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Voice of Academia

Academic Series of Universiti Teknologi MARA Kedah

Special Issue:
Selected Papers form the 6th International Conference on Public Policy and Social Sciences ICOPS2017)

Volume 12 Issue 2 2017

Voice of Academia
Academic Series of Universiti Teknologi MARA Kedah
Special Issue: Selected Papers form the 6th International Conference on Public Policy and Social Sciences ICOPS2017)

Volume 12 Issue 2 2017
ISSN: 1985 – 5079

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Voice of Academia
Academic Series of Universiti Teknologi MARA Kedah
Available online at http://voa.uitm.edu.my

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Voice of Academia
ISSN: 1985-5079

Waqf Land in Malaysia: Legal and Non-legal Impediments with Propositions

[1]Siti Khadijah Abdullah Sanek , [2]Ekmil Krisnawati Erlen Joni, [3]Siti Nurbaya Ismail, [3]Nor Hafizah Abdul Razak, and [3]Zanariah Idrus*

[1]Faculty of Law, Universiti Teknologi MARA (UiTM), Cawangan Kedah
[2]Faculty of Law, Universiti Teknologi MARA (UiTM), Cawangan Melaka
[3]Faculty of Computer Science & Mathematics, Universiti Teknologi MARA (UiTM), Cawangan Kedah

ARTICLE INFO

Article history:
Received: 6 June 2017
Received in revised form:
1 November 2017
Accepted: 30 November 2017
Published: 15 December 2017

Keywords:
Waqf legislations, waqf management, spatial database, GIS Model

Corresponding Author:
Khadijah016@kedah.uitm.edu.my

ABSTRACT

In Malaysia, any waqf related matter is subjected to different Islamic Religious Council of each state causing many hindrances in its management and implementation. As such, this paper seeks to identify legal and non-legal impediments encountered in the management of waqf land in Malaysia. A few propositions are discussed about legal and non-legal aspect where the discussion on non-legal aspect will be scrutinized by proposing a web based Geographical Information System (GIS) model. The usage of web based applications is preferred than the manual system due to its data storage capability on the servers which could ease the record keeping process. Additionally, spatial databases are a pre-requisite element for any GIS program to ensure all the required data to be fully functioning such as GIS map which may be able to display all data layers and dimensions. The study indicates that this integration could ensure that waqf land data management would become more systematic and accurate.

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1. Introduction

Waqf (sometimes referred to as wakaf) originates from an Arabic term Awqaf (plural). Habib Ahmed defines waqf as a charitable voluntary act that emanates within the purview of sadaqah and infaq, Ahmed, (2004). Additionally, Monzer Kahf demonstrates that waqf is a perpetual deed and applicable to property which is not deteriorated with its usage and it includes all immovable, movable property and even cash.

The definition can also be found under the Wakaf (State of Selangor) Enactment 1999 (Enactment No. 7 Of 1999) where in pursuant to Section 2, "wakaf" means a giving up of any property from which its use and enjoyment may be utilized for any benevolent purpose whether as "wakaf am" or "wakaf khas" according to Shariah Law excluding a trust within the ambit of the Trustee Act 1949 [Act 208]. The basis of waqf ruling as an encouragement for Muslims to bequeath their wealth for other Muslims is derived from the Quranic verse of Surah Ali Imran: 92 which means: "Never shall you attain the righteousness unless you spend out of that which you love; and whatever you spend, Allah surely knows it well".

2. Legislations Of Waqf In Malaysia

In Malaysia, our supreme law of the Land via Federal Constitution empowers Syariah Court as having jurisdiction concerning waqf except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. This is in accordance with List II (1) of the Ninth Schedule, (Federal Constitution, n.d.). Therefore, it can be deduced that the administration of Muslim's property including waqf shall be ensuing Islamic Law. Moreover, pursuant to Section 25 the Civil Law Act 1956, the power lays under their states' religious councils (SRC) respectively, (Civil Law Act 1956, n.d.). For instance, in Selangor, the legislation relating to waqf is governed by Administration of Islamic Law (State of Selangor) Enactment 2003. Section 61(3)(b)(vii) of the Enactment granted power to the Syariah High Court to hear and determine all cases pertaining to waqf. Nevertheless, subject to Section 2 of the same statute, the jurisdiction in dealing with waqf property is restricted to property other than trust as defined under the Trustee Act 1949.

Sharifah Zubaidah Syed Abdul Kader addresses that pursuant to Section 4(2) of the National Land Code 1965 (NLC) it can be inferred that any land pertaining to waqaf or baitul mal is governed by the Administration of Muslim Law enactments. Such provision is seen as a guarantee recognizing Islamic principles in Malaysia (Zubaidah & Kader, 2014).

3. Legal And Non-Legal Impediments

3.1 Overlap Between Shariah Court and Civil Court

In reality, though amendment to Article 121(1A) of the Federal Constitution has been made which granted power to Syariah Court pertaining to Islamic law (including waqf) but when it comes to implementation there is an overlapping jurisdiction between Syariah Court and Civil Court. This can be seen from the case of Isa bin Abdul Rahman and Anor vs Majlis Agama Islam Pulau Pinang [1996] 1 CLJ 283 where the issue of proposal by trustees to construct building on land was a breach of purpose of waqf, and therefore contravened the Syariah Law. The court in this case had granted an injunction as provided by Specific Relief Act 1950 and the power is vested upon High Court only. Hence, there are no specific provisions under Enakmen Undang-undang Pentadbiran Ugama Islam 1959 (Pulau Pinang) in vesting power to Syariah Court to issue an Injunction. Therefore, the problem is worsened if the civil court's judges are not acquainted with Islamic jurisprudence and in particular if the case is presided by non-Muslim judges.

3.2 Absence Of Specific Provisions On Waqf In The NLC (Syed Abdul Kader & Md. Dahlan, 2006)

Trusts matters are provided under National Land Code 1965 (NLC) whereas waqf is omitted. In the absence of waqf provisions, endorsement of waqf over the land could not been made. Thus, waqf land is not recognised and remains unknown. Moreover, there exist a probability that the land will be taken over or developed by any parties who have no right over it and hence defeating the very basic intention of the real owner. Therefore, no such guarantee that the intended waqf land will be created and achieved accordingly.

In addition, the very basic intention of waqf is a perpetual deed. If waqf land were leasehold grant, then upon expiry of the lease it will go back to the state authority. As such, it will defeat the purpose of Waqf

for lacking perpetuity. In furtherance, subject to the provision of Section 136(1)(f)(i), any subdivision of any agricultural land which less than certain requirement is prevented. This provision would hinder waqf land from being developed.

3.3. Poor Administration Of Waqf Assets

Based on study conducted by Zunaidah Ab Hasan, Azhana Othman, Khalilah Ibrahim, Mohd Ab Malek Md Shah, Abd. Halim Mohd Noor in 2015, they observed that among the obstacles encountered by Majlis Agama Islam Melaka (MAIM) is a result of the poor administration of waqf assets in term of documentation due to their conventional data system which is manually stored.

A study by Noor Aimi Mohd Puad, Nurauliani Jamlus Rafdi & Wan Shahdila Shah Shahar, 2014 was given shown that in Selangor certain Waqf properties had been mismanaged and in absence of proper record and documentation. Besides, very least attention was given towards waqf properties. It was reported that the routine check made once a year was conducted with a shortage number of staffs for monitoring purpose. Moreover, a number of waqf properties were not registered even after the demise of the waqif and this led to case delay and requires many years to ascertain the matter.

3.4 Land Encroachment

There exist waqf lands' encroachment by irresponsible party with an erection of buildings upon them. This is probably due to the absence of waqf endorsement on the waqf land title therefore the status remains unknown and ambiguous to public. Noor Aimi Mohd Puad, Nurauliani Jamlus Rafdi & Wan Shahdila Shah Shahar (2014) have also adressed that in certain case, lackof knowledge among the waqif's close family has led to one's own and improper dealing with the Waqf properties. Some of the Waqf properties had been unlawfully conveyed to another party and in certain case the properties were misused. Syed Abdul Kader & Md. Dahlan (2006) believe that when this happen, the intention of waqf is impeded. In Penang, occupiers' declination to vacate land for any proposed development were caused with the hope for good offer to be made by developers or government as an exchange. (Nor Asiah, Syarifah and Zuraidah, 2012)

4. Legal Proposition

Nor Asiah Mohamad, Sharifah Zubaidah Syed Abdul Kader & Zuraidah Ali (2012) believe that the system of record practiced in the land offices in respect of waqf land must be enhanced so as to meet the anticipation of the society and it is in line with Islamic principles. Hence, it is vital to enunciate a comprehensive law to administer waqf lands. Moreover, Rohayati Hussin and Rashid (2015) have demonstrated that there are no such provisions under the NLC dealing with waqf land registration. Therefore, waqf land is subjected to the same provisions as provided for other lands and yet, to date there are no uniformed procedures between states respectively. Failure to register waqf land would later on stimulate so many issues such as difficulty for developing the land and to some extent the land may be claimed by the successors or heirs of the waqf donors upon their demise (Siti Mashitoh Mahamood, 2006).

5. Non-Legal Proposition

There are many administrative propositions which could possibly curb this problem. According to

Zuina, Nor, Salim, Jawanees, and Hanafiah, (2015), transformation and reinforcement on waqf administration in all states must be done. This includes restructuring the SIRC's organization so as to ensure all waqf land could be developed efficiently and thus the very intention of waqf is attained. The writers also believe that all waqf land must be registered with comprehensive identification. Registration should be implemented via effective data base system by an expert.

The waqf authority also needs a systematic, effective and efficient mechanism to manage the waqf land data. It is because every waqf land must be managed carefully in order to benefit the ummah. There is a need for a high end technology to handle this situation. Hassan and Abdullah (2008) in their study have proven that in this era, "the implementation of ICT in waqf administration provides an effective management and planning". The next section will propose the use of web based application, spatial database and Geographical Information System for a better management of waqf land data.

6. Proposed Web Based Geographical Information System Model

In this ICT age, integration between web based applications and database can bring tremendous new opportunity, making record keeping process more systematic, effective and efficient. A study explained that the merging of web and database technologies happen due to the increasing demands of data intensive web sites (Korrison, Morrison, & Keys, 2002). Studies also show that integration between web based applications and database is predicted to become the next generation of database technology as web database connectivity opens the door to new innovative services.

Although there are some GIS implementation within this area, we are uncertain of the capability of the current system. A study argued that land record systems (paper based, computer assisted or fully computerised) must be flexible in order to respond meaningfully to what is required of the system as situation changes (Molero et al., 2010). The paper also discussed 5 existing models in database structures namely, Land Administration Domain Model (LADM), Social Tenure Domain Model (STDM), Open Source Cadastre and Registry (OSCAR), Talking Titler Model and Comparison and Critique. Based on the existing problems and models, there is a great prospect to reconstruct the current practice of managing waqf land data, Molero et al., (2010). Hence, this study is an opportunity to bring ICT in the scope of waqf land data management. In order to overcome the problem in managing waqf land data, this study proposes a web based GIS model with the combination of spatial database. Figure 1 shows the proposed model.

Voice of Academia 12 (2) 2017, 1-14

Voice of Academia
ISSN: 1985-5079

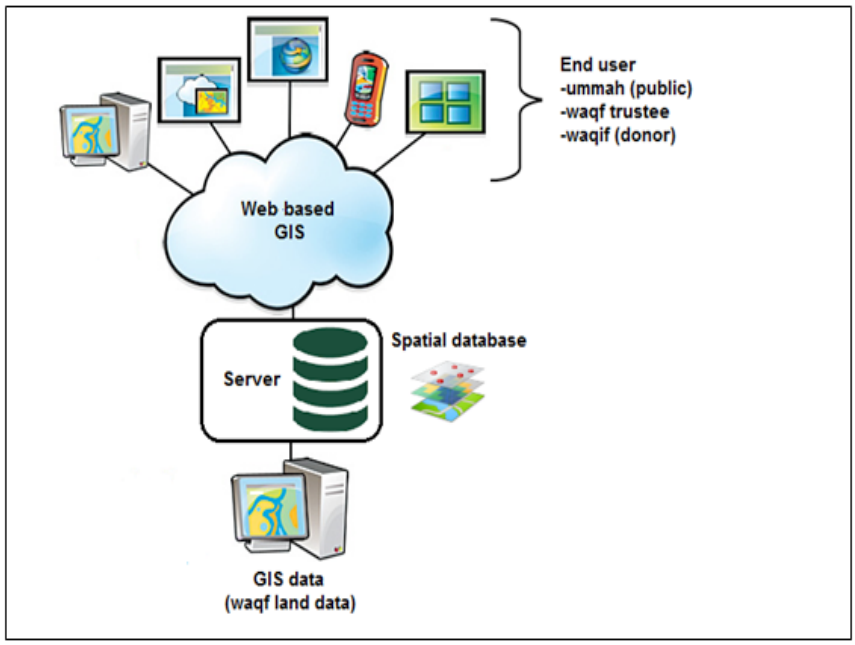

Figure 1: Proposed web based Geographical Information System model integrated with spatial database.

6.1 Web Based Application

The web, a widely used service on the Internet, consists of a worldwide collection of electronic documents (Shelly & Vermaat, 2011). To explain further, the web based application is an online system that can be seen as global library of information available to anyone connected to the internet. It is an outstanding mechanism for interactive applications with excellent ability to deliver and distribute data. According to Connoly and Begg (2007), the web ubiquity provides global application availability to both users and organization. Based on these advantages, the web had been used widely all over the world now days to support almost every possible work.

The web based applications had been used over the manual system for numerous reasons. The first, and possibly most significant, is the capability of web based application to store data on the servers. This situation reflects the management of record keeping process. In an average manual process, record keeping is conducted with pen and paper. However, with the used of web based applications, all the problems within the manual process can be overcome easily. Effective accessibility is the second advantage in web based applications. It promotes accessibility to an application anytime and anywhere around the globe. Pursuant to the second advantage, it arises the third advantage that is datawithin web based applications can be managed easily. Moreover, with the use of spatial database, all the relevant records regarding Waqf land data is stored and organized properly.

6.2 Spatial Database

The conventional database can only support conventional data type such as number and text whereas spatial database is a database management system that provides an environment for spatial data types in its implementations (Güting, 1994). Spatial data type is a data type with reference to spaces such as GPS latitude and longitude coordinates. Briefly, spatial database can be claimed as geographical database that supports geographical data such as Waqf land data. Therefore, spatial database is the best tool to be implemented in managing waqf land data.

6.3 Geographical Information System

Most researchers agree that the evolvement of Geographic Information System (GIS) in almost every industry benefits organizations in many different areas. All sectors that deal with land analysis and management, apply GIS application for integrating and analysing data from different formats, scale and coordinate systems in accordance with specific cognitive objectives.

For each of these features, everything based on land survey and its precise and accurate graphic and cartographic representation, make GIS is a useful tool in waqf administration. For example, the implementation of GIS application in waqf land data management provides various benefits in term of data, record, figures and enables efficient waqf property's management and administration (Hasan & Abdullah, 2008).

As stated in "Sistem GIS selesai isu tanah wakaf", 30 October 2011, the implementation of GIS known as "Sistem GIS Wakaf" developed by Universiti Putra Malaysia (UPM) has shown an excellent achievement in solving land mapping problem under management of Majlis Agama Islam Selangor (MAIS). This accomplishment has become an initiation to further investigate and explore the benefit of GIS application in land management sector in Malaysia.

6. Conclusion

This study has introduced the usage of a web based GIS model integrated with spatial database for developing waqf land computerized data management system. This model is expected to be used as a standard that is beneficial to all the related parties towards effective waqf land administration and management when all the data are accessible and systematically stored. Hence, such model is highly required to curb the existing problem regarding waqf management and not to depend solely on legal implementation

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