

Turnitin Artikel Industrial Design Protection in Indonesia

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INDUSTRIAL DESIGN PROTECTION IN INDONESIA: A FIQH PERSPECTIVE AND ITS CHALLENGES IN FACING COMMUNALISTIC VALUES

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Abstract: As a member of the World Trade Organization and a signatory to the TRIPs Agreement, the Indonesian Government drafted Law Number 31 of 2000 concerning industrial design. The establishment of TRIPs was the desire of industrial countries such as America and Europe to protect their products and strengthen their monopolistic position in international trade. Besides that, the philosophical foundation of TRIPs is based on individualism, while the social reality of the Indonesian nation adheres to a communalistic way of life. This research aims to describe industrial design protection in Indonesia and its problems from a *fiqh* perspective. This research is a legal research based on primary and secondary legal materials. Researchers also examined Law No. 31 of 2000 concerning industrial design and the Academic Paper of the Draft Law on Industrial Design in 2015. In data analysis, the authors use descriptive and comparative techniques. This study finds that although the Law of industrial design originates from the rules of the TRIPs Agreement, it generally does not conflict with Islamic jurisprudence but is in harmony with it. However, there are problems in protecting industrial design. To solve these problems, it is necessary to improve the industrial design law by considering national interests, improve the legal structure by increasing the professionalism of judges and judicial staff, and improve legal culture through education, socialization of legal regulations, good examples, and halal industrial designs.

Keywords: industrial design; TRIPs agreement; Islamic jurisprudence

Abstrak: Sebagai anggota Organisasi Perdagangan Dunia dan sebagai penandatanganan dari Perjanjian TRIPs, Pemerintah Indonesia menyusun Undang-undang Nomor 31 tahun 2000 tentang desain industri. Pembentukan TRIPs merupakan keinginan negara Industri seperti Amerika dan negara-negara Eropa untuk melindungi produk-produk mereka dan mengukuhkan posisi monopolistiknya dalam perdagangan internasional. Selain itu, landasan filosofis TRIPs berdasar pada individualisme, sedangkan realitas sosial bangsa Indonesia menganut tata kehidupan yang bersifat komunalistik. Penelitian ini bertujuan untuk mendeskripsikan perlindungan desain industri di Indonesia dan problem-problemnya dari perspektif hukum Islam. Penelitian ini merupakan penelitian hukum yang didasarkan pada bahan hukum primer maupun sekunder. Peneliti juga menguji UU No 31 tahun 2000 tentang desain industri dan Naskah Akademik Rancangan Undang-undang tentang Desain Industri tahun 2015. Dalam menganalisa data, penulis menggunakan teknik deskripsi dan perbandingan. Penelitian ini menyimpulkan bahwa meskipun undang-undang desain industri bersumber dari aturan-aturan yang ada di kesepakatan TRIPs, secara umum ia tidak bertentangan dengan hukum Islam, bahkan selaras dengannya. Hanya saja terdapat permasalahan-permasalahan dalam perlindungan desain industri. Guna menyelesaikan masalah-masalah tersebut, perlu ada penyempurnaan undang-undang desain industri dengan mempertimbangkan kepentingan nasional, pembenahan struktur hukum melalui peningkatan profesionalisme hakim dan staf peradilan, dan peningkatan budaya hukum melalui pendidikan, sosialisasi peraturan perundang-undangan, suri teladan yang baik, dan desain industri halal.

Kata Kunci: Desain Industri; perjanjian TRIPs; Fikih



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INTRODUCTION

An industrial design adds value to a product. It makes a product attractive and appealing to customers and maybe its unique selling point.¹ Customers prefer to buy a product with attractive designs rather than unattractive ones. An industrial design is a business asset that can increase the commercial value of a company and its products. The more successful a design, the higher its value to the company.²

Due to that, industrial design protection has been a recurring topic among industrial designers and intellectual property scholars since product design became an integral part of the manufacturing process during the Industrial Revolution.

¹ J.K. Ahmadu-Suka, *An Introduction to Industrial Designs for Small and Medium Sized Enterprises in Nigeria*, 6. https://www.wipo.int/export/sites/www/sme/en/documents/guides/customization/looking_good_nigeria, accessed August 15 2023.

² M. Goatman and L. Moody, "The changing nature and definitions of industrial design and implications for prospective undergraduate students." *An International Journal* 19, 1, (October 2014), 21. <https://ojs.lboro.ac.uk/ojs/index.php/DATE/article/view/1922>

Proponents argue that protecting industrial design will foster more creativity and innovation from designers. Meanwhile, opponents base their argument on the adverse economic effects that extending protection would have on the price and availability of consumer goods.³

Historically, industrial design protection is divided into three periods. The first period was called the territorial period, where industrial design protection was still limited within the territory of each country. England's first industrial design law in 1787 was The Designing and Printing of Linens, Cotton, Calicoes, and Muslins Act.⁴

The second period is called the international period. Starting in the 19th century, it focused more on international cooperation in industrial design through bilateral agreements. In 1852, France protected the copyright of foreign works without conditions of reciprocity.⁵

The third period is after the birth of the World Trade Organization (WTO). After the WTO was successfully declared and signed in April 1994 in Morocco, industrial design became one of the agreements stated in Annex 1 C about the Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPs).⁶

The inclusion of industrial design regulations in the WTO was the desire of industrial countries, namely the United States and the European Union, so that the industrial designs they own could be more guaranteed in international trade. On the other hand, developing countries rejected that inclusion. They thought there was no connection between industrial designs and trade, and it would strengthen the monopolistic position of industrial countries.⁷

In addition, the TRIPs Agreement provides more benefits to developed countries, both economically and in terms of the dominance of science and technology. For example, developed countries usually put pressure on developing countries in the interests of companies in those countries, such as the pharmaceutical industry.⁸

³ Regan E. Keebaugh, "Intellectual Property and the Protection of Industrial Design: Are Sui Generis Protection Measures the Answer to Vocal Opponents and a Reluctant Congress?" *Journal of Intellectual Property Law* 13, no. 1 (October 2005), 2, <https://digitalcommons.law.uga.edu/cgi/>.

⁴ Alexander Carter-Silk and Michelle Lewiston, *The Development of Design Law Past and Future from History to Policy* (Cardiff: The Intellectual Property Office, 2012), 20.

⁵ Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia* (Bandung: CV Mandar Maju, 2012), 46.

⁶ Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia*, 89.

⁷ Nandang Sutrisno, "Implementasi Persetujuan TRIPs dalam Undang-Undang Hak Cipta di Indonesia," <http://www.iprcentre.org/doc> accessed Nov 3 2023.

⁸ Hira Jhamtani, *WTO dan Penjajahan Kembali Dunia Ke Tiga* (Yogyakarta: Insist Press, 2005), 89.

However, the participation of Indonesia as a member of the World Trade Organization resulted in Indonesia's ratification of the Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPs) with the enactment of Law number 7 of 1994,⁹ as well as to regulate provisions regarding industrial designs,¹⁰ the latest of which was a Law number 31 of 2000.¹¹ This law contains 13 chapters and 57 articles.

The question is whether the changes in the industrial design law are contradictory or could be detrimental to Indonesia's national interests. First, the TRIPs Agreement was born due to pressure from Western countries to protect their hegemony over developing countries. *Second*, the value underlying the industrial design concept is individualism; on the contrary, the Indonesian nation's social reality adheres to a communal social life system, not individualistic. Besides that, property is not solely personal property but has a social function.¹²

Based on the preceding, this research will raise several problem statements: *First*, what is the view of *fiqh* regarding the protection of industrial design in Indonesia? *Second*, what does *fiqh* offer the solutions to overcome problems in industrial design protection?

This research aims to describe the view of *fiqh* towards the protection of industrial design in Indonesia. It also illustrates solutions offered by *fiqh* to overcome problems in industrial design protection in Indonesia.

This is library research, where the researchers collect the data from books and journals, then read, study, record, filter, and pour it into a theoretical framework. The authors also examine the Law Number 31 of 2000 on industrial design and the Academic Manuscript of the 2015 Draft Law on Industrial Design. This research uses a qualitative approach by descriptively presenting the data and research results. The research explains the protection of industrial design in Indonesian law and compares it with Islamic jurisprudence to see whether it is compatible with Islamic jurisprudence.

CONCEPTION OF INDUSTRIAL DESIGN

⁹ Imas Rosidawati Wiradirja, "Legal Protection of Industrial Designs to Creative Economy after The Enactment of Asean Economic Society." *International Journal of Multidisciplinary Thought* 7, no. 2 (2018), 470.

¹⁰ Erika Vivin Setyoningsih, "Implementasi Ratifikasi Agreement on Trade Related Aspects of Intellectual Property Right terhadap Politik Hukum di Indonesia." *Jurnal Penegakan Hukum dan Keadilan* 2, no. 2 (September 2021), 118, <https://doi.org/10.18196/jphk.v2i2.11749>.

¹¹ Alfariz Maulana Reza, "Kepastian Hukum dalam Kekayaan Intelektual: Perlindungan Desain Industri Melalui Unsur Kebaruan di Indonesia." *Nagari Law Review* 5, no. 1 (October, 2021), 77, <https://doi.org/10.25077/nalrev.v5i1.p.76-86.2021>.

¹² Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia*, 23.

Article 1 Law Number 31 of 2000 states that industrial design is the creation of the shape, configuration, or composition of lines or colors, or lines and colors, or the combination thereof in a three or two-dimensional form which gives the aesthetic impression and can be realized in a three or two-dimensional pattern and used to produce a product, goods or an industrial commodity and a handy craft.¹³

The International Council of the Society of Industrial Design (ICSID) defines industrial design as a creative activity to realize the properties of the shape of an object. In this case, it includes the characteristics and relationships of harmonious structures or systems from the point of view of producers and consumers.¹⁴

Therefore, referring to those definitions above, the characteristics of industrial design can be formulated as follows:

1. Creation on the shape, configuration, or composition of lines or colors, lines, and colors, or the combination thereof.
2. The creation must be in the form of two or three dimensions or a combination of both.
3. The creation must give an aesthetic impression.
4. The creation must be usable for producing a product in the form of goods, industrial commodities, or handy crafts.

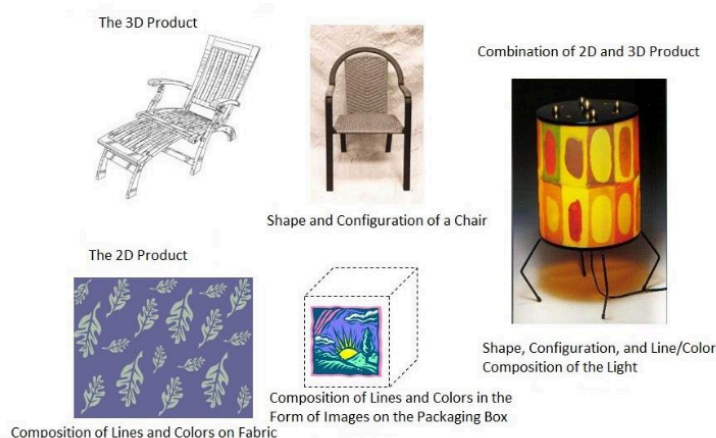
The industrial design can be in the form of three-dimensional, two-dimensional, or a combination of them.¹⁵ The image below is an example of products containing industrial designs in two, three, or a combination.

Figure 1. Examples of Industrial Designs

¹³ Law Number 31 of 2000 concerning industrial design, article 1, paragraph 1.

¹⁴ Khoirun Nissa, "Protection of Industrial Design Law in the Enhancement of Economic Development in Indonesia." *Journal of Private and Commercial Law* 3, no. 2 (2019), 77, <https://doi.org/10.15294/jpcl.v3i2.19774>.

¹⁵ Khoiril Hidayah, *Hukum Hak Kekayaan Intelektual* (Malang: Setara Press, 2017), 137.



Source: processed by the researcher, 2023

An industrial design differs from a patent in that the industrial design is an ornamental or aesthetic aspect of a product. At the same time, a patent refers to a product's technological and functional side.¹⁶ A design protects its appearance, whereas a patent protects a device's function, method, or method of operation. A design protects the appearance of a product or item. In contrast, a patent protects ideas and concepts.¹⁷

Designer shall mean a person or several persons who produce an industrial design.¹⁸ If the designer is only one person, the right to Industrial design shall be granted to him or those who receive the right from him. Where the designers comprise several persons, the right to industrial design shall be granted jointly.¹⁹

The right to industrial design means an exclusive right granted by the Indonesian Government to a designer for his creation for a given period to exploit his creation by himself or to give permission to another party.²⁰ This right grants

¹⁶ Raym Su'ud Samawi, *Barā'at al-Ikhtirā' fi al-Ṣinā'at al-Dawā'iyyah* (Oman: Dār al-Thaqāfah, 2011), 72.

¹⁷ Renjani R, "Patent vs Design: What's the Difference?," accessed March 12, 2023, <https://vakilsearch.com/blog/patent-vs-design-what-the-difference/>

¹⁸ Law Number 31 of 2000 concerning industrial design, article 1, paragraph 2.

¹⁹ Zico Armanto Mokoginta, "Perlindungan Hukum Atas Desain Industri Berdasarkan Undang-Undang Nomor 31 Tahun 2000 Tentang Desain Industri," *Lex Privatum* 5, no. 5 (July 2017), 126.

²⁰ Law Number 31 of 2000 concerning industrial design, article 1, paragraph 5.

him an exclusive right to exploit his design by making, using, selling, importing, exporting, or distributing it and to prohibit others without his consent.²¹

The granting of this right is a form of appreciation and recognition for his success in producing innovative works. In addition, giving this right to the designer is a logical consequence because he has exercised and used his intellectual abilities to create creative ideas, so he needs to be given an exclusive right to enjoy the results of his creativity as a reward.²²

LEGAL ROOTING (*AL-TA'ŞĪL AL-QĀNŪNĪ*) OF THE INDUSTRIAL DESIGN

Legalists always mention industrial design when discussing industrial property rights, which indicates that industrial design is included in Indonesian law's terms of rights and property.²³ For this reason, these two terms and their relationship to industrial design should be clarified.

1. Right and Its Relationship to the Industrial Design

Right is a relationship between a person and an object of the right protected by law and obliges others to respect it. The right is divided into a fundamental right (property right) and a personal right (individual right). A fundamental right is a right that a person has to an object, whereas a personal right is a right that a person has against another.²⁴

The fundamental right can be divided into two, namely, material and immaterial. The immaterial right includes intellectual property rights. Intellectual property rights are divided into patent, trademark, copyright, industrial design, trade secret, geographical indication, plant variety, and layout design of integrated circuits.²⁵ From the division above, it can be seen that industrial design is part of intellectual property rights.

2. Property and Its Relationship to the Industrial Design

Property varies according to different types. Given its form, property is divided into tangible and intangible. Tangible property is like land and equipment, which has a

²¹ Law Number 31 of 2000 concerning industrial design, article 9, paragraph 1.

²² Mikhail Muhammad Ashiddiq, "Perlindungan Desain Industri Terhadap Praktik Peniruan Desain Berdasarkan Kualifikasi Kebaruan Desain Industri," *Palar* 7, 2 (Desember, 2021), 96, DOI: 10.33751/palar.v7i2.3401.

²³ Suyud Margono, *Hak Milik Industri: Pengaturan dan Praktik di Indonesia*, 14; Suyud Margono *Hukum Hak Kekayaan Intelektual* (Bandung: Pustaka Reka Cipta, 2015), 113; Kholis Roisah, *Konsep Hukum Hak Kekayaan Intelektual*, 8.

²⁴ Neng Yani Nurhayani, *Hukum Perdata* (Bandung: CV Pustaka Setia, 2015), 176.

²⁵ Dian Latifiani, "Pentingnya Hak Kekayaan Intelektual Sebagai Hak Benda Bagi Hak Cipta Atau Merk Perusahaan," *Supremasi Hukum* 31, no. 1 (Januari 2022), 67, <https://doi.org/10.33369/jsh.31.1.66-74>.

physical existence. Meanwhile, intangible property is like rights, benefits, and goodwill, which do not exist physically.²⁶

Given the possibility of transfer, property is divided into movable and immovable. Movable property means something can be moved to another place while remaining in its original form, such as currencies. On the other hand, immovable property refers to something that cannot be moved to another place without changing its original form, such as land and buildings.²⁷

From the previous divisions, the industrial design is included within the intangible property because it does not have a physical existence, such as a company's brand name. But both of them had great financial value, so merchants protected them.²⁸

Among the evidence that industrial design is considered intangible property is that consumers are often first interested in how a product looks before deciding to buy it. Industrial design plays an essential role as one of the determining factors for consumers to buy the product or not. Therefore, many business actors innovate to make products with a unique appearance.

JURISPRUDENTIAL ADAPTATION (*AL-TAKYĪF AL-FIQHĪ*) OF THE INDUSTRIAL DESIGN

The identification of the jurisprudential adaptation (*al-takyif al-fiqhī*) of the industrial design is considered a natural entry and a scientific prelude to arranging the legal ruling of it. Therefore, the researchers present the jurisprudential adaptation of the industrial design by describing the concept of right and property in Islamic jurisprudence and their relationship to the industrial design.

1. *Al-Ḥaq* and Its Relationship to the Industrial Design

In Arabic, the term "right" is known as *al-Ḥaq* with several meanings, such as reality, justice, truth, and fact. It is the opposite of *al-Bātil*, which means false, wrong, unjust, and unreal.

Classical Muslim jurist Al-Aini²⁹ defined *ḥaq* as the entitlement of a person to a thing (*al-ḥaq mā yastahiqquhu al-raju*). Meanwhile, modern scholar Musthafa al-Zarqa³⁰ argues that *ḥaq* is an exclusive assignment by which the legislator bestows

²⁶ Abdul Kadir Muhammad, *Hukum Perdata Indonesia* (Bandung: PT. Citra Aditya Bakti, 2014), 129.

²⁷ Butarbutar, *Hukum Harta Kekayaan Menurut Sistematika KUH Perdata dan Perkembangannya*, 28-29.

²⁸ Margono, *Hak Milik Industri: Pengaturan dan Praktik di Indonesia*, 6.

²⁹ Mahmud bin Ahmad al-Aini, *Al-Bināyah Sharḥ al-Hidāyah* (Beirut: Dār al-Kutub al-Ilmiyyah, 2001), 7, 386.

³⁰ Musthafa Ahmad al-Zarqa', *Al-Madkhāl ilā Nazariyyāt al-Itizām al-'Ammah fī al-Fiqh al-Islāmī* (Damascus: Dār al-Qalam, 1999), 19.

upon a person authority over a thing or sets an obligation to do an act (*ikhtiṣās yuqarriru bihi al-shar'u sultatan aw taklifan*). This definition signifies *ḥaq* as an exclusive assignment from the Shariah in either power, demand, or obligation (*taklif*).

The right can be divided into many categories according to different considerations. According to its owner, the right is divided into the right of Allah (*ḥaq Allah*), the right of servant (*ḥaq al-'abdi*), and joint right (*ḥaq mushtarak*).³¹

Another way to classify the right is by consideration of its relation to the property. In this sense, the right can be classified into property rights (*ḥaq māli*) and non-property rights (*ḥaq ghayr māli*). A property right is defined as a right related to property and its benefits, such as a debt right (*ḥaq al-dayn*) and ownership right (*ḥaq al-milkiyyah*). This right includes the right over the object (*'ayn*), the usufruct (*manfa'ah*), and the debt (*day*). On the other hand, Non-property right can be defined as a right that is not related to property, such as custodial right (*ḥaq al-ḥadānah*) and guardianship right (*ḥaq al-wali*).³²

On this basis, nothing in Islamic jurisprudence prevents industrial design from being considered a property right. Because the property right in Islamic jurisprudence includes the right to the object, the benefit, and the debt. As mentioned before, industrial design has a great benefit, whether for its owner, consumers, or the public. So, there is no objection to considering it as a property right.

2. *Al-Māl* and Its Relationship to the Industrial Design

The dictionary defines *māl* as simple; "whatever you own from all matters."³³ However, the legal definitions given by the jurists to *māl* are various due to their differences in describing the focus of the proprietary aspects of things (*manāt māliyyat al-ashyā'*). Some of them say that the property is limited to human matter only (*'ayn*), while others emphasize that it also includes usufruct (*manfa'ah*) and right (*ḥaq*).

The majority of the classical Hanafi jurists limited *māl* to corporeal matter only. For example, Ibn 'Abidin defined *māl* as "that which human nature inclines and can

³¹ Abdullah bin Ahmad bin Qudamah, *Al-Mughni* (Beirut: Dār al-Kutub al-Ilmiyyah, 2009), 12, 128.

³² Engku Rabiah Adawiah Engku Ali, "Re-Defining Property and Property Rights in Islamic Law of Contract." *Jurnal Syariah*, 11, no. 2, (2003), 52.

³³ Muhammad bin Ya'qub al-Fairuzabadi, *al-Qāmūs al-Muḥit* (Beirut: Muassasah al-Risālah, 1996), 1368.

be stored for future needs.³⁴ In another place, he described *māl* as "corporeal matter ('*ayn*) capable of being controlled and acquired.³⁵

The majority of scholars from the Maliki, Shafi'i, and Hanbali schools,³⁶ as well as almost all contemporary scholars,³⁷ chose to expand the meaning of *māl* to include corporeal matter, usufruct, and right if they meet the financial conditions (*shurūt al-māliyyah*).

According to this view, to be a proprietary value (*māl mutaqaawam*), two essential elements should be present. *First*, the usufruct of the thing should be legally permissible; *second*, it is customarily treated as property or of proprietary value.³⁸

Based on the opinion of the *Jumhūr*, the researcher says that the industrial design can be considered as *māl* because it has a benefit (*manfa'ah*). It benefits its owner by granting him the right to exploit his design by himself or to permit another party to do so.

Industrial design also benefits consumers because it helps them choose and buy goods according to their wishes. Consumers are often first interested in a product's appearance before deciding to buy it. Industrial design plays a vital role in determining whether consumers buy the product. Therefore, many business actors innovate to make products with a unique appearance.

³⁴ ما يميل إليه الطبع، ويمكن ادخاره لوقت الحاجة

Muhammad Amin bin Umar bin Abidin, *Radd al-Muhtār 'alā al-Dur al-Mukhtār* (Riyad: Dār 'Alam al-Kutub, 2003), 7, 10.

³⁵ والمراد بالمال عين يجري فيه التناقل والابتدال

Ibn Abidin, *Radd al-Muhtār*, 7, 21.

³⁶ al-Syatibi from the Maliki School defined *māl* as:

ما يقع عليه الملك، ويستند به المالك عن غيره إذا أخذ من وجهه

al-Zarkhasyi from the Syafi'i School defined *māl* as:

ما كان منتظماً به، أي مستعداً لأن ينتفع به، وهو إما أعيان أو منافع

al-Buhuti from the Hanbali School defined *māl* as:

ما يباح نفعه مطلقاً أي في كل الأحوال، أو يباح اقتناؤه بلا حاجة

Ibrahim bin Musa al-Shatibi, *al-Muwāfaqāt* (Giza: Dār Ibnu 'Affan, 1421), 2, 17; Muhammad bin Bahadir al-Zarkashi, *al-Manthūr fī al-Qawā'id* (Kuwait: Muassasah al-Falij, 1982), 3, 222; Manshur bin Yunus al-Buhuti, *Sharḥ Muntahā al-Irādāt* (Beirut: 'Alam al-Kutub, 1996), 2, 7.

³⁷ al-Ibadi defined *māl* as:

ما كان له قيمة مادية بين الناس، وجاز شرعاً الانتفاع به في حال السعة والاختيار

Abdussalam Daud al-'Ibadi, *al-Milkiyyah fī al-Sharī'ah al-Islāmiyyah* (Beirut: Muassasah al-Risālah, 2000), 1, 210.

³⁸ Engku Ali, *Re-Defining Property and Property Rights in Islamic Law of Contract*, 50.

PROTECTION OF INDUSTRIAL DESIGN IN INDONESIA FROM FIQH PERSPECTIVE

1. Protection of Industrial Design in Indonesia

As stated above, Indonesian Law classifies industrial design as a right and property, so it is entitled to protection, like any other right and property.³⁹ An industrial design will receive legal protection if registered⁴⁰ in the Directorate General of Intellectual Property, Ministry of Law and Human Rights of the Republic of Indonesia.

To be registered, an industrial design must meet administrative and substantive requirements. Substantive requirements include:

- a. Novelty. An industrial design shall be deemed new if, on the filing date,⁴¹ such industrial design is not the same as any previous disclosures.⁴²
- b. Not included in the exemption list for obtaining industrial design. Among several conditions that prohibit the registration of an industrial design are:
 - 1) It has similarities in principle, or as a whole, with the industrial design of another person previously registered for the same goods.
 - 2) It contradicts prevailing laws, regulations, public order, religion, or morality.

If an industrial design is declared to meet administrative and substantive requirements, it will be protected, and the right to industrial design will be granted.⁴³

The protection of the right to industrial design shall be granted for 10 (10) years from the filing date.⁴⁴ Within that time, the design is protected, and only the designer or right holder has the right to exploit it. Therefore, any person who deliberately and without rights commits any acts, namely making, using, selling, importing, exporting, and distributing the products that have been granted the right to the

³⁹ Suyud Margono, *Hak Milik Industri: Pengaturan dan Praktik di Indonesia* (Bogor: Penerbit Ghalia Indonesia, 2011), 8; Kholis Roisah, *Konsep Hukum Hak Kekayaan Intelektual* (Malang: Setara Press, 2015), 8; Khoirul Hidayah, *Hukum Hak Kekayaan Intelektual* (Malang: Setara Press, 2017), 3.

⁴⁰ Law Number 31 of 2000 concerning industrial design, Article 10.

⁴¹ A Filing Date means the date of receipt of an application provided that the applicant has filled in the application form, he has attached a physical sample or drawing or photograph and a description of the industrial design being applied for registration, and he has paid the application fee. (Law of Industrial Design, Article 18).

⁴² Law Number 31 of 2000 concerning industrial design, Article 2.

⁴³ Rizqi Tsaniati Putri, *Syarat Kebaruan pada Desain Industri sebagai Dasar Gugatan Pembatalan Desain Industri*, 2115.

⁴⁴ Law Number 31 of 2000 concerning industrial design, Article 2.

industrial design, shall be sentenced to imprisonment of at most 4 (four) years and a fine of at most Rp.300,000,000.00 (three hundred million rupiahs).⁴⁵

2. The Fiqh Views on The Protection of Industrial Design in Indonesian

The previous discussion explained that Islamic jurisprudence categorizes an industrial design as right and property. So, it must be protected like any other rights and property.

According to al-Ghazali, *Māqāṣid* of Sharia are five, namely the protection of religion (*hiḥf al-dīn*), the protection of soul (*hiḥf al-nafs*), the protection of intelligence (*hiḥf al-aql*), the protection offspring (*hiḥf al-nasl*), and the protection of property (*hiḥf al-māl*).⁴⁶ It means that God establishes various provisions to preserve these five necessities.⁴⁷

Thus, protecting property is one of *Māqāṣid* of Sharia. Islamic jurisprudence preserves property by prohibiting types of abuse, such as theft, fraud, consuming it unjustly, and the like.⁴⁸

In contrast to the Law, Islamic jurisprudence does not require registration for a design to receive protection. It makes the basis of protection the proprietary aspects of things (*māliyat al-ashya*). Everything that people consider as property is property and legally protected, as long as there is no evidence for its prohibitions.⁴⁹

However, it seems to the researchers that there is no objection to implementing this condition (registration of the industrial design) because it includes the documentation of rights highly recommended in Islamic jurisprudence.⁵⁰

Meanwhile, regarding other requirements, namely novelty and legality, the authors emphasize that these requirements do not contradict Islamic jurisprudence. *First*, novelty. This condition is by this provision, the Prophet Muhammad said: "If anyone reaches a water which has not been approached before by any Muslim, it belongs to him."⁵¹ The hadeeth indicates that if anyone reaches a design that has not

⁴⁵ Law Number 31 of 2000 concerning industrial design, Article 9 Paragraph 1.

⁴⁶ Salami Mahmud, "Building Students' Character Based on Maqāṣid al-Shari'ah: Perspectives of Parents, Teachers, and Community Members in Banda Aceh," *Samarah* 7, no. 3 (November 2023), 1807, <http://dx.doi.org/10.22373/sjhk.v7i3.17708>.

⁴⁷ Iffatin Nur and Reni Puspitasari, "Postgender Fiqh: The Views of MUI's and KUPI's Ulama on Postgenderism from Maqāṣid Shari'ah Perspective," *al-Ihkam* 18, no. 1 (2023), 166, <http://doi.org/10.19105/al-lhkam.v18i1.7313>.

⁴⁸ Wahbah al-Zuhayli, *al-Wajiz fi Ushul al-Fiqh* (Damascus: Dār al-Fikr, 1999), 220.

⁴⁹ Muhammad bin Muhammad al-Ghazali, *al-Mustasfā* (Beirut: Dār al-Kutub al-Ilmiyyah, 2000), 1, 173.

⁵⁰ Surah al-Baqarah: 282.

⁵¹ Sulaiman bin al-Ash'ath Abu Dawud, *Sunan Abi Dāwūd* (Beirut: Dār al-Kutub al-Ilmiyyah, 2001), 496.

been approached before by any others, it belongs to him, and therefore, he has the right to apply for its registration.

Second, legality. The researcher sees that this condition is permissible because registering a design similar to another person's design causes harm to him by stealing the fruit of his idea. Allah forbids encroaching on property, as He said: "Do not consume one another's wealth unjustly" (Al-Baqarah: 188).

In addition, registering a design contrary to the prevailing laws and regulations, public order, religion, or morality causes harm to society because it will lead to chaos, corruption, and hostility among them. And it was stated in the maxim of *fiqh* (*qā'idah fiqhiyyah*) that "Harm is to be eliminated."⁵²

Meanwhile, the punishment for industrial design infringers in Indonesian law, imprisonment, and a fine, is somewhat similar to the so-called discretionary punishment (*Ta'zīr*) in Islamic jurisprudence. *Ta'zīr* is a discretionary punishment for crimes for which no specific punishment is stated in Islam, and it is left to the Syariah ruler or the judge to specify its type and amount.⁵³

Ta'zīr punishments may be classified as follows: Physical punishments, financial punishments, punishments of imprisonment, and moral punishment.⁵⁴ *First*, Physical punishments. This punishment can be imposed by beating or flogging for some types of design infringement, such as repeated infringement by a person who is hoped to be punished with this type of *ta'zīr*.

Second, financial punishments, such as destroying tools necessary for producing counterfeit products, seizing counterfeit products, or finding a certain amount of the offender's money. *Third*, Punishment of imprisonment. The length of time in prison depends on the type of crime. Short prisons are for simple crimes or first-time offenders, while longer prisons are for severe crimes or continuous offenders. *Fourth*, Moral punishments, such as public rebuke. This is by announcing to all people the sins that the person has committed so that they warn him. Multiple media and publications can be used to inform people about his condition, to warn him, and to leave dealing with him.⁵⁵

In the end, it can be noted that Islamic jurisprudence and Indonesian law agree to protect industrial design. They also agree on the prohibition of infringement on it

⁵² Jalaluddin al-Suyuthi, *al-Ashbāh wa al-Nazā'ir* (Riyad: Maktabah Nizār Muṣṭafā, 1997), 1, 176.

⁵³ Izzuddin bin Abdissalam, *Qawā'id al-Ahkām fi Maṣā'il al-Anām* (Beirut: Dār al-Kutub al-Ilmiyyah, 1999), 1, 130.

⁵⁴ Ibn Qayyim al-Jauziyah, *Al-Thuruq al-Hukmiyyah fi al-Siyasah al-Syar'iyyah* (Cairo: Dār al-Hadith, 2002), 225.

⁵⁵ Husein bin Ma'lawi al-Syahrani, *Huquq al-Ikhtira' wa al-Ta'lif fi al-Fiqh al-Islāmi* (Riyadh: Dār Thaibah, 2004), 543.

as a right and property for its owner. They also agree to impose a criminal penalty on the infringer, whether by making, using, selling, importing, exporting, or distributing the products granted the right to industrial design.

However, they differ in some forms of punishment, as the law was limited to imprisonment and fines. In contrast, the punishments in Islamic jurisprudence varied to include flogging, destruction, confiscation, fines, imprisonment, and defamation.

PROBLEMS OF INDUSTRIAL DESIGN PROTECTION IN INDONESIA AND ITS SOLUTIONS FROM FIQH PERSPECTIVE

1. Problems of Industrial Design Protection in Indonesia

In Indonesia, violations of industrial design still occur frequently. The Directorate General of Intellectual Property reported that from 2011 to 2020, it had received 41 complaints of industrial design infringement cases.⁵⁶ This fact shows that industrial design protection in Indonesia has not worked as expected.

The ineffectiveness of industrial design protection in Indonesia causes several problems. *First*, problems in legal substance. Since the enactment of Industrial Design Law number 31 of 2000 on 20th December 2000, disagreements among jurists emerged between those who supported it and those who objected to it. Proponents argue that this law is the result of an adaptation of the TRIPs Agreement and follows international development in the regulation and protection of industrial design so that it can be considered suitable for Indonesia.

On the other hand, opponents such as Candra Irawan argue that the law does not regulate aspects of national interest completely and firmly, for example, regarding mandatory licensing and the protection of traditional knowledge, folklore, and netizens' cultural products.⁵⁷

In line with Candra, Enny Nurbaningsih Emphasizes that the current law does not discuss protecting industrial design for small and medium enterprises (SMEs).⁵⁸ However, Small and medium enterprises are essential in determining the survival and evolution of countries' economies,⁵⁹ including Indonesia. Most businesses in

⁵⁶ <https://ppid.dgip.go.id/file/429836529.pdf>

⁵⁷ Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia* (Bandung: Penerbit CV Mandar Maju, 2012), 20.

⁵⁸ Cita Citrawinda et al, *Naskah Akademik Rancangan Undang-undang tentang Desain Industri* (Jakarta: Kementerian Hukum dan HAM, 2013), 26.

⁵⁹ Abdo Yousef Qaid Saad, Mustafa Omar Mohammed, Ibrahim Al-Jubari, and Forbis Ahamed, "The Prospect of Waqf in Financing Small and Medium Enterprises (SMEs) in Yemen," *QIJS* 10, No. 2 (2022), 382, DOI: <http://dx.doi.org/10.21043/qjjs.v10i2.9689>.

Indonesia (more than 99%) are in the form of UKM.⁶⁰ She adds that the law does not protect folklore or traditional cultural expressions by emphasizing that those cannot be given protection as industrial designs.⁶¹ This law does not regulate the government's implementation of industrial design rights based on state security considerations or public interest.⁶²

Second, problems in legal structure, including courts, justices, judges, lawyers, and so on. Unfortunately, until now, the face of the Indonesian judiciary is still shrouded in dark clouds. Corruption, collusion, and nepotism (KKN), which should be eradicated, instead nest there. The practice of the judicial mafia has become an open secret.⁶³

Last January, the public was shocked by the news of the appointment of two Mahkamah Agung judges and several officials as suspects in the bribery case handling the civil bankruptcy cassation case of the Intidana Savings and Loans Cooperative (KSP).⁶⁴ It cannot be denied that this incident tarnished the face of the judiciary and reduced the level of public trust. As a result, they lose trust in the judiciary as a place to fight for justice.⁶⁵

Third, there is a problem in legal culture. Public legal awareness is also an obstacle in law enforcement in Indonesia. Various bad cultures, such as a lack of appreciation for intellectual work, a sense of pride when their intellectual work is imitated, and using shortcuts to achieve big profits, encourage society to commit plagiarism or imitate people's intellectual work.⁶⁶ This fact is exacerbated by the view that industrial design protection has no historical roots in Indonesia and does not exist in customary law.⁶⁷

2. Proposed Solutions to Solve the Problems of Industrial Design Protection in Indonesia in the Light of Fiqh

Regarding the problems above, the authors try to provide solutions by relying on Islamic jurisprudence. Several things can be mentioned here. *First*, regarding problems in legal substance, it is necessary to restructure the legal substance through

⁶⁰ Cita Citrawinda et al, *Naskah Akademik Rancangan Undang-undang tentang Desain Industri* (Jakarta: Kementerian Hukum dan HAM, 2013), 26.

⁶¹ Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia*, 198.

⁶² Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia*, 200.

⁶³ Syihabuddin, "Beberapa Permasalahan Penerapan Paten dan Upaya untuk Membangun Sistem Paten Indonesia yang Efektif, Wajar, dan Realistis." *Jurnal Hukum* 16, 8 (Maret 2001), 142.

⁶⁴ "2 Hakim Agung Jadi Tersangka KPK," <https://nasional.kompas.com/read/>, accessed Nov 3 2023.

⁶⁵ Syihabuddin, *Beberapa Permasalahan Penerapan Paten dan Upaya untuk Membangun Sistem Paten Indonesia yang Efektif, Wajar, dan Realistis*, 142.

⁶⁶ Syihabuddin, *Beberapa Permasalahan Penerapan Paten...*, 142.

⁶⁷ Syihabuddin, *Beberapa Permasalahan Penerapan Paten...*, 140.

reviewing and restructuring legislation to create good laws, especially industrial design law.

In amending this law, it is necessary to pay attention to the national benefit of the Indonesian people, even if it will result in slight losses for some people, namely the owners of industrial design rights. It has been proven in the *qaidah fiqhiyyah* that “the public interest takes precedence over the private interest.”⁶⁸ Therefore, Islamic fiqh allows the guardian to set the price to achieve the public interest if the price is high.⁶⁹

In addition, this law must protect folklore or traditional cultural expressions of Indonesia because these are state assets. It means that those are assets of all Indonesian people, so those may not fall under individual ownership, like roads, rivers, and bridges.⁷⁰ Al-Sharbini mentions that permissible water from valleys, springs in the mountains, and the like, people are equal in it. It is not permissible for anyone to petrify or monopolize it to the exclusion of the rest of the people.⁷¹

Second, regarding problems in the legal structure, it is necessary to improve it by increasing the professionalism of judges and judicial staff and improving the quality of a transparent judicial system so that the law can be applied fairly.

The prophet Muhammad teaches Muslims to have a high work ethic and be professional. He said: “Verily Allah, most High, loves for you to perfect a good deed when you perform it.” (HR. Baihaqi).

Allah also commands Muslims to do justice and do everything that brings justice. Allah said: “Allah commands justice, the doing of good, and liberality to kith and kin.” (Surah an-Nahl: 90).

There is no doubt that a fair decision will provide satisfaction and peace for society. On the contrary, an unfair decision leads to a decline in their confidence in the judiciary.⁷²

Third, there is a problem in legal culture. This problem can be solved by improving legal culture, namely through education. The education plays a vital role in forming law-abiding cultures. Education here can be formal or non-formal

⁶⁸ Muhammad ibn Bahadir al-Zarkashi, *al-Mantsur fi al-Qawaid* (Kuwait: Muassasah al-Falij, 1982), 1, 349.

⁶⁹ Abdullah ibn Mahmud al-Mushili, *al-Ikhtiyar li Ta'wil al-Mukhtar* (Damascus: Dar al-Risalah al-Alamiyyah, 2010), 4, 132.

⁷⁰ Al-'Ibadi, *al-Milkiyyah fi al-Shar'ah al-Islamiyyah*, 1, 246.

⁷¹ Muhammad ibn Ahmad al-Khatib al-Sharbini, *Mughnī al-Muhtāj* (Beirut: Dār al-Kutub al-Ilmiyyah, 2000), 3, 516.

⁷² Yayan Sopyan and Syamsuddin, “Sulūk al-Qāḍī: MuQāranah Bayna MaFhūm al-Māwardī Fi Kitāb Adab al-Qāḍī wa Qawā'id Sulūk al-Qāḍā fi Indūnisiyā,” *AHKAM* 21, no. 2 (Desember 2021), 447, <https://doi.org/10.15408/ajis.v21i2.19671>

education at schools or universities, such as legal consultation or outreach regarding statutory regulations.

Legal culture can also be built by socializing that obeying the government through compliance with the regulations they make, including the industrial design law, is mandatory. Allah said: "O you who believe! Obey Allah and obey the Messenger (Muhammad SAW), and those of you (Muslims) who are in authority." (Surah an-Nisa: 59).

In addition, there must be outreach to the public regarding the prohibition of violating the rights to industrial design because it includes consuming other people's property in a vanity way, which is prohibited in Islamic fiqh.⁷³ Even the Holy Qur'an motivates Muslims to produce products, whether in the form of goods or designs, by praising the value of industry and its role in life and explaining that the prophets, messengers, and righteous people were masters of crafts and industries. Noah made ships.⁷⁴ Abraham and his son Ishmael raised the foundations of the house.⁷⁵ David made the coat of armor, and iron is softened for him.⁷⁶ For Solomon, Allah made a spring of tar flow, and they made him sanctuaries, statues, basins like reservoirs, and heavy cauldrons.⁷⁷

Islamic jurisprudence also considers crafts and industries as collective obligations (*furūd al-kifāyah*)⁷⁸ because the fulfillment of this world is due to those, and the establishment of religion depends on the affairs of the world. If people are inclined to leave one of them, they will sin.⁷⁹

Lastly, legal culture can be built through the example of government officials and their staff complying with the law. It cannot be denied that example is the best educational method because the human soul is hardwired to imitate the morals of those he loves and those he respects. Accordingly, they must reform themselves and adhere to the laws to be ideal models in their behavior and deeds so people work to imitate them. Their imitation comes from personal will and conviction, not pressure or coercion.

Fourth, halal industrial designs. Halal industries are growing, with expenditures worth 1.4 trillion US dollars in 2017, estimated to reach 2.6 trillion US

⁷³ Wahbah al-Zuhayli, *al-Wajiz fi Ushul al-Fiqh*, 220.

⁷⁴ Surah al-Mu'minun: 27.

⁷⁵ Surah al-Baqarah: 127.

⁷⁶ Surah Saba': 10.

⁷⁷ Surah Saba': 12-13.

⁷⁸ Ibn 'Amir Haj, *al-Taqrir wa al-Taḥbīr* (Beirut: Dār al-Kutub al-Ilmiyyah, 1999), 2, 175.

⁷⁹ Muhammad ibn Ahmad al-Khatib al-Sharbini, *Mughni al-Muḥtāj*, 6, 13.

dollars in 2024.⁸⁰ Accordingly, this theme has become a severe concern for scientists, for instance, Chuzaimah Batubara et al.,⁸¹ Cucu Susilawati et al.,⁸² on halal food; Tareq Rasul,⁸³ Intan Purwandani et al.,⁸⁴ on halal tourism; Joeliaty et al.,⁸⁵ Alfred Suci et al., on the halal hotel;⁸⁶ Anom Sigit Suryawan et al.,⁸⁷ on halal standards.

Based on a report by The Royal Islamic Strategic Studies Center (RISSC), Indonesia's population reached 277.53 million in 2023, with the Muslim population reaching 240.62 million.⁸⁸ Thus, Indonesia is a promising market for halal industries.

From here, the researchers offer ideas for halal industrial designs. Halal designs mean designs that have been declared halal by Islamic jurisprudence.⁸⁹ Islamic jurisprudence introduces two types of halal: in substance and nature. In substance, halal means the essence of an object does not contain prohibited elements, either in the raw materials or in the manufacturing techniques. Meanwhile, halal means an object is obtained through halal ways, such as through gift, buying, selling, or inheritance.⁹⁰

Halal designs do not contain prohibited elements, either in the raw materials or manufacturing techniques,⁹¹ such as pork, dog, alcohol, these three-based products, and other synthetic products made from them.⁹² On the other hand, those

⁸⁰ Chuzaimah Batubara and Isnaini Harahap, "Halal Industry Development Strategies: Muslims' Responses and Sharia Compliance in Indonesia," *Journal of Indonesian Islam* 16, No. 01, (June 2022), 103, DOI: 10.15642/JIIS.2022.16.1.103-132

⁸¹ Chuzaimah Batubara and Isnaini Harahap, "Halal Industry Development Strategies: Muslims' Responses and Sharia Compliance in Indonesia," 103-132.

⁸² Cucu Susilawati, Agus Joharudin, Muhamad Abduh, and Adang Sonjaya, "The Influence of Religiosity and Halal Labeling on Purchase Intention of Non-Food Halal Products," *Indonesian Journal of Halal Research* 5, no. 2 (2023), 77-89, <https://doi.org/10.15575/ijhar.v5i2.22965>

⁸³ Tareq Rasul, "The Trends, Opportunities and Challenges of Halal Tourism: A Systematic Literature Review," *Tourism Recreation Research* 44, no. 4 (2019), 434-450, <https://doi.org/10.1080/02508281.2019.1599532>.

⁸⁴ Intan Purwandani and Mohamad Yusuf, "Localizing Indonesia Halal Tourism Policy within Local Customs, Qanun, and Marketing," *Journal of Policy Research in Tourism, Leisure and Events* (2021), 1-19, <https://doi.org/10.1080/19407963.2021.1996382>

⁸⁵ Joeliaty Joeliaty, Yudi Ahmad Faisal, and Wendra Wendra, "An Analysis of Strategy Formulation for Halal Hotel Human Resources in Indonesia," *Cogent Business and Management* 7, no. 1 (2020), <https://doi.org/10.1080/23311975.2020.1842008>.

⁸⁶ Alfred Suci, Junaidi, Satria Tri Nanda, Bagio Kadaryanto, and Lucky Lhaura, "Muslim-Friendly Assessment Tool for Hotel: How Halal Will You Serve?" *Journal of Hospitality Marketing and Management* 30, no. 2 (2021), 201-241, <https://doi.org/10.1080/19368623.2020.1775746>.

⁸⁷ Anom Sigit Suryawan, Shuji Hisano, and Joost Jongerden, "Negotiating Halal: The Role of Non-Religious Concerns in Shaping Halal Standards in Indonesia," *Journal of Rural Studies* 92, no. 3 (September 2022), 482-491, <https://doi.org/10.1016/j.jrurstud.2019.09.013>

⁸⁸ "10 Negara Dengan populasi Muslim terbanyak dunia," <https://databoks.katadata.co.id/datapublish/> accessed Nov 3 2023.

⁸⁹ Law Number 33 of 2014 Concerning Halal Product Guarantees, Article 1.

⁹⁰ M. Cholil Nafis, "Dāmān Muntijāh al-Ḥalāl li Ḥimāyah Ḥuqūq al-Mustahlīkīn," *al-Ihkam* 15, no. 3 (December 2020), 307, <http://dx.doi.org/10.19105/al-lhkam.v15i2.3660>

⁹¹ Law Number 33 of 2014 Concerning Halal Product Guarantees, Article 1.

⁹² Saad Al-Harran and Kim Cheng Patrick Low, "Marketing of Halal Products: The Way Forward," *The Halal Journal*, (January/February 2008), 44-46, https://papers.ssm.com/sol3/papers.cfm?abstract_id=1577795.

designs result from the designer's creation or with other people, not from imitating or copying others' designs.

CONCLUSION

After conducting the research, the authors conclude that although the Law number 31 of 2000 concerning industrial design originates from the rules of the TRIPs Agreement, it generally does not conflict with Islamic jurisprudence. Both laws agree to protect the industrial design, prohibit any violation, and punish violators with fines, imprisonment, and so on. Several problems cause the ineffectiveness of industrial design protection in Indonesia, namely problems in legal substance, structure, and culture. Legal substance problems can be solved by amending the industrial design law to include regulations protecting national interests. Legal structure problems can be overcome by increasing the professionalism of judges and judicial staff and improving the quality of a transparent judicial system. Meanwhile, legal culture problems can be solved through education, socialization of laws and regulations, and exemplary and halal industrial designs.

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