

# TRADE SECRET AS LEGAL PROTECTION FOR MICRO AND SMALL, MEDIUM ENTERPRISES' TRADITIONAL FOOD PRODUCTS IN ESCALATING ECONOMIC GROWTH

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**Abstract.** *The trade secret for traditional food products from a particular area that possesses certain characteristics in the terms of quality or secretive production process generates from traditional cultures massively produced by Micro, Small, and Medium Enterprises (MSMEs) consider as the big hope for Indonesia in increasing the local economy. However, a high number of MSMEs do not have sufficient and comprehensive knowledge of trade secret protection for traditional food products. This research aims to identify and analyze the possibility of enacting trade secrets as the legal protection of traditional food produced by MSMEs to escalate the economic growth of society.*

*The result shows that Law Number 30 year 2000 on Trade Secret can be the legal justification to protect traditional food products produced by MSMEs considering in the production process of traditional food there are some secret recipes and methods that are not known by the public. In order to implement the comprehensive legal protection of trade secret, there are some requirements for the government and the producers in both internal and external aspects. It's important to formulate a conducive business ecosystem, upgrading of human resources, management system, the strengthening of capital power, creation of creative industries, legal permit system for business, the advancement of information and technology also global business and marketing network. There are some efforts conducted by the government in raising legal awareness concerning the importance of intellectual property protection and the high economic potential of intellectual property protection*

**Keywords :** *Legal Protection, Trade Secret, Traditional Food, Micro-Small Medium Enterprises.*

## 1. INTRODUCTION

The comprehensive protection of intellectual property including trade secret is highly crucial in escalating the economic growth of society. In the term of trade secret as legal protection for traditional food products produced by Micro-Small and Medium Enterprises (MSMEs), there is an interesting yet important correlation between the necessity of legal protection and the escalation of economic growth. In this case, there are at least 3 (three) important considerations of trade secret protection: 1) the high potential of economic benefit from the utilization of traditional knowledge, 2) Fairness in global trade and 3) the urgency to protect local indigenous community's rights.

Although intellectual property is classified as private rights, the emerging convergence of socio-politic-cultural and economic aspects shifted intellectual property into the economic area, (Muhammad, Abdul Kadir, 2007 : 76) not only as the business asset for well-established companies but also as potential capital assets for MSME's, the sector that is proven to be crucial for Indonesia because of the strategic role in ensuring the survival and sustainability of the society ( Tambunan, Tulus, 2009 : 45).

The empowerment of MSMEs is crucial concerning in ASEAN, MSMEs create 50 %-95% of job vacancies with contribution from 30% - 50 % to Gross Domestic Products (Islam, 2020), one of the potential sectors is traditional food that relatively close to MSMEs businesses'. The utilization of traditional knowledge in creating traditional food has become the core business of MSMEs, thus it's highly important to provide comprehensive legal protection and strategic measures to encourage the monetization of knowledge, information, creativity, and resources in traditional food products development.

In product development, MSMEs create valuable recipes, production process including the choice of raw material and the supplier to create traditional food product with high product differentiation and quality, these recipes and production processes then protected as valuable information for business sustainability, in other words, this information protected as a trade secret, where the owner taking necessary measures to protect the secrecy.

Trade secret becomes a problematic concept when it comes to the protection of traditional food products in Indonesia for several reasons, first the difference of mindset in viewing trade secret and intellectual property (IP) in general. The western perceived IP as capitalistic private rights, whereas in Indonesia the culture is still deeply rooted in communalism and kinship that often perceived information, creativity, and innovation as a public domain that needs no legal protection.

Law number 30 year 2000 on Trade Secret states that secret information includes production method, processing methods, selling and marketing methods or other information in the field of technology and/ or business that possess economic values and not known publicly are the subject to trade secret protection (Widjaya, Gunawan, 2001 : 36). This regulation, in fact potentially protect traditional food products developed by MSMEs and foster further creativity and innovation in product development, therefore there are 3 (three) important questions in this research :

1. Are the information considering the composition of ingredients and cooking recipes of the traditional food products can be categorized as trade secret and protected according to the intellectual property regime in Indonesia?
2. What is the effort taken by the Indonesian Government and Micro-Small and Medium Enterprises in Indonesia to overcome the challenges in implementing the trade secret protection for traditional food products?
3. How to formulate the comprehensive legal protection for traditional food products of Micro-Small and Medium Enterprises that foster the escalation of local economic growth?

## **2. LITERATURE REVIEW**

### **2.1 *Trade Secret as Business Assets and Legal Protection in Indonesia According to Law Number 30 year 2000 on Trade Secret***

Ideas, knowledge, concept, and information are important assets that potentially have high economic values (Beckerman-Rodau, 2002) and this economic value make the information valuable. The importance of information in businesses is compelling, this information defines broadly from methods, material, supplier contacts, consumer data, marketing strategy, and many others and company regularly seeking to develop their information databases as well as taking necessary measures in protecting them to

sustain their business and maintain their competitive advantage over their competitors (Epstein, 1988:887) when the trade secret owner can manage the secret information, on contrary, poor trade secret management potentially harms the business sustainability as well as losing their competitive power and characteristic as valuable business assets (Setiawan, Sulistianingsih, 2018).

Indonesia regulates trade secret protection on Law number 30 year 2000, the scope of trade secret protection covers production methods, processing methods, sales, and marketing strategies also any other information in the field of technology and/or business that possess economic value and unknown to the public. (Widjaya, Gunawan, 2001:36). A trade secret is automatically protected as long as this information remain secret, possesses economic value, and the secrecy is protected by the owner by taking certain measures. There is no time limitation for trade secret protection, as long as the confidential criteria are fulfilled, the protection of trade secret remains.

Information considered as confidential when there are only certain parties who know or have the access to that information or there are specific measures to keep the confidentiality, for example, the certain food recipes are secured in a *safe deposit box* or the company made a confidential agreement with the employee or third parties regarding the confidentiality of the information (Lindsey, Damian, et.al, 1994 : 68). The economic value of information comes from the ability of the information gaining economic value/benefit for example through certain ways and methods in produce the food products, the utilization of certain raw ingredients, secret recipes, and other details that can produce certain characteristics or taste as the competitive advantage for the businesses, including MSMEs businesses.

The right of trade secret covers the rights to utilize the information, methods, and other forms of the protected trade secret, the right to license the trade secret to other parties, and also to forbid any other parties to utilize the trade secret without prior inform consent or permission from the owner.

## *2.2 Traditional Food Products and Micro-Small Medium Enterprises (MSMEs) in Indonesia*

The food culture in Indonesia is shaped by several determinant factors such as nature, culture, and history that result in a wide variety of tastes and characteristics. Globally, food has become recognized as a part of local identity and culture (Bessiere, 1998; Du Rand GE, Heath, E, Alberts, N, 2003) and Indonesia has plenty of traditional food as the result of "food habits" that has been maintained and preserved through generations. Food habits are a certain cultural standard of behaviors that are expressed by individuals who have grown within certain cultures and traditions (Counihan, C and Esterik VP, 2008), that teaches them how the food ingredients are selected, how the foods are made, obtained and distributed. These rules are made by the influence of many factors such as natural/geographical factors, belief, ethnicity, and related technologies such as hunting, fishing, agricultural, and many others. (Wahlqvist and Lee, 2007).

Traditional food in Indonesia has extensive distinctiveness when it comes to the details, there are many differences and special characteristic from basic ingredients, the way the foods were cooked, prepared, preserved, the implements and utensils which are used, and the techniques for the food serving and the how-to consume it that highly influenced by geographic, natural, cultural and historical factors including cultural assimilation as an impact of colonialism (Wijaya, 2009). The high variety of geographical conditions and cultural diversity produced the rich Indonesian cuisine in variety and taste.

Traditional food deeply rooted in the daily life of society, and with the emergence of local traditional food businesses carried by Micro-Small and Medium Enterprises (MSMEs) it's highly important to protect, preserve as well as promote the unique characteristic of traditional food products to support the sustainably and resilience of small business and foster the economic growth of society.

### 3. RESEARCH METHODS / METHODOLOGY

This study used the juridical normative method by implementing applicable legal issues especially regarding trade secret and MSMEs businesses as a tool to analyze the legal protection as well as in creating the suggestions for a more comprehensive protection formula. The specification of the research is descriptive-analytical, in which this research describes the legal instruments concerning the protection of trade secret and further analyze this legal aspect regarding the implementation to protect traditional food products produced by Micro- Small and Medium Enterprises (MSMEs) using qualitative analysis based legal theories, legal principles, doctrines and regulations related to the research problems to identify the current condition and to provide the suggestions for improvement.

### 4. RESULTS AND DISCUSSION

#### 4.1 *Trade Secret as Legal Protection for Traditional Food Product Developed by Micro-Small Medium Enterprises (MSMEs) according to Law Number 30 year 2000 on Trade Secret*

Currently, the correlation between law and economic development gaining more attention in the development of economic activities as elaborated by Sunaryati Hartono : The functions of law in economic development are: 1) as the keeper of the order and security 2) as the instrument of development 3) as the instrument 4) as the instrument of justice education for the society. (Hartono, Sunaryati 1982 :10).

Law at the tool of engineering means that the law development needs to be conducted in certain ways to create the national legal system development, further Mochtar Kusumaatmadja stated that law in the term of norms or regulations functioned as the instrument of development by directing human behavior to certain direction as desired by the development itself, on the other words law as the tool of social engineering, besides its natural function as the order keeper. (Kusumaatmadja, Mochtar, 1976:17)

Law in economic view has an important role in regulating and empowering the producers to conduct the economic activities in certain ways, for example fulfilling the standard quality, protecting small businesses, and ensuring fair competition (Djumhana, Muhammad, 1994:78).

As the effort and strategy in protecting small businesses particularly in the culinary field, the government currently implementing the Good Manufacturing Practice (GMP) and Indonesia National Standard for food products to strengthen the structure of local food industries. The protection of trade secrets for food products plays a critical role in ensuring certain qualities are strictly followed in the production process. Trade secret also considers as "small business-friendly assets" because trade secret automatically protects confidential information that has economic value and the confidentiality is kept by taking certain efforts and measures to (Ramli, Ahmad. M, 2000: 47). The obligation of registration in Directorate General of Intellectual Property only covers the administrative documents in case there is a transfer of ownership or license agreement of trade secret with no disclosure of the substance of the trade secret. This is to protect the confidentiality of the trade secret object from the public.

The trade secret holder can transfer the information to other parties through a license agreement. This license agreement tied both parties and will have a legal impact on the third party once the agreement is registered. The government ensures that the registration costs are affordable especially for MSMEs businesses. This is to foster MSMEs business expanding the trade secret as business formula without having to disclose the information to the public and gaining economic benefit in the form of license fee without having to lose their rights on their trade secret. In other words, the protection of trade secret enables the producer/trade secret holder to keep utilizing the information to run the business and generate income while creating other sources of income through a license agreement.

#### *4.2 Government Action and MSMEs Strategies to Overcome the Challenges in Implementing Trade Secret Protection for Traditional Food Products to Escalate Economic Growth*

There are numerous challenges faced by traditional food industries – which are dominated by home industries, for example: **First**, limited knowledge concerning professional business management like how to produce the hygienic product with safe and good packaging. There is plenty of traditional food with great and likable taste stuck on poor packaging that prevents them to be marketed broadly.

**Second**, there are uncountable prospective traditional food businesses that remain stuck in the home industry level, this could happen due to the lack of business knowledge and management also as the effect of complicated bureaucracy and regulation for funding and business permit. **Third**, the lack of access to funding and credit caused by the lack of knowledge and information also the inability to fulfill funding requirements

Other than the aforementioned challenges, there are still many challenges faced by traditional food industries for example concerning the availability of infrastructures, business competition, and environmental issues. Therefore the strategic concrete measures are required to be taken by local government and all the stakeholders to escalate the development of local knowledge-based traditional food businesses utilized trade secret protection.

The government conducting a series of efforts and measures in empowering food products including traditional food to have competitive power in the global market. In a legal aspect, the government issued Law Number 30 year 2000 on Trade Secret and Law 7 number 1996 on Food. This effort needs to be supported by the producers, especially MSMEs producers in implementing those regulations. In particular, for the traditional food producers, it's highly crucial to maintain confidentiality regarding the process of their product by implying strategic measures for example through the confidentiality agreement between the company and the employee.

The retail business of Indonesian traditional food has high potential. There are many opportunities to gain acknowledgment from local, regional, and international consumers. Many business models that developed by MSMEs as an effort to improve their product by utilizing the strong protection of trade secret, for example:

1. The creation of creative industries as the model of the industry is based on the utilization of human creativity and potential in creating job vacancies and social welfare.
2. Product standardization to gain the acknowledgment and the guarantee of quality, for example through halal certification.

The protection of trade secret based on contract/ agreement has been explicitly states in article 5 verse (1) d Trade Secret Law, while the transfer of ownership requires a written contract in the form of an authentic deed. Written contract consider to be an important element, and the confidentiality clause can be inserted in the employment agreement or specifically made as a separated agreement. These regulations are important guidance for the producers/trade secret holder on how to maintain their trade secrets.

Trade secret protection based on a written agreement is particularly perceived as having more certainty for both parties since the confidentiality agreement precisely states the rights and obligations of both parties. For example, the employee signs the agreement that forbids them to leak any confidential information concerning the company and obliges to maintain the confidentiality of the aforementioned information. Written agreement/contact also provides a sense of security for the company in case of the employee breach the confidentiality agreement, the company would have a legal basis for example to file a lawsuit against the employee.

Particularly for the employee in a certain position like the research and development division, product design or other important position in the company, the existence of a confidentiality agreement is compelling to protect the company from the risk of unfair and unlawful action from the employee.

Those series of efforts also have been supported by collaboration and cooperation between institution and department, particularly in raising the awareness of the importance of intellectual property protection for traditional food product among producers to promote the high potential of a traditional food product as the pillar of economic development.

#### *4.3 . Formulation of Trade Secret Protection Concept for Traditional Food Products by Micro-Small Medium Enterprises (MSMEs) to Escalate Economic Growth Potential*

Indonesia has a very rich and unique food culture, almost every region in Indonesia has numerous traditional food and the derivatives means the new variation of food as the result of experiment and development with unique character and tastes. The potential and strategic value of local knowledge-traditional food development is infinite and requires more serious attention from the local government, producers, and community.

This endless potential of traditional food product supported by some important elements. **First**, abundant natural resources as the sources for ingredients, cultural richness, and traditional knowledge. Would be an absolute waste and unfortunate if these massive assets do not manage properly to create values and benefit.

**Second**, high market demand. Traditional food and crafts have a big market niche and are perceived as a necessity concerning tourism, the massive promotion of tourism also escalate the demand for traditional products.

**Third**, usually the producers of local souvenirs, local food, and other local products dominated by Micro-Small Medium Enterprises (MSMEs), home industries that absorb a high number of the informal worker. This can be perceived as the form of society-based economy empowerment, with more strategic optimization traditional food product business can be the generator of income and society welfare in a broader way including the local farmer as the provider of food ingredients.

**Fourth**, the optimization of the traditional food industry can be promotional tools as well as preservation media for cultures. Generally, local knowledge-based industries have some specialties other than as the tools of local empowerment also as the representation of local culture and the preservation of local culture as well as local food culture from the risk of extinction. Traditional food businesses also can shape regional branding to promote their region nationally and globally.

The aforementioned facts show that the traditional food business is highly potential for social welfare and local economic growth, the optimization becomes an urgency. Unfortunately, the efforts and measures taken by the government and local producers still far from comprehensive, the measures and efforts are sporadically taken and create

a massive gap between regions, this requires immediate actions from local government, local producers, and local society in the form of a collaborative platform.

The collaborative platform ought to be implemented in concrete measurements. **First**, Government, in particular, local government needs to create traditional food inventory in every region, this is an important step in preventing the extinction of traditional food. The inventory is then followed by an analysis concerning the potential development of traditional food.

**Second**, it's highly critical to provide socialization, information business coaching for MSMEs producers to encourage them in developing their traditional food product commercially and professionally, for example in the standard quality of the product, hygiene, and more interesting and safe packaging. The producers also need the information and training to manage the industrial waste to manage the environmental effect of their production and to prevent social conflict with society.

**Third**, socialization and education to the producers of traditional food concerning the importance of business permit and the registration and protection of intellectual property for example trademark and trade secret of traditional food. In the era where the awareness of intellectual property are highly rising, the registration of a trademark, patent, and protection of trade secret of traditional food product becomes crucial to prevent any claim from other parties or states. In the term of secret recipes and information, it's important to take strategic and specific measures in maintaining the confidentiality and concerning the invention and technology used to produce the product, patent protection is very crucial to prevent any unlawful act of utilization.

**Fourth**, to improve the existence and business competitiveness of traditional food products, the traditional food producers that are dominated by MSMEs producers and home industries need to be supported by training and professional business coaching to reach the higher state and improving their home industries to a bigger business scale.

One of **Fifth**, it's important to open wider access to funding considering the capital often becomes the most challenging for home industries to escalate their business. The requirement to apply for funding and banking credit need to be more simplified and when needed it's better if the local government, bank, or financial institution approach the producers who needed capital funding.

**Sixth**, the development of the traditional food business needs the support and collaboration of state holders and stakeholders: the government, non-governmental organizations, and social organizations to participate in socialization and public education. Further, academics can contribute to the term of research and development on innovation. Mass media and digital media can be an effective tool for massive publication for traditional food. The support for other sectors like agriculture as the provider of food ingredients and transportation sector in providing fast delivery also play important role in traditional food development by MSMEs.

In the term of escalating social welfare, it's important to open up to the possibilities in adopting custodianship or joint ownership and community-geographical-based ownership and custodianship (Santika, 2019) that proportionally protect traditional food and traditional knowledge as common property while the innovation in the form of traditional food product as trade secret or patent as the intersection and the balance between communal rights and private rights.

## CONCLUSION

The recipes concerning ingredients and how to process traditional food products can be categorized as a trade secret as states in Article 2 and 3 Law Number 30 year 2000, as the consequence trade secret law can be the basic justification of legal protection. Concerning the importance of trade secrets in traditional food businesses, there are several measurements to protect trade secrets of traditional food products by MSMEs for example by utilizing the trade secret law and the protection based on a confidentiality agreement. To create more comprehensive legal protection of trade secrets, it's important for the MSMEs producers to obey the regulation concerning trade secrets and to take strategic measurements in trade secret protection based on related regulations in the form of public- private partnership, community custodianship also trade secret and patent protection approach. To escalate the economic growth, MSMEs business needs to be supported by wider access to knowledge, training, and funding through the collaborative platform model involving state holder/government action and stakeholders participation from producers, academic institution, media, banking / financial institution and also society in general.

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