

LEGAL PROTECTION FOR INFORMAL WAQF (*WAQF SIRI*) ASSETS: THE URGENCY OF ISBAT WAKAF AND LAW NUMBER 41 OF 2004 IMPLEMENTATION IN INDONESIA

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Abstract

Waqf (Islamic endowment), as a legal act within the framework of Sharia, holds significant dual dimensions: a deep spiritual dimension and a profound socio-economic dimension aimed at realizing the economic potential of assets for general welfare. However, the common practice of *wakaf siri* (informal waqf), established through oral declarations or unauthentic deeds, leaves a significant portion of waqf assets in Indonesia in a precarious legal position. This study addresses the legal implications of *wakaf siri* and analyses the urgency of formal legal protection. Using a normative legal approach, this research examines Law Number 41 of 2004 concerning Waqf and related judicial precedents. The findings indicate that *wakaf siri* lacks legal certainty, making the assets susceptible to disputes, transfer of ownership, and potential misuse. The judicial mechanism of *Isbat Wakaf* (legal ratification or confirmation of waqf in the Religious Court) is identified as the critical instrument to formalize and validate these previously informal endowments. Effective implementation of the Waqf Law, particularly the mandatory registration and certification of waqf assets, is crucial to transitioning informal waqf to a legally secure status, thus guaranteeing the asset's perpetuity and achieving its intended social welfare goals.

Keywords: *Waqf, Legal Protection, Wakaf Siri, Isbat Wakaf, Legal Certainty.*

INTRODUCTION

Waqf (Islamic endowment), as a legal act within the framework of Sharia, possesses significant dual dimensions: a deep spiritual dimension (*taqarrub ila Allah*) and a profound socio-economic dimension. Within the National Law of Indonesia, waqf functions to realize the economic potential and benefits of waqf assets for the purposes of worship and advancing general welfare, as guaranteed by Law Number 41 of 2004 concerning Waqf (the Waqf Law). However, despite the sincere intentions of the *Wakif* (Endowers), waqf assets in Indonesia often remain in a legally precarious position, primarily due to the lack of adequate formal registration. The practice of *wakaf siri* (informal or underhand waqf), where the waqf declaration is only made orally or via a non-authentic deed, creates severe legal vulnerability for the asset. This phenomenon frequently occurs at the grassroots level, where the *Wakif*, despite having sincere intentions, lacks sufficient understanding of formal legal requirements.

The primary vulnerability of *wakaf siri* is the threat of disputes, particularly claims from the *Wakif*'s heirs at a later date, which can jeopardize the ongoing social function of the community asset (Fahrany & Intihani, 2024).

A key case study analyzed in this paper illustrates such a procedural error: the use of an Underhand Grant Deed as an instrument for transferring land rights for the purpose of a mosque waqf, witnessed only by the local village head. This error results in a complex juridical contradiction: the substantive intention of waqf has been realized (de facto, the mosque stands), but the formal ownership status of the land remains with the *Wakif*.

A fundamental principle of waqf in Islamic law is irrevocability (non-revocability). Once property is declared as waqf, it can no longer be granted, sold, or inherited, as its ownership has conceptually reverted to God (*Mauquf*). This perpetual principle is the core of the spiritual and social protection of waqf assets. In an effort to affirm legal protection for waqf assets and prevent the practice of *wakaf siri*, the state, through Law Number 41 of 2004, mandates that the Waqf Vow must be executed authentically, namely before the Official Authorized to Draw Up the Deed of Waqf Declaration. This formal authentication is crucial for confirming the permanent and irrevocable nature of the relinquishment of land rights. The essential contradiction arises because the *wakaf siri* case involves the use of an incorrect legal instrument: an underhand grant deed. Under positive law, an underhand grant deed for the transfer of land ownership is *batal demi hukum* (null and void by operation of law), as per the imperative provision in Article 1682 of the Civil Code. The legal contradiction is that the perpetual substantive intent (waqf) is tied to a formal instrument (grant) that is defective and void. This situation creates severe legal uncertainty and demands judicial or administrative intervention to restore the legal status of the community asset (Waluyo, 2023). Given the presence of absolute formal defects and the vulnerability of the asset to heir claims, two strategic scenarios emerge in practice for the legalization of *wakaf siri* assets:

- a) Scenario I: New Deed of Waqf Declaration Registration (Administrative Route). This scenario involves the *Nazhir* (Trustee) and the *Wakif* (Endower) attempting to bypass the judicial procedure of *Itsbat Wakaf* (Waqf Confirmation). The *Nazhir* and *Wakif* deliberately apply for the issuance of a new Deed of Waqf Declaration at the Office of Religious Affairs. They argue that the previous underhand grant deed was *batal demi hukum*, thereby considering *Wakif* to still hold full legal authority (proprietary clearance) to re-endow the property. This route is often chosen as it is perceived to be faster and avoids litigation (Faujiah & Hamidiyah, 2022).
- b) Scenario II: *Itsbat Wakaf* Petition (Judicial Route). This is the institutionally recognized procedure where the *Nazhir* files a petition for the Judicial Edict of *Itsbat Wakaf* with the local Religious Court. The objective of *Itsbat* is to legalize the de facto *wakaf siri* that has occurred and obtain an authentic judicial evidence that legally serves as a substitute for the Deed of Waqf Declaration. *Itsbat* is a judicial action aimed at transforming the *Wakif*'s sacred intent into state-recognized Legal Certainty (Ridho, 2017).

This paper will now deeply analyze these two scenarios using the framework of Legal Certainty Theory (LCT) and Progressive Law Theory (PLT) to determine which pathway is strategically and juridically strongest in providing permanent protection for the waqf asset.

LITERATURE REVIEW

The Waqf Law is the primary legal source governing waqf in Indonesia, which requires strict formalities and substance. The legal basis used in this paper is as follows:

- a) Article 5 of Law No. 41 of 2004: “Waqf functions to realize the economic potential and benefits of waqf assets for the purposes of worship and for advancing general welfare”. Article 5 provides the national legal foundation for the principle of *maslahah mursalah* (public interest) and *hifzu al-din* (preservation of religion) within the *Maqashid Syariah* (Objectives of Sharia). This function is very important because it serves as the main justification for Religious Court Judges to apply Progressive Law. When a judge is faced with a formally defective waqf that has fulfilled its social function (the mosque is already established), Article 5 justifies judicial efforts (*Itsbat Wakaf*/Scenario II) to prioritize social utility over procedural rigidity (Saputra et al., 2020).
- b) Article 8 Paragraph (1) letter d of Law No. 41 of 2004: “An individual *Wakif* must fulfill the following requirements: a. be an adult; b. be of sound mind; c. not be legally impeded from performing legal acts; and d. be the lawful owner of the waqf property” (Ikromi, 2025). Article 8 Paragraph (1) letter d is a fundamental pillar of Legal Certainty (LCT) in waqf. The requirement of “lawful owner” demands clarity of ownership status that is undisputed and singular. Failure to meet this requirement, for instance, if the waqf land is undivided inherited property or joint marital property will trigger an absolute substantive defect that nullifies a Deed of Waqf Declaration, even if that Deed of Waqf Declaration is formally authentic. This article serves as the primary legal basis for the *Wakif*’s heirs to file a lawsuit in the Religious Court for the revocation of the Waqf.
- c) Article 11 of Law No. 41 of 2004: “*Nazhir* has the following duties: a. performing the administration of the waqf property; b. managing and developing the waqf property in accordance with its purpose, function, and designation; c. supervising and protecting the waqf property; d. reporting the execution of duties to the Indonesian Waqf Board” (Gobel, 2015). Article 11 clearly sets forth the fundamental responsibilities of *Nazhir*, establishing the standard for professionalism and accountability (LCT). The duties of administration (a), management and development (b), and protection (c) are the core mandates for safeguarding waqf assets from neglect or legal risk. Specifically, the duty to protect the property mandates the *Nazhir* to pursue maximum legal efforts, such as obtaining a Judicial Edict of *Itsbat Wakaf* (Scenario II), to ensure the asset’s legal status is secured and registered with the state.
- d) Article 42 of Law No. 41 of 2004: “The *Nazhir* is obliged to manage and develop the waqf property in accordance with its purpose, function, and designation” (Amriah, 2023). This provision mandates the active and responsible stewardship of the asset, directly linking the *Nazhir*’s actions to the core objectives of waqf as outlined in Article 5 (welfare and utility). This obligation reinforces the duty of protection detailed in Article 11, requiring the *Nazhir* to not only protect the asset’s existence but also ensure its productive utility for the community.
- e) Article 43 Paragraphs (1) and (2) of Law No. 41 of 2004: “The management and development of waqf property by the *Nazhir* as referred to in Article 42 shall be

implemented in accordance with Sharia principles" (Muttaqien, 2007). "The management and development of waqf property as referred to in Paragraph (1) shall be carried out productively" (Efendi, 2019). The term "productively" is interpreted broadly (Article 43 Explanation), encompassing financial and physical growth, such as investment, capital placement, trade, and the development of buildings (apartments, shopping centers, educational facilities, or health facilities) that do not contravene Sharia. This emphasizes the modern, economic dimension of waqf stewardship and accountability.

f) Article 49 letter g of Law Number 3 of 2006 concerning Amendments to Law No. 7 of 1989: "The Religious Court has the duty and authority to examine, decide, and settle cases at the first instance between Muslims in the field of waqf". Article 49 letter g affirms the Religious Court's absolute competence over waqf cases. Although this article is generally interpreted in the context of disputes (contentiosa), jurisprudence and progressive interpretation by the Supreme Court have expanded it to include petitions for edicts (voluntair), specifically *Itsbat Wakaf* (Hastuti, 2014). This expanded interpretation is supported by synchronization with Article 58 paragraph (1) letter c of Government Regulation No. 42 of 2006 concerning the Implementation of the Waqf Law (which requires a "Penetapan" (Edict) from the Religious Court for the registration of unregistered waqf assets). With the linking of these two articles, the Religious Court's authority is interpreted to extend handling *Itsbat Wakaf* as a voluntair matter. This judicial discovery (progressive *ijtihad*) by the Supreme Court aims to fill the administrative legal vacuum and serves as the juridical basis for Scenario II. It demonstrates that the judiciary in Indonesia has consciously employed Progressive Law to ensure that the LCT demands of land administration can be met through a Judicial Edict (Suhairi, 2017).

Resolving *wakaf siri* is an arena of contestation between the rigid demands of Formal Legal Certainty (Legal Positivism) and the need for Substantive Justice (Progressive Law Theory). Understanding these two theories is essential for evaluating the risks and strengths of each scenario. Legal Certainty Theory (LCT) demands clarity, order, and rigid adherence to formal procedures and the hierarchy of norms. In this context, LCT is heavily influenced by the school of Legal Positivism, notably the thought of Hans Kelsen and John Austin.

Hans Kelsen, through his doctrine of "The Pure Theory of Law," asserts that legal certainty is achieved through adherence to the hierarchical structure of laws and regulations (*Grundnorm*). Kelsen views law as an autonomous, structured, and objective science. Kelsen argues that legal norms are tiered within a system or hierarchy (*Stufenttheorie*), and the *Grundnorm* is the cause that validates the effectiveness of the lower norm (Nwabuokei, 2024). The Kelsenian implication for *wakaf siri* (the underhand grant case) is absolute: because the deed failed to meet the formality of authentication (Official Authorized to Draw Up the Deed of Waqf Declaration/Notary), the legal act is formally not valid and is deemed to have no legal force. Kelsenian Positivism strictly rejects the intervention of social values or material justice in determining legal validity.

John Austin, with his Theory of Law as the "Command of the Sovereign", defines law as a command supported by sanctions. Austin rigorously separates law from morality. Austin states that Law is the general command of a political entity that holds sovereignty, which is the political authority that must be obeyed or not obeyed (it is non-optional). Law as a command

also contains the will of a sovereign that someone must do or refrain from doing something (Singh & Kumar, 2025). From Austin's perspective, *Nazhir*'s failure to obey this command (Law No. 41 of 2004) requiring authentic registration results in a legal sanction in the form of the states non-recognition of the asset. The potential dispute from the heirs is a logical consequence (sanction) of the non-compliance with the valid legal formality. Pure LCT, while guaranteeing order, often becomes too rigid and lacking in the substance of justice or religious conviction.

As an antithesis to the rigidity of positivism, Progressive Law Theory (PLT) was born in Indonesia, pioneered by Satjipto Rahardjo. Rahardjo philosophizes that law must be made an instrument of liberation that serves humanity, justice, and community welfare (*pro bono publico*). Progressive Law aims to usher people into a life that is just prosperous, and makes people happy, and refuses to maintain the status quo in applying the law. Rahardjo urges judges not to function merely as the "mouthpiece of the law", but to dare to find the law and excavate the values of justice living in society (Laili & Fadhila, 2021). This principle is guaranteed by Article 4 of Law Number 48 of 2009 concerning Judicial Power. In the context of waqf, the main goal of PLT is to pursue justice and welfare for the community. Justice is realized when community assets (*Mauquf*) that have been tangibly utilized (the mosque has been established) can be permanently protected, prioritizing the sacred intent (substance) over administrative failure (formality).

The application of PLT by judges in *Itsbat Wakaf* is strongly oriented towards the principle of *Maslahah Mursalah* (public interest). To justify *maslahat* (utility) that aligns with *Maqashid Syariah* (hifzu al-din), judges may employ the *Maslahah Mursalah* Theory by Wahbah Az-Zuhaili. The theory requires harmony between the *maslahah mursalah* used as the basis and the *maqashid syariah* (objectives of Sharia), and that it does not negate that basis or contradict a *qhat'i* (definite) *dalil* (evidence). Furthermore, the *maslahat* must occupy the level of *dharuriyah* (primary necessity) or *hajjiyah* (secondary necessity) at the level of *dharuriyah* (Hak et al., 2019).

RESEARCH METHOD

This research uses a descriptive-analytical Normative Juridical Research approach. This approach focuses on analyzing relevant legislation and jurisprudence to provide prescriptive legal recommendations for the case study. The approaches used include:

- a) Statute Approach: A detailed analysis of the imperative norms in Law Number 41 of 2004 concerning Waqf, Law Number 3 of 2006 concerning Religious Courts, article 1682 of the Civil Code, and Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency Number 2 of 2017.
- b) Conceptual Approach: A fundamental comparison of the legal concepts of Waqf (based on Sharia and Law No. 41/2004) and Grants (The Civil Code), as well as the contestation between the Formalistic Theory of Legal Certainty (Kelsen/Austin) and Progressive Law (Rahardjo) to identify formal flaws and appropriate legal solutions.
- c) Case Approach: Analyzing the ratio decidendi of *Itsbat Wakaf* Determination (to validate *Wakaf Siri*) and Deed of Waqf Declaration Cancellation Decision (to identify legal risks) from the directory of religious court decisions.

RESULT AND DISCUSSION

1. Examination of Scenario I: Issuance of a New Deed of Waqf Declaration Administratively

Scenario I, where the *Nazhir* and *Wakif* register a new Deed of Waqf Declaration directly at the Office of Religious Affairs or Official Authorized to Draw Up the Deed of Waqf Declaration, is a strategy that leverages the legal nullity of the underhand grant deed (Article 1682 of The Civil Code) to achieve formal legality. Although the goal is *maslahat* (mosque legalization), analysis indicates that this route suffers from methodological flaws and high legal risk. In this scenario, *Wakif* assumes that because the previous grant deed was *batal demi hukum*, *Wakif* still holds full rights (proprietary clearance) to act as the lawful owner and issue a new Deed of Waqf Declaration. The application for the new Deed of Waqf Declaration to the Official Authorized to Draw Up the Deed of Waqf Declaration will attach the initial ownership evidence of *Wakif* and the *Nazhir's* endorsement, using the existence of the mosque as supplementary evidence of the undeniable sacred intent.

The Official Authorized to Draw Up the Deed of Waqf Declaration, who serves ex officio as the Head of the Office of Religious Affairs, is a state official with an administrative mandate. The Official Authorized to Draw Up the Deed of Waqf Declaration's duty is to serve the execution of the waqf, issue the Deed of Waqf Declaration, and examine the pillars and requirements of the waqf, including the legality of the waqf land. This Official Authorized to Draw Up the Deed of Waqf Declaration mandate is bound by formalities and the completeness of documents according to ministerial regulations.

Scenario I is highly vulnerable from the perspective of Legal Certainty (LCT) because the land title history is not clean. The Official Authorized to Draw Up the Deed of Waqf Declaration, as an administrative official, lacks judicial mandate. The Official Authorized to Draw Up the Deed of Waqf Declaration is bound by formalities and possesses no litigation mechanism to definitively verify the history of title disputes. If the Official Authorized to Draw Up the Deed of Waqf Declaration decides to issue a new Deed of Waqf Declaration, the Official Authorized to Draw Up the Deed of Waqf Declaration is implicitly performing a “title clearance” (proprietary clearance). This action exceeds their administrative authority, as the function of proprietary clearance in cases of historically defective waqf should be the absolute domain of the Religious Court through a Judicial Edict of *Itsbat Wakaf*. The Official Authorized to Draw Up the Deed of Waqf Declaration faces a high risk of facing a maladministration lawsuit for failing to ensure the land is “not subject to dispute”.

LCT demands that the Official Authorized to Draw Up the Deed of Waqf Declaration ensures the *Wakif* is the lawful owner (Article 8 Paragraph 1 letter d of the Waqf Law). In this case, although the underhand grant is null, the ambiguous history of legal action and the establishment of the mosque create an ambiguous ownership history that must be verified by a judicial institution. A new Deed of Waqf Declaration issued without judicial examination (*Itsbat Wakaf*) is considered to provide only “pseudo certainty”. The authentic document generated administratively is highly likely to be revoked if a third party

(especially *Wakif's* heirs) emerges to file a lawsuit. The heirs will base their lawsuit on LCT, claiming that *Wakif* did not meet the requirement of Article 8 because the land might have been undivided inherited property or joint marital property, thus the *Wakif* lacked full legal capacity to endow the asset (Hatim, 2021).

Theoretically, the Official Authorized to Draw Up the Deed of Waqf Declaration might be motivated by Progressive Law (PLT), seeing themselves as administrative “legal reformers” filling a vacuum for the sake of social utility (*maslahat*) (Rohman, 2019). They leverage the legal nullity of the previous grant and the fact that the mosque is already established to advance the waqf objective. However, Progressive Law has strict limitations on authority when applied by administrative officials. The Official Authorized to Draw Up the Deed of Waqf Declaration does not have an equal standing with a Religious Court Judge. The progressive administrative breakthrough made by the Official Authorized to Draw Up the Deed of Waqf Declaration will fail in the face of demands for judicial Legal Certainty. If the Official Authorized to Draw Up the Deed of Waqf Declaration's legal breakthrough infringes on the property rights of a third party (heirs), that breakthrough will be revoked by the Religious Court Judge, who is precisely the party authorized to use PLT. Paradoxically, although judges are encouraged to be progressive, in cases of ownership disputes involving inheritance rights, the Judge will revert to strict LCT principles to protect valid property rights, as represented by Article 8 of the Waqf Law (Rohayana & Muhtarom, 2021).

If the new Deed of Waqf Declaration is successfully issued (Scenario I), the *Nazhir* can formally submit it to the local Land Office as authentic evidence for waqf certification registration, pursuant to the Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency Number 2 of 2017. Although the Deed of Waqf Declaration possesses perfect evidentiary force formally, this formal authenticity does not guarantee its substantive validity. If the history of *Wakif's* land acquisition (juridical data) proves problematic such as a case of undivided inherited property, the administrative Deed of Waqf Declaration is vulnerable to a revocation lawsuit. If National Land Agency issues a Waqf Land Certificate based on this substantively defective administrative Deed of Waqf Declaration, and subsequently the Deed is revoked by a Religious Court Decision (such as Supreme Court Decision No. 456 K/AG/2007), the resulting Waqf Certificate will be considered to suffer from a substantial administrative defect. This administrative strategy (Scenario I) merely shifts the risk of title verification failure from the *Nazhir* to the Official Authorized to Draw Up the Deed of Waqf Declaration or National Land Agency system, without genuinely resolving the historical property issue (Rizaldi et al., 2023).

2. Examination of Scenario II: Legalization of Waqf via *Itsbat Wakaf* (Judicial Route of the Religious Court)

The *Itsbat Wakaf* scenario is the judicial route recognized and institutionally integrated by the state to resolve cases of *wakaf siri* and formally defective waqf, effectively marrying Legal Certainty with Progressive Law. *Itsbat Wakaf* (Edict of Waqf Ratification) is the single legal procedure required for the *Nazhir* to legitimize the Waqf intent that failed to be formalized administratively. The goal of *Itsbat Wakaf* is to provide legal protection

and certainty for uncertified waqf land, and to ratify the *wakaf siri* legal act that previously occurred.

The *Itsbat Wakaf* procedure is filed via a voluntair matter petition (petition for edict) by the *Nazhir* to the local Religious Court. This judicial action functionally fills the administrative legal vacuum caused by the absence of a Deed of Waqf Declaration. By issuing an Edict, the Religious Court acts as a catalyst for the legal administration of land, providing an authentic starting point for the certification process previously blocked at National Land Agency.

The success of *Itsbat Wakaf* hinges on the application of Progressive Law by the panel of Judges. Religious Court Judges consistently apply Progressive Law (PLT), prioritizing the social function of waqf assets (*pro bono publico*) and the welfare of the community (*Maslahah Mursalah*) over the rigidity of formalities. For *wakaf siri* cases, the Judge focuses on proving the Waqf intent (*sighat*) that is permanent (irreversible). In this substantiation, non-authentic documents like the underhand grant deed, despite being null and void for title transfer (Article 1682 of The Civil Code), are accepted as strong circumstantial evidence (*qarinah*) of waqf intent. This evidence is reinforced by:

- a) Witness statements convincingly confirm the declaration.
- b) Evidence of continuous utilization (the fact that the mosque stands), which meets the *maslahat* criteria prioritized by the progressive judge.
- c) *Syahadah al-Istifadah* (information widely spread in society) regarding the declaration of waqf that occurred long ago.

The case of the *Itsbat Wakaf* Edict Number 281/Pdt.P/2011/PA.Clg by the Cilegon Religious Court serves as a strong judicial precedent. In this case, the Panel of Judges granted the *Itsbat Wakaf* petition even though the waqf was carried out underhand without a formal Deed of Waqf Declaration. The Judge's Ratio Decidendi demonstrates the concrete application of Progressive Law. The Judge explicitly prioritized the social function of the waqf asset and *maslahat*, accepting non-authentic letters as convincing evidence that the *Wakif* had definitively and permanently relinquished their ownership rights. This Edict proves that instead of nullifying the waqf act due to administrative formal defects (Kelsenian Positivism), The Religious Court created a new authentic legal force (the Edict) that ratified the substantive intent realized on the ground (Triyono, 2021).

Despite utilizing a progressive method (PLT) in substantiation, the outcome of *Itsbat Wakaf* serves to achieve the highest level of Legal Certainty (LCT). The *Itsbat Wakaf* Edict is the only legally recognized mechanism to provide judicial proprietary clearance for waqf assets with defective histories. The judicial examination process, including decent review and substantiation, implicitly allows the Judge to assess potential ownership and inheritance conflicts before the Edict is issued.

The Religious Court Edict possesses the binding legal force of *res judicata*, which is significantly stronger than the administrative Deed of Waqf Declaration (Scenario I). The power of this Edict binds all parties involved in the petition, including potential interested parties (despite its voluntair nature), thus providing the guarantee of Legal Certainty required by National Land Agency. Therefore, solid Formal Legal Certainty (National Land Agency registration) is achieved through the gateway of Material Legal Certainty (the edict

of the progressive judge). *Itsbat Wakaf* proves to be the successful mechanism for marrying the principles of Progressive Law (recognition of intent and *maslahat*) with the demands of Legal Certainty (authentic evidence immune to heir lawsuits) (Hamzah et al., 2024).

3. *Itsbat Wakaf* as the Substitute Deed for the Deed of Waqf Declaration (Official Authorized to Draw Up the Deed of Waqf Declaration) and Cross-Sector Regulatory Synchronization

The *Itsbat Wakaf* Edict issued by the Religious Court is the key to unlocking land administration, requiring synchronization between judicial and agrarian regulations. Waqf land registration in Indonesia is strictly governed by the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 2 of 2017 concerning Procedures for Waqf Land Registration. This regulation serves as the Legal Certainty (LCT) framework in the agrarian sphere.

Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 2 of 2017 explicitly accommodates the results of *Itsbat Wakaf* as valid authentic evidence for registration. “The Substitute Deed for the Deed of Waqf Declaration is a substitute deed in the event that the Waqf act has not been formalized in an Deed of Waqf Declaration, but the Waqf act is known based on various evidence (*qarinah*) and 2 (two) witnesses, and the Deed of Waqf Declaration is impossible to create because the *Wakif* has passed away or their whereabouts are no longer known”. This definition normatively recognizes that the *Itsbat Wakaf* Edict (Scenario II) functionally meets the Substitution Deed for Deed of Waqf Declaration criteria required by National Land Agency. Institutionally, this LCT regulation (National Land Agency) has formalized the result of progressive *ijtihad* (PLT) in the Religious Court. By accepting the *Itsbat Wakaf* Edict as Substitution Deed for Deed of Waqf Declaration based on *qarinah*, National Land Agency has acknowledged that formal Legal Certainty can be generated from a progressive judicial process (Pratama & Khisni, 2019).

After the *Nazhir* obtains the binding and final *Itsbat Wakaf* Edict (which serves as the Substitution Deed for Deed of Waqf Declaration) from the Religious Court, the next step is to register the land with the local Land Office, as per Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency No. 2 of 2017. *Nazhir* must apply for certification, compiling the following requirements (Pratama & Khisni, 2019):

- a) Application letter for registration.
- b) Results of land measurement and mapping (Land Plot Map/Measurement Letter), if the land is uncertified.
- c) Initial evidence of ownership of *Wakif*.
- d) The Substitute Deed for the Deed of Waqf Declaration, namely the *Itsbat Wakaf* Edict from the Religious Court (Mandatory).
- e) Endorsement letter for the *Nazhir* concerned (from the Indonesian Waqf Board or the local Ministry of Religious Affairs).

If the application fulfills all LCT administrative requirements, the Head of the Land Office will issue a decision confirming the status as Waqf Land. Subsequently, the Waqf Land Certificate is issued in the name of the *Nazhir*, specifying that the right is Waqf Land

and its designated purpose (mosque). This certification process is mandated to be free of charge. This certificate provides the highest Legal Certainty, capable of preventing the risk of disputes or land misuse in the future.

The Integrated Itsbat Waqf Program, a result of cooperation between the Supreme Court (Badilag), Islamic Community Guidance (Ministry of Religious Affairs), and National Land Agency clearly demonstrates the state's institutional preference that the confirmation of vulnerable waqf legal status must pass through a judicial mechanism. This synergy guarantees that *Itsbat Wakaf*, as Scenario II, is the official agreed-upon route to bridge Progressive Law (recognition of intent and *maslahat*) with the demands of Legal Certainty (proprietary clearance). This regulatory flow shows that *Itsbat Wakaf* is a structured process supported by positive law:

Table 1. Contestation of Legal Theory in the Settlement of *Wakaf Siri*

Stage	Key Actor	Key Regulation	Legal Instrument Obtained	Function in Legal Certainty
Conflict Diagnosis	<i>Nazhir</i>	Law No. 41/2004 & Article 1682 of The Civil Code	Underhand Grant Deed (Formal Defect)	Confirms the failure of Formal Legal Certainty.
<i>Itsbat Wakaf</i>	<i>Nazhir</i> and Religious Court	Law No. 3/2006 Article 49 g, Progressive Law	<i>Itsbat Wakaf</i> Edict	Ratifies the substantive intent (<i>wakaf siri</i>) and provides authentic judicial evidence.
The Substitute Deed for the Deed of Waqf Declaration Recognition	Religious Court/National Land Agency	Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency No. 2/2017 (Article 1)	<i>Itsbat Wakaf</i> Edict	Functions as the Substitute Deed for the <i>Deed of Waqf Declaration</i> bridging <i>Itsbat</i> and <i>Agraria</i> .
Certification Filing	<i>Nazhir</i> and National Land Agency	Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency No. 2/2017	<i>Waqf</i> Land Certificate	Highest formal Legal Certainty, protection of land rights in the <i>Nazhir's</i> name.

4. Property Law Implications and Risk of Revocation: Critical Jurisprudence

The fundamental difference between Scenario I (Administrative) and Scenario II (Judicial) lies in their ability to withstand revocation lawsuits. Jurisprudence shows that formal Legal Certainty (National Land Agency certificates) cannot survive if based on a substantive defect in ownership.

The greatest legal risk of *wakaf siri* is the emergence of a lawsuit from *Wakif*'s heirs demanding the revocation of the waqf. This lawsuit is based on the Legal Certainty (LCT) contained in Article 8 paragraph (1) letter d of Law No. 41 of 2004, which requires that the

Wakif must be the lawful owner of the Waqf property. Failure to meet this requirement of lawful and singular ownership is considered a substantive defect that absolutely nullifies the waqf deed. Scenario I (Administrative Deed of Waqf Declaration) fails to pass the judicial proprietary clearance process. Consequently, the resulting Deed of Waqf Declaration is based only on the assumption that the informal grant is null, but without a judicial edict binding all parties, making it extremely fragile in the face of property rights revocation lawsuits.

Supreme Court Decision Number 456 K/AG/2007 is a critical case study confirming the vulnerability of waqf with defective title grounds. This case involved a waqf dispute over inherited land. Supreme Court Decision Number 456 K/AG/2007 is a critical case study confirming the vulnerability of waqf with defective title grounds. This case involved a waqf dispute over inherited land.

The Ratio Decidendi in this decision demonstrates that the focus of legal consideration (LCT) is the absolute requirement of lawful ownership by the *Wakif* according to Article 8 paragraph (1) letter d of Law No. 41 of 2004. The Supreme Court explicitly declared the issued Deed of Waqf Declaration and the National Land Agency issued Waqf Land Certificate on the disputed land to be null and void by operation of law.

This precedent confirms that: (1) title issues are the dominant factor in the revocation of waqf deeds, even if the deed is formal 1; and (2) when property rights are challenged, the Religious Court Judge will revert to the strict Legal Certainty (LCT) framework to protect the valid property rights of the aggrieved party, represented by Article 8 of the Waqf Law. This logic further reinforces that Scenario I, based on historically questionable title grounds (informal grant), has an exponentially high risk of failure before the court. This analysis shows a fundamental duality in the Religious Court Judge's role: the Judge is progressive when ratifying intent (*Itsbat/Voluntair*) but strictly positivistic when reviewing ownership (Revocation Lawsuit/*Contentiosa*):

- a) Vulnerability of Scenario I: The administrative Deed of Waqf Declaration (Scenario I) will be judged by the Judge (in a dispute case) as a progressive effort carried out by a weak authority (Official Authorized to Draw Up the Deed of Waqf Declaration), which failed to provide judicial proprietary clearance. Therefore, if proven to violate Article 8 of the Waqf Law, the Judge tends to revoke it to enforce LCT.
- b) Strength of Scenario II: Conversely, *Itsbat Wakaf* (Scenario II) is inherently stronger. In the *Itsbat* process, the Judge has performed the proprietary clearance function by reviewing the title grounds and intent (using PLT). The result (Substitution Deed for Deed of Waqf Declaration Edict) possesses far greater *res judicata* force and has legally “cleared” the defective history, making it immune to potential heir lawsuits. This is the single mechanism supported by the state's institutional framework to resolve the contradiction between LCT and PLT.

The direct legal consequence of the revocation of the Deed of Waqf Declaration by the Religious Court is that the National Land Agency Waqf Certificate (if issued) is declared invalid, and the legal ownership status of the land will revert to *Wakif* or their heirs. The revocation of the Deed of Waqf Declaration creates a serious dilemma regarding the status of the mosque built on the land. Under property law, the mosque becomes a structure built

on private or inherited land, potentially triggering eviction disputes or claims for compensation. This revocation is evidence of the failure of the Official Authorized to Draw Up the Deed of Waqf Declaration's progressive attempt (in Scenario I) because the procedure followed did not yield sufficient Legal Certainty to withstand the LCT challenge from the heirs.

CONCLUSION

In-depth analysis of the *wakaf siri* legalization scenarios indicates three points of failure and one point of success within the national legal framework:

- Failure of Pure LCT: Pure formalistic Positivism (LCT) fails because it rigidly refuses to recognize the sacred intent (waqf) simply due to the formal defect of the grant deed being null and void by operation of law.
- Failure of Administrative Progressivity (Scenario I): Progressive efforts by the Official Authorized to Draw Up the Deed of Waqf Declaration (Scenario I) fail because the administrative official lacks the judicial authority to conduct proprietary clearance or overcome the issue of substantive ownership defects (Article 8 of the Waqf Law). This effort transfers the risk of litigation from the *Nazhir* to the state administrative system.
- Success of Responsive Legal Certainty (Scenario II): *Itsbat Wakaf* (Scenario II) is the ideal manifestation of Responsive Legal Certainty. The Judge uses Progressive Law (PLT) to recognize the substance of intent (*qarinah* and *maslahat*) and then generates strong judicial Legal Certainty (*res judicata*) through the Edict (Substitution Deed for Deed of Waqf Declaration).

Only *Itsbat Wakaf* is the institutionally and judicially recognized mechanism to marry progressive intent with the demands of robust judicial LCT.

Parameter	Scenario I: New Deed of Waqf Declaration	Scenario II: <i>Itsbat Wakaf</i>
Main Legal Basis	Initial <i>Wakif</i> Ownership Document, Law No. 41/2004 (Article 10)	Law No. 3/2006 Article 49 g, Progressive Law
Resulting Legal Instrument	<i>Administrative Deed of Waqf Declaration</i>	<i>Itsbat Waqf</i> Edict (Functions as Substitution Deed for Deed of Waqf Declaration)
Strength of Legal Certainty (LCT)	Low (Pseudo Certainty). Vulnerable to revocation lawsuit based on title defect (Article 8).	High (Solid Certainty). Provides judicial <i>proprietary clearance</i> .
Application of PLT	Progressive intent applied by an Administrative Official with weak authority.	Progressive <i>Ijtihad</i> by a Judge with the authority to decide and bind third parties.
Primary Risk	Revocation of Deed of Waqf Declaration Certificate due to substantive ownership defect by heirs.	Risk of dispute minimized, the resulting edict is <i>res judicata</i> .

The strategy of issuing a new Deed of Waqf Declaration through the administrative route (Scenario I) is a high-risk strategy that must be avoided. Only through the judicial route of the *Itsbat Wakaf* Edict (Scenario II) can the *Nazhir* obtain solid Legal Certainty,

ratify the *wakaf siri*, and generate a valid Substitution Deed for Deed of Waqf Declaration for the National Land Agency certification process.

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