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FOREWORD

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I am happy to present this Volume of the Journal of Indian Law and Society (JILS). This student-led review is a stunning example of the high quality of legal academic works written and channelled by an ever-growing body of scholars in the Indian landscape. I am also convinced that this JILS volume can encourage further research and discussion around different areas of law that have already attracted academic attention.

The range of topics covered by this journal issue is wide and heterogeneous. It includes the thorny issue of patent evergreening, addresses the difficulties of choosing arbitrators following gender criteria, and advocates for the evolution of the World Trade Organization (WTO) into a regime more capable of accommodating non-Western principles and values. This volume also investigates the nature of sexual crimes under Indian law and the intersection between data privacy rights and freedom of the press.

Harshad Pathak, Swati Gola, Ratna Kapur, Shraddha Chaudhary, and Shruti Bedi are the authors of this volume. Student editors Anjana Raghunath and Tanvi Aggarwal penned the editorial note.

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The editorial note titled *Traversing Patent Law's 'Evergreening' Maze Vis-à-Vis Pharma Industry* examines the complex issue of patent evergreening within the pharmaceutical sector, focusing on its impact on innovation, competition, and public health. Patent evergreening, the practice of securing new patents for minor modifications of existing inventions, extends market exclusivity and impedes the availability of affordable generic medicines, posing significant challenges for both patent law and public health. The Article provides a detailed analysis of India's approach to combating evergreening by introducing Section 3(d) in its Patents Act of 1970. This provision aims to restrict the grant of secondary patents by mandating that new forms of known substances demonstrate enhanced efficacy. Despite this legislative effort, challenges remain in interpreting and applying Section 3(d), revealing persistent issues in effectively curbing evergreening practices. In contrast, Brazil's dual approval system presents a different strategy for addressing these challenges. Brazil has achieved a significantly lower rate of secondary patent grants by requiring concurrent reviews from the patent office and the National Agency for Sanitary Vigilance (ANVISA). This model highlights Brazil's commitment to controlling evergreening through rigorous regulatory processes and offers a valuable comparative perspective. Through this comparative analysis, the paper explores the effectiveness of Section 3(d) in India and draws lessons from Brazil's regulatory framework. It provides insightful recommendations for enhancing India's patent approval process, aiming to strike a balance between fostering innovation and ensuring the accessibility of essential medicines. This exploration is crucial for developing strategies promoting technological advancement and public health. By reflecting on the experiences of India and Brazil, this article contributes to shaping a more equitable and effective patent system aligned with global efforts to mitigate the adverse effects of patent evergreening.

Harshad Gupta, then, in his article titled *Dealing in Gender: Implicit Biases and Arbitrator Appointments*, enunciates the complexities in the demographic composition of gender in arbitrator appointments and critiques its plain binary understanding and the lack of an intersectional outlook. He argues that the prevalence of privilege exacerbates the absence of gender diversity. His primary goal is to bring forth the structural biases borrowed from Dezalay's work, among others, to track the three generations of arbitrators. The author emphasises the role of implicit gender biases in defining the existing gender disparity in arbitration. The author concludes by noting the co-relationship between an arbitrator's perceived competence and gender stereotypes.

Swati Gola, in the *Resistance at the WTO Article: (De)Coloniality in the Making?* discusses the epistemic coloniality inherent particularly in the World Trade Organisation (WTO), which originates in the power hegemony of

developed and developing countries. The author delves into instances where such a divide comes to the forefront, particularly concerning a varied prioritisation of interests and demonstrates the existence of unequal bargaining power in an organisation like the WTO. She begins by defining coloniality as a long-standing pattern of power that emerged because of colonialism, not restricted to the strict limits of colonial administration. Specifically, she takes a case study of the Agreement on Fisheries Subsidies and examines how a skewed negotiation process has led to the problem of overfishing and consequential environmental degradation and resource depletion. A three-pronged approach is adopted to elucidate how this hegemony manifests itself, namely the coloniality of power, knowledge and being. The interrelation among modern forms of exploitation and domination is brought forward, particularly due to an unequal bargaining power. The Article discusses another realm of coloniality, which manifests itself by putting Western ideas on a pedestal while disregarding their indigenous counterparts. A result of the two manifests itself into the lived experiences of colonial subjects, which the author calls the coloniality of being. Finally, as a remedy, the author suggests the reforms' aim to transform the WTO from a hegemonic rule-based system to one supporting a pluriverse global trade regime that includes non-Western experiences through a holistic approach.

In her article, *Four Hours to Lockdown: The Biopolitics of Law, Life, and Death*, Ratna Kapur delves into the intricacies of biopolitics in light of the COVID-19 pandemic. She highlights the continuity of biopolitics in the postcolonial world and its current interface with law, as they work together to cause the marginalisation and sacrifice of certain sections of society. She discusses Michel Foucault's identification of biopolitics as a derivative of biopower. The author emphasises the biopolitics of COVID-19 measures and questions the prophylactics involved. Intriguingly, she uses snippets of Rajender Singh Bedi's work in Urdu that display the lives of those working during the pandemic as caregivers. She also showcases the role of Indian courts by delving into the subtle nuances of 'four hours of lockdown', drawing on real-life experiences. She highlights the interplay of social strata in biopolitics in modern India through the plight of vulnerable constituencies such as informal sector labour and trans persons. The case of Tablighi Jamat as a scapegoat reinforces the idea of nationalist commitments in the dynamics of biopolitics. The allocation of death and grief makes a remarkable case for managing the dead amidst social and communal divides. The author ends on an analytical note of the prophylactics and biopolitics of the pandemic to finally question what life is worth saving.

Shraddha Chaudhary's article, *Why 'Illicit Intercourse' Needs to be Retired from Indian Criminal Law* explores the dual nature of sexual offences under the Indian Penal Code ('IPC') and their judicial interpretations. It highlights

two contrasting perspectives: one rooted in traditional socio-normative concepts of 'illicit intercourse,' which criminalises sexual conduct deemed 'immoral' by societal standards, particularly for women, and another based on constitutional morality, which focuses on sexual autonomy and consent. The author examines the historical context and implications of 'illicit intercourse,' defined in specific sections of the IPC, and how it has been interpreted to regulate sexual behaviour outside of socially sanctioned relationships, like marriage. This approach, deeply embedded in patriarchal norms, often undermines women's sexual autonomy and reinforces outdated stereotypes. In contrast, recent judicial decisions, such as the decriminalisation of consensual homosexual acts in *Navtej Singh Johar v. Union of India* and the striking down of the adultery law in *Joseph Shine v. Union of India*, reflect a shift towards recognising individual rights, personal autonomy, and equality. These rulings emphasise that criminal law should align with constitutional morality rather than public or majoritarian morality. The author argues that the term 'illicit intercourse' and the criminalisation it represents are incompatible with modern constitutional values. It calls for the retirement of this outdated concept from Indian criminal law, advocating for a legal framework that respects and upholds the autonomy and dignity of individuals, free from the constraints of patriarchal and majoritarian moralities.

In *Caught Off-Guard: Balancing the Horizontality Discord Between Privacy and Paparazzi Press Rights*, Shruti Bedi meticulously navigates the intricate interplay between individual privacy and press freedom, particularly in the context of intrusive paparazzi practices. The Article opens with a quote by Shay that underscores the pervasive and invasive nature of paparazzi photography, drawing on the foundational 1890 Harvard Law Review article by Samuel Warren and Louis Brandeis on the 'Right to Privacy.' This seminal work's foresight about the potential for instantaneous photographs to encroach on personal privacy is strikingly relevant in today's digital age, where social media and camera phones further magnify these intrusions. The transitions to a contemporary case involving Indian actress Alia Bhatt, whose private moments were captured and published without her consent, spotlighting the significant gap in legal protections against such invasions in India. The paper extensively explores various dimensions of this issue, including the tension between the fundamental right to privacy and the freedom of the press as protected under Article 19(1)(a) of the Indian Constitution. It examines the impact of declining social norms, the rapid advancement of technology on privacy, and the inadequacy of existing legal protections, which are largely confined to common law and criminal statutes. The discussion extends to the horizontal application of fundamental rights, analysing how privacy, as both a common law and constitutional right, operates in private law disputes and how recent judicial developments suggest a more integrated approach. It also delves into the complexities of balancing privacy with public

interest, scrutinising how courts have navigated this balance post-Puttaswamy and the implications for press freedom. The Article reviews the expectations of privacy for public figures versus private individuals, the nuances of privacy in public places and public records, and the judicial approaches exemplified by cases such as *Shilpa Shetty* and legislative measures like California's anti-paparazzi laws. The analysis thoroughly examines how courts and legislatures might better reconcile the need to protect privacy with the essential democratic function of the press, offering insights into how future jurisprudence could address these evolving challenges.