

ONE SARI, THREE DIFFERENT WAYS TO DRAPE IT: TRADEMARKS, RELIGION, LANGUAGE, AND MORALITY IN POST-COLONIAL INDIA, PAKISTAN, AND BANGLADESH

Zehra Jafri

ABOUT THE AUTHOR

Zehra Jafri is a J.D. graduate of University of California College of the Law, San Francisco, class of 2022. She is now an associate at the Intellectual Property group of Morgan Lewis, based out of the Palo Alto office.

TABLE OF CONTENTS

| | | |
|-----|--|-----|
| I. | BACKGROUND AND OVERVIEW..... | 128 |
| | A. <i>Historical Background on Religion as a Driving Force towards Independence in the Post-British Indian Subcontinent.....</i> | 131 |
| | B. <i>Historical Background on the Origins of Trademark Law Before, During, and After the British Raj.....</i> | 132 |
| | C. <i>The Statutory Evolution of the Morality Framework in Pre-Colonial to Post-Colonial South Asia.....</i> | 135 |
| II. | DEVELOPMENT OF THE MORALITY BAR TO TRADEMARK REGISTRATION IN SOUTH ASIAN BRITISH COLONIES..... | 137 |
| | A. <i>India.....</i> | 137 |
| | 1. Legislative Guidance on the Morality of Marks..... | 139 |
| | a. <i>Legislative Guidance on Scandalous or Obscene Matter.....</i> | 139 |
| | b. <i>Legislative Guidance on Marks Likely to Harm Religious Susceptibilities.....</i> | 141 |
| | 2. Legal Guidance on the Morality of Marks..... | 142 |
| | a. <i>The Registration of Scandalous or Obscene Matter.....</i> | 142 |
| | b. <i>The Registration of Marks Likely to Harm Religious Susceptibilities.....</i> | 145 |
| | 3. Landscape Analysis on the Morality of Marks..... | 147 |
| | B. <i>Pakistan.....</i> | 152 |
| | 1. Legal Guidance on the Morality of Marks..... | 153 |
| | a. <i>The Registration of Scandalous or Obscene Matter.....</i> | 154 |
| | b. <i>The Registration of Marks Likely to Harm</i> | |

| | | |
|------|--|-----|
| | <i>Religious Susceptibilities</i> | 156 |
| 2. | Landscape Analysis on the Morality of Marks | 158 |
| C. | <i>Bangladesh</i> | 163 |
| 1. | Legal Guidance on the Morality of Marks..... | 164 |
| | <i>a. The Registration of Scandalous or Obscene Matter</i> | 165 |
| | <i>b. The Registration of Marks Likely to Harm</i> | |
| | <i>Religious Susceptibilities</i> | 166 |
| 2. | Landscape Analysis on the Morality of Marks | 168 |
| III. | CONCLUSION | 170 |

I. BACKGROUND AND OVERVIEW

Thus far, there has been a rich literature on the history of trademark¹ law in Europe, but comparatively little on the history of trademark law in countries that originated as European colonies, especially in the context of immoral and scandalous trademarks. The post-colonial perspective of these countries is vitally underrepresented and should be included as part of the broader global discussion about trademark law.² Prior post-colonial studies focused on countries such as Australia, Canada, and more recently, Africa, but a survey of Post-Colonial South Asia has yet to be a part of the conversation and is at the heart of this analysis.³

1. Unlike the United States, Europe, India, Pakistan, and Bangladesh all break the word “Trademark” into two words: “trade mark.” The two are synonymous despite the many variations used in this paper.

2. See Caroline B. Ncube, *Decolonising Intellectual Property Law in Pursuit of Africa’s Development*, 8 WIPO J., no. 1, 2016 at 34. In the historical journey of decolonization in the context of IP, the task is not to erase the colonial past, but to add the colonized perspective.

3. For Canada: see, e.g., Pierre-Emanuel Moyses, *Canadian Colonial Copyright: The Colony Strikes Back*, in AN EMERGING INTELLECTUAL PROPERTY PARADIGM 107 (Ysolde Gendreau ed., 2008); for Australia: see, e.g., Catherine Bond, ‘Cabinéd, Cribbed, Confined, Bound in’: *Copyright in the Australian Colonies*, in RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW 372 (Isabella Alexander and H. Tomas Gomez-Arostegui, eds., 2016); and AMANDA SCARDAMAGLIA, *COLONIAL AUSTRALIAN TRADE MARK LAW: NARRATIVES IN LAWMAKING, PEOPLE, POWER, & PLACE* (2015). This paper focuses on the countries India, Pakistan, and Bangladesh. Sri Lanka, Bhutan, and Burma are not a part of the analysis for the following reasons. Burma, a former British colony had already separated from India in 1937, prior to India gaining independence from the British. While Sri Lanka was also a British colony, it has been left out of the analysis because it was not a part of India. The influence of British colonial trademark law and how it was adopted into the statutes of the resulting nations is critical to the three-fold analysis, and for this reason Sri Lanka has been left out of the analysis as it has been a colony of three different European countries; Portugal, the Netherlands, as well as Great Britain. As a result, there is likely a comingling of influences on Trademark law in Sri Lanka that cannot be traced to one source. Bhutan, a former British colony, separated peacefully from India and its independence was recognized in 1947 without conflict. The discussion is limited to Pakistan, India, and Bangladesh due to the unique religious tensions that have colored the formation of Pakistan, India, and Bangladesh and the potential interplay of religion, identity, nationalism, and politics after post-colonial India and its impact on trademark law is the topic of this paper.

While most nations seem to have a prohibition on the registration of marks that are deemed “immoral,” no two trademark statutes are the same; rather, their application tends to be colored by various sociological influences. The Paris Convention and the TRIPS Agreements obligate member states to protect trademarks.⁴ However, those agreements also give member states the right to deny registration of a mark if the marks themselves are “contrary to morality or public order” as determined by the member state.⁵

Australia, a former British colony, recognizes that definitions of morality and what an “ordinary” person would consider to be shameful, offensive, or shocking can change over time and therefore adopts a fluid definition of morality with respect to acceptance of modern norms.⁶ There are many articles discussing the treatment of colonial trademark laws regarding morality in Australia.⁷ However, while scholarship on the interpretation of morality in trademark law has been explored in Australia, there is no similar scholarship exploring Post-Colonial South Asian trademark law and how the nations of India, Pakistan, and Bangladesh exercise their latitude. This note aims to articulate the evolution of the morality bar in statutory trademark law and trademark practices in present-day India, Pakistan, and Bangladesh, as colored by the events following the 1947 independence from the British Raj.

The role of religion in the morality bars of trademark statutes is a rare feature in trademark statutes at large, and has yet to be explored in the context of South Asian Colonialism.⁸ The trademark system in Pakistan, India, and Bangladesh were initially modeled on the trademark

4. See TRIPS, Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 305, art. 6quinquies [hereinafter Paris Convention], http://www.wipo.int/edocs/lexdocs/treaties/en/paris/trt_paris_001en.pdf [<https://perma.cc/Z9XQ-4KF3>]. See also CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT 174–75 (2007). See generally STEPHEN P. LADAS, PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTIONS 66 (1975); 970.

5. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [<https://perma.cc/7WQJ-84PM>] [hereinafter TRIPS]. See generally INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 1998); DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 421 (4th ed. 2012).

6. Trade Marks Act 1995 s 42, http://classic.austlii.edu.au/au/legis/cth/consol_act/tma1995121/s42.html [<https://perma.cc/3JC6-Y7NF>].

7. See, e.g., AMANDA SCARDAMAGLIA, COLONIAL AUSTRALIAN TRADE MARK LAW: NARRATIVES IN LAWMAKING, PEOPLE, POWER & PLACE (2015).

8. Colin Manning, Moral bars on Trade Mark Registration 62–76 (2016) (L.L.M Thesis, University College Cork) (SSRN) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875687 (last visited May 16, 2022). Other countries with explicit religion or tribe-based bars include El Salvador, Indonesia, Korea, Saudi Arabia, Costa Rica, Iran, Sudan.

system in the United Kingdom.⁹ While British statutes contained morality clauses, India, Pakistan, and Bangladesh each added a provision providing that trademarks were not registrable if they are “likely to hurt the religious susceptibilities of any class.”¹⁰ This addition differs considerably from the original 1938 British statute, showing a greater sensitivity to religious tradition.¹¹ The contours of what is considered religiously offensive to the susceptibilities of citizens in each country, as well as what is considered “scandalous” or “obscene” in each of these vastly different countries which were once one subcontinent, will be explored in this paper.

Pakistan, India, and Bangladesh were all established on a sense of wanting to be a majority in a nation where they were once “othered,” be it by the British, Hindu majority, or Urdu-speaking majority. As a result, religious independence and mother-tongue/linguistic independence are highly valued in these countries, and are the context by which the morality of trademarks within the borders of these countries are assessed. Notions of free speech traditions and political ideologies that also color traditions are discussed, as they also run abreast trademark law. Although these three countries once emerged from one land, they carry differences as distinct and rich as the cultural and religious historical tensions that define them. Each sought to create a space where their cultural and religious identities were represented fairly. As thus, it is no surprise that religion is such an important consideration that it was codified into each country’s trademark law.

This paper aims to illustrate what each country deems as running afoul to notions of morality and religious susceptibilities, and how that may have changed over time with politics and other social factors. The factors that may have influenced these definitions is assessed in depth by country, with homage to the political structures and free speech traditions within which they are nested. A framework of what would and what wouldn’t qualify as a registrable trademark under the morality bar is posited through an analysis of government guidelines on registering trademarks, case law, and a comparative analysis of certain marks that were treated one way under one country’s standard but could be treated differently under different standards from other countries.

The aims of this note are three-fold: (1) tracing the influence of the liberation movement in India, Pakistan, and Bangladesh on the morality clause of their respective trademark laws; (2) illustrating how and why the subsequent trademarks acts in India, Pakistan, and Bangladesh diverged from the original UK Trade Marks Act of 1938; and (3) showcasing how

9. P. NARAYANAN, *LAW OF TRADE MARKS AND PASSING OFF* 3 (6th ed. 2004).

10. See Bangladesh: The Trademark Act, 2009 and Rules 1963, www.bdlaws.govt.com; Pakistan: Trade Mark Ordinance 2001, https://ipo.gov.pk/system/files/Trade_Mark_Ordinance_2001_0.pdf; India: the Trade Marks Act, 1999 https://legislative.gov.in/sites/default/files/A1999-47_0.pdf.

11. See Trade Marks Act 1938 (Gr. Br.), https://www.legislation.gov.uk/ukpga/1938/22/pdfs/ukpga_19380022_en.pdf [<https://perma.cc/VZ2P-QPFD>].

the government's differing attitudes on religion and the prominence of majority faiths within each country may play a role in the types of marks that are registrable.

This note is limited to a discussion of trademark law in the countries of India, Pakistan, and Bangladesh (“the countries”). This is done to maintain focus on the countries that arose from the partition of India after 1947. India was ruled directly under the rule of the British crown until the partition in 1947, and trademark laws in Pakistan stem from trademark laws in Pre-Partition India while trademark laws in Bangladesh stem from trademark laws in Pakistan.¹²

A. *Historical Background on Religion as a Driving Force towards Independence in the Post-British Indian Subcontinent*

India gaining its independence in 1947 is the core, defining event of the history of 20th century South Asia.¹³ Pakistan gained its independence from India during the partition in the same year 1947.¹⁴ Bangladesh, originally East Pakistan, gained its independence later in 1971 through a liberation war with West Pakistan in 1971.¹⁵ As these events unfolded, four large historical trends intersected and interacted throughout the history of twentieth-century South Asia: the slow retreat of British imperialism, the growth of Indian nationalism, the development of Muslim separatism, and a call to recognize the Bengali (Bangla) language and promote linguistic and cultural diversity and multilingualism.

While it is possible that the British authorities desired to keep religious peace in India, their approach likely had the opposite effect. Over the course of the 19th century, the British had laid out a system of categories in their census to “capture” all Indians.¹⁶ A number of historians have emphasized this process of categorization as contributing to an increasing antagonism between religious communities, as communities were defined and pitted against one another in imperial calculations and political policies.¹⁷ Historians argue that through the very construction and utilization of such categories, the British had already begun dividing

12. *IPR Toolkit – Pakistan*, U.S. EMBASSY & CONSULATES IN PAKISTAN I, https://pk.usembassy.gov/wp-content/uploads/sites/76/2016/03/trademarks_geographical_indications.pdf [<https://perma.cc/K8SV-QQ37>].

13. See generally 1947 Indian Independence Act, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-empire/collections1/collections2/1947-indian-independence-act> (last visited May 16, 2022) [<https://perma.cc/J784-MF7G>].

14. *Id.*

15. Eric A. Strahorn, *The Bangladesh Liberation War*, ORIGINS: CURRENT EVENTS IN HISTORICAL PERSPECTIVE (Dec. 2021), https://origins.osu.edu/milestones/bangladesh-liberation-war?language_content_entity=en [<https://perma.cc/TH89-B295>].

16. RACHEL FELL MCDERMOTT ET AL. SOURCES OF INDIAN TRADITIONS: MODERN INDIA, PAKISTAN, AND BANGLADESH 455 (3rd ed., 2014). <http://www.jstor.org/stable/10.7312/mcde13830.15> [<https://perma.cc/NQY3-J7TZ>].

17. *Id.*

India against itself.¹⁸ As strife increased, the British attempted to come up with their own solutions to maintain the peace, such as the incorporation of the Government of India Act of 1935 and the “Two Nations Theory” into colonial governance. Nevertheless, these measures only continued to widen the political gulf between Muslims and Hindus, and the partition of India into two separate states, started to become the only viable solution for self-governance.¹⁹

The first calls for a separate Muslim state, or at least an autonomous Muslim part of South Asia, dated back to the 1930s; positioned in time along with World War II and the global wave of decolonization that followed shortly thereafter. As August 15, 1947 approached, the British withdrew from its former crown jewel. Millions of Muslims migrated to what was to be Pakistan while millions of Hindus and Sikhs migrated to what was to be the new India.²⁰ The crisis of 1969 to 1971 in East Pakistan, the breaking up of East and West Pakistan, and the establishment of Bangladesh as a new nation followed shortly thereafter, arising out of a lack of official recognition for the Bengali language.²¹

B. *Historical Background on the Origins of Trademark Law Before, During, and After the British Raj*

The trademark systems in India, Pakistan and Bangladesh had their grounding and were initially modeled on trademark systems in the United Kingdom.²²

The Anglo-Indian trademark law had its origin dating back to 1266.²³ The law at that time was referred to as the Bakers Marking Law.²⁴ The law required bakers to place a mark on the loaves of bread that they sold, identifying the baker.²⁵ An “officer of abundance” confiscated any unstamped bread offered for sale and subjected the offending baker to heavy damages.²⁶ As the British Empire extended their global reach, they applied their own intellectual property (“IP”) laws in the new

18. *Id.*

19. *Id.* at 456, 500–501.

20. *Id.* at 457–58.

21. Anirban Mahapatra, *When Bangladesh went to war over language*, BOLAN VOICE (July 17, 2018), <https://bolanvoice.wordpress.com/2018/07/17/when-bangladesh-went-to-war-over-language>.

22. For Bangladesh see BAZLUL H. KHONDKER & SONIA NOWSHIN, DEVELOPING NATIONAL INTELLECTUAL PROPERTY POLICY FOR BANGLADESH: AN ASSESSMENT OF NATIONAL INTELLECTUAL PROPERTY SYSTEM, 2, https://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/policies/0b84dc51_4a40_4333_ab01_66b4be436e26/IP%20Policy.KS.pdf [<https://perma.cc/Z447-LMFU>]. For India see NARAYANAN, *supra* note 9, at 3. For Pakistan see Government of Pakistan, The Trade Marks Act, 1940, <https://www.wipo.int/edocs/lexdocs/laws/en/pk/pk017en.pdf>.

23. *Trademarks Past and Present*, WIPO MAGAZINE (2005), https://www.wipo.int/wipo_magazine/en/2005/02/article_0003.html [<https://perma.cc/3AJU-RY7T>].

24. *Id.*

25. *Id.*

26. *Id.*

territories they controlled, including India.²⁷ The imposition of Western models of IP via the General Agreement on Tariffs and trade (“GATT”) or the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) is often described as the globalization of IP, but this was not the first wave; an earlier wave of IP globalization had already been carried out by the British Empire during the late nineteenth century and early twentieth century.²⁸

Although in the 1860s the British government had rejected the idea of a trademark registry, a number of colonies established their own registration systems.²⁹ For example, Canada was the first colony to adopt a trademark registration act in 1861, and a number of other British colonies followed suit shortly thereafter.³⁰ It was not until 1875 that Britain itself would make such a move, and it seems likely that the experiences of the colonies provided evidence to the British that the benefits of such registries outweighed their perceived dangers.³¹ Thereafter, perhaps less surprisingly, other colonies followed the lead of the Imperial Parliament.

However, it is notable that as late as 1888 there was not even a trademarks ordinance in India, let alone a trademark registry.³² In 1916, P.K. Sen reported in his Tagore Law lectures that in India there remained “no system of registration, nor is there any provision for a statutory title to a trade-mark.”³³ Despite attempts to introduce such laws in the late 1870s and first decade of the twentieth century, India remained without a trademark registration system until 1940.³⁴

British India had no specific trademark protection enactments before 1889.³⁵ At that time, more general enactments such as the Penal Code of 1860 and the Specific Relief Act of 1877 ensured trademark protection.³⁶ In 1889, the then British rulers resolved this by enacting the Merchandise Marks Act of 1889, which was later followed by the Trade Marks Act of 1940 to protect trademarks.³⁷ The Trade Marks Act of 1940,

27. See Michael Birnhack, *A Post-Colonial Framework for Researching Intellectual Property History*, in HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH: LENSES, METHODS, AND PERSPECTIVES 261 (Irene Calboli and Maria Lilla Montagnani, eds., 2021).

28. *Id.*

29. See Lionel Bentley, *The “Extraordinary Multiplicity” of Intellectual Property Laws in the British Colonies in the Nineteenth Century*, THEORETICAL INQUIRIES IN LAW, 161, 170 (2011).

30. *Id.* South Australia did so in 1863, Queensland and Tasmania in 1864, New South Wales in 1865, New Zealand in 1866, New Brunswick in 1867, Mauritius in 1868 and Hong Kong in 1873.

31. *Id.*

32. *Id.* at 170–71.

33. *Id.* at 171.

34. *Id.*

35. See Md. Milan Hossain, *Trademark Protection: Bangladesh Approach*, IOSS J. HUMAN’S AND SOC. SCI., Nov.-Dec. 2012 at 1.

36. *Id.*

37. *Id.*

as enacted in British-India, greatly borrowed from the British Trademark Act of 1938 which had been passed into England's law at the time.³⁸ Independent India later passed the Trade & Merchandise Mark Act of 1958. The Trade & Merchandise Mark Act of 1958 was subsequently reincorporated as the Trademark Act of 1999, which came into effect in India on December 30, 1999.³⁹ Bangladesh inherited the Merchandise Marks Act of 1889 and the Trade Marks Act of 1940 from Pakistan after declaring independence in 1971.⁴⁰ These two laws would govern trademark protection in Bangladesh for a long time.⁴¹

Ultimately, the Merchandise Marks Act of 1889 and the Trade Marks Act of 1940 would be repealed to make way for the respective present legal bases of trademark protection for each country: The present legal basis of trademark protection in India is the Trademark Act of 1999.⁴² The present legal basis of trademark protection in Pakistan is the Trade Mark Ordinance of 2001.⁴³ The present legal basis of trademark protection in Bangladesh is the Trademark Act of 2009 and Trademark Rules of 1963.⁴⁴

While the Colonial statutes contained general morality clauses, India, Pakistan, and Bangladesh each added a distinct statutory provision that originated not from British law but from India's Trade Mark Act of 1940, which stated that trademarks were not registrable if they are "likely to hurt the religious susceptibilities of any class."⁴⁵ This language, set in the context of religious strife in the 1920s-1930s primarily between Hindus and Muslims, differs considerably from the original British statute as written in 1938 and shows a great sensitivity to religious tradition that is embedded deep within the intellectual property laws of these countries.⁴⁶ Thus, India's approach exemplifies the intersectional racial and colonial complexities of globalized intellectual property law.

38. *Id.*; see also *History and Evolution of the Trademark System*, BANANA IP REPORTER, <https://www.bananaip.com/ip-news-center/history-and-evolution-of-trademark> (Jan. 7, 2011) [https://perma.cc/JLQ7-69Y3].

39. *Id.*

40. *Id.*

41. *Id.*

42. The Trade Marks Act, 1999 India. <https://www.indiacode.nic.in/handle/123456789/1993?locale=en> [Hereinafter India Trade Marks Act 1999].

43. Trade Marks Ordinance, No. 19 of 2001, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Apr. 13, 2001 https://ipo.gov.pk/system/files/Trade_Mark_Ordinance_2001_0.pdf. [Hereinafter Pakistan Trade Mark Ordinance 2001].

44. Trademarks Act, 2009, No. 19 of 2009 Bangl. http://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/law/14f54832_791a_4fe9_b08a_687ed9c5f139/Trademarks%20Act,%202009%20English.pdf [Hereinafter Bangladesh Trade Marks Act of 2009].

45. For India see Trade Marks Act of 1999, *supra* note 42 at § 9(2)(b). For Pakistan see Trade Mark Ordinance of 2001, *supra* note 43, at Chapter II, § 14(3)(b). For Bangladesh see Trademark Acts 2009, *supra* note 44, at Chapter II, § 8(d).

46. B. R. AMBEDKAR, PAKISTAN OR THE PARTITION OF INDIA, ch. VII, pt. IV, (3rd ed., 1946) http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/ambekar_partition/307c.html#part_4 [https://perma.cc/83X6-UQ97].

As the World Trade Organization (WTO) was overseeing the globalization of intellectual property, India became an important voice for the developing world.⁴⁷

An analysis of the contours of what is considered religiously offensive to the susceptibilities of citizens in each country, as well as what is considered “scandalous” or “obscene” in each of these vastly different countries, which were once one subcontinent, follows.

C. *The Statutory Evolution of the Morality Framework in Pre-Colonial to Post-Colonial South Asia*

Prior to 1947, Bangladesh and Pakistan did not exist under the British Crown. In trademark cases in those regions, either British law was applicable, or the Crown passed new laws for the Indian Subcontinent.⁴⁸ There were no specific enactments in British India before 1889.⁴⁹ Enactments such as the Penal Code of 1860 as well as the Specific Relief Act of 1877 ensured trademark protection.⁵⁰ The British government enacted the Merchandise Marks Act of 1889 and the Trade Marks Act of 1940 to protect trademarks.⁵¹ The Act of 1940 was enacted in British-India, closely following the Trade Mark Act of 1938 of England.⁵²

Just as the nations evolved over time, so did the moral trademark bar. While the UK Trade Marks Registration Act of 1875 barred scandalous and then immoral subject matter, the law for British India added a feature in its 1938 revision of the UK Trade Marks Act not found in UK law: religion. When the independent countries of India, Pakistan, and Bangladesh adopted their own trademark laws as independent nations in 1999, 2001, and 2009 respectively, they carried this feature forward in their respective trademark laws.

UK Trade Marks Registration Act of 1875

6. It shall not be lawful to register . . . any scandalous designs.⁵³

Revised UK Trade Marks Act of 1938

11. It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of, which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.

—

47. REDDY T. PRASHANT & SUMATHI CHANDRASHEKARAN, CREATE, COPY, DISRUPT: INDIA'S INTELLECTUAL PROPERTY DILEMMAS 38 (2017).

48. Hossain, *supra* note 35, at 1.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. See The Trade Marks Registration Act, 1875 U.K., 24, <https://babel.hathitrust.org/cgi/pt?id=mdp.35112105404224&view=1up&seq=9&skin=2021> [<https://perma.cc/P4PC-BG75>].

“Contrary to morality” was retained in United Kingdom legislation until 1994, and has remained beyond then in amended form (“contrary to public policy or accepted principles of morality”).⁵⁴

India Trade Marks Act of 1940

8. No trade mark nor part of a trade mark shall be registered which consists of, or contains, any scandalous design, or any matter the use of which would—

- a) By reason of its being likely to deceive or to cause confusion or otherwise, be disentitled to protection in a Court of justice; or
- b) Be likely to hurt the religious susceptibilities of any class of His Majesty’s subjects; or
- c) Be contrary to any law for the time being in force or to morality.⁵⁵

Revised (current) India Trade marks Act of 1999

Section 9(2)

(2) A mark shall not be registered as a trade mark if—

- (a) it is of such nature as to deceive the public or cause confusion;
- (b) it contains or comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India;
- (c) it comprises or contains scandalous or obscene matter;
- (d) its use is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950 (12 of 1950).⁵⁶

Pakistan Trade marks Ordinance of 2001

(3) No trade mark nor any part thereof in respect of any goods or services shall be registered which consists of, or contains, any scandalous design, or any matter the use of which would- . . .

- (b) be likely to hurt the religious susceptibilities of any class of citizens of Pakistan, per se, or in terms of goods or services it is intended to be so registered; or
- (c) be contrary to any law, for the time being in force or morality.⁵⁷

Bangladesh Trade marks Act of 2009

8. Prohibition of registration of certain matters.

—No mark or part of a mark shall be registered as a trademark—

- (a) which comprises or consists of any scandalous or obscene matter; or

...

- (d) which contains any matter likely to hurt the religious susceptibilities of any class of the citizens of Bangladesh;⁵⁸

54. See Trade Marks Act, 1938 U.K., § 11, https://www.legislation.gov.uk/ukpga/1938/22/pdfs/ukpga_19380022_en.pdf [<https://perma.cc/8BU2-P5NA>].

55. The Trade Marks Act, 1940 India <https://iprlawindia.org/wp-content/uploads/2021/04/1940.pdf> p. 10.

56. India Trade Marks Act, 1999, *supra* note 42 at p. 11.

57. Pakistan Trade Mark Ordinance, 2001, *supra* note 43 at p. 10.

58. Bangladesh Trademarks Act, 2009, *supra* note 44.

While the countries share a common origin and similarly worded morality clauses paying heed to religious susceptibilities, India, Bangladesh, and Pakistan have embarked on different paths in developing the trademark law originating from the same Colonial statute. These nascent paths are rooted in varying traditions of free speech, religion, and cultural-linguistic identity; they play a great role in developing different applications of the identically-worded morality clauses which arose from the same 1940's Trademark Act in British-India.

II. DEVELOPMENT OF THE MORALITY BAR TO TRADEMARK REGISTRATION IN SOUTH ASIAN BRITISH COLONIES

A. *India*

The present legal basis of trademark protection in India is the Trade Marks Act of 1999.⁵⁹ India is signatory to the following international agreements: the World Intellectual Property Organization (“WIPO”), since 1975, Paris Convention since 1998, and the (amended) TRIPS agreement since 2007.⁶⁰

This section traces the influences on trademark registration in India with respect to the morality clause of Section 9 of the 1999 act; the morality clause includes references to religion and political climate. Next, this section lays out the government's framework for the morality of marks, and finally, it posits additional examples of trademarks outside of the government's criteria under Section 9. Section 9 states in pertinent part:

Section 9(2)

(2) A mark shall not be registered as a trade mark if—

...

(b) it contains or comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India;

(c) it comprises or contains scandalous or obscene matter;⁶¹

Indian trademark legislation and judicial doctrine historically followed the contours of British law.⁶² However, with the Trade Marks Act of 1994, British Law began an irreversible drift away from its common law origins and continues to become increasingly European, with a

59. India Trade Marks Act, 1999, *supra* note 42, at § 9(2)(a-c).

60. *Amendment of the TRIPS Agreement*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm [<https://perma.cc/4U8C-RYHV>].

61. India Trade Marks Act, 1999, *supra* note 42, at § 9(2)(a-c).

62. *See* Sunder Parmanand Lalwani v. Caltex (India) Ltd., AIR 1969 Bom 24, 32 (High Court of Bombay) (“Our Trade Marks law is based on the English Trade Marks law and the English Acts.”); *See generally* Dev Gangjee, *Non Conventional Trade Marks in India*, 22 NAT'L L. SCH. OF INDIA REV. 67 (2010), <http://docs.manupatra.in/newslines/articles/Upload/BB1047DA-5CCF-41BC-9C82-487F5DC570D3.pdf> [<https://perma.cc/62VH-7DA3>]; Draft Manual Ch II, at 1.2 (“To a large extent the practice of the Registry in India broadly corresponds with the practice prevailing in the UK.”).

number of civil law concepts and interpretative techniques informing the development of substantive trademark law.⁶³ Registered trademark law in England today looks very different from pre-1994 law, whereas there is arguably greater doctrinal continuity between Indian Acts of 1958 and 1999.⁶⁴ The UK's (pre-Brexit) adherence to EU standards gave its trademark law a distinctly European, rather than common-law, identity.⁶⁵

Consequently, even though the language of the Indian Act of 1999 often closely follows the UK's Trade Mark Act of 1994, Indian courts retain interpretative freedom and can retain the common law approach of the Act of 1958 in certain areas, or otherwise depart from UK precedent.⁶⁶ Dev Gangjee, lecturer in intellectual property at the London School of Economics, believes that while Indian Courts look to older, European precedent, Indian trademark law need not be 'Europeanized' by stealth.⁶⁷

Case law and the trademark registry both provide guidance on the morality of marks in India. Additional guidance comes from the Manual of Trademarks Practice & Procedure ("The Manual") published by India's Ministry of Commerce & Industries.⁶⁸ Gangjee argues that The Manual serves as a guide for the examiners who apply the law, while

63. See generally the manner in which the European Court of Justice bypassed the literal wording of the legislation and adopted a teleological or purposive approach in *Zino Davidoff SA v. Gofkid Ltd.*, (C-292/00) [2003] 28 FSR 490 (European Court of Justice). More importantly, much of European trade mark law has developed against the backdrop of European rules on the free movement of goods in the common market, while these considerations do not apply in the Indian context. For this history, see I. Simon, *How does Essential Function Drive European Trade Mark Law?*, 36 I.I.C. 401 (2005); F.K. Beier, *The Development of Trade Mark Law in the Last Twenty-Five Years* 26, I.I.C. 769 (1995).

64. Dev Gangjee, *Non Conventional Trade Marks in India*, 22 NAT'L L. SCH. OF INDIA REV. 67, 70 (2010), <http://docs.manupatra.in/newslines/articles/Upload/BB1047DA-5CCF-41BC-9C82-487F5DC570D3.pdf> [<https://perma.cc/62VH-7DA3>].

65. *Id.* ("Other common law jurisdictions have noticed this widening gap as well, while re-emphasizing the importance of local conditions and requirements . . . The British Trade Marks Act 1994 (Ch.26) had to conform to the [European] Directive and its interpretation by the [European Court of Justice (ECJ)] binds the English courts. This does not mean that we are bound to follow these authorities . . . [The South African Act] must be interpreted and applied in the light of our law and circumstances. Local policy considerations may differ from those applicable in Europe.") .

66. *Id.* ("Ironically, the common law approach to registered trade marks is no longer an option for UK courts – the home of the common law – since they are now bound by ECJ precedents. UK law is now European law, whereas the very basis for following it in the past was the common law connection.") .

67. <http://docs.manupatra.in/newslines/articles/Upload/BB1047DA-5CCF-41BC-9C82-487F5DC570D3.pdf>. *Id.*

68. See generally Ministry of Commerce & Industries, Designs & Trade Marks, A draft of Manual of Trademarks Practice and Procedure (Issued on March, 10, 2015), https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf [Hereinafter TMR Draft Manual 2015].

ensuring transparency for the users of the registration system; it is an evolving document and “will be updated from time to time in the light of important judgments and decisions of courts involving interpretation of the provisions of the Act and Rules.”⁶⁹

1. Legislative Guidance on the Morality of Marks

The Government of India’s Ministry of Commerce & Industries re-published The Draft Manual in 2015 in an attempt to present the provisions of the Trade Marks Act of 1999, the rules made thereunder and office practice, in a simplified manner.⁷⁰ The previous copy was from 2009 and appears to be the first iteration of this guidance.⁷² This direct guidance promulgated by the Controller General of Patent, Design, and Trademarks allows for a more robust understanding of how the morality clause of Section 9 of the 1999 trademarks act is actually applied.

The Draft Manual provides commentary on the language of the statute, and aids in the understanding what marks might be considered to violate Section 9 i.e. a) what is considered scandalous or obscene matter under Section 9 that would be barred from registration, as well as marks that are b) likely to hurt religious susceptibilities and would be barred from registration under Section 9. These two matters under the Section 9 bar are distinct, and as such will be discussed separately starting with legislative guidance on scandalous or obscene matter.

a. Legislative Guidance on Scandalous or Obscene Matter

The Draft Manual provides guidance with respect to what entails scandalous or obscene matter.⁷³ Specifically, it details that a mark is deemed “scandalous” and is prohibited from registration if the mark could “induce public disorder or incite the criminal or other offensive behavior.”⁷⁴ The applicability of the objection is decided objectively and non-discriminately by the trademark examiner.⁷⁵ Moreover, the outrage must be amongst an identifiable section of the public.⁷⁶ This departs significantly from the earlier version of the Draft Manual, which, highlighted that a higher degree of outrage against a small section of the public will be sufficient to raise an objection, just as a lesser degree of outrage amongst a larger section of the public will also suffice.⁷⁷

69. Gangjee, *supra* note 64, at 69.

70. TMR Draft Manual 2015, *supra* note 68.

71. See generally Ministry of Commerce & Industries, Public Notice, No./CG/TMR/Public Notice/2015/83 (Issued on May 10, 2015), https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_33_1_public-notice-11march2015.pdf.

72. See generally Ministry of Commerce & Industries, Designs & Trademarks, Draft Manual (Revised) for Trademark Practice & Procedure (Issued January 23, 2009), https://yamunaanand.files.wordpress.com/2009/05/draftmanual_tmr_23january2009.pdf [<https://perma.cc/AB59-BFF5>] [Hereinafter TMR Draft Manual 2009].

73. TMR Draft Manual 2015, *supra* note 68, at 60.

74. *Id.*

75. *Id.*

76. *Id.*

77. Trade Draft Manual 2009, *supra* note 72, at 98.

Moreover, to make this assessment, the examiner must be objective. Objectivity is defined as something that is not out of date, a trend setter, a moral standard, or insensitive to public opinion.⁷⁸ The earlier version of the Draft Manual from 2009 highlighted that it is not enough that the examiner finds the mark offensive, but the fact that the examiner is offended will alert them to the need for caution.⁷⁹ They might find it helpful to seek the views of others; for example, women may find some marks offensive, whilst men may find them distasteful at the most.⁸⁰ Similarly, the examiner may not be offended, but must take into consideration whether an identifiable section of the public would be offended.⁸¹ The new iteration seems to emphasize the objective nature and disfavors a subjective test, highlighting that each case must be taken on its own facts.⁸²

With respect to vulgar and scandalous content, examiners seem to treat these marks synonymously in that such a mark may not be acceptable on any goods.⁸³ The Draft Manual further lists objections against explicit full-frontal nudes and offensive (scandalous) back views.⁸⁴ Furthermore, objections are warranted on services and goods depicting racially offensive marks.⁸⁵ Where an obscene or crude mark is concerned, an objection will be certain where the goods or services are primarily or equally aimed at children, such as toys, games, confectionery, soft drinks, etc.⁸⁶ For goods intended for adults, such as alcohol and contraception, there may be less cause for concern.⁸⁷ The Draft Manual indicates that each case must be decided on its own facts.⁸⁸ The dividing line is to be drawn between the mark which amounts only to distaste and the mark which would justifiably cause outrage or would be the subject of justifiable censure as being likely to undermine current religious, family or social values.⁸⁹

The Draft Manual lists examples of marks which may be considered to be objectionable under this Section including: “WHITE DOVE YOU DON’T NEED WINGS TO FLY”⁹⁰ Because White Dove is a nickname for a type of drug, it is seen as contrary to public policy as it would be seen as promoting drugs.⁹¹ Moreover, the Draft Manual lists “SNUFF MOVIES” as obscene and scandalous for promoting pornography and

78. TMR Draft Manual 2015, *supra* note 68, at 60.

79. Trade Draft Manual 2009, *supra* note 72, at 98.

80. *Id.*

81. *Id.*

82. TMR Draft Manual 2015, *supra* note 68, at 61.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

murder, which is contrary to accepted principles of morality in view of bad language.⁹²

b. Legislative Guidance on Marks Likely to Harm Religious Susceptibilities

The Draft Manual also provides guidance about what would be prohibited under Section 9(2)(c) which prohibits marks that harm religious groups.⁹³ If a mark is merely distasteful, an objection under Section 9(2)(c) is unlikely to be justified. On the other hand, if the mark would cause outrage or likely would significantly undermine religious, family or social values, then an objection must be raised.⁹⁴

Moreover, under Section 9(2)(c), a mark is prohibited for registration as a trademark if it contains or comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India.⁹⁵ The Draft Manual further explicitly acknowledges that it is a common trade practice in India to use names and pictures of religious deities or symbols as trademarks.⁹⁶ Accordingly such use is not regarded *per se* as offending religious sentiments of any class or section of public.⁹⁷ However, such use in relation to certain goods may offend the religious sentiments of the people.⁹⁸ For example, the use of the names or device of deities or religious heads on footwear will be considered distasteful and will be open to objection.⁹⁹ Similarly, use of Hindu Gods on beef or meat products or use of names of Muslim saints on pork products would offend the religious feeling of respective sections of the public and may attract objection under this section.¹⁰⁰ Certain names and images of deities and heads of religious organizations are prohibited from being registered as trademarks in terms of directions issued by the Central Government under Section 23(1) of the Trade & Merchandise Marks Act, 1958. These directions continue to remain valid.¹⁰¹ The Draft Manual goes on to list illustrative examples.¹⁰² The use of religious symbols (like OM) or names (e.g., Jesus) as trademarks is likely to undermine/offend religious value and sentiments.¹⁰³ Names of gods or goddesses which are also used as personal names may be considered as personal names for registration purpose, unless accompanied by the device of such god or goddess.¹⁰⁴

92. *Id.*

93. *Id.* at 60.

94. *Id.*

95. *Id.* at 59.

96. *Id.*

97. *Id.* at 59–60.

98. *Id.* at 60.

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.*

103. *Id.*

104. *Id.*

2. Legal Guidance on the Morality of Marks

Beyond the text of the statute and of the Draft Manual, recent case law and registered trademarks can also be used to ascertain a better understanding of the trademark morality framework in India.

a. The Registration of Scandalous or Obscene Matter

FCUK

The “FCUK” mark illustrates a case where India has registered what might be regarded as a scandalous, obscene mark, despite the prohibitions. The register approved and never appears to have contested the trademark “FCUK,” which is an acronym for the fashion brand French Connection UK.¹⁰⁵ This trademark has been contested in the United Kingdom because it is so close to the swear word “f**k.”¹⁰⁶ Ultimately, it was not precluded under the morality bar because the intrinsic qualities of the mark, including whether children might be exposed to them, as well as if the word was identical phonetically or visually to the swear word. These criteria suggest that the mark did not, in every circumstance, bring in mind the swear word. Therefore, the intrinsic quality of the mark was not purely to offend and as the mark was not itself a swear word, it could not be said to contravene the accepted moral principle prohibiting the use of swear words.¹⁰⁷ The Trade Marks registry of India approved the FCUK mark for registration which was applied for on 5/3/1998, registered on 02/15/2006, and was renewed for registration on 1/25/2018.¹⁰⁸

WHITE DOVE (LABEL)

Curiously, while the Draft Manual explicitly lists “White Dove You Don’t Need Wings to Fly” as an objectionable mark because it elicits a nickname for a type of drug which would make it contrary to public policy, the “White Dove (Label)” without the “Wings to Fly” is a registered trademark. White Dove is a slang for narcotics and under the Draft Manual, it should be rejected. However, approval of the trademark suggests that it is proper to use the phrase “white dove” under the specific class 18 category under which it is registered: articles made wholly or principally of leather or of imitation leather. Perhaps this is because in connection with leather, “white dove” might not be offensive

105. See Trademark Registration of FCUK™ in Uttar Pradesh, STARTUPWALA, <https://www.startupwala.com/trademarks-registration/search-DELHI-FCUK-793779> [<https://perma.cc/94SS-KXVD>] (last visited May 16, 2022).

106. See Susan Barty, *UK; FCUK Trade Mark – not invalid*, MONDAQ (July 10, 2006), <https://www.mondaq.com/uk/trademark/41096/fcuk-trade-mark—not-invalid> [<https://perma.cc/M6QX-X6YY>]. See also *Woodman v. French Connection Ltd.* [2007] RPC 1 [83] (UK).

107. This case is distinguishable from the “FOOK” case, in which it was held that the word “FOOK” could be phonetically identical to the word “f**k” and therefore the application was rejected. U.K. Trademark Application Serial No. 2309350 (filed Aug. 30, 2002); application denied, Dec. 0–133–04, paras. 13–14, 20 (May 13, 2004).

108. Trademark Registration of FCUK™ in Uttar Pradesh, *supra* note 105.

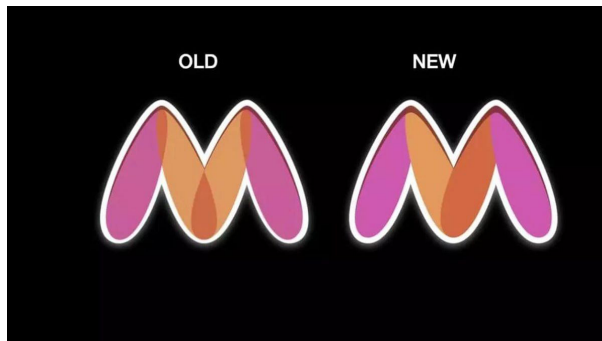
to accepted principles of morality. The mark was applied for on January 28, 2008, before the first Draft Manual in 2009 included guidance contravening the registry of the term White Dove, but the Trade Marks Registry nonetheless approved this mark for registration on December 16, 2009.¹⁰⁹

ORGY



India refused to register the term *orgy* in conjunction with a logo image that could be perceived as offensive under Section 9. The Indian register in class 25 refused this mark on November 18, 2011.¹¹⁰ The image could be construed as the silhouetted image drawing of a man on his haunches, engaging in a sexual act with someone whose feet can be seen. This logo, paired with the word, *orgy* is likely to be offensive and scandalous to society despite the lack of explicit, full-frontal nudity.

MYNTRA (Logo)



109. Trademark Registration of White Dove (label) in Maharashtra, STARTUPWALA, [https://www.startupwala.com/trademarks-registration/search-MUMBAI-WHITE-DOVE-\(LABEL\)-1646533](https://www.startupwala.com/trademarks-registration/search-MUMBAI-WHITE-DOVE-(LABEL)-1646533) [<https://perma.cc/KF8V-XXSW>] (last visited May 16, 2022).

110. Trademark Search for “Orgy” within Class 25, Gov. of INDIA, MINISTRY OF COMMERCE & INDUSTRY, DEPARTMENT OF INDUSTRIAL POLICY & PROMOTION, CONTROLLER GENERAL OF PATENTS DESIGN & TRADE MARKS, <https://ipindiaonline.gov.in/tmrpublicsearch/tmsearch.aspx?tn=337854652&st=Wordmark#> [<https://perma.cc/F2VP-4AN5>] (last visited May 16, 2022).

A rather noteworthy, modern scenario arises with the “Myntra” logo which India registered. The mark went uncontested for almost a decade, before being brought into the limelight in 2020. While the case never went to court, the Cyber Crime Department found the logo to be *prima facie* insulting towards women based on the complaint. The following suit demonstrates how the Mumbai Cyber Crime department is known to have catered toward hypersensitive individuals in determining how offensive a logo is.

In December 2020, Mumbai-based activist Naaz Patel of Avesta Foundation NGO filed a complaint with the Cyber Crime Department of the Mumbai Police.¹¹¹ The complaint alleged that Myntra’s Brand logo (legally called “Trade Mark”) is offensive to women.¹¹² In interviews, Patel explains that she realized that the logo was offensive after having seen people laugh at it.¹¹³ After some conversations, she realized that the logo was disrespectful towards women.¹¹⁴

The Mumbai Cyber police found the logo *prima facie* insulting towards women.¹¹⁵ Mumbai Cyber Crime Department responded to the complaint wherein they “found” the logo to be offensive to women because it looks like the legs of a woman spread open, with the middle depicting a vagina.¹¹⁶ It is pertinent to note that no further explanation or detailed reasoning was given by the Mumbai Cyber Crime Department.¹¹⁷ Such a reasoning would have been helpful because it would have elucidated what considerations went into determining the logo as “offensive to women.” The Cyber Crime Department sent a legal notice to Myntra, and within a month of the complaint with no objection, the e-commerce business revised its logo so that the orange and purple elements no longer overlap to create a red center and the shades are no longer the same so that it looks less like a vagina.¹¹⁸ As of date, Myntra already applied on January 13, 2021, for a Multi-Class Series Application (Class 99) bearing trademark number 4819586 for its revised logo.¹¹⁹

This *prima facie* decision made by the Mumbai Cyber Crime department is an over-reaction, and it shows that the law enforcement is willing to see from the viewpoint of a few hypersensitive persons.

111. Daniel Piper, *Is This Really the Most Offensive Logo of 2021?*, CREATIVE BLOQ (Dec. 30, 2021), <https://www.creativebloq.com/news/most-offensive-logo-of-2021>[<https://perma.cc/J7XP-5YZ9>].

112. *Id.*

113. Anshal Dhiman, *Myntra Trademark Change: Overhyped*, iPLEADERS: BLOG (Mar. 15, 2021), <https://blog.iplayers.in/myntra-trade-mark-change-overhyped> [<https://perma.cc/K4RA-84QD>].

114. *Id.*

115. Trademark Registration of White Dove (label) in Maharashtra, *supra* note 109.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

Looking at the logo, it is highly unlikely for a person to perceive it as derogatory and obscene to women because one would have to stretch the imagination considerably or be prompted beforehand to see that it may be portrayed as a nude woman; it otherwise looks like an innocent letter “m” with pink, nude, and orange overlapping colors.¹²⁰ The unlikelihood is proven by the fact that Myntra’s logo had not been objected to until December 2020, 10 years since its registration as a trademark in India.¹²¹

b. The Registration of Marks Likely to Harm Religious Susceptibilities

Religious Figures and Symbols

Indian case law and the prohibited marks list (available on the Government of India’s Public Search of Trademarks) provide some guidance as to which marks may harm religious susceptibilities of the Hindu, Jain or Sikh communities. While some names are outright prohibited, others may not be used in conjunction with certain goods. Finally, certain names may be used in limited contexts because India recognizes that personal names often overlap with names for gods. It is a common trade practice in India to use names and pictures of Gods and Goddesses or religious symbols as trademarks. Typically, using the likeness of these deities and symbols is not regarded by the public as offending religious sentiments of any class or section. However, exceptions are found with respect to use in relation to certain goods. Then, using the likeness of these deities and symbols may offend the religious sentiments of the people. For example, as pointed out in the 2009 Draft Manual, the registration of trademarks consisting of Goddess Meenakshi is not allowed with respect to fertilizers and manures under section 11(b) of the 1958 Trademarks Act (1976 IPLR 144)¹²².

How India proceeds with trademarking names adjacent to gods is a rather gray area. Therefore, to better explain this concept, the mark “Vishnu” Will be analyzed. Vishnu is the second person of the Hindu Trinity, representing the principle of stability. As such, the use of the word “Vishnu” could be used by merchants as a direct reference to the character and quality of the goods.

In 2004, the Intellectual Property Appellate Board upheld the validity of a trademark for Vishnu Cement Limited in *Vishnu Cement Limited vs. B.S. Cement Private Limited*.¹²³ While the mark made reference to a major Hindu God, the court held “the name of Hindu Gods are used as personal names and they are also commonly used as trademarks. It cannot be said that merely using that name as a trademark would hurt the religious susceptibility of Hindus.” In the absence of the formal term

120. *Id.*

121. *Id.*

122. *TMR Draft Manual 2009*, *supra* note 72, at 96.

123. *Vishnu Cement Limited vs. B.S. Cement Private Limited* 2004 (28) PTC 314 IPAB <https://indiankanoon.org/doc/1437321> [<https://perma.cc/8AAU-GT3D>].

“Lord Vishnu,” the word “Vishnu” is treated by the register only as a personal name, attaching no religious significance.¹²⁴

This can be contrasted to several rejected trademarks such as *Vishnu Shakti* which has a more religious connotation. Vishnu Shakti is the name given in Hinduism to a type of divine energy and ability of perception, which is markedly different than a common name merely inspired by a deity.¹²⁵

Venkateswara, a form of the Hindu god Vishnu, however, is still included in the prohibited marks list provided by the Government of India’s Public Search of Trade Marks.¹²⁶ The list includes the following religious figures: *The Lord Buddha, Guru Nanak, Guru Amar Das, Guru Angad, Guru Arjan Dev, Guru Gobind Singh, Guru Harkrishan, Guru Har Rai, Guru Hargobind, Guru Ram Das, Guru Tej Bahadur, Guru Tegh Bahadur, Lord Venkateswara, Shree Sai Baba, Swami Vivekananda, Lord Venkateswara, The Holy Mother/Sri Sarada Devi, Sri Ramkrishna*. The list also included the following religious symbol: *Dharma Chakra*.

It is unclear whether names and symbols outside of these heavily Hindu and Sikh figures can be trademarked at all, or just *per se* in connection with imagery or goods that would offend religious sentiments. For example, while Allah is the Muslim word for God, this is not included in the list of prohibited trademarks provided above. Also excluded are any Muslim figureheads, despite it being the second most prevalent religion in the region, while Buddhist, Jain, and Sikh deities and figureheads are included. However, in practice, “Allah” seems to have been consistently refused by the registry, including class 14 registrations for jewelry including: “allah kareem locket,” “allah kareem locket (device)” and “Allah Barkat” even though they would not be offensive to religious sentiments and are quite common in Islam.¹²⁷

Religious Books

The ruling on the acceptability of registering religious books is far less ambiguous than religious figures and symbols. The word “Ramayan,” a religious Sanskrit text for Hindus, was refused registration.¹²⁸ There, the

124. *TMR Draft Manual 2009*, *supra* note 72, at 96.

125. *See Details of Vishnu Shakti Trademark*, ZAUBA CORP, <https://www.zaubacorp.com/trademark/VISHNU%20SHAKTI/1407408> [<https://perma.cc/EK5Y-DL5A>] (last visited May 16, 2022).

126. *Prohibited Marks*, GOV. OF INDIA, MINISTRY OF COMMERCE & INDUSTRY, DEPARTMENT OF INDUSTRIAL POLICY & PROMOTION, CONTROLLER GENERAL OF PATENTS DESIGN & TRADE MARKS, <https://ipindiaonline.gov.in/tmrpublicsearch/prohibitedmarks.aspx> [<https://perma.cc/EC3B-DGT9>] (last visited May 16, 2022).

127. Trademark Search for “Allah” in Class 14, GOV. OF INDIA, MINISTRY OF COMMERCE & INDUSTRY, DEPARTMENT OF INDUSTRIAL POLICY & PROMOTION, CONTROLLER GENERAL OF PATENTS DESIGN & TRADE MARKS, <https://ipindiaonline.gov.in/tmrpublicsearch/tmsearch.aspx?tn=337859801&st=Wordmark> [<https://perma.cc/EY6U-YAS9>] (last visited May 16, 2022).

128. *TRM Draft Manual 2009*, *supra* note 72, at 96; *see Amritpal Singh vs. Lal Babu Priyadarshi And Anr. 2005* (30) PTC 94 IPAB <https://indiankanoon.org/doc/321613> [<https://perma.cc/2FYC-8HA5>] (India).

appellant sought registration of the name to go along with a picture of a crown for his product—incense sticks which included photographs of Lord Rama, Sita and Lakshman on the carton.¹²⁹

In an appeal from the Intellectual Property Appellate Board (IPAB), The Indian Supreme Court held that since the word “Rama-yan” denoted the title of a religious book and because the presence of the photographs of gods were on the carton of the product, the product was held to be impermissible for the purposes of registration.¹³⁰ The Court held that a person may not trademark a holy or religious book such as the Quran, Bible, Guru Granth Sahib, Ramayan etc. because allowing names of holy books to be trademarked could offend people’s sensibilities.¹³¹

3. Landscape Analysis on the Morality of Marks

In sum, India’s colonial history mirrors its trademark laws, as it first adopts and then departs from looking to the British as the legal role model. India was carved by the deep religious tensions that permeated throughout its history, and as a result the trademark laws with respect to morality seem to be deeply rooted by a need to maintain religious peace. With respect to scandalous marks, the government seems to be receptive to what would be offensive to a person, even a hypersensitive person. Finally, with the exception of religious books, there does not seem to be an entirely clear-cut answer as to when a religious name would be deemed offensive to religious susceptibilities.

The Influence of ‘Pseudo-Secularism’

Relevant to the theme of trademark morality is an analysis of the role religion has played in government. With the Forty-second Amendment of the Constitution of India enacted in 1976, the Preamble to the Constitution asserted that India is a secular nation.¹³² Religion in India is characterized by a diversity of religious beliefs and practices. While the 2011 census indicates that India is majority Hindu, religious minorities have sizeable populations as well.¹³³ Not only do most of the world’s Hindus, Jains and Sikhs live in India, but it also is home to one of the

129. Pranit Kulkarni, *Lal Babu Priyadarshi vs. Amritpal Singh*[1], LINKEDIN (Apr. 2, 2020) <https://www.linkedin.com/pulse/lal-babu-priyadarshi-vs-amritpal-singh1-pranit-kulkarni> [<https://perma.cc/7C8Q-E4EL>].

130. *Id.*

131. *See No One Can Claim Trademark Right on Holy Books: Supreme Court*, THE ECONOMIC TIMES, <https://economictimes.indiatimes.com/news/politics-and-nation/no-one-can-claim-trademark-right-on-holy-books-supreme-court/articleshow/49922846.cms?from=mdr> [<https://perma.cc/N8M7-XT4E>] (Nov. 25, 2015, 06:29 PM IST).

132. Christophe Jaffrelot, *A Skewed Secularism?*, HINDUSTAN TIMES (May 15, 2011, 10:39 PM IST), <https://www.hindustantimes.com/ht-view/a-skewed-secularism/story-MfUza7MZXVWxuUXJIvZQ6J.html> [<https://perma.cc/KZ6R-T5HK>].

133. *See Hindu Muslim Population in India*, POPULATION CENSUS, <https://www.census2011.co.in/religion.php> [<https://perma.cc/Q4RB-BLGU>].

world's largest Muslim populations, and is home to millions of Christians and Buddhists.¹³⁴

However, India no longer completely separates religion and state as it once did under Prime Minister Manmohan Singh.¹³⁵ The current prime minister, Narendra Modi, has been criticized for his Hindutva, sectarian politics catering to the Hindu majority.¹³⁶

Modi's political party, the Bharatiya Janata Party (BJP) not only wants India to be rid of "Bangladeshi migrants" but also has normalized the persecution of Indian Muslims.¹³⁷ Prior to the 2019 general election, BJP President Amit Shah called Bangladeshi Muslim immigrants, "termites," and pledged that a BJP government would "pick up infiltrators one by one and throw them into the Bay of Bengal." In a think piece, Shashi Tharoor, comments on the bigotry towards Muslims.¹³⁸ He discusses the dramatic increase in lynchings of Muslims for offenses such as consuming beef, campaigns against Hindus marrying Muslims, restrictions on Muslim practices, and preventing fast-track citizenship to individuals who are Muslim.¹³⁹

Not surprisingly, Hindu deities, symbols, and figures are the subject of the majority of the legislative directions for deeming trademarks immoral in the 2015 Draft Manual. Not included in the explicit list of unauthorized religious names in the trademark guidance are Islamic marks. All of the explicitly prohibited religious deities and figures are Hindu, Jain, and Sikh. By including only Hindu, Sikh, and Jain names in the official guidance of prohibited marks, India may also project a certain vision of Indian identity in line with the "pseudo-secularism" and Hindutva ideology espoused by Modi and the BJP, which has its roots from the religious tension harbored from the partition between India and Pakistan.

The Influence of Free Speech Traditions

With regards to scandalous and immoral trademarks, India finds itself at a definitional crossroads. In the case of *Directorate General of Doordarshan v. Anand Patwardhan*, the Supreme Court held that "the

134. Johnathan Evans & Neha Sahgal, *Key Findings about Religion in India*, PEW RESEARCH CENTER (June 29, 2021), <https://www.pewresearch.org/fact-tank/2021/06/29/key-findings-about-religion-in-india> [https://perma.cc/W4YE-JU8G].

135. Jaffrelot, *supra* note 132.

136. See Azeem Ibrahim, *Modi's Slide Toward Autocracy*, FOREIGN POLICY (July 13, 2020, 12:11 PM), <https://foreignpolicy.com/2020/07/13/modi-india-hindutva-hindu-nationalism-autocracy> [https://perma.cc/3QE7-JF5T].

137. Debasish Roy Chowdhury, *Is India Headed for an Anti-Muslim Genocide?*, TIME (Oct. 4, 2021, 8:17 AM EDT), <https://time.com/6103284/india-hindu-supremacy-extremism-genocide-bjp-modi> [https://perma.cc/67YS-8XUD].

138. Former UN under-secretary general, former Indian Minister of State for External Affairs, Minister of State for Human Resource Development, and a member of parliament for the Indian National Congress.

139. Sashi Tharoor, *Modi's Anti-Muslim Jihad*, PROJECT SYNDICATE (Nov. 11, 2021), <https://www.project-syndicate.org/commentary/bjp-islamophobia-hate-crimes-against-muslims-by-shashi-tharoor-2021-11> [https://perma.cc/XR8U-C8AR].

Indian Penal Code on obscenity grew out of the English Law, which made Court the guardian of public morals.”¹⁴⁰ Trademark morality as applied in India is a gray and under standardized area, as the country is caught in the middle ground of wanting to create their own definition of “obscene and scandalous,” while determining how much it should depart from the UK law that it has clung to in the past for guidance, even years after emancipation.

In regards to scandalous and immoral marks, the newest 2015 draft of the Manual of Trade Marks Practice & Procedure shows a departure from the earlier 2009 version with respect to any legislative guidance from UK law. While the 2009 Manual of Trade Marks Practice refers to the “general principles applied in UK” as to what constitutes “accepted principles of morality” in India, the 2015 revision omits reference to UK law.¹⁴¹ While the guidance in 2009 suggested that the applicability of the objection must be decided objectively and in a manner that is not discriminatory, the term “accepted principles of morality” is somewhat harder to define, and the general principles applied in UK may be relevant.¹⁴² UK law is no longer pointed to in the 2015 iteration. The deletion of this explicit reliance on UK decisions could be part of a general rejection of looking to UK law, indicating a fuller colonial emancipation and a stronger sense of Nationalism. However, it could also be due to a different reason altogether. As pointed out by Dev Gangjee in his analysis of Non-Conventional Trade Marks in India, British Law evolved away from its common law origins and continues to become increasingly European, with a number of civil law concepts and interpretative techniques informing the development of substantive trademark law.¹⁴³ Perhaps because it no longer reflected common law principles, it would be no longer beneficial to India.

Whether a trademark is considered obscene is not a clear-cut answer in India. Article 19(1)(a) guarantees the citizens of India freedom of speech and expression.¹⁴⁴ The mode can be anything from the following: oral, written, electronic, broadcasting, press, or others.¹⁴⁵ However, there are several sections of the penal code that criminalize certain types of speech. For example, Section 153A makes it illegal to “[promote] enmity between different groups on the basis of religion, race, place of birth, residence, language, or other factors, and to do acts prejudicial to

140. *Director General, Directorate General of Doordarshan & Ors. v. Anand Patwardhan & Anr.*, Unreported Judgments, C.A. No. -000613–000613 of 2005, decided on Aug. 25, 20006 (SC), 5, <https://main.sci.gov.in/jonew/judis/27983.pdf> [<https://perma.cc/EZ4C-33C9>].

141. *TMR Draft Manual 2009*, *supra* note 72, at 98.

142. *Id.*

143. Gangjee, *supra* note 64 at 70.

144. India Const. art. 19, cl. 1(a).

145. *Id.*

the maintenance of harmony by words, either spoken or written, or by signs, visible representations, or other means.”¹⁴⁶

Obscenity is illegal under Section 292 of the Criminal Code. Section 295A makes it illegal for individuals to commit “deliberate and malicious acts intended to insult religious emotions of any class.”¹⁴⁷ Section 298 makes it illegal to “utter any word or make any sound” with the “deliberate intention of injuring a person’s religious emotions.”¹⁴⁸

The conflicting jurisprudence makes it difficult to propose whether trademarks would qualify as “speech.”¹⁴⁹ As voiced by Divij Joshi, a prominent technology and policy lawyer in India, even if trademarks do meet the barrier of ‘speech’ under the constitution, it would still have to be proven that any restriction on the speech is not ‘reasonable’ and is in the “*interest of sovereignty and integrity of India, public order, decency or morality*” to be struck down as unconstitutional.¹⁵⁰

While restrictions of speech on the ground of ‘obscenity’ have passed constitutional scrutiny in India, restrictions due to being ‘likely to hurt religious susceptibilities’ and ‘scandalous’ have not been tested in view of Article 19(1)(a).¹⁵¹ Joshi hypothesizes that it is likely that any defense of these provisions would be based on such restriction being ‘in the interest of . . . morality and decency’ under Article 19(2), which does not have a clear standard of applicability by Courts.¹⁵²

There are two thresholds for obscenity in India: the Hicklin Test vs. the Test of Contemporary Standards.¹⁵³ The former is derived from British law, and the latter from Indian law.

146. Indian Penal Code, 1860, § 153A.

147. Indian Penal Code, 1860, § 295A.

148. Indian Penal Code, 1860, § 298.

149. Indian jurisprudence makes a distinction between commercial speech and political speech but does not set a clear principle on the non-protectability of commercial speech. In *Hamdard Dwakhana v. Union of India*, the Supreme Court considered a law that banned misleading advertisements. *Hamdard Dwakhana v. Union of India*, AIR 1967 SC 1167 (1964). When this law was challenged as violating the advertisers freedom of speech and expression, the Court held that such advertisements were not ‘speech’ within the meaning of Article 19(1)(a), and that “*it cannot be said that the right to publish and distribute commercial advertisements advertising an individual’s personal business is a part of freedom of speech guaranteed by the Constitution.*” The Court reached its conclusion on the basis that a commercial advertisement ‘is not an propagation of ideas’ but related to ‘commerce and trade’. In *TATA Press v. MTNL*, the Supreme Court struck down a law restricting yellow pages from being published, categorically held that “commercial speech” is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution, on the premise that such speech would also serve a democratic purpose. *Tata Press Ltd. v. Mahanagar Telephone-Nigam*, AIR 1995 SC 2438.

150. Divij Joshi, *Matal v. Tam and the Question of Free Speech and Trademarks – Part II*, SPICY IP (July 5, 2007), <https://spicyip.com/2017/07/matal-v-tam-and-the-question-of-free-speech-and-trademarks-part-ii.html> [<https://perma.cc/LJ9X-RM2X>].

151. See *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881 (1964).

152. See *Dr. Ramesh Yeshwant Prabhu vs. Shri Prabhakar Kashinath Kunte* AIR 1996 SC 1113 (1995).

153. Sannidhi Mahapatra, Legal Issues in ‘Trademark and Obscenity’ Issue: What

The Hicklin Test asks if the matter charged as obscene has the tendency to corrupt or deprave those who perceive it. The Hicklin test looks at the potential audience in determining the standard.¹⁵⁴

The Test of Contemporary Standards, draws a line between obscenity and vulgarity and observes that “what arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel is vulgarity.”¹⁵⁵

In *Aveek Sarkar v. State of West Bengal*, the Supreme Court of India held that a picture of a nude/semi-nude woman, cannot per se be called obscene unless it tends to arouse feeling or an overt sexual desire.¹⁵⁶ The picture should be suggestive of a depraved mind and designed to excite sexual passion in the audience. It will depend on the particular posture and the background in which the nude/semi-nude woman is depicted.¹⁵⁷ Only sex-related materials which have a tendency of “exciting lustful thoughts” can be considered obscene, but the obscenity must be judged from the perspective of an average person, by applying contemporary community standards.¹⁵⁸

The Hicklin Test and the Test of Contemporary Standards often result in different approaches. India seems to favor the latter departing from the British Hicklin Test. The Test of Contemporary Standards is a more conservative, subjective test. But because there is no one set test, there is often a lack of standardization in this area of trademark law with respect to judicial officers.

More conservative and subjective approaches to obscenity highlight how in India, a challenge against restrictions upon the registration of trademarks under Section 9 of the Trade Marks Act is difficult to sustain. Thus, it should come as no surprise that the *MYNTRA* and the *ORGY* trademarks were both found to be sufficiently problematic, although objectively the Myntra mark did not seem to be overtly sexual.

What is remarkable to see in light of the *Myntra* case, is how India is able to readily reject a trademark if it is offensive to even a hypersensitive person. Myntra’s logo had not been objected till December 2020, over 10 years since its registration as a trademark in India. Moreover, the average person would not view it as a lewd photo unless they really stretched their imagination.¹⁵⁹ The logo was rejected because some women were offended and the coloring, which may have resembled a

is the Threshold for Obscenity Under the Trade Marks Act, 1999, ALG INDIA LAW OFFICES LLP (June 28, 2021), https://www.algindia.com/wp-content/uploads/2021/06/LISS-29_Sannidhi-Mahaptra_Legal-Issues-in-my-AOI-1.pdf [<https://perma.cc/GEY6-6HNT>].

154. See *Regina v. Hicklin* L.R. 3 Q.B. 360, 367 (1868).

155. *Samaresh Bose v. Amal Mitra*, AIR 1986 SC 967 (1985).

156. *Aveek Sarkar & Anr v. State of West Bengal and Anr.*, (2014) 4 S.C.C. 257.

157. *Id.*

158. *Id.*

159. *Supra* note 109.

character icon with its orange legs opened in a pink dress, suggested full frontal nudity.

The conflicting decisions arise due to the varying degrees of interpretation of “obscene and scandalous matter. Thus, the high probability of subjective understanding interpretation of obscenity by a judge would result in varied degrees of interpretation for scandalous and obscene matter under section 9(2). Perhaps the *Myntra* case is the result of the Indian Legislature’s failure to give a clear-cut, standard definition for “scandalous or obscene matter” under Section 9(2)(C). Perhaps the *Myntra* case can be an opportunity for the Indian legislature to clarify and standardize the meaning of obscene and scandalous instead of leaving it to the personal bias and subjectivity of the judge as seen in *Samaresh Bose v. Amal Mitra*.¹⁶⁰

In conclusion, while India seems to step away from its British colonial past and carve a trademark law of its own, it still clings to the past when it chooses to, like in the case of the Trademark Manual guidance on morality from the UK It was used as far back as 2009 before it was finally amended in 2015. Similarly, the Hicklin Test is still used for obscenity in India. The imposition of a foreign, external law onto a local population, especially in the fields of culture and technology, has led IP to play an important role in identity politics in India.

India is incredibly diverse religiously linguistically and culturally in comparison to Pakistan and Bangladesh which emerged from creating a space for Muslims and/or the Bangladeshi national language. One might expect detailed guidance about various religions in the manual, since examiners might not be attuned to the sensitivities of all groups.

However, the expressly prohibited religious trademarks seem to include deities and symbols from the Hindu, Buddhist, Jain and Sikh faiths but not any Muslim ones despite it being the second most prevalent religion in the region. Yet in practice, certain Muslim trademarks are prohibited even if they are paired with acceptable, non-offensive goods. This may be to curry favor with the Anti-Muslim attitudes surrounding Modi. While each minority group may not be represented in the legislative material or trademark registry’s prohibited mark instructions, the government does seem to be openminded at least in practice if not *per se*, about making sure to not offend sensibilities whether they be moral or religious given a lack of standardization of what names are considered religiously offensive, and what types of marks are considered immoral or scandalous. It would be interesting to see if there is more legislative clarity in these areas, and if a gradual shift to bright-line rules will accompany India’s future in trademark law.

B. *Pakistan*

The Pakistani government acknowledges that while the country had not officially formed until 1947, the first trademark law that

160. See *Samaresh Bose v. Amal Mitra*, AIR 1986 SC 967 (1985).

governed Pakistan, the Trade Marks Act, was passed in 1940.¹⁶¹ This law is identical to the Trade Marks Act of 1940 in India, both in name and substance; prior to partition, the areas now part of Pakistan were governed by the 1940 Act like the rest of British India. Pakistan later decided to amend and consolidate the law relating to trademarks and unfair competition to provide for registration, better protection of trademarks, and the prevention of infringement. Therefore, the President of Pakistan passed the Trade Marks Ordinance of 2001, the codified law related to the registration of trademarks for goods and services within Pakistan, to succeed the 1940 Act.¹⁶² Trademark law in Pakistan is presently governed by the Trade Marks Ordinance, 2001 and the Trade Marks Rules, 2004 which set out the process and procedure for filing a trademark.¹⁶³

Pakistan is also a signatory to the following international agreements: WIPO since 1977, Paris Convention since 2004, and the (amended) TRIPS agreement since 2010.¹⁶⁴

This section traces the influences on trademark registration in Pakistan with respect to the morality clause of Section 14 of the 2001 Trade Marks Ordinance including religion and political climate, while laying out the government's framework for morality of marks. Additional examples of trademarks outside of the government's framework that illustrate what the government deems satisfactory or unsatisfactory for registration under the Section 14 bar, will be posited. The Section 14 bar states in pertinent part:

14. Absolute grounds for refusal of registration.-

(3) No trade mark nor any part thereof in respect of any goods or services shall be registered which consists of, or contains, any scandalous design, or any matter the use of which would—

...

(b) be likely to hurt the religious susceptibilities of any class of citizens of Pakistan, *per se*, or in terms of goods or services it is intended to be so registered;

or (c) be contrary to any law, for the time being in force or morality.¹⁶⁵

1. Legal Guidance on the Morality of Marks

Unlike India, Pakistan does not, at least publicly, include legislative guidance created by their trademark registrar on the registration of scandalous or obscene marks as well as marks that are likely to harm religious susceptibilities. Beyond the guidance of section 14, there are no prohibited marks *per se*. However, present case law and registrations

161. *IPR Toolkit*, *supra* note 12, at 1.

162. *Id.*

163. *Id.*

164. WORLD TRADE ORGANIZATION, *supra* note 60.

165. Pakistan Trade Mark Ordinance, 2001, *supra* note 43 at p. 10.

allow for a better understanding of what Pakistani society deems to be moral/immoral for marks. There are several limiting factors limiting a full, robust discussion because specific rejections to trademark filings and court cases where trademarks have been rejected under the section 14 do not seem to be available online or in circulation in the U.S. for a full analysis. While it may very well be the case, this analysis should not be taken to mean that the prohibition is not applied frequently.¹⁶⁶ Pakistan Civil courts simply are not equipped with the requisite digital technology and are dependent on labor-intensive manual methods of record-keeping, resulting in many records being confined to the geographical boundaries of Pakistan.¹⁶⁷

The contours of what is considered religiously offensive to the susceptibilities of citizens in Pakistan, as well as what is considered “scandalous” or “obscene” here will be considered through case law and registrations, since there is no formal Draft manual like in India.

a. The Registration of Scandalous or Obscene Matter

3SUM

Certain marks which may be regarded as scandalous in English, have been registered in Pakistan. Here, in the case of “3Sum,” the word spelled out i.e. “threesome” is a slang term for sexual acts between three individuals. This mark was registered in the Trade Marks Registry for pharmaceutical and veterinary preparations under class 5 in January 2022.¹⁶⁸ The three is replaced with the number instead. According to precedent of the Pakistani courts, such a mark is not an invented word, which would get one of the highest levels of trademark protection as a coined mark. Words which are pronounced like ordinary English words, but are misspelt do not become new words. An addition to or variation of an English word would not produce an invented word.¹⁶⁹ Ordinary descriptive words which are merely misspelt or combined with a common termination or which contain trivial variations or alterations, but which nevertheless convey same sound or meaning without constituting substantially different words or which are spelt ‘phonetically, fantastically or conventionally’ or are ordinary slang words and do not qualify as invented words. This is despite the fact that they are common words and are not found in the dictionary.¹⁷⁰

Currently, Pakistan allows marks like 3SUM to be trademarked because while it may be considered scandalous in a primarily

166. *Case law: online resources for common law countries: Pakistan*, BODLEAN LIBRARIES UNIVERSITY OF OXFORD, <https://ox.libguides.com/c.php?g=423193&p=2889653> [<https://perma.cc/R5MC-M29V>].

167. Mayhar Qazi, *Q&A: Conducting Litigation in Pakistan*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=8108bcfa-bd6c-4a89-b2f8-583a5e6e9485> [<https://perma.cc/BD4X-77QA>].

168. *3SUM*, THE TRADE MARKS JOURNAL (Registrar of Trade Marks Registry, Karachi, PK), Jan. 1, 2022, at 7160, https://ipo.gov.pk/system/files/852%20%28January%2C%202022%29_0.pdf.

169. *Boots Pure Drugs Co. Ltd. V. Registrar of Trade Marks*, P L D 1973.

170. *Nat'l Disinfectant Co. v. Nat'l Detergents Ltd.*, (1983) PLD 402 (Pak.).

English-speaking nation, this is not the case in Pakistan. However, the mark is used in with the context of seemingly harmless pharmaceutical and veterinary preparations. Therefore, it might carry another innocent meaning referring to its chemical or physical properties. Moreover, the wording of the statute in Pakistan, “No trade mark . . . shall be registered . . . which consists of, or contains, any scandalous design,” refers to the logo and design and imagery of the logo rather than the literal meaning of the words themselves. It contrasts with India’s trademark which refers to “scandalous or obscene matter” rather than “design” which is more inclusive of wording itself.

CHANAR PHARMA (Logo)

Another example of a mark that might be regarded as scandalous, but was registered in Pakistan is the mark for “Chanar Pharma” and its associated logo. While weed is ordinarily illegal in Pakistan and disallowed in Islam, this mark was registered in January 2022 under Class 5 for Pharmaceutical substances.¹⁷¹ While it is not a marijuana plant, it is a green oak leaf in conjunction with a pharmacy that may or may not sell medical marijuana, which is allowed in Pakistan. There is a stigma against marijuana in Pakistan as an Islamic country¹⁷², seeing that for the most part, cannabis is banned under Islamic law.¹⁷³ Under the Control of Narcotics Substance Act of 1997, it is illegal to produce, manufacture, extract, prepare, possess, offer for sale, sell, purchase, or distribute cannabis in Pakistan. However, a permit from provincial or federal government for cultivation of cannabis is allowed for medical, scientific or industrial purposes. A violation of the prohibition on cannabis is punishable with imprisonment which may extend to seven years, with a fine, or with both.¹⁷⁴ Yet this flew under the radar. Perhaps there is a changing attitude on marijuana at least for medicinal purposes.



171. THE TRADE MARKS JOURNAL, *supra* note 168, at 7119.

172. See generally Syed Saboor Hasan et al., *Perception and Practices Regarding Cannabis Consumption in Karachi, Pakistan: A Cross-Sectional Study*, 20 J. ETHNICITY SUBSTANCE ABUSE 471 (2021), https://www.researchgate.net/publication/336129366_Perception_and_practices_regarding_cannabis_consumption_in_Karachi_Pakistan_A_cross-sectional_study [<https://perma.cc/D2N8-M2NC>].

173. See generally Maziyar Ghiabi et al., *Islam and Cannabis: Legalisation and Religious Debate in Iran*, 56 INT’L J. ON DRUG POL’Y 121 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6153265> [<https://perma.cc/AP5L-98T9>].

174. See generally Control of Narcotic Substances Act, (Act No. XXV of 1997) (Pak.) <https://na.gov.pk/uploads/documents/Control-of-Narcotic-Substances-Act-XXV.pdf> [<https://perma.cc/Y38U-QNYC>].

b. The Registration of Marks Likely to Harm Religious Susceptibilities

While there are no bright-line rules that explicitly define what is likely to harm religious susceptibilities, a trademark would not be registered if it injures the religious feelings of Muslims or of any sect of Muslims if used as a trademark. Guidance on religions other than Islam is not available, presumably because Pakistan is an Islamic nation governed by Shari'ah law. However, with a stretch of imagination, the inquiry of what is deemed adverse to religion is discernable.¹⁷⁵

Trademarks Surrounding Islamic Figures and Symbols



Unlike India where trademarks for certain religious figures and deities are explicitly prohibited in guidance from the trademark office and the trademark registry's list of prohibited marks, the same cannot be said for Pakistan which doesn't seem to have a restriction *per se* available publicly. The Trade Marks Registry of Pakistan has accepted the names of religious figures as trademarks from Shia as well as Sunni sects including most recently in its April 2022 and March 2022 catalogs of registered trademarks, the words *MUSLIM PRO*, *HASAN*, and *USMAN*.¹⁷⁶ The word *BURAQ* along with the symbol of a horse is also a registered trademark despite the similarities between the logo and the religious symbol.¹⁷⁸

Sect-neutral trademarks also seem to be accepted. For example, the Registrar of Trade Marks accepted the word "hafiz." The court held that the trademark *HAFIZ* would mean a protector, preserver, a guardian, a governor, and by all these meanings the word "Hafiz" was a word that could not be rejected as a trademark. Hafiz is a neutral word used

175. See AHSAN S. ANJUM, *MANUAL OF TRADE MARKS: A BOOK FOR BUSINESSMEN AND LAWYERS* 57–58 (MANSOOR BOOK HOUSE 1991); see also *Hussain Agahi, Multan v. Registrar of Trade Marks* (1987) CLC 1448 (Pak.).

176. TRADE MARKS REGISTRY, *THE TRADE MARKS J.*, no. 854, Mar. 1, 2022, at 9172, 10077 (Pak.), <https://ipo.gov.pk/system/files/854%20%28March%2C%202022%29.pdf> [<https://perma.cc/Q9SF-CEG6>].

177. Usman ibn Affan was one of the companions of the prophets and is the third caliph of Islam, who is heavily revered in Sunni tradition and shunned in Shia tradition. Hasan ibn Ali was the second Imam in Shi'a Islam and grandson of the Prophet.

178. The Buraq is a revered, mythical, flying horse that transported prophets. It is often illustrated as a horse with wings, or a horse with wings as well as with the face of a human.

by all sects, that also means someone who has memorized the Quran in its entirety. The acceptance of “Hafiz” as trademark meant that it is not in violation of any of the Trade Marks Act of 1940. The word “Hafiz” used as trademark that in the eyes of the law is not seen as something that would injure religious feelings of Muslims or of any sect of Muslims if used as a trademark.¹⁷⁹

Trademarks Surrounding Alcohol

Curiously, although alcohol is illegal in Pakistan under the principles of Shari’ah law, the government formally recognizes class 33 of the Nice Classification, which pertains to alcoholic beverages.¹⁸⁰ The Register of Trade Marks accepted a trademark for a brewery, perhaps so that it may cater to foreign diplomats and officials.¹⁸¹ Moreover, Pakistan seems to have adopted a trademark for sake—an alcoholic beverage from China.¹⁸² This may also be to establish positive foreign relations with its neighboring country so that Pakistan can improve its international image.

In Pakistan, while alcohol is illegal, it is still permissible under certain contexts. For example, alcohol is legally served to non-Muslims at restaurants in five-star hotels, and those same hotels often have a small shop where beer and liquor are stored.¹⁸³ Typically, a permit is needed to purchase alcohol, which can be applied for at the office of Excise and Taxation in sector F8 in Islamabad.¹⁸⁴



179. Hasan et al., *supra* note 172.

180. See generally Class 33 of the Nice Classification, INTELL. PROP. ORG. PAK. (11th ed. 2021) <https://ipo.gov.pk/system/files/20210101-en-class-flat-33.pdf> [<https://perma.cc/8YB6-GMCK>].

181. See Trademark Details for ESTD 1861 MURREE BREWERY CO.LTD., JUSTIA, <https://trademarks.justia.com/862/72/estd-1861-murree-brewery-co-86272530.html> [<https://perma.cc/YHR5-2YCO>] (last visited May 16, 2022).

182. TRADE MARKS REGISTRY, *supra* note 176.

183. Heather Carreiro, *Guide to Drinking and Buying Alcohol in Pakistan*, MATADOR NETWORK, Jan. 27, 2011, <https://matadornetwork.com/nights/guide-to-drinking-and-buying-alcohol-in-pakistan> [<https://perma.cc/G5X7-MDMT>].

184. *Id.*



Advertised under section 28(1) of Trade Mark Ordinance 2001. (Rule 29(1)) of Trade Marks Rule 2004.

Application No: 601099

Title

Class: 33

Goods or services: 33 Rice alcohol; Yellow rice wine; Fruit extracts, alcoholic; Alcoholic beverages, except beer; Alcoholic beverages containing fruit; Sake; Wine; Edible alcohol; Baijiu [Chinese distilled alcoholic beverage]; Spirits [beverages]; Cooking wine

Name and address of Applicant: Foshan Haitian Flavouring & Food Co., Ltd. (a company organized and existing under the laws of The People's Republic of China), No. 16, Wen Sha Road Foshan City, Guangdong ProvinceFF

Date of filing: 28/01/2021

Agent's name: TMT LAW SERVICES Annexe Auqaf, 2nd floor, Suite No. 1, 2 & 3,
And address: (Adjacent) Lahore High Court, The Mall, Lahore-54000

2. Landscape Analysis on the Morality of Marks

Pakistan is unique in its approach to trademark law as compared to India and its former colonizer, the United Kingdom. To understand Pakistan's unique approach to trademark law, it is also necessary to understand how Pakistan's development into a Muslim nation has informed its trademark law regime, especially when compared to the UK and India.¹⁸⁵ While Pakistan identifies as a devoutly Muslim nation, its trademark regime is markedly more open to protecting marks that would conflict with Shari'ah law. Even allowing for trademarks to carry names of entities that are sacred to Sunni and Shia Muslims. Nevertheless recently, Pakistan has allowed for the registration of marks that would not comply with the principles of Shari'ah Law as the country steps towards a more secular route.

Prior to 1955, Pakistan was a secular nation. However, Pakistan adopted Islam as its state religion during the ratification of its 1956 constitution.¹⁸⁶ While Islam is the main religion in Pakistan, Pakistan is characterized by a diversity of religious beliefs and practices, as well as different sects within Islam. The Pakistan Bureau of Statistics released religious data of Pakistan Census 2017 on May 19, 2021 finding that

185. The paramount body of law Pakistan is the *Shari'ah*. The *Shari'ah* is composed of a collection of fundamental principles derived from a number of different sources, including the Holy Quran, the *Sunnah* (sayings of the Prophet Mohammed) and the works of *Shari'ah* scholars. In addition to the *Shari'ah*, Pakistan law is also derived from enacted legislation. All such laws are ultimately subject to and cannot conflict with the *Shari'ah*. See John Pike, *Pakistan Legal System*, GLOBAL SECURITY, <https://www.globalsecurity.org/military/world/pakistan/legal-system.htm> [https://perma.cc/XQV2-LJN8] (last visited May 16, 2022).

186. Abbas Nasir, Opinion, *How Pakistan Abandoned Jinnah's Ideals*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/opinion/pakistan-jinnah-ideals-abandoned.html> [https://perma.cc/E2JS-SZEJ].

96.47 percent are Muslims, followed by 2.14 percent Hindus, 1.27 percent Christians, 0.09 percent Ahmadis and 0.02 percent others.¹⁸⁷ Pakistan seemingly values religious tolerance for its minorities; the significance of the color and symbols used in the Pakistani Flag is as follows: the white and dark green field represents Minorities and Muslim majority, respectively, the crescent on the Flag represents progress, the five-rayed star represents light and knowledge.¹⁸⁸

Pakistan practices a more liberal approach to trademark, notwithstanding its identity as a Muslim nation beholden to Shari'ah Law, as it is surprisingly lenient in its trademark regime compared to other areas of regulation and government control. There seems to be a greater leniency enjoyed by the types of goods that can be trademarked in Pakistan compared to, other countries that follow Shari'ah law. Countries that strictly tailor their trademark law to Shari'ah law have prohibited a wide array of material from trademark protection.¹⁸⁹ There are registrations in Pakistan for alcohol, and in the case of "3Sum," words with indecent meaning which is in stark contrast to the "orgy" registration that was denied in India.

Pakistan has regulated and restricted a wide array of conduct that conflicts with Shariah Law. Pakistan has heavily regulated internet access, limiting everything from webpage content to access to pages that may "offend Islamic morality."

One of the more high-profile cases of internet censorship in Pakistan was the blocking of YouTube response to the posting of the anti-Islamic video "The Innocence of Muslims."¹⁹⁰ In January 2016, a localized version of the YouTube platform, YouTube PK, became available. The Pakistani government only agreed to the use of the localized platform when Google agreed to allow takedown requests, through a direct channel, to remove any "objectionable content."¹⁹¹

187. Khalid Hasnain, *Pakistan's Population is 207.68m, Shows 2017 Census Result*, DAWN (May 19, 2021), <https://www.dawn.com/news/1624375/pakistans-population-is-20768m-shows-2017-census-result> [<https://perma.cc/3UE7-Z4GP>].

188. Pakistani Flag, EMBASSY OF ISLAMIC REPUBLIC OF PAK. WASH., D.C. <https://embassyofpakistanusa.org/pakistani-flag> [<https://perma.cc/GCR9-8GFE>] (last visited May 16, 2022).

189. For example, the United Trademark and Patent Services, an international firm of lawyers in the Middle East, provides guidelines on types of trademarks that may not comport with Shari'ah law including prohibitions on registering trademarks related to pornographic material, words which have indecent meaning or translations thereof, pictures which reveal naked men or women, alcohol, narcotics, pork, sex toys, and gambling. Some countries may even not allow registration of trademarks for bars and night club services. Sarmad Hasan Manto, *Impact of Shari'a on Intellectual Property Laws*, 17 UNITED TRADEMARK & PATENT SERVS. 1 (2019) <http://www.utmps.com/newsletters/impact-of-shari'a-on-intellectual-property-laws/7> [<https://perma.cc/P7DW-4F97>] (last visited May 16, 2022).

190. *Innocence of Muslims*, ENT. WEEKLY, <https://ew.com/creative-work/innocence-of-muslims> (last visited May 16, 2022).

191. Theodor Porutiu, *Censorship in Pakistan: How to Get Around Online Restrictions*, VPNOVERVIEW (Nov. 8, 2022), <https://vpnoverview.com/unblocking/>

Of the 80,000 internet pages currently censored by the PTA and Pakistani ISPs, around 25 percent of them are blocked in Pakistan because they are critical of Islam or offend “Islamic morality.”¹⁹² In a high-profile case, anti-terrorism courts handed down a thirteen-year prison sentence to Rizwan and Saqlain Haider for sharing “hateful messages against the companions of the Prophet Mohammed” on Facebook; he was a Shia Muslim and doing so would go against Sunni Islam.¹⁹³ Blasphemy, defiling the Quran, and using derogatory remarks against the Prophet as well as injuring any place of worship are illegal in Pakistan and may even require a death sentence.¹⁹⁴

Additionally, gambling is illegal for citizens under the Prevention of Gambling Act 1977, which is based on the British-era Public Gambling Act of 1867.¹⁹⁵ Pakistan has strict anti-gambling laws that prohibit all forms of gambling including internet gambling and lotteries except for highly regulated horse racing betting at the country’s four racetracks.¹⁹⁶

Finally, Pakistan banned the sale of alcohol in 1977 and drinking was later made a crime punishable by 80 lashes, but this penalty was repealed in 2009.¹⁹⁷ However, there is a brewery in Pakistan in Murree, and Non-Muslims can consume alcoholic beverages after getting a license from the government.¹⁹⁸ Non-Muslim foreigners are also allowed to order alcohol in some hotels.¹⁹⁹ A similar rule applies to pork.²⁰⁰ Cannabis is illegal for recreational use seeing that drugs are also against Shar’iah law unless used for medicinal purposes, although since September 2020 extracts of cannabis can be used for industrial and medical use.²⁰¹ Finally, Pakistan does not have civil rights to prohibit discrimination or harassment on the

mentorship/internet-censorship-pakistan [https://perma.cc/PX2Y-REZZ].

192. *Id.*

193. Colum. Univ., *The State v. Saqlain Haider*, GLOBAL FREEDOM OF EXPRESSION, <https://globalfreedomofexpression.columbia.edu/cases/case-saqlain-haider> [https://perma.cc/PL9G-DK5Q] (last visited May 16, 2022).

194. *See generally* Act XLV of 1860, PAK. PENAL CODE (1860), <https://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html> [https://perma.cc/FH73-6A4D] (last visited May 16, 2022).

195. *See generally* The Prevention of Gambling Act, XXVIII of 1977 (1977) https://dponwl.punjabpolice.gov.pk/system/files/GAMBLING%20ACT%201977.doc_.pdf [https://perma.cc/K56F-LQ6A].

196. *Id.* at 2.

197. Associated Press, *Pak Ban on Alcohol Doesn't Stop Addiction*, NDTV (Sept. 29, 2010), <https://www.ndtv.com/world-news/pak-ban-on-alcohol-doesnt-stop-addiction-433663> [https://perma.cc/BR98-RY4S].

198. *Id.*

199. *Id.*

200. Asad Hashim, *Pakistan: A Slice of China in Islamabad*, AL JAZEERA (Sept. 3, 2017), <https://www.aljazeera.com/features/2017/9/3/pakistan-a-slice-of-china-in-islamabad> [https://perma.cc/EJ5H-JK3B].

201. Imtiaz Ahmad, *In ‘Landmark Decision’, Pakistan Approves Industrial Use of Cannabis and Hemp*, HINDUSTAN TIMES (Sept. 3, 2020), <https://www.hindustantimes.com/world-news/in-landmark-decision-pakistan-approves-industrial-use-of-cannabis-and-hemp/story-BNWRPToqe0eMKBASrnqq8O.html> [https://perma.cc/CV8N-Z5YR].

basis of sexual orientation; neither same-sex marriages nor civil unions are permitted under current law.²⁰²

Interestingly, Pakistan differs from other Shari'ah law based nations like Saudi Arabia and Iran in a few key ways. Shar'iah law is so interwoven into Pakistan's political structure, since the country was founded on a need to have an independent, Muslim nation in South Asia.²⁰³ However, Pakistan differs from Saudi Arabia and Iran in certain regards. In Saudi Arabia, the registration of trademarks covering alcoholic goods and related retail or wholesale services are prohibited within the kingdom.²⁰⁴ Moreover, in Saudi Arabia, Article 2 of the Law of Trademarks mandates that 'any expression or sign or drawing violating religion, or which is identical or similar to a symbol of religious nature' is prohibited. In Iran, marks relating to the manufacture, import, distribution and consumption of alcohol are expressly prohibited.²⁰⁵

In registering trademarks such as *BURAQ* as well as *MURREE BREWERY* and the Foshan Haitian Flavoring and Food Co. trademark for Sake, Pakistan diverges from Shari'ah. precedent espoused by sister Shari'ah nations, Iran and Saudi Arabia. Perhaps Pakistan hopes to keep peace between different groups than India, namely those who are not Muslims and those who are catering to foreign embassy officials or even a growing Chinese population in Pakistan that can eat pork. After living through the Partition and the split of East Pakistan and West Pakistan, perhaps preserving identities to maintain the peace has become more important to Pakistan, and it is therefore more lenient on the trademarks it accepts. Or perhaps, the difference is better explained by political instability in tandem with a lack of need to develop trademark law. This is exhibited by the fact that Pakistan took 60 years since it's emancipation to create a new trademark code to overturn the previous 1940 code that it adopted from British-India. Pakistan may simply not have the resources to devote to policing trademark registrations. Either way, each Shari'ah nation does not have a one size fits all approach to its trademarks.

202. Immigration and Refugee Board of Canada, *Pakistan: Information Regarding Muslim Law on Homosexuality*, REFWORLD (Nov. 1, 1991), <https://www.refworld.org/docid/3ae6ab4b8c.html> [<https://perma.cc/P59K-W28L>].

203. The paramount body of law Pakistan is the *Shari'ah*. The *Shari'ah* is composed of a collection of fundamental principles derived from a number of different sources, including the Holy Quran, the *Sunnah* (sayings of the Prophet Mohammed) and the works of *Shari'ah* scholars. In addition to the *Shari'ah*, Pakistan law is also derived from enacted legislation. All such laws are ultimately subject to, and cannot conflict with, the *Shari'ah*. See Pike *supra* note 186.

204. See generally Saudi Arabian General Investment Authority (*SAGIA*), *Laws-Trademark Law*, <http://www.sagia.gov.sa/Investment-climate/Some-Things-You-Need-To-Know-/Laws> (last visited May 16, 2022).

205. Mohammad Badamchi, HAMI Legal Servs., *Iran, in* WORLD TRADEMARK REVIEW YEARBOOK 2005 at 180 (World Trademark Review, 2005) <https://www.worldtrademarkreview.com/article/D95E51AF52FC3A036B048456AEB484EE977620D1/download> [<https://perma.cc/7PEL-Y5TD>].

Moreover, Pakistan differs from the approach taken by India in prohibiting certain religious deities, figures, and symbols from being trademarked. Pakistan has registered various trademarks stemming from religious figures and symbols. Perhaps this is because many Muslims are named after religious figures and the religious associations are not as strict. For example, a school district named after a Caliph may be done out of respect rather than using the name in vain, which may be not as favorable in India. Trademarks using Islamic elements could perpetuate a sense of an Islamic nation and is more catered to the ideals of Pakistan rather than the secular ideals of India.

With respect to obscenity, “immoral” content” according to the Pakistan government’s definition, includes nudity, blasphemy and obscenities.²⁰⁶ In Pakistan, TikTok was banned for being “repeatedly involved in spreading obscenity and immorality” because the platform started a social media campaign whereby they celebrated “LGBT” (Lesbian, gay, bisexual and transgender) Pride Month. This content was a failure to respect the Sha’ria law and cultures of Pakistan.²⁰⁷ Pakistan has also had a ban on internet websites containing pornography since November 2011. Pornography remains illegal in Pakistan and access thereto is blocked.²⁰⁸ The government also blocks most porn-related subreddits on platforms like Reddit.²⁰⁹ Satirical comedy websites that are deemed critical of Islam or the Pakistani government are subject to censorship by the Pakistan Telecommunication Agency (“PTA”).²¹⁰ The government also often censors satirical websites that poke fun at their policies.²¹¹

Pakistan’s definition of immoral trademarks differs from Iran’s definition. In *Shahzad Tea v Trademark Office* the Trademark Office opposed a trademark application claiming that the portrait of a woman as a trademark in any form is contrary to public policy and morality of Iran.²¹²

206. Umar Farooq & Jibrán Ahmad, *Pakistan Court Lifts Ban on Social Media App TikTok*, REUTERS (Sept. 15, 2020), <https://economictimes.indiatimes.com/tech/technology/pakistan-court-lifts-ban-on-social-media-app-tiktok/articleshow/81867146.cms> [<https://perma.cc/Z8QN-QL4X>].

207. *SHC Imposes Ban on TikTok Till July 8*, EXPRESS TRIBUNE (June 28, 2021), https://tribune.com.pk/story/2307756/1?fbclid=IwAR0r4sWWwNk-doA2vAYtr9i6j2-M8GnDJuIWeEzV6GaklZ9sYN_W5UbmEr4.

208. Pakistani Flag, *supra* note 188.

209. *Id.*

210. *Id.*

211. *Id.*

212. See Patents, Industrial Designs and Trademarks Registration Act of 12 Feb. 2008 (Iran), <https://www.wipo.int/wipolex/en/text/197776> [<https://perma.cc/7R95-4Z56>]; see also Iran, ABU-GHAZALEH INTELL. PROPERTY, https://www.agip.com/Agip_Country_Service.aspx?country_key=255&service_key=T [<https://perma.cc/7DW2-ZKS3>].

Pakistan does allow for the registration of women in their trademarks, especially in their skin lightening and beauty brands.²¹³ This may be due to differences in the status of women's rights in these countries.



Despite the fact that Pakistan upholds Shari'ah law in some cases, often penalizing Muslims who diverge from it and even resorting to censorship. In many ways, its lenient registration of Trademarks for alcohol, weed, and the word "3SUM" tell a different story. Pakistan diverges from traditional Shar'iah law with respect to the trademarks that it allows to be registered within its boundaries. It would be interesting to do a deeper dive beyond alcohol, portraits of women, and marijuana to see if Pakistan also allows for the registration of Shar'iah prohibited concepts like gambling, LGBTQ+ relationships and identities, and pork, or if it is veering towards a more progressive direction. This is perhaps evidenced by Pakistan's loosened restrictions on alcohol and pork for non-Muslims. The next steps for research to further develop the inquiry would be to visit Pakistan and see if and why certain trademarks have been rejected under section 14. This would further corroborate a hypothesis that trademark morality in Pakistan reflects or expresses a diverse national identity as opposed to a nominal Hindu/Sikh supremacy identity cultivated by India at present.

C. Bangladesh

Bangladesh gained its independence in 1971 through a liberation war with West Pakistan. Prior to 1947, it was the part of Indian subcontinent under the British Regime and British Rules were applicable in most cases or otherwise new enactments were passed for the subcontinent.²¹⁴ There were no specific enactments in British India before 1889.²¹⁵

213. The Trade Marks Journal (April 2022) <https://ipo.gov.pk/system/files/854%20%28March%2C%202022%29.pdf>.

214. Bentley, *supra* note 29, at 171.

215. *Id.*

At that time, enactments such as the Penal Code of 1860 and the Specific Relief Act of 1877 ensured trademark protection was.²¹⁶ The then British rulers first enacted the Merchandise Marks Act of 1889 and the Trade Marks Act of 1940 for protecting the trademarks.²¹⁷ The British rulers followed the Trade Mark Act of 1938 of England in when enacting the Trade Marks Act of 1940.²¹⁸ Like India and Pakistan, the area that is now Bangladesh was part of British India and governed by the Trade Marks Act of 1940.

Bangladesh inherited the Merchandise Marks Act, 1889 and the Trade Marks Act, 1940 from Pakistan by the independence of 1971.²¹⁹ These two laws had ensured trademarks protection in the region that is now Bangladesh, for over a century.²²⁰ In 2008, both, the Merchandise Marks Act, 1889 and the Trade Marks Act, 1940 were repealed by the Trademark Ordinance, 2008, but this law was also repealed by the Trademarks Act, 2009.²²¹ The present legal basis of trademark protection in Bangladesh is the Trademark Act of 2009 (herein referred to as the 2009 Act) and Trademark Rules 1963.²²² The 2009 act was amended in 2015 but this amendment does not affect the immoral/scandalous trademark bar.²²³

Bangladesh, is also signatory to the following international agreements: the World Intellectual Property Organization, since May 1985, the Paris Convention for the Protection of Industrial Property since March 1991, the (amended) Agreement on Trade-Related Aspects of Intellectual Property Rights, since 2011.²²⁴

The statutory framework on morality is as follows in Bangladesh:

8. Prohibition of registration of certain matters.

- No mark or part of a mark shall be registered as a trademark—
 - (a) which comprises or consists of any scandalous or obscene matter; or

...

- (d) which contains any matter likely to hurt the religious susceptibilities of any class of the citizens of Bangladesh;²²⁵

1. Legal Guidance on the Morality of Marks

Like Pakistan, Bangladesh does not provide any legislative guidance on the registration of scandalous or obscene marks as well as marks

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. Pakistan Trade Mark Ordinance, 2001, *supra* note 43 at p. 10.

223. Trademarks Amendment Act of 2015 (Iran), <http://www.dpdt.gov.bd/site/page/d4af3384-bb1b-43bc-8fc5-e08b8fcbd0be> [<https://perma.cc/JD26-GASF>].

224. Bentley, *supra* note 29, at 171.

225. Pakistan Trade Mark Ordinance, 2001, *supra* note 43 at p. 10.

that are likely to harm religious susceptibilities. Adding to the difficulty, caselaw is also limited because the Trademark Act of 2009 is only 13 years old. Moreover, while Bangladesh protects word marks and logos, the public registered trademarks list doesn't include the symbols associated with the word mark, it only includes words in English or the Bengali Script, but no actual images of the mark.

Similar to trademark law in Pakistan, caselaw and court records in Bangladesh are difficult to access due to special authorization requirements and limitations on who may access court records. These barriers to access make it difficult to determine the scope and application of Section 8 of the Trademark Act. Nevertheless, the registrations that are accessible and analyzed below provide some insight into what Bengali society considers moral or immoral in terms of trademarks.

Because specific rejections to trademark filings and court cases where trademarks have been rejected under section 8 do not seem to be available online or in circulation in the U.S. for a full analysis, this is a limiting factor of a full discussion. While it may very well be the case, this analysis should not be taken to mean that the prohibition doesn't seem to be applied very frequently. Access to Bangladesh court record requires special authorization and approval restricted to legal professionals in Bangladesh.²²⁶ While information is limited, the current registrations which are public although limited to word marks, however, allow for a better understanding of what Bengali society deems to be moral/immoral for marks.

a. The Registration of Scandalous or Obscene Matter

KALI

“Kali” has been accepted by the Bangladesh trademark office.²²⁷ While Kali is a derogatory racial slur for a Black or dark-skinned girl in Urdu and Hindi which are predominantly spoken in Pakistan and India, it is not a swear word in Bangla which is spoken more in Bangladesh.²²⁸ Kali has not been a registered trademark in Pakistan or India, although it would likely be barred from registration in India because Kali could also refer to the Hindu goddess of time.,

226. Bdlex Informations, *How to Find Bangladesh Court Record? Why is It Useful?*, MEDIUM (Sept. 13, 2017), <https://medium.com/@bdlexinformations/how-to-find-bangladesh-court-record-why-is-it-useful-bf8e03331976> [https://perma.cc/2MLW-9PL2].

227. *Registered Trademarks - Class-01*, DEP'T OF PATS., DESIGNS & TRADEMARKS, MINISTRY OF INDUS. 25 (Bangl.), http://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/page/44208ad5_0633_4b60_9be0_5e93eeb1ea20/2022-02-02-06-47-4d14b2e8a611662dc81f958008ec0a86.pdf [https://perma.cc/7ZD9-3Z9V] (last visited ____).

228. See Jannat Majeed, *It's Time We Stopped Using 'Kala' as an Insult and Respected the African-American Community*, DAWN (Feb. 27, 2017) <https://www.dawn.com/news/1317116> [https://perma.cc/8WFM-RKCG]. Kala is the male form of Kali.

FAG

The word “Fag” is an accepted trademark in Class 4 for industrial oils and greases.²²⁹ This is a slur in English that is used against LGBTQ+ individuals in many countries. Homosexuality is illegal under Bangladesh’s Penal Code of 1860 which criminalizes acts of ‘carnal knowledge against the order of nature’ with a maximum penalty of life imprisonment for men who engage therein.²³⁰ Despite being an English slur, it seems acceptable for trademarks in Bangladesh because same sex relationships are looked down upon in Bangladesh.

b. The Registration of Marks Likely to Harm Religious Susceptibilities

There is no manual or readily available case law that explicitly defines what is likely to harm religious susceptibilities. However, a few religious figures and symbols across Hinduism and Islam, which are the two most prominent religions in Bangladesh, seem to be trademarked. This is in stark contrast to the prohibited marks in India which often prohibits the registration of religious figures and symbols.

Trademarks Surrounding Religious Figures and Symbols

The Trade Marks Registry of Bangladesh has accepted the names of Hindu and Islamic religious figures as trademarks. The trademarks that are linked to Islam that have been registered include the religious well ZAMZAM²³¹, the name of the Prophet IBRAHIM²³², and ISLAM SPECIAL.²³³ The trademarks that are linked to Hinduism that have been registered include the goddess SHAKTI²³⁴, goddess KALI²³⁵, and divine

229. See *Registered Trademarks - Class-04*, DEP’T OF PATS., DESIGNS & TRADEMARKS, MINISTRY OF INDUS. 4 (Bangl.), http://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/page/44208ad5_0633_4b60_9be0_5e93eeb1ea20/2022-01-30-10-27-e55efe8bae08c2fc08e3303757cc0d.pdf [https://perma.cc/3STQ-EWQ2].

230. *Bangladesh*, HUMAN DIGNITY TRUST (2023), <https://www.humandignitytrust.org/country-profile/bangladesh> [https://perma.cc/7U25-499V]; see also Associated Press, *Bangladesh Authorities Arrest 27 Men on Suspicion of Being Gay*, INDEPENDENT (May 19, 2017), <https://www.independent.co.uk/news/world/asia/bangladesh-authorities-arrest-27-men-gay-homosexuality-muslim-country-islam-police-charge-a7744366.html> [https://perma.cc/F2G7-4Z5B].

231. *Registered Trademarks - Class-03*, DEP’T OF PATS., DESIGNS & TRADEMARKS, MINISTRY OF INDUS. 49 (Bangl.), http://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/page/44208ad5_0633_4b60_9be0_5e93eeb1ea20/2022-01-30-10-15-d7eac528380eac5fb09370a281c39108.pdf [https://perma.cc/G5UH-W5YQ].

232. *Registered Trademarks - Class-24*, DEP’T OF PATS., DESIGNS & TRADEMARKS, MINISTRY OF INDUS. 8 (Bangl.), http://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/page/44208ad5_0633_4b60_9be0_5e93eeb1ea20/2022-02-02-06-36-900f73453ac08bf39c2e64b13c6b219a.pdf [https://perma.cc/XLH5-LQYZ].

233. *Registered Trademarks - Class-09*, DEP’T OF PATS., DESIGNS & TRADEMARKS, MINISTRY OF INDUS. 4 (Bangl.), http://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/page/44208ad5_0633_4b60_9be0_5e93eeb1ea20/2022-01-31-10-20-33130c0ac59d033b320c602cd2bc5e56.pdf [https://perma.cc/FM7Q-PH25].

234. *Registered Trademarks - Class-03*, *supra* note 231 at 57.

235. *Registered Trademarks - Class-01*, *supra* note 227 at 25.

teacher *GURU DEV*²³⁶. Unlike India where trademarks for certain religious figures and deities are explicitly prohibited, similar to Pakistan, the same cannot be said for Bangladesh.

Trademarks Surrounding Pork

Curiously, although pork is forbidden in Bangladesh because Islam is the predominant religion there with only non-Muslim minorities raising pigs in Bangladesh, the word *PIGGY BOTTLE* has been registered as a trademark.²³⁷

Despite the Islamic prohibition on pork, pork remains available in Bangladesh as there are some restaurants and shops that do sell pork, and pig farmers.²³⁸ There is an active Reddit thread listing popular locations in Bangladesh to get pork.²³⁹

Trademarks Surrounding Alcohol

Additionally, alcohol is mostly forbidden in Bangladesh because Islam is the predominant religion there. Nonetheless, Bangladesh trademark law makes trademarks for alcohol available through class 33. Class 33 is an entire class open to alcoholic beverages, including multiple trademarks for alcoholic beverages, and this is in stark contrast to Pakistan.²⁴⁰ Among others, these include *BACARDI*, *SMIRNOFF*, *MARTINI*, *TIGER RUM*, and *JACK DANIEL'S*²⁴¹.

As of 2022, the government has issued fresh rules with the aim of regularizing the sale and consumption of alcohol across the country. Under the new rules, hotels, restaurants, and outlets that serve food as well as display and sell alcohol will be allowed to apply for liquor sale licenses.²⁴² Clubs and organizations that have a certain number of members with drinking permits can also apply for the licenses.²⁴³ Anyone over the age of 21 will be allowed to apply for a drinking permit.²⁴⁴

236. *Registered Trademarks – Class-03, supra* note 231 at 58.

237. *Registered Trademarks - Class-05*, DEP'T OF PATS., DESIGNS & TRADEMARKS, MINISTRY OF INDUS. 106 (Bangl.), https://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/page/44208ad5_0633_4b60_9be0_5e93eeb1ea20/2022-01-31-07-33-c6358f606032a7f7e117c8cae00240c9.pdf [<https://perma.cc/2B7X-99FD>].

238. *See Pig Rearing, a Profitable Business*, DHAKA TRIBUNE (June 21, 2014), <https://archive.dhakatribune.com/uncategorized/2014/06/21/pig-rearing-a-profitable-business> [<https://perma.cc/87J5-66AW>].

239. Reddit User (@theexistentialbread), *Where Can I Find Pork in Dhaka?*, REDDIT, https://www.reddit.com/r/bangladesh/comments/n8x0jb/where_can_i_find_pork_in_dhaka [<https://perma.cc/P578-9JPD>] (last visited May 16, 2022).

240. *See Registered Trademarks - Class-33*, DEP'T OF PATS., DESIGNS & TRADEMARKS, MINISTRY OF INDUS. 25 (Bangl.), http://dpdt.portal.gov.bd/sites/default/files/files/dpdt.portal.gov.bd/page/44208ad5_0633_4b60_9be0_5e93eeb1ea20/2022-02-02-10-32-e42bff71252d18674802b74469fb42f6.pdf [<https://perma.cc/4N6P-6FQE>].

241. *Id.* at 2–3, 5.

242. Ali Asif Shawon, *Government Moves to Regularize Alcohol*, DHAKA TRIBUNE (Feb. 16, 2022), <https://www.dhakatribune.com/bangladesh/2022/02/16/government-moves-to-regularize-alcohol> [<https://perma.cc/N4KU-W3QK>].

243. *Id.*

244. *Id.*

Muslims over the age of 21 must get a prescription from a doctor with a minimum rank of associate professor.²⁴⁵ Members of ethnic groups, such as those in the Chittagong Hill Tracts and other areas, will also need drinking permits to purchase alcohol. It thus follows that Bangladesh more readily accepts trademarks for alcoholic beverages in contrast to Pakistan.

2. Landscape Analysis on the Morality of Marks

A majority of the Bangladeshi population identifies as Muslim (89.1 percent) while the second largest group is Hinduism (10 percent). A remaining 0.9 percent of the population identifies with some other religion including Buddhism and Christianity.²⁴⁶

Like Pakistan, Bangladesh also has a history of censoring content that would be highly critical of Islam or offend “Islamic mortality.” One of high-profile case of internet censorship in Pakistan was the blocking of YouTube in response to a posted, anti-Islamic video titled: “The Innocence of Muslims.”²⁴⁷

While this demographic makeup mirrors Pakistan, Bangladesh differs largely from the country it was once a part of because it has a secular constitution.²⁴⁸ However, while Bangladesh does not project the views of the religious majority in its laws regarding pork, alcohol is still banned.²⁴⁹

There is a lack of information about Bangladeshi trademarks and it seems that the system is still developing. In contrast to India, Bangladesh does not have a surplus of publicly available litigation on moral trademarks. Bangladesh’s trademark regime seems to be the most liberal of all compared to India and Pakistan, even allowing for trademarks to carry names of entities that are sacred to Muslims and Hindus alike, as well as trademarks of certain paraphernalia that would be distasteful to the Muslim majority including pork and alcohol.

With respect to scandalous or obscene marks, the government seems to accept a few trademarks containing slang from other countries that would be disparagingly offensive to someone speaking a language

245. *Id.*

246. Chara Scroope, *Religion*, CULTURAL ATLAS (2017), <https://culturalatlas.sbs.com.au/bangladeshi-culture/bangladeshi-culture-religion> [<https://perma.cc/T5PR-7L8C>].

247. Hasnain, *supra* note, 187.

248. *See* Desi News, Bangladesh: Bangladesh’s Hindu Women Right for Divorce Rights, PEACEWOMEN (June 27, 2012), <https://www.peacewomen.org/content/bangladesh-bangladeshs-hindu-women-right-divorce-rights> [<https://perma.cc/7ZAU-XUZ4>]. However, marriage, divorce, alimony and property inheritance are regulated by Sha’ria law for Muslims.

249. *Cabinet Clears Narcotics Control Act Draft With Death Penalty For Smuggling, Selling Yaba*, Dhaka Tribune (Oct. 8, 2018), <https://archive.dhakatribune.com/bangladesh/statecraft/2018/10/08/cabinet-clears-narcotics-control-act-draft-with-death-penalty-for-smuggling-selling-yaba> [<https://perma.cc/TN6P-D2Y6>].

that is not Bangla. This is similar to the “3SUM” registration in Pakistan and unlike the “Orgy” registration in India.

For example, while *KALI* would be a derogatory word for a dark-skinned individual in Pakistan and India because of its meaning in Hindi, Punjabi, and Urdu spoken by its neighboring countries, it does not carry a similar derogatory and colorist meaning in Bangla. Rather, it may refer to a goddess instead. This is in line with Bangladesh’s reason for partition: the need to create an independent state to maintain the recognition of the Bengali language as the official language of the country. This resulted in the secession of East Pakistan as the People’s Republic of Bangladesh. Therefore, the Bengali translation governs in determining if a word is scandalous, even if there is a competing translation in another language. This may be one example, but it illustrates the adherence to nationalism, the mother tongue, and Bangladesh’s roots of secession as reflected in the realm of trademarks.

Perhaps in a similar fashion, while *FAG* is a derogatory word for homosexuals and its registration, it is allowed in Bangladesh. Indeed, the term is commonly used for cigarettes. However, it is in Class 4 for industrial oils and greases which is highly unrelated to tobacco. Needless to say, the fact that the homosexual population would be offended by such a derogatory term is not a consideration taken into account. However, Bangladesh would most likely not care if it would offend homosexual individuals because homosexuality is a crime in Bangladesh.²⁵⁰

The widespread allowance of marks for alcohol mirrors Bangladesh’s looser restrictions on alcohol compared to the Shar’iah law ruled country it was once a part of: Pakistan. Alcohol is available across Bangladesh and is produced locally. Unlike Pakistan which permits only one brewery, there are government-approved alcohol producing companies in Bangladesh which produce local brands of vodka, rum, whisky, gin, and brandy. As thus, there are pages of registered trademarks including local varieties and foreign varieties of liquor as opposed to Pakistan.²⁵¹ In this regard then, Bangladesh is not entirely religious.

Moreover, although pork is forbidden in Bangladesh because Islam is the predominant religion there, and pigs are frowned upon as being a vile and haram animal (with only non-Muslim minorities raising pigs in Bangladesh), the word *PIGGY BOTTLE* has been registered as a trademark. Although Bangladesh is a Muslim-majority nation, pork seems to not be illegal in Bangladesh like it is in Pakistan. Perhaps Bangladesh as a secular nation keeps a trademark avenue open for minorities to register trademarks rather than impressing the Muslim-majority view, but draws the line at alcohol.

250. Penal Code, 1860 (Act No. XLV of 1860) (Bangl.), <http://bdlaws.minlaw.gov.bd/act-11/section-3233.html> [<https://perma.cc/SDC8-FT5N>].

251. *Id.*

A host of religiously charged phrases including names of deities and respected figures have been trademarked regardless of religion including *ZAMZAM*, *GURU DEV*, *SHAKTI*, *ISLAM SPECIAL*, *IBRAHIM*. While there is not enough guidance to say what can or cannot be registered, this approach looks less like India in prohibiting certain religious deities, figures, and symbols from being trademarked and looks more like Pakistan's approach.

Bangladesh, like Pakistan, has registered various trademarks stemming from religious figures and symbols. Perhaps this is because many Muslims, Hindus, and Sikhs are named after religious figures and the diversity of religion in Bangladesh is captured by this equality in treatment regardless of faith.

However, what would harm one group because it is prohibited and distasteful in their religion or mother tongue but would not necessarily harm another group because it is allowed in their religion or mother tongue—i.e. alcohol, pork, and “kali” can still be trademarked in Bangladesh. This is in stark contrast to Pakistan, showing the secular nature of Bangladesh that permeates through its trademark laws. It would be interesting to see more case law as Bangladesh continues to develop its trademark space since the trademark system of Bangladesh is the junior-most of all three of the countries.

The next steps for research to further develop the inquiry would be to visit Bangladesh or get ahold of a Bangladeshi attorney who can access the court records and see if and why certain trademarks have been rejected under Section 8. It would be especially helpful to see logos in addition to wordmarks. This would further corroborate the hypothesis that trademark morality in Bangladesh reflects or expresses a diverse religious identity as opposed to a nominal Hindu/Sikh supremacy or Muslim identity cultivated by India and Pakistan at present.

III. CONCLUSION

The above discussions demonstrate the similarities and differences in how various countries seek to balance commercial speech interests with principles of morality and public order within their domestic trademark laws.

While the colonial statutes gave rise to morality clauses, India, Pakistan, and Bangladesh each added provisions that trademarks were not registrable if they are “likely to hurt the religious susceptibilities of any class.”²⁵² This addition differs considerably from the original British statute, showing the greater sensitivity to religious sentiments in these countries compared to other former British colonies such as Australia and the U.S.

252. The Trade Marks Act, 1940, § 8(b) (India), <https://iprlawindia.org/wp-content/uploads/2021/04/1940.pdf> [<https://perma.cc/FFW9-J4GM>]; India Trade Marks Act, 1999, *supra* note 42, at § 9(2)(b); Pakistan Trade Mark Ordinance, 2001, *supra* note 43, at 10; Bangladesh Trademarks Act, 2009, *supra* note 44, at § 8(d).

With respect to offending religious sensibilities, India seems to cover the largest span of religions. Indian law is often overinclusive and even caters to a standard of a hypersensitive person. However, often Muslims are explicitly left out of the trademark morality equation.

Pakistan seems to be the strictest in matching its trademark laws to mirror fundamentals of Sha'riah law. In Pakistan, however, there is still greater leniency enjoyed by the types of goods that can be trademarked in these countries compared to, for example, other Shar'iah law countries with trademark systems. Despite this greater leniency, Pakistan limits alcohol and pork trademarks more than Bangladesh where there is more religious freedom with respect to pork, and alcohol.

Similarly, the contours of what is considered religiously offensive to the susceptibilities of citizens in each country, as well as what is considered "scandalous" or "obscene," differs vastly in each of these different countries and reflect the countries' independent paths forward towards independence after the partition. India's trademark Draft manual provides a lot of guidance, which Pakistan and Bangladesh notably lack. Perhaps such a Draft manual is needed in Pakistan and Bangladesh because it is more assumed that because Islam is the majority religion, an elaboration of what would be offensive to other religions is not needed. But this overlooks the minority groups that do live in these countries other than the Sunni Muslims. However, India has had more time to develop its trademark laws and it will be intriguing to see what direction Pakistan and Bangladesh take in continuing to flesh out the nature of their morality bar. India could benefit from reconciling its many standards of obscenity, in favor of a blanket rule that would make the registration process of trademarks much more streamlined. Such insights may be clearer from records of trademark registration, manuals, and case law *in situ*. Perhaps even a deeper analysis alongside attorneys in Bangladesh and Pakistan that have records of rejected trademarks would be the intuitive next step to parse out comprehensive guidance on how each country defines as scandalous, immoral, and offensive to religion.