONS FROM ESSENTIAL WORKS OF FOUCAULT 1954-1984 (The New Press, 2003b).
[19] K. McKee, *Post-Foucauldian governmentality: what does it offer critical social understanding*, 29(3) CRIT. SOC. POL. 465-486 (2009).

productivity.[20] State, vide biopolitics, becomes a population manager which governs both individuals and groups without the element of direct coercion. This theory is relevant as it significantly helps in examining how government practices shape individual and collective behaviours, especially in respect of disease surveillance and stigmatisation of certain sexual behaviours. This would aid in explaining the role of labelling done by the blood donation regulation in structuring the lives of LGBTQ community.

Overall, the integration of the theories of stigma, self-identification, governmentality, and biopower would provide a holistic framework for navigating the experiences of the LGBTQ+ community, especially in connection with the blanket ban on blood donations by them in India. stigma theory elucidates the processes as to how social and systemic forms of discrimination creates a domain of power imbalances and shapes negative stereotypes, resulting into harmful health behaviours among the LGBTQ+ community. Self-identification theory illuminates the enquiry as to the perception of LGBTQ+ individuals regarding themselves and their identities within legal and social expectations-based boundaries. This reveals the challenges posed by the interplay between legal scrutiny and social marginalisation. Expanding from self-identification, the theories of governmentality and biopower offers insight on how state mechanisms and regulatory frameworks affects and confines the identities and behaviors of LGBTQ+ community. Foucault's governmentality provides a critical viewpoint as to how policies, like blood donation ban, regulates the lives of LGBTQ+ individuals under the garb of public health, reinforcing discrimination and perpetuating stigma. Biopower further adds flavor to this process by revealing the extension of state's management of population beyond mere regulations to structuring societal norms and healthcare practices, ultimately influencing LGBTQ+ individuals' access to resources and societal inclusion. This intersectionality of governmentality and individual identity reveals the requirement of critical examination and address of the systemic forces perpetuating inequality and exclusion, underscoring the policies reformation that could foster the element of inclusivity and equity for the LGBTQ+ community.

Sexuality and Health in the Realm of Stigma and Power: A philosophical enquiry

[20] MAJIA HOLMER NADESAN, GOVERNMENTALITY, BIOPOWER AND EVERYDAY LIFE (Routledge, 2008).

Stigma, increasingly ceded by health personnels and public, links social elements with illness, affecting both public and private spaces of an individualism. Stressing on this interplay between public and private spheres, Jurgen Habermas has significantly observed that public campaigns often have its roots in private backdrop.[21] In context of public health regime, stigma associated with illnesses significantly impacts the aspects like case reporting and treatment, thwarting public health efforts and disease control mechanisms.[22] This problem gains more complexity when marginalised community, which is already stigmatised on account of facets like poverty, ethnicity, or sexual choices, face additional form of vulnerabilities in the health sector. In this context, it becomes fundamental to ask as to how stigma and power dynamics shapes health-associated discriminations for sexual minorities?

Stigma, Power, and Sexuality: A Critical Exploration

Stigma, once perceived as a physical mark, has evolved into a complex social phenomenon, deeply embedded in cultural and societal structures. Erving Goffman's seminal work on stigma, defining it as "the situation of the individual who is disqualified from full social acceptance,"[23] lays the groundwork for understanding the social exclusion faced by marginalized groups. Goffman identifies three models of stigma: physical deformities, character blemishes, and tribal identity (e.g., race, religion, nationality).[24] However, these models struggle to address the nuances of stigma in culturally diverse societies like India, particularly in health policy contexts. The limitations of these models highlight the need for a more culturally sensitive approach to understanding stigma, especially as it pertains to public health and social inclusion.

Stigma plays a crucial role in health-related social studies, particularly in understanding how societal attitudes impact health outcomes. Goffman's concept of "spoiled identity" is relevant in examining how health-related stigma leads to social exclusion, further marginalizing already vulnerable populations.[25] This is particularly true in the Indian context, where cultural stigmas surrounding diseases like HIV/AIDS

[21] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 23 (Englewood Cliffs, 1963).
[22] *Ibid* at 15.
[23] *Ibid.*
[24] Imogen Tyler & Tom Slater, *Rethinking the Sociology of Stigma*, 66 (4) THE SOCIO. REV. 730 (2018).
[25] *Supra* Note 22.

are pervasive. Sexual minorities, often labeled as engaging in "risky health practices," face compounded stigma that obstructs their access to essential healthcare. While existing literature extensively explores the social stigma associated with HIV/AIDS, there is a gap in understanding how cultural differences influence the manifestation and criteria of stigma, particularly in the Indian context. This research aims to fill that gap by examining how Western ideologies on sexuality, coupled with state-sponsored policies, contribute to the stigmatization of LGBTQ+ communities in India, further hindering their access to healthcare.

Historically, the stigmatization of homosexuality in India has been heavily influenced by colonial-era laws, such as Section 377 of the Indian Penal Code, which criminalized "carnal intercourse." While the decriminalization of Section 377 represents progress, cultural morality continues to constrain Indian notions of sexuality. Pre-colonial India had a more diverse and inclusive understanding of sexuality, as evidenced in texts like the Kamasutra, which recognized non-vaginal births and homoerotic relationships.[26] The shift towards a more punitive view of homosexuality was largely a result of the Judeo-Christian moral framework imposed during British colonization.[27] This transformation raises critical questions about the imposition of sexual morality and the role of power in shaping societal norms.

In modern times, the stigma associated with sexuality is closely tied to power structures, particularly through Michel Foucault's concept of governmentality. Governmentality refers to the processes through which governments shape social relations and individual behaviors, often marginalizing certain groups while privileging others.[28] Foucault's notion of biopower, which links the governance of populations to the management of individual bodies, is particularly relevant in understanding how state policies impact sexuality and health.[29] Biopower operates by embedding state rationalities within public life, shaping both individual choices and societal norms.[30] This intersection of biopolitics and sexuality has profound

[26] Nityanand Tiwari, *Homosexuality in India: Review of Literatures*, SSRN E-J. 6 (19 September, 2010), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1679203, accessed 30 May, 2024.
[27] Basuli Deb, *Manusmriti, Macaulay's 1860 Penal Code, Neoliberal India, and Queer Cinematic Subjectivities*, 35(3) S. ASI. REV. 170 (2014).
[28] THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 55 (Chicago University Press, Graham Burchell, Colin Gordon & Peter Miller (eds.),1991).
[29] NIKOLAS ROSE, GOVERNING THE SOUL 67 (Free Association Books, 2nd edn., 1999).
[30] *Supra* Note 29.

implications for the LGBTQ+ community, as it normalizes heterosexuality and patriarchal values while marginalizing non-normative sexual identities.

Foucault's work on the history of sexuality emphasizes the role of power in disciplining bodies and regulating populations, revealing how state interventions shape individual identities and social norms.[31] In this context, the intersection of biopolitics and sexuality creates a space for state control over personal identity and sexual behavior, often leading to the marginalization of LGBTQ+ individuals. This marginalization is further exacerbated by epistemic ignorance, particularly in policy frameworks that overlook the experiences of non-Western and minority groups.[32] Epistemic ignorance, as it relates to LGBTQ+ healthcare, manifests in discriminatory practices that lead to avoidance of healthcare services and worsening health outcomes.

In India, epistemic ignorance is deeply embedded in policies that exclude LGBTQ+ individuals from full participation in society. This is exemplified by the Blood Donation Regulation Guidelines of 2017, which impose a blanket ban on blood donation by transgender individuals, men who have sex with men (MSM), female sex workers (FSWs), and individuals with multiple sexual partners. This policy is based on outdated and biased assumptions about the susceptibility of these groups to HIV/AIDS, ignoring advances in individual risk assessment and the availability of alternative preventive measures. By failing to consider the social factors that exacerbate health risks, such as discrimination and deprivation, this policy perpetuates stigma and reinforces societal biases against LGBTQ+ individuals.

The policy's reliance on statistical findings rather than individual risk assessment fails to meet the proportionality test established by the Indian Supreme Court. This test requires that any legal measure be designed to achieve a legitimate objective, have a rational connection to that objective, and be the least restrictive measure available. The blanket ban on blood donation by LGBTQ+ individuals not only fail to meet these criteria but also fosters prejudice and discrimination by labeling all members of these groups as inherently susceptible to HIV/AIDS. This reflects a broader stigmatizing attitude reinforced by societal and medical biases, which are deeply rooted in medical training and education.

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[31] *Ibid.*

[32] DOROTHY PORTER, HEALTH, CIVILISATION AND THE STATE: A HISTORY OF PUBLIC HEALTH FROM ANCIENT TO MODERN TIMES 331 (Routledge Publications, 1999).

These biases, in turn, are aligned with biopolitics, as the state uses knowledge and statistical findings to perpetuate pre-existing stigmas. This epistemic ignorance perpetuates a cycle of marginalization, where flawed policies lead to social exclusion, which then further exacerbates the stigma associated with LGBTQ+ identities. The result is a systematic denial of dignity and equality for LGBTQ+ individuals, who are continually subjected to discrimination in both social and medical contexts.

The implications of these dynamics are far-reaching, affecting not only the everyday lives of LGBTQ+ individuals but also the broader societal understanding of sexuality and health. The intersection of biopolitics, stigma, and epistemic ignorance highlights the need for more inclusive and culturally sensitive policy frameworks that recognize the diversity of sexual identities and experiences. Addressing these shortcomings requires a critical examination of how knowledge and power intersect to shape societal norms and policies, particularly in relation to the LGBTQ+ community. Hence, the relationship between stigma, power, and sexuality is complex and multifaceted, particularly in the Indian context. While Foucault's concepts of governmentality and biopower provide valuable insights into the mechanisms through which state policies shape social relations, they also highlight the limitations of current policy frameworks in addressing the needs of marginalized communities.[33] To create a more inclusive society, it is essential to challenge the epistemic ignorance that underpins discriminatory policies and to develop more nuanced understandings of how cultural and social factors influence stigma and health outcomes for LGBTQ+ individuals.

Vacillation between Empathy and Contempt of Sexuality: Tracing the Evolving Judicial Notions

The Indian Constitution, through its "golden triangle" of Articles 14, 19, and 21, guarantees dignity, liberty, and privacy to all citizens. However, sexual minorities have historically been denied these rights, particularly in the health sector. This denial is evident in colonial-era cases like the Khairati case and the Nowshirwan case, where the judiciary displayed a deep-seated disgust towards non-conforming gender and sexual identities.

[33] *Supra* Note 32.

The *Khairati case*[34] was one of the earliest instances where Section 377 of the Indian Penal Code (IPC) was invoked. Khairati, referred to as a "eunuch," was subjected to a humiliating and invasive medical examination that revealed signs of sodomy, though no conviction followed due to lack of evidence. The court's language was harsh, reflecting the colonial judiciary's view of sexual minorities as beyond the human pale. This case exemplifies how the judiciary reinforced societal norms of gender and sexuality, treating any deviation with contempt and violence. Khairati's treatment underscores the colonial judiciary's role in criminalizing gender nonconformity, using legal processes to impose societal norms on sexual minorities. Similarly, the *Nowshirwan case*[35] involved the prosecution of a man for sodomy, where the court acknowledged the consensual nature of the act but still used derogatory language, describing the act as "animal-like" and "despicable." This reflects the judiciary's inclination to view same-sex desires through a lens of moral abhorrence, reducing them to perverse acts rather than acknowledging them as expressions of human intimacy.[36] The *Naz Foundation case*[37] marked a significant shift from these colonial attitudes. It challenged the constitutionality of Section 377, arguing that it violated the rights to equality, privacy, dignity, and expression. The case became a symbol of the LGBT community's struggle for recognition and rights, with extensive community engagement and public support. The Delhi High Court's ruling in favor of the Naz Foundation was groundbreaking, as it relied on the concept of constitutional morality, distinguishing it from popular morality. The court argued that fundamental rights should not be restricted based on public disapproval but must be upheld based on constitutional values. This ruling redefined the judicial approach to homosexuality, moving it from mere tolerance to protection under the law.

However, this progress was short-lived, as the *Suresh Kumar Koushal case*[38] reversed the Naz Foundation ruling. The Supreme Court reinstated Section 377, citing the "minuscule" presence of the LGBT community as insufficient to declare the law unconstitutional. This decision was widely criticized as a regression in the fight for

[34] Queen Emperor v. Khairati, I.L.R. 6 All 205.
[35] Nowshirwan v. Emperor, AIR 1934 Sind 206.
[36] Arvind Narrain, *Vacillating Between Empathy and Contempt: The Indian Judiciary and LGBT Rights, in* NANCY NICOL, *et al.*, ENVISIONING GLOBAL LGBT HUMAN RIGHTS: (NEO)COLONIALISM, NEOLIBERALISM, RESISTANCE AND HOPE 45 (University of London Press, 2018).
[37] Naz Foundation v. NCT, Delhi, 160 Delhi Law Times, 277 (2009).
[38] Suresh Kumar Koushal & Anr. v. NAZ Foundation & Ors., 2013 (15) SCALE 55: MANU/SC/1278/2013.

LGBT rights, with commentators arguing that the judiciary failed in its duty to protect marginalized groups.[39] The *National Legal Services Authority (NALSA) case*[40] provided some relief by recognizing the rights of transgender individuals and highlighting the discrimination they face. The court acknowledged the historical and cultural significance of transgender identities in India and condemned their marginalization as a colonial legacy. The NALSA ruling expanded the scope of inclusivity, directing the government to implement measures for the welfare of transgender people. Finally, the *Navtej Singh Johar case*[41] overturned the Koushal judgment, decriminalizing consensual same-sex relations and affirming the rights to dignity, privacy, and freedom for sexual minorities. This landmark ruling re-emphasized constitutional morality as the guiding principle for safeguarding rights, irrespective of public opinion, marking a decisive victory for LGBT rights in India.

The Permissible Extent and Appropriateness of Judicial Interventions in Policy Matters

The Indian judiciary has shown a commitment to addressing issues related to sexual minorities, beginning with decriminalizing Section 377 and directing changes in medical curricula to reduce bias. This positive shift highlights the judiciary's role in challenging government policies that perpetuate stigma, such as the permanent ban on blood donations by sexual minorities. Despite recognizing the need for scientific guidance, the judiciary missed opportunities to address inherent issues of dignity and privacy in such policies. The argument stresses that judicial intervention is necessary when policies impact social stigmas and individual rights, even if such policies are based on expert opinions. Moreover, the right of self-identification, allowing individuals to choose their gender identity without medical scrutiny, is vital for countering the state's biopower that erases sexual minorities from public spaces. The intersection of global trends and local diversity challenges this right, emphasizing the need for indigenous self-governance. Indian jurisprudence, favoring a performance-based model of identity over immutability, contrasts with policies inspired by foreign models, creating inconsistencies. The path forward involves fostering open

[39] *Supra* Note 36.
[40] National Legal Services Authority v. Union of India and Ors., AIR 2014 SC 1863.
[41] Navtej Singh Johar & Ors. V. Union of India, (2018) 10 SCC 1.

communication, indigenous self-governance, and aligning legal frameworks to ensure the dignified inclusion of sexual minorities.

Conclusion and Observation

In summary, the text critically examines the entrenched biases against sexual minorities within the framework of masculine heterosexuality, which continues to dominate societal norms and state policies. These biases not only perpetuate the subjugation of women but also deny the very existence and rights of sexual minorities, leading to pervasive stigma and discrimination, especially in areas such as healthcare.

The concept of epistemic ignorance—where individuals and institutions fail to fully engage with or question the breadth of available knowledge—emerges as a key factor in this ongoing marginalization. This ignorance, rooted in unchallenged traditions and conventions, allows for the continuation of one-sided and harmful policies that reinforce the exclusion of sexual minorities. The judiciary, while having the potential to disrupt this cycle, often falls short by deferring to medical expertise that is itself steeped in heteronormative biases, thus limiting its effectiveness in championing the rights of marginalized communities. To move forward, the text argues for a fundamental shift in how policies are formulated and scrutinized, advocating for a lens of rationality, proportionality, and dignity that truly encompasses the experiences and rights of sexual minorities. The role of civil society, particularly NGOs, is highlighted as crucial in raising awareness and empowering sexual minorities to assert their rights.

Ultimately, the path to an inclusive and just society requires dismantling the deep-seated epistemic ignorance that underpins current structures of discrimination. Only by doing so can we pave the way for a democracy that genuinely enables all individuals to live with dignity, free from stigma and exclusion, and recognized for their humanity rather than their conformity to heteronormative standards.

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