



## Genericide, A Quintessential Outcome of Ignoring Passing off or Infringement of Geographical Indications

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The theme of this paper is Genericide of Geographical Indications. It traces the historical foundation for evolution of Geographical Indications as an Intellectual Property. It reflects on the concept of 'property' and 'intellectual property' as elucidated by Salmond in his legal classic on Jurisprudence and by the Hon'ble Supreme Court of India. The role of TRIPS in catalysing the enactment of a '*sui generis*' legislation on Geographical Indications in India i.e., The Geographical Indication of Goods (Registration and Protection) Act, 1999. It discusses a field trip undertaken by the writer to understand the GI potential of a specific variety of rice cereal '*Zinnia 31*' (Wada Kolam).

**Keywords:** Intellectual Property, Geographical Indications, Genericide of Geographical Indications, '*Zinnia 31*' (Wada Kolam)

The primary objective of this study is to take a glimpse of the substantive law and related concepts in the context of GI, and thereafter, move on to the actual application of the law to the concerned sections of the society, since law, as aptly put by Roscoe Pound, is "(S)ocialengineering".<sup>1</sup> GI denotes that the product originates from a particular place, which has a reputation for certain characteristics attributable to that place of production or manufacture.<sup>2</sup> As a subject of 'Case Study' this paper focusses on a specific variety of rice known as '*Zinnia 31*' (locally known as '*Zinni*' or '*Wada Kolam*') that is exclusively cultivated in the Wada region in District Palghar of Maharashtra.

Since GI is an Intellectual Property, it would be logical, at the start of this paper, to engage with the jurisprudential concept of property and intellectual property. The connotation of property for this paper is based on the definition provided by the Hon'ble Supreme Court of India's landmark judgment, *R. C. Cooper v Union of India*<sup>3</sup> wherein it defines property to mean "(T)he highest right a man can have to anything, ..." including rights in intellectual property.

The essence of Intellectual Property is latent in Salmond's definition on property in his legal classic on Jurisprudence.

*"(I)n modern law every man owns that which he creates. That which he produces is his, and he has an exclusive right to the use and benefit of it. The immaterial product of a man's brains may be as valuable as his land or his goods. The law, therefore, gives him a proprietary right in it, and the unauthorised use of it by other persons is a violation of his ownership, no less than theft or trespass is."*<sup>4</sup>

Historically, the concept of GIs can be traced to the Egyptian Civilization when brick-makers marked bricks to identify the manufacturer. Similarly, in ancient Greece, Thasian wine had acquired a reputation based on its source being the Island of Thasos in Macedonia.<sup>5</sup> However, GIs appear to have been statutorily recognized as an intellectual property since the year 1222, in Yugoslavia, where Charter of Steven I governed the sale of wine<sup>6</sup>; thus, the Charter permitted only products emanating from the region to carry the geographic indication.<sup>7</sup> A fundamental question that emerges here is, 'What could have led Steven I to draw up such a Charter?' Could it be that duplication was prevalent even as back as 1222? Was it simply to confer an exclusivity on wines produced in area 'X' and thus distinguish it from wines produced in area 'Y'? Or was it built up on the foundation of Magna Carta (1215) that spoke of rights and access to swift justice? Legal rules protecting GIs have been there for centuries in Europe, for instance,

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French king John's decree of 1351 on wine, Laguiole cheese making process, Roquefort cheese, and use of guild trademarks to indicate geographical origin on products – 'Murano glass'.<sup>8</sup> Thus, Delphine Marie-Vivien (2015) aptly explains, GIs indicate the rootedness of the product in the local environment which confers upon it quality, characteristics or a reputation, in such a striking manner that the name of the product itself includes a reference to the place of origin.<sup>8</sup>

In modern times, the earliest historical codification of GIs appears to be embodied in the Paris Convention of 1883. Article 1 (2) of the Paris Convention for the Protection of Industrial Property (Paris Convention) *inter alia* contains the term 'indications of source or appellation of origin' as one of the objects of industrial property. This was followed by the 'Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods of 1891' and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958'. However, for India the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of 1994 has been the corner stone of the GI law that the country promulgated in 1999.

The significance of TRIPS springs from the fact that it mandates that other countries are under no obligation to extend protection to a product unless a geographical indication is protected in the country of its origin (Article 22.2). Thus, in the absence of legislative protection, only an action against unfair competition is possible.<sup>8</sup> Being a signatory to TRIPS, it was incumbent for India to enact a law on GI, so that Indian goods could enjoy reciprocal protection in other countries. 'The Geographical Indications of Goods (Registration and Protection) Act, 1999, was thus enacted with the object of providing registration and better protection of geographical indications relating to Indian goods (agricultural and manufactured) - the underlying motivation being to curb infringements.

The researcher has adopted a non-doctrinal approach. For which purpose, the researcher has interviewed cultivators in the Chinchani area of taluka Dahanu, district Palghar, Maharashtra to obtain first-hand information on a locally cultivated variety of rice known as 'Zinnia 31', and locally known as 'Zinni' or 'Wada Kolam'. Along with the primary interview mentioned above and a set of readings, the

three significant secondary sources used for this articulation are that of O'Connor (2004), Latha Nair & Rajendra Kumar (2005), Gangjee (2017) and Venkateswaran (2018).

O'Connor, in his book 'The Law of Geographical Indications' begins by examining the protection of GIs scenario with respect to international law. He, *inter alia*, analyses the bilateral or pluri-lateral agreements, conflict between advocates for a *sui generis* legislation and those who believe that GIs can be effectively protected under Trademark laws, Generic goods and TRIPS.

Latha Nair and Rajendra Kumar (2005), in their book 'Geographical Indications, A Search for Identity', discuss the concept of GIs *vis-à-vis* other forms of IP rights, the international evolution of GIs, evolution of case law jurisprudence on GIs, TRIPS, the controversy of Article 23 of TRIPS, Economics of protection of GIs and developing countries. The book dedicates an entire chapter to Genericide of GIs.

In his paper 'From Geography to History: Geographical Indications and the Reputational Link', Gangjee brings out the importance of 'Reputation in the product place link', and states that reputation is an independent and sufficient basis for satisfying the definition of a GI. However, it is a form of linkage that will inevitable be subjected to testing.

Kailasam & Panchamia (Ed.), 'Venkateswaran on Trademarks & Passing Off' (2018) contains a detailed commentary on 'The Geographical Indications of Goods (Registration and Protection) Act, 1999.

In the legal sphere 'Genericide' occurs when a brand name loses its distinctive identity as a result of being used in reference to any product or service of its kind. The Black's Law Dictionary defines the term 'Genericide' in the context of trademarks to mean 'The loss or cancellation of a trademark that no longer distinguishes the owner's product from others' products. Genericide occurs when a trademark becomes such a household name that the consuming public begins to think of the mark not as a brand name but, as a synonym for the product itself.'<sup>9</sup> This term is usually associated in the context of a trademark in order to denote the termination of a trademark or brand name due to its own success. Instances of trademarks that have been 'killed' by Genericide include, *Asprin, Xerox, Escalator, Yo-yo, Thermos, Frisbee and Bubble Wrap* to name a few. A trademark loses its distinctiveness or exclusivity when consumers begin to understand the trademark as the product itself.

In the view of the writer 'Genericide' in context of trademarks is when the trademark being so equivalently associated with the product that it represents, has passed into colloquial usage to become a nomenclature for the very product. Therefore, the question, 'Can Genericide be associated with loss of distinctive identity?' Let's consider the word 'Xerox' which is currently being used synonymously to photocopying. Yet the Xerox Corporation continues to remain a leading American global corporation engaged in selling print and digital document products and continues to protect the word 'Xerox' as a trademark.

According to WIPO<sup>10</sup>, generic terms are names which, although they denote the place from where a product originates, have become the term customary for such a product, for instance, Camembert for cheese. Such generic character imposes an impediment for protection of GIs.<sup>10</sup>

The writer is of the view that the market for GI goods is oligopolistic in nature as a result of which the quality, price and supply of such goods is determined and controlled by the GI certification holders (manufacturers / suppliers) which makes such goods premium in nature and in case of certain goods circumstantially even rare or scarce or in the case of agricultural goods, difficult to harvest, for instance, Kashmir Saffron or 'Wada Kolam', which factors play a significant role in making such goods premium. Being premium leads to establishment of a distinctive identity or *vice-versa*, and therefore, the usurpation of this distinctive identity by counterfeiting or duplication causes gradual dilution eventually leading to Genericide.

In this context, a question that needs to be addressed is whether 'Genericide' is really a threat or only a matter of perception *vis-à-vis* Geographical Indications? Therefore, 'Genericide' is the process of gradual dilution of the source identification<sup>11</sup> of a product or good that eventually leads it to pass into the public domain whereby its distinctive identity is extinguished thus, becoming generic. For instance, the attempt by Pepsi Co. India to register 'Bikaneri Bhujia' as a trademark in order to capitalize on the geographic association and market appeal of the food product which is a GI of Rajasthan<sup>12</sup> and which has been registered as such under The Geographical Indications of Goods (Registration and Protection) Act, 1999.<sup>13</sup> Such "free-riding on reputation"<sup>14</sup> is a common phenomenon that leads to Genericide through gradual dilution.

However, in the context of GIs 'Genericide' can be a serious threat, for goods with GI potential are either natural, agricultural or locally manufactured that acquire their identity from the place of origin. Therefore, the product-place link is what is necessary for the sustenance of a GI potential product. One of the prominent instances of 'Genericide' is that of 'Epsom Salt', where, the Epsom region in Surrey, England acquired a reputation for high content of magnesium sulphate in its mineral waters, however, with colloquial usage over a period of time, the term Epsom salts, have by generic application, become synonymous to sulphate of magnesia, regardless of whether it actually belongs to Epsom or not.<sup>15</sup> Therefore, consumer perception of the product is directly proportional to the retention of distinctiveness of a GI product.

Misrepresentation and Passing off both being interconnected and antecedent act as catalysts to 'Genericide', for gradual dilution of goodwill / reputation commences with "...*(M)isrepresentation...during the course of trade*" to customers.<sup>16</sup> Gangjee avers, 'Reputation' is the relatively ignored option bracketed between qualities and characteristics. Although a fundamental concept, ironically, reputation is the least talked about form of linkage between product and place. The basis for treating GIs as a distinct intellectual property regime rests on the notion of a verifiable link between a product and its place of origin.<sup>17</sup> In this context, *J Bollinger v Costa Brava Wine Company*<sup>18</sup> is of relevance for the Champagne Houses of France successfully established that only wine produced in the Champagne district of France by the Champagne houses was known as 'Champagne' and that such wine has acquired great reputation and that the use of the term 'Spanish Champagne' by others would deceive by causing consumers to believe that wine so described was Champagne. On the Indian scenario, the Tea Board of India has victoriously protected the GI 'Darjeeling Tea' against several instances of infringement and misuse, including successful rejection of trademark application 'Darjeeling Nouveu' by Republic of Tea, USA and 'Dusong' (Darjeeling with kettle device for stationery), France as well as has successfully opposed registration of marks pertaining to goods and services *viz.*, clothing, telecommunication, internet services, coffee, cocoa, etc.<sup>19</sup> The circle of case law jurisprudence on the preservation of distinctive identity of GIs is

circumferentially vast comprising of 'Champagne', Harris Tweed, British Sherry, Scotch Whisky, Swiss Chocolates, Havana Cigar, Basmati Rice, Darjeeling Tea, and several other instances,<sup>20</sup> where the common argument for protection rests on the base of a 'product-place' link and where, geography triumphantly determines the distinctive identity of the product.

A GI is owned collectively by a group of producers who may be individuals, organisations or enterprises to whom a registration has been granted. According to Gangjee, as signs which are used by more than one producer, GIs contain the potential seeds to its own destruction. The greater the success a regional product achieves in the marketplace, the greater the risk that its designation will be treated as the general term for that type of a product. Generic terms can no longer communicate a specific geographical origin; they merely indicate the familial features for a product category. Generic status is therefore the antithesis of protected GI status.<sup>21</sup>

It is in the light of this discussion on GI that this paper looks into whether the local variety of Rice botanically termed as '*Zinnia 31*', and colloquially known as '*Zinni*' or '*Wada Kolam*' has the potential to acquire a GI certification.

The primary trigger to research on Wada Kolam's potential to acquire the GI label was a news report (Mumbai Mirror, 20<sup>th</sup> October 2018) entitled 'Palghar Farmers want GI Tag for '*Wada Kolam*' by Mr. Makarand Gadgil. The researcher visited the Chinchani area (Taluka Dahanu, District Palghar) and met agriculturalists and farmers and learned that, '*Zinnia 31*' or '*Zinni*' which is popularly known as '*Wada Kolam*' is a local dwarf variety rice cultivated predominantly in the area of Wada and other parts of district Palghar viz., Chinchani, Dahanu, Gholvad, Bordi and Zai. These rice grains are translucent in appearance and on cooking as boiled or steamed rice, they have a non-sticky texture and is not aromatic. In order to authenticate the information on rice classification, the researcher was shown a book (by a respondent) in Marathi titled '*Kshetmargadarshika*' (Agricultural Directory), authored by Kane & Phadke sometime in 1957. The book noted that '*Zinnia 31*' acquires its uniqueness due to factors like, quality of the soil, the climatic conditions (note, the quantum of rains and dewdrops) are crucial for Wada Kolam's inherent uniqueness, cultivation practices and the ease of cooking along with its highly nutritious content

(the unpolished variety is known to contain all essential nutrients required for human nourishment).

The first important factor is the quality of soil. This variety of rice grows best in weak soil as highly fertile soil causes changes in the natural texture (making it opaque) and increases length of the grain. Secondly, climatic conditions play a vital role inasmuch to providing the rice grain its translucence. The best time to sow is after the 15th of August preferably after '*Hasta Nakshatra*' when monsoons rains begin to recede. As this variety of rice is inherently frail, heavy rains can cause severe and irreversible damage. Dewdrops play a crucial role in germination causing the grain to acquire its translucent texture. Thirdly, traditional cultivation practices, viz., the time of sowing as stated above is most important. Inherently, this crop variety is not strong enough to withstand heavy rain. Selection of seed variety, raising seedlings, maintaining distance between each plant while sowing, maintaining the water level in the fields, draining out excessive water, use of organic fertilizers, time and stage of harvesting, drying post-harvest are important factors to be meticulously observed. It is perceived that the traditional knowledge of its cultivation practices plays an equally crucial role in carving out a distinctive identity for '*Wada Kolam*'.

Although '*Zinnia 31*' is unique to the region, farmers prefer cultivating hybrid varieties mainly due to the following factors:

- (i) Cultivating this particular variety is a tedious task as it is highly dependent upon monsoon patterns inasmuch a heavy monsoon can destroy the entire crop. Therefore, cultivation of hybrid varieties such as GR4, GR11, YSR, Daphtary which are able to withstand adverse climatic conditions are preferred by farmers to avoid the risk of losing an entire crop due to unfavourable climatic conditions.
- (ii) The yield per hectare of '*Zinnia 31*' is far lower than that of hybrid crops. Although hybrid varieties are not equivalent to '*Zinnia 31*' in terms of nutrition and texture, they are bumper crops providing a higher yield, and therefore, turn out to be more profitable to farmers. Given its uniqueness in terms of cultivation, nutrition and taste '*Zinnia 31*' cannot be sold (currently) for less than Rs. 60/- per kg (approximately), whereas, hybrid rice can be sold for a lesser price.

- (iii) Rice varieties *viz.*, HMT, Suvarna, YSR which are similar in terms of grain size are widely cultivated in Andhra Pradesh, Karnataka and Tamil Nadu, and are passed off as '*Wada Kolam*'. Modern machinery enables grain cutting, polishing and finishing to give rice grains an appearance similar to *Wada Kolam* i.e., '*Zinnia 31*', which are obviously indistinguishable to the untrained eyes of consumers, thus, indicating blatant Passing-off. Another adverse factor is that farmers in Chinchani and neighbouring areas have reduced the cultivation of *Kolam*, and therefore, there is a likelihood that in future the identity of '*Zinnia 31*' may be replaced with that of duplicate varieties from other states. The question is whether hybrid varieties can be blamed for Genericide of '*Zinnia 31*', or is it dying a slow circumstantial death, not due to unfair competition or passing off but due its very fundamental characteristics and specific requirements. Thus, the writer infers that '*Wada Kolam*' is on the brink of 'Genericide' and therefore, an indigenous 'claw-back'<sup>22</sup> mechanism initiated through statutory GI certification to begin with is essential. However, it is not only '*Zinnia 31*' (*Wada Kolam*) but, several products *viz.*, Moradabad idol makers for 'Swamimala Bronze Icon' (SBI), cheap substitutes of 'AranmulaKannadi' in Aranmula and elsewhere, imitation of 'Pochampali Ikat' weaving by power looms and mills, imitation of 'Machilipatnam Kalamkari' by screen printers, Channapatna and Nirmal Toys (although registered GIs) are close substitutes to 'Kondapalli Toys', that have been withstanding stiff unfair competition.<sup>23</sup>
- (iv) Nevertheless, it is interesting to note that, an Application under The Geographical Indications of Goods (Registration and Protection Act, 1999 has been filed in 2020 by the '*Wada Kolam v BahuuddeshiyShetiUtpadanSahakariSansthaMaryadit*' for registration of '*Wada Kolam*' as a GI.<sup>24</sup> Given the numerous factors that contribute in making this variety of rice unique, a GI status would help provide more authenticity and marketability to the rice. Considering the uniqueness of '*Zinnia 31*' (*Wada Kolam*) the researcher is of the opinion that this variety of rice qualifies for a protection under The

Geographical Indications of Goods (Registration & Protection) Act, 1999. As GI is a mark of authenticity, it could act as an encouragement to farmers to cultivate this variety, and owing to its exclusivity, claim a higher price for it than the hybrid varieties. As cultivation of this particular variety is highly dependent on climatic conditions, there is little contribution that the government could do in otherwise preserving its identity. Nevertheless, governmental proactiveness through mass educational workshops, advertising, publicity and promotional activities aimed to create awareness so as to enable consumers to distinguish between genuine and pseudo *Wada Kolam* would certainly do much good. Moreover, registration would help in certifying and preserving its distinctive identity and help in counteracting infringement and perhaps GI-shield it from leading to 'Genericide'.

It is opined that mere legislation is insufficient for bringing about the required change in preserving the GI potentiality of a product. The law has to primarily benefit those for whom it has been enacted. The producers, a majority of who belong to the rural sector, may not be informed enough of laws that could assist them. This information asymmetry has kept producers in the dark about the possibility of acquiring a GI and thereby enjoys the benefits that it entails. This makes it essential for the legal fraternity to work towards spreading 'Legal Literacy' among citizens. Such a programme should include awareness of rights and the accessibility to legal protection mechanism. Through such a campaign the awareness of GI and connected rights would seep into the social consciousness of people.

In the case of '*Wada Kolam*', the farmers prefer cultivating hybrid varieties for the reasons stated above. The writer is convinced that a GI tag for '*Wada Kolam*' would certify its distinctive identity and help consumers differentiate it from the pseudo *Kolam*. In this context of the social responsibility of the legal fraternity *vis-à-vis* GI, this paper presents the following recommendations:

Involve students of Law as agents of the GI message. Students must be required to not only study the substantive law, but also aid in working the procedural law, by educating producers of the law per se, their rights and the ways and means to secure those rights.

Conducting workshops to educate and involve agriculturalists and manufacturers of the GI potential of their produce / goods. For instance, a series of workshops were conducted to sensitize the weavers of 'Pochampalli Ikat' about the relevance of GI. Simultaneously, an application for GI for Pochampalli Ikat' was filed in 2003. A meeting of the officials from the DHT, Weavers Service Centre (WSG), Textile Committee, APTDC and weavers from Pochampalli was convened in March 2004 to discuss the GI application when weavers were educated on the importance of protecting 'Pochampalli Ikat' for it being their traditional livelihood activity.<sup>25</sup>

Amend Chapter VIII (Offences, Penalties and Procedure) of The Geographical Indications of Goods (Registration and Protection) Act, 1999 to make the penal provisions more stringent in terms of imprisonment and fine, when infringement violations take place.

Enact a *sui generis* legislation to protect 'Traditional Knowledge' (TK) as there is a natural linkage between TK and GI. The 'good' per se qualifies for a GI tag, however, the process of manufacture involves TK - the 'AranmulaKannadi' metal alloy mirror manufactured in Aranmula, Kerala, is a case in point where process of manufacture involves TK, and the finished product is a GI.

In case of GI potential goods that have already become generic or are on the brink of Genericide, a 'claw-back' mechanism for reinstating distinctive identity would prove beneficial.

The writer of this paper agrees with Latha Nair & Rajendra Kumar (2005)<sup>26</sup>, that "the premium of a geographical indication is directly proportionate to the chances of its usurpation" and therefore, the supply chain integrity is imperative to the existence and survival of products branded with GIs. Once a GI passes into the generic domain, it becomes a futile attempt to restore its status quo. Product conscious consumers look for GI branded products for they are mentally assured of the quality, characteristics and reputation, which if otherwise duplicated or replicated outside the traditional production region or territory would be withered away. Lalitha & Vinayan (2019) call for collective strategies to minimize costs, prevent infringement, maintain quality, and brand-building efforts for conservation of GIs.<sup>23</sup> It is obvious that characteristics duplicated fraudulently or otherwise of all goods including 'Zinnia 31' (*Wada Kolam*) would lead to loss of reputation

and commercial advantage - hence the significance of GI.

In conclusion, the following observations of Lord Langdale MR in *Perry v Truefitt*<sup>27</sup> are of relevance to GIs as well,

"A man is not to sell his goods under the pretence that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot therefore, be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."<sup>28</sup>

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