Decoloniality and Mortgages: A Legal Discourse in Pakistan's Perspective

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Abstract

This article argues that, after independence, Pakistan inherited the legal system of British India; based on the principles of common law having least concern with customary practices of the subcontinent as well as personal laws of indigenous communities; erected to strengthen the ongoing colonization of the subcontinent. Three quarters of a century has been passed since independence but still some of very important statutes are from colonial era; the "Transfer of Property Act, (TPA) 1882" is one of them, based on English principles of real property, deals with creation and disposition of rights and interests over immoveable property by act of individuals. Mortgage is the "transfer of an interest" in immoveable property to secure the repayment of a loan; TPA, 1882 provides six kinds of mortgages, most of them were those originated and practised in United Kingdom during eighteenth and nineteenth centuries or even before; customary mortgages of subcontinent were ignored while drafting TPA, 1882. Pakistan still has more than one hundred- and forty-years old kinds of mortgages which are also out of practice in the United Kingdom now. This article focuses on two kinds of mortgages namely "mortgage by deposit of title deeds" and "anomalous mortgage". The author critically analyzes these two kinds through the lens of decoloniality. This article first explores the concept of decoloniality and its intersection with law and mortgages then analyzes the kinds of mortgages mentioned above. Furthermore, the article suggests that mortgages may be modernized and decolonized through legislative amendments.

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1. Introduction

Decoloniality is a critical framework developed to confront and challenge the dominance of western knowledge, culture, and epistemology. Emerging primarily from Latin American scholarship, it critiques the long-standing imposition of western values, knowledge systems, and legal structures on colonized societies. This imposition, which began during the colonial era, aimed to eradicate indigenous cultures, wisdom, and legal traditions to serve the political and economic interests of colonial powers.[1]

Epistemic Disobedience comprises of dismissing western academies and their implications as superior and questioning the very notion of the fact that western knowledge and institutions are universal. It is a matter of holding on to native knowledge systems and speaking out against the majority paradigm. It is killing the all-pervasive power of western philosophy with the fact that it respects and elevates local, indigenous knowledge.[2] The practitioners of epistemic disobedience aim to emphasize the aspects that have historically provided less attention to the local culture and knowledge systems; especially in the fields of law, education and history.[3]

Epistemological de-linking is a liberating process that rejects Eurocentric biases, freeing knowledge from being tethered to European-

[1] Tanja Winkler, "What Might Decoloniality Look like in Praxis?," *Planning Theory* 23, no. 1 (February 2024): 3-21, https://doi.org/10.1177/14730952231163240.

[2] Naghmana Siddique, HM Zahid Iqbal, and Ambreen Bibi, "Contemporary Engagements with Decoloniality: Tracing Epistemic Disobedience and Decolonial Aesthesis in Pakistani Anglophone Literature," *Panacea Journal of Linguistics & Literature* 2, no. 2 (2023): 222-233, https://doi.org/10.59075/pjll.v2i2.311.

[3] Ali Meghji, "Dwelling in Epistemic Disobedience: A Reply to Go," *The British Journal of Sociology* 74, no. 3 (June 2023): 294-301, https://doi.org/10.1111/1468-4446.12987.

centered theories and models. It is about embracing every belief system and nurturing its growth. This approach acknowledges the need to shift away from western-centered systems of thought, theories, and learning paradigms.[4] The objective is to cultivate mental autonomy, which ultimately facilitates the creation of multiform knowledge systems.[5]

Epistemic resuscitation or revival is defined as the reinforcement of indigenous traditional knowledge systems, which at one point were marginalized or stood against due to colonialism, which resulted in their disappearance.[6] It is the restoration and renaissance of traditional knowledge, languages and individual or communal practices. The law serves as a platform for the construction of modern law through the recognition and incorporation of traditional laws, customs and forms into the formal legal order**.** This also includes educational reforms that incorporate indigenous knowledge into the curriculum, ensuring cultural preservation. These practices foster a sense of cultural pride and continuity.[7]

At present, the law is heavily influenced by western thoughts, which were disseminated during Europe's colonization of the world. This process was not a peaceful assimilation of legal doctrines but a deliberate effort to replace the existing legal systems of indigenous populations with those of the colonizers. The imposition of western law served to bolster colonial

[4] Jack T. Lee, "Romanticizing Decolonization and Asian Epistemology: Reflections on Identity and Space," *Asia Pacific Education Review* 24, (June 2023): 187-197, https://doi.org/10.1007/s12564-023-09835-3.

[5] Veeran Naicker, "The Problem of Epistemological Critique in Contemporary Decolonial Theory," *Social Dynamics* 49, no. 2 (June 2023): 220-241, https://doi.org/10.1080/02533952.2023.2226497.

[6] Asad Zaidi, "Pakistani World making in International Politics: Empire, Decolonization and Cold War Struggles 1950-1989" (PhD Thesis, London School of Economics and Political Science, 2022), http://etheses.lse.ac.uk/id/eprint/4486.

[7] Thapelo Tselapedi, "The Darker People, Decolonisation and the Making of 'the International': A Theoretical Enquiry" (PhD Thesis, University of Pretoria (South Africa), 2021), https://search.proquest.com/openview/0cde31159202aebdcec2f9df59cafca1/1?pq-origsite=gscholar&cbl=2026366&diss=y.

power, erode local customs and traditions, and justify the perceived superiority of the colonizers over the colonized societies.[8]

Multiple authors focused on interdisciplinary approaches while participating in decolonial discourse; these authors critically explored how the colonial past still affects modern legal systems and advocate for legal system reconstruction as a part of decolonization.[9] Decolonial legal critiques contribute by analyzing historically and ideologically the grounds of international legal orders. In highlighting the role of international law in colonialism, it has been pointed out that international law used to be an instrument to perpetuate and exercise colonialism. International law more often serves the interests of dominant states rather than powerless or marginalized ones as a result of colonial history. This assessment posits that the primary principles of international law are linked to colonial practices and, there must be an academic re-examination to deal with their colonial origins.[10]

A second approach has been proposed; which is the decolonial interrogation of the human rights course. This approach asserts that the human rights discourse is steeped in western traditions of morality and philosophy that lack the knowledge to accommodate the experiences and values of other societies. Scholars of decoloniality postulate that human rights laws should be modified to take into account different cultural

[8] Foluke Ifejola Adebisi and Katie Bales, "Reinventing Possibility: A reflection on law, race and decolonial discourse in legal education," in *What Is Legal Education For?*, ed. Rachel Dunn, Paul Maharg, Victoria Roper (London: Routledge, 2022), 85-110.

[9] Karina Theurer, "Minimum Legal Standards in Reparation Processes for Colonial Crimes: The Case of Namibia and Germany," *German Law Journal* 24, no. 7 (November 2023): 1146-1168, https://doi.org/10. 1017/glj.2023.81.

[10] Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," in *The Nature of International Law*, ed. Gerry Simpson (London: Routledge, 2017), 437-516.

viewpoints and respect indigenous people's self-determination.[11] The nineteenth century witnessed the British colonial encounters on Islamic legal traditions in British India. This encounter has exhaustively made changes to, redefined, and even subdued Islamic law to suit the system of administration of colonial masters. English left long ago but their footprints can easily be seen on legal systems of both India and Pakistan.

Pakistan's legal scholars have also contributed to the discourse of decoloniality and law. These eminent people enhance and encourage Pakistan's legal system's intellectual struggle to analyze colonial influences and how to correct them. Their pieces provide for academic investigation, policy dynamism, and legal analyses to improve justice and equality in Pakistan. In a nutshell, these scholars altogether argued that gaining an understanding and overthrowing colonial influences over modern legal systems will depend on an intersection of decoloniality and law. They advocate for a "decolonial legal theory and practice" centered on the appreciation of indigenous laws, and the world order should be more inclusive and equitable at the global level.

2. Impact of Colonialism on Subcontinent

The British colonial era marked the system of law of present India and Pakistan with an indelible impression. The implementation of the codes was a tactic aimed at disseminating colonial dominance and dismantling the indigenous legal system. This process, initiated around 1830, aimed to replicate English common law in Indian society. Lord Macaulay's famous assertion that no country needed a legal code more than India, and that this

[11] Makau Mutua, "Critical Race Theory and International Law: The View of an Insider-Outsider," *Vill. L. Rev.* 45 (2000): 841, https://digitalcommons.law.villanova.edu/vlr/vol45/iss5/2.

need could be met by adopting English legal principles, underscores the colonial perspective and its influence on the legal system.[12]

Between 1861 and 1887, the colonial administration passed 15 statutes that significantly reshaped the legal landscape of British India. These statutes introduced both the substantive laws and procedural laws for British India, some of which are still in force today, and were hailed by colonial authorities like Whitley Stokes as a benevolent step towards sharing "the blessings of a conscientious, clean, and ascertainable law" with India.[13] However, the entire process was marred by the colonial ambition to gain unfailing authority over the region, revealing the underlying motives and challenges of the time. The law formalized a set of regulations for the standardized administration of justice, which was applied under colonial interests. It produced the condition that the legal procedures and results were foreseeable and in agreement with the purpose of the British Empire.[14]

To uphold the dominance of British common law, the colonial government worked to suppress and eventually replace the diverse tribal laws and practices prevalent in the Indian subcontinent. This not only disrupted the legal traditions but also the social and cultural fabric of the people, underscoring the broader impact of actions of colonial masters. Integrate the colonized societies into the colonial legal framework; the introduction of a single uniform legal code was the attempted process of melding the colonized societies into the unifying colonial legal system.

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[12] Raza Saeed, "Law and Coloniality of Empire: Colonial Encounter and Normative Orderings in the Indian Sub-Continent," *YB Islamic & Middle EL* 19, no.1 (2016): 103-133.

[13] Amna Hassan, "Impact of the European Private Law Codification Outside Europe I: Common Law in the Old Colonial Empire (Pakistan)," *Dezs\HoMárkus Research Group for Comparative Legal History, DIKE* 3, no. 2 (2019):170-183, https://doi.org/10.15170/DIKE.2019.03.02.11.

[14] Katharina Rietzler, "Counter-Imperial Orientalism: Friedrich Berber and the Politics of International Law in Germany and India, 1920s–1960s," *Journal of Global History* 11, no. 1 (2016): 113-134.

Incorporating western patterns was helpful for the British colonial representatives in exercising control over the magnanimous and varied population of the Indian subcontinent.[15]

The long-term influence of this codification is well-illustrated through the legal systems of these two countries to date. Many laws that were made in colonial times are still in force. These laws are reflections of the persevering principles of the British legal system. However, this legacy necessitates balancing the existing colonial legal systems, which have been inherited, with the contemporary needs of the society, which are changing with regard to both culture and law.[16]

The codification of laws in British India was part of a careful effort to dominate colonial rule and crush the indigenous legal traditions. Although it provided a certain and unified legal framework, it had deep and lasting impacts on the judicial systems of India and Pakistan, which is a problem that continues to exist since they are in a quest for good governance and justice. The introduction of codified common law did not out rightly abolish customary practices but placed the burden of proving their existence on those who claimed such rights. Over time, the reliance on common law principles in judicial decisions led to the gradual fading away of indigenous legal practices.[17] Colonialism almost affected every branch of law. But this article primarily focuses on "mortgages", especially two kinds of mortgages.

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[15] Aziz Rahman, Mohsin Ali, and Saad Kahn, "The British Art of Colonialism in India: Subjugation and Division," *Peace and Conflict Studies* 25, no. 1 (2018): 1-26, https://nsuworks.nova.edu/pcs/vol25/iss1/5.

[16] Elise Huillery, "History Matters: The Long-Term Impact of Colonial Public Investments in French West Africa," *American Economic Journal: Applied Economics* 1, no. 2 (2009): 176-215, https://sciencespo.hal.science/hal-01052798/file/app.1.2.176.pdf.

[17] Bernard Cohn, "Colonialism and Its Forms of Knowledge: The British in India," in *The New Imperial Histories Reader*, ed. Stephen Howe (London: Routledge, 2020), 117-124.

3. Background of Land and Property Laws of Pakistan

Land laws of the colonial era still mark the landholding pattern and property rights in Pakistan; the ownership and management of land traces are very deep and sustainable. These laws originated in British colonial times with the sole purpose of increasing revenue and consolidating the colonial powers, and most of the time, they ended up preserving the powers of colonial officials administrating the land.[18]

The adoption of such laws always began with the formalization and codification of land rights, which totally ignored the traditional and customary ownership systems. The legal reclassification was, therefore, instrumental in the local tribes seeing all their ancestral and traditional land rights diminished or not even recognized at all in the new systemic structure. Typically, colonial administrators tended to use land distribution systems that created a class of landlords who were loyal to the rule of the colonial regime, whichever further extended colonial influence and control over the region.[19]

Before the colonial era, property laws had many forms and were subject to rules rooted in customs, shaped by personal laws of communities and nourished by decisions of Indian judges. The drafters of Transfer of Property Act 1882 employed the crystallization and standardization strategies; crystallization means to make the law clear enough, hence, left very little room for judicial development of law; standardization denotes a notion that property must have a standard form and subject to a standard

[18] Fatima Tassadiq, "Colonial Laws, Postcolonial Infrastructures: Land Acquisition, Urban Informality, and Politics of Infrastructural Development in Pakistan," *Environment and Planning D: Society and Space* 42, no.3 (2024): 401-421, https://doi.org/10.1177/02637758241240363.

[19] Zia Akhtar, "Colonial Legacy of Pakistan and Genesis of a New Constitution," *European Journal of Law Reform* 22, no.3-4 (2022): 267-288, https://www.elevenjournals.com/tijdschrift/ejlr/2022/3-4/EJLR_1387-2370_2022_024_003_002.

rule, for whole the then British India, and the role of local customs and usages regarding property must be curtailed. It was 1882 when the Transfer of Property Act was finally enacted, the law regulating the mortgages of immoveable property incorporated in the Act as a whole. In British India the mortgages were legislated first for Bengal in 1798 but the legislation failed to respond effectively to multiple notion of issues of mortgages commonly practiced then, resultantly chaos and uncertainty had been increased, both creditor and debtor involved in vague litigation and the value of mortgaged property compromised. The enactment council shared the first draft which received criticism, because, among other things, mortgages were not properly comprehended. Sir Rashbihari Ghosh, an Indian scholar of mortgage law, reported to have said that customary mortgages in India are countless. Hence, the final draft of the Act, section 58, after enactment, host definition and essential of mortgage in general and then provides four kinds of mortgages, by detailing their core essentials with high degree of specificity. Anomalous mortgage included for creating a space for "all mortgages" customarily practiced in India and explicitly different from those enumerated in the Act. Mortgage by deposit of title deeds became part of the Act by an amending Act 20 of 1929.[20]

4. Law Relating Mortgages in Pakistan

Mortgage is a transfer of an interest in a specific immoveable property for the sole purpose of securing the repayment of a sum of money, already advanced or will be advanced in future, as loan or to secure the performance of an obligation which may give rise to a pecuniary liability, the transferor of an interest is known as "mortgagor" and to whom the interest has been transferred known as "mortgagee" the property employed as security is

[20] Shyamkrishna Balganesh, "Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint," *The American Journal of Comparative Law* 63, no. 1 (2015): 33-76, http://www.jstor.org/stable/26386648.

known as “mortgaged property” the loan which repayment has been secured known as “mortgage money”. Mortgage money includes the principal amount of loan plus interest, though interest is forbidden in Islam but contemporary mortgages' law still hosts provisions of interest.

Mortgage is a transaction which creates an interest in immoveable property, therefore, can only be affected by an instrument and such instrument known as “mortgage deed”. There are six kinds of mortgages including “simple mortgage” “mortgage by conditional sale” “usufructuary mortgage” “English mortgage” “mortgage by deposit of title deeds” and “anomalous mortgage”.[21] The author observed that each kind of mortgage can be analyzed through the lens of decoloniality; but the scope of this article would be limited only to “mortgage by deposit of title deeds” and “anomalous mortgage”.

4.1 Mortgage by Deposit of Title Deeds-Legislative Evolution

Mortgage by deposit of title deeds is an equitable mortgage by nature originated from the decision of an English court. Therefore, it would be appropriate to explore the origin, scope, evolution and contemporary implications of mortgage by “deposit of title deeds” in English law. Equitable mortgages may be created of legal or equitable estates and in English law equitable mortgage operates as a contract by which a charge is created on the property but such contract does not convey any legal estate to the creditor.[22]

Deposit of title deeds constitutes an enforceable security against depositors, first, established in *Russel v. Russel* (1783). A borrower deposited the title deeds of his leasehold estate with the lender for a loan

[21] Transfer of Property Act, 1882, sec. 58.

[22] The Law Commission, *Working Paper No. 99 Land Mortgages*, 1986, London: Her Majesty’s Stationery Office, https://lawcom.gov.uk/project/land-mortgages/.

and resultantly secured a loan from the lender. Later on the debtor became bankrupt; the lender for realization of loan brought an action in the court of Chancery for the sale of debtor's leasehold estate. It was argued by the debtor that the creditor's action was against the law because it amounted to creating a legal charge over debtor's leasehold estate without writing, therefore, causing violation of 4th clause of Statute of Frauds, enforced. The principal question before the court was whether the debtor's act of depositing the title deeds of leasehold estate with the lender operated as a security for the loan which had been advanced to the debtor. It was found that the title deeds of leasehold indeed deposited with the lender as security, therefore, entitled the lender to have a charge over leasehold notwithstanding in the absence of a written agreement constituting the same and consequently justified this presumption that parties were intended to create a mortgage. Russel case founded the rule that deposit of title deeds of property as security of loan is not only evidence of mortgage but "act of depositing" is a part performance of the agreement which makes it enforceable in equity.[23]

Prior to the verdict in Russel v. Russel by Lord Thurlow, any party, with whom title deeds were deposited, was only permitted to hold the title deeds of property so as to secure payment from debtor by embarrassing him, however, no charge being created upon the estate and if the right granted to the creditor had stopped here it would not have been in the nature of a mortgage at all. After Russel the same principle has been reinstated in the cases of *Featherstone v. Fenwick* (1784) and *Hartford v. Carpenter* (1785). Where, it was held that the deposit of title deeds entitled the holder of such deeds to have a mortgage though there was no special agreement to assign but holder's lien upon property effectuated, hence, the deposit affords an

[23] Russel v. Russel, (1783) 1 Bro. C. C. 269.

assumption that such was the intent of parties while depositing and accepting title deeds. The same principle was reaffirmed in *Edge v. Worthington's case*. The Russel case introduced an exception to the Statute of Frauds and Perjuries 1677 and such exception justified, firstly, due to commercial necessities that might have existed in late eighteenth and early nineteenth century England. Secondly, the justification of exception was the significance of "title deeds" as proof of ownership of property, at that time there was lack of land registries in England, therefore "title deeds" was the sole badge of ownership and title to land could not be proved without having title deeds. Therefore, if a person could not have deeds of the property, then no potential vendee would attract. The equitable mortgage by deposit of title deeds was not required registration because there was no document to be registered but where the deposit made along with an instrument evidencing the transaction than registration is required to retain its priority among multiple charges.[24]

Lord Cairns reported to have said that in equity, it is a well-established rule that deposit of documents, comprising title, without anything else, without anything verbal or written will construe a charge upon the referred property.[25] Later the English statutory law preserved the doctrine of equitable mortgage by deposit of title deed; the Law of Property Act, 1925 does not affect the doctrine, in fact, it provides that it shall not prejudicially affect the interest or right of a person arising out of or following on the possession by him of any documents concerning to a legal estate in land, furthermore it shall not affect any question arising out of or consequential upon any omission to acquire a document relating to a legal

[24] W. D. Rollison, "English Doctrine of Equitable Mortgages by Deposit of Title Deeds or Other Muniments of Title," *NOTRE DAME LAW REVEW* 6, no.3 (1931): 341-361, https://scholarship.law.nd.edu/ndlr/vol6/iss3/6/.

[25] Shaw v. Foster, (1872) 5 H.L. 321 (340).

estate in land or any question arising from absence of possession by any person of any documents relating to a legal estate in land.[26]

As regards the registration of mortgage by deposit of title deeds the law provides that every mortgage, whether legal or equitable, constituted after the commencement of Law of Property Act 1925 affecting a legal estate in land, but not being a mortgage protected by the deposit of documents relating to the legal estate, shall stand according to its date of registration as a land charge in pursuant to the Land Charges Act, 1925.[27] The author submits that the law of Property Act 1925 made a clear room for an equitable mortgage protected by deposit of title deeds.

From its creation the mortgage by deposit of title deeds got the attention of the commercial world and became an effective and easy mode of creating security of loans. A significant change was introduced by the Law of Property (Miscellaneous Provisions) Act 1989, it provides that a contract for the sale of land or a contract affects any other disposition of an interest in land can only be made in writing and by incorporating all the terms upon which the parties have expressly agreed either in a single document or in each instrument where contracts are exchanged and every such document must be signed by each party. The section 40 of Law of Property Act 1925 having the law of "part performance" has also been repealed.[28] It was held that after commencement of Law of Property (Miscellaneous Provisions) Act 1989 an equitable mortgage by deposit of title deeds in violation of section 2 of said legislation could no longer be constructed and enforced.[29] The author submits that an equitable mortgage by deposit of title deeds founded by Court of Chancery and ended by an

[26] Law of Property Act 1925, sec. 13.
[27] Ibid., sec. 97.
[28] Law of Property (Miscellaneous Provisions) Act 1989 sec. 2.
[29] United Bank of Kuwait plc v. Sahib, [1997] Ch 107.

enactment. Now in England mere deposit of title deeds with the creditor has no value unless accompanied by written evidence as per law.

4.2 Mortgage by Deposit of Title Deeds in Pakistan

The mortgage by deposit of title deeds was not in the scheme of TPA 1882 until 1929 by an amending Act, it become part of TPA 1882 as clause "f" of section 58; initially it was available in the towns of Calcutta, Karachi, Bombay, Madras and Rangoon…etc.[30] A proviso has been introduced therein by Finance Act of 1986.[31]

When a person, with the intention of creating security for a loan advanced or to be advanced, delivers the documents of title of specific immoveable property to a creditor or his agent then mortgage by deposit of title deeds is created. The mortgage by deposit of title deeds may also be created in favour of a banking company by making an entry in record-of-rights[32] against the entry relating to such immoveable property.[33] The mortgage by deposit of title deeds is indicial with simple mortgage; the same provisions that govern simple mortgage shall apply to a mortgage by deposit as much as applicable.[34] Following are essentials of a mortgage by deposit.

1. Documents of Title; documents of title must consist upon those documents evidencing the valid title of mortgagor or in absence of

[30] Act XX of 1929 sec. 19, https://www.indiacode.nic.in/repealed-act/repealed_act_documents/A1929-20.pdf, accessed May 4, 2024.

[31] Finance Act 1986 sec. 2, https://molaw.gov.pk/SiteImage/Misc/files/Collections/1986.pdf, accessed May 1, 2024.

[32] The term "record of rights" has been explained by section 39 of Land Revenue Act 1967 consisting upon documents including details of persons having rights and interest upon a particular piece of land, nature of their rights and interests and liabilities/conditions attached thereto. An entry in record of rights shall be deemed to be conclusive proof of existence of any right or interest in land unless contrary proven. In land revenue law, record-of -rights is an essential document affecting and extinguishing rights in relation to land.

[33] Transfer of Property Act 1882, sect. 58(f).

[34] Ibid., sec. 96.

original documents duplicate may also be admissible. To constitute a mortgage under clause (f) of section 58 of TPA 1882 the documents of title of specific immovable property must disclose an apparent title or interest of the mortgagor in that property. If documents deposited by mortgagor don't disclose any interest or title in such property then the transaction failed to attract the provision of section 58(f) of TPA 1882. The rule was affirmed and it was held that against the property which is subject matter of the suit, documents of title deposited by depositor along with the memorandum of deposit of title deeds only comprise of sale agreement and the sale agreement, on the face of it, allegedly cancelled by vendor due to non payment of consideration on time, therefore, the depositor in lieu of such sale agreement doesn't have any title or interest, hence, no mortgage has ever been created over suit property under section 58(f) of TPA 1882.[35]

2. Existence of Debt; a debt must exist; a mere deposit of title documents without existence of a debt shall not constitute a mortgage. The author submits that existence of debt is core essential of every mortgage; where existence of debt doesn't prove, mere deposit of title deeds wouldn't create the status of "mortgagee" in favour of its holder.

3. Delivery to Creditor; the documents must be delivered to creditor or to duly appointed agent of creditor as security against an existing or future debt. Delivery may be actual or constructive where documents are already in creditor' possession.

[35] Australisia Bank Limited v. Faruqui House Building Corporation Ltd PLD 1975 KH 870.

4. Sale; a mortgagee by deposit of title deeds may institute a suit of sale of mortgaged property for recovery of loan at mortgagor's default. Personal liability; where proceeds of sale prove insufficient to discharge the mortgage money in full then a suit for recovery of remaining amount may also be filed by the mortgagee. Registration; a mortgage by deposit of title deeds doesn't require registration.[36] A mere deposit to a creditor or agent with the intent of creating a security of loan would be sufficient to create a valid mortgage by deposit. But where the parties draft a written instrument incorporating terms and conditions therein then registration is compulsory being a non-testamentary instrument creating or disposing of rights or interests in immoveable property.[37]

The author submits that "mortgage by deposit of title deeds" in Pakistan still can be affected without registration if parties entered into such mortgage verbally, but such mortgage is extremely hard to prove in court; it must be made compulsory that mortgage by deposit of title deeds shall be affected only by an instrument. To modernize and decolonize the contemporary law of mortgages of Pakistan the author further submits that rather than a separate form of mortgage, it should become part of simple mortgage; "that a simple mortgage may also be constituted by deposit of title deeds but "registration of deposit" must be compulsory to avoid any sort of ambiguity".

4.3 Mortgage by Deposit of Title Deeds in India

India inherited the same TPA 1882 after independence and it is still enforced there. Beside minor differences no major change has been introduced yet. In India, essentially, a mortgage by deposit of deeds may be

[36] Transfer of Property Act 1882, sect. 59.
[37] Registration Act 1908, sec. 17.

created in the towns of Calcutta, Bombay and Madras but the state government may also be authorized to extend the operation of section 58(f) to other towns too. Along with aforesaid mentioned towns a mortgage by deposit of title deeds may be created in various towns, now, throughout India. As regard the proviso which was included in TPA 1882 in Pakistan by Financial Act of 1986 no such proviso exists in Indian legislation. Author submits that regarding the essence of "mortgage by deposit of title deeds" both (Pakistani & Indian) legislations are quite the same.

4.4 Anomalous Mortgage

An anomalous mortgage has not been given a definition. Anomalous mortgage had not been made part of the section 58 of TPA 1882 initially; it was the part of section 98 of TPA 1882. The amending Act 20 of 1929 split section 98 and first part of the section was included in section 58 of TPA 1882 as sub-section (g) and the rest remains in section 98. Before the inclusion of anomalous mortgage in section 58, there were six kinds of mortgages regulated by the Act, which included a "simple mortgage", an "English mortgage", a "usufructuary mortgage", a "mortgage by conditional sale", "combination of simple mortgage & usufructuary mortgage" and "combination of a mortgage by conditional sale & usufructuary mortgage". Many other classes of mortgages popular among masses usually practiced in a particular business and ethnic community or area fall within the ambit of section 98 before amendment and regarded as anomalous. Amendment abolished the last two kinds of mortgages mentioned above and introduced two new classes, "mortgage by deposit of title deeds" and "anomalous mortgage".[38]

[38] Darashaw Vakil, *Commentaries on The Transfer of Property Act*, 2nd ed. (New Delhi: Wadhwa and Company Nagpur, 2004), 875.

An anomalous mortgage is a mortgage which is by characteristic neither a simple mortgage nor a mortgage by conditional sale, a usufructuary mortgage, an English mortgage and a mortgage by deposit of title deeds.[39] The obligations and rights of parties having an anomalous mortgage shall be ascertained by their contract and such contract documented as "mortgage deed". Whether a mortgage is "anomalous" or not the intention of the parties and nature of transaction must be gathered from mortgage deed and so far as the mortgage deed does not extend to determine the rights and liabilities of parties then local usages determine the fate of transaction.[40] But the parties by executing a deed of anomalous mortgage cannot undo any of the statutory rights available to either party in a mortgage such as the right of redemption given to a mortgagor.[41]

A mortgage may be anomalous if it was constituted by a combination of two or more kinds of mortgages specified in section 58 of TPA or it was a mortgage customarily practiced in any area of the subcontinent. Local mortgages prevailed in different parts of subcontinent especially in Malabar were anomalous mortgages and usually governed by local customs and usages, therefore, to protect them legally clause (g) has been introduced. Some forms of anomalous mortgages are discussed below.

a. ***Zarpeshgi*** is a transaction that may possess the features of a lease and a mortgage. The question whether a *zarpeshgi* was a mortgage or lease entirely depends upon the nature of transaction and intention of parties. If there is a secured debt and a right of redemption then the transaction is a "*zarpeshgi* mortgage". In "*zarpeshgi* lease" the lessor has been given an advance and lessee has possession for a

[39] Transfer of Property Act 1882, sec. 58 (g).
[40] Ibid., sec. 98.
[41] Ibid., sec 60.

term during which the lessee compensate himself for the advance made along with profits out of the proceeds of property.[42]

b. ***Otti* mortgage of Kerala** is an anomalous possessory mortgage as practiced and understood in Kerala. It gives the mortgagee the right to possess and enjoy the rents and profits of mortgaged property without any liability to account. The mortgagor is personally liable for the mortgage amount. Unless there is a contract to the contrary, an *otti* mortgage cannot be redeemed before the expiry of twelve years from the date of its execution.[43]

c. ***Kanom* & *Peruarthuam* mortgages of Malabar.** *Peruarthuam* as a customary mortgage of Malabar having a unique feature, that is, while redeeming the mortgage instead of actual mortgage amount, current market value of the mortgaged property is payable by the mortgagor. A *kanom* is an anomalous mortgage having the features of both a usufructuary mortgage and a lease and governed by customary law of Malabar. The lessee is the mortgagee and lessor (mortgagor) known as the *Jenmi*. A *Jenmi,* in the absence of a contract to the contrary, cannot redeem the mortgaged property before the lapse of twelve years from the date of execution.[44]

There were various local mortgages including "*Iladarawara* mortgage", "*Lahan Gahan*" "San-mortgage of *Guzerat*" "*Nirmutal*" "*Taran-Gahan*" "*Drishtabandaka*" "*Muddata Kriyan*" and "Nazar Gahan" …. etcetera, all governed by local usages and if not explicitly violated any of the terms of TPA 1882 then be considered as anomalous.[45] But now it's

[42] Vakil, *Commentaries on The Transfer of Property Act*, 843.
[43] Ibid., 877-878.
[44] Ibid.
[45] Ibid.

very rare to have such a mortgage in practice. All such types of mortgages became obsolete gradually.

5. Contemporary Relevance of Decoloniality

In any case, the significance of decolonizing the legal system in Pakistan in modern times is under-evaluated. It is a complex and crosscutting one that brings into focus many governance and social justice issues as well as cultural questions. The process cannot be limited only to achieve justice; new civil legislation must be developed that actualizes Pakistan's current conditions. The author submits that the decolonization of the legal system facilitates the implementation of appropriate governance and qualified administration. A law that adopts regional norms and values such as religion and ethics is more likely to be followed closely by the people, which ultimately will increase the level of credibility and trust of the government among the citizens. Similarly, the system ensures that the local problems and disagreements that arise get solved faster by taking into consideration cultural practices and norms.

Alongside the rise of anti-colonialism, people started raising the calls for increased social justice. In the majority of the cases, the norms of the colonizers didn't take into consideration the benefits and prosperity of the community but were designed just for the rule and extraction of resources from the locals. The process of reforming these laws and abandoning hidden biases, as well as putting a proper emphasis on fair and equity principles, is part of the solution to this problem. Thus, it is significantly putting in place amendments to the clauses in laws that are against the interest of masses.[46]

[46] Muhammad Asadullah, "Decolonization and Restorative Justice: A Proposed Theoretical Framework," *Decolonization of Criminology and Justice* 3, no 1 (2021): 27-62, https://doi.org/10.24135/dcj.v3i1.25.

The author further submits that a decolonized legal system may also be helpful for reinstating Pakistan's cultural identity. It becomes the implementation of the restoration of both indigenous and Islamic legal traditions, which have suffered marginalization since the oncoming of colonization. In addition to this complementation, from one point of view, not only pay tribute to the culture's rich history but also promote national identity and unity. It is conscious, and it agrees with the fact that the traditional legal system includes all the practices of different traditional laws within the country; hence, the people feel like they belong to and are proud of their natural legal system.

The economic consequences of the decolonized legal system also include a lot more than creating a context in which more effective economic policies could be developed. Providing a regional-based policy that is applicable to support indigenous enterprises, preserve the working rights of the indigenous, and sustain natural resources is of paramount importance. International laws and treaties are often only partially conducive to development goals or priorities in local economies in modern times. For this reason, they present challenges on how economies can navigate through them.[47]

It is pertinent to mention that Pakistan has taken two significant steps to strengthen the efforts of decolonizing the contemporary law. First; establishment of "Council of Islamic Ideology" having the mandate to review the existing laws so as to bring them in conformity with Islamic injunctions. Second; promulgation of "The Financial Institutions (Recovery of Finances) Ordinance, 2001" regarding enforcement of mortgages where

[47] Maleeka Tul Zahra et al., "Socio-Economic Implications of Colonialism: A Comparative Study of Africa and Indian Sub-Continent," *Journal of Languages, Culture and Civilization* 5, no. 2 (2023): 125-140, https://doi.org/10.47067/jlcc.v5i2.

financial institutions are mortgagees. Both steps have been discussed briefly hereunder.

Pakistan has established the "Council of Islamic Ideology" for Islamization of laws. The council has been established to advise the legislatures whether or not a proposed law is repugnant to injunctions of Islam. The functions of the council shall also include making recommendations for bringing existing laws into conformity with the injunctions of Islam.[48] In its 17th session the Council of Islamic Ideology scrutinized the Transfer of Property Act 1882 through the lens of Shari'ah and later on published its report. The Islamic law of "*Rahn*" is based on *Holy Quran* and *Sunnah* and prevalent law of mortgages on many points contradicts Islamic law of *rahn* especially Islamic law strictly prohibits *riba*/interest but contemporary law of mortgages include interest in the principal amount (mortgaged money). The council comprehensively analyzed the chapter four (mortgages) of TPA, 1882 in which it has been found that almost every single provision concerning mortgages (58 to 104) is contrary to the principles of *Holy Quran* and *Sunnah* and such contradiction cannot be undone merely through introducing amendments in the contemporary law; rather council suggested that Islamic law of *rahn* which was incorporated in *"Majallat al-Akham al-Adliyyah"* with appropriate modifications shall be made the law of *rahn* in Pakistan.[49] The author submits that the council published its report in 1984 but after the passing of forty years the recommendations of the council are still awaiting legislative fortification.

Pakistan's mortgage law is largely rooted in the colonial era. The British colonial administration's promulgated Transfer of Property Act of

[48] Constitution of Pakistan, 1973 article 230.

[49] Council of Islamic Ideology, "*14th Report on Islamization of Laws*", https://cii.gov.pk/E-Books.aspx, accessed May 4, 2024.

1882 which established the legal basis for transfers of interests over immoveable property, including mortgages. This Act established laws and processes for numerous property transactions that still enforce. The Transfer of Property Act of 1882 regulates people's property rights, including rights of mortgagors and mortgagees. Over time, new laws have refined and updated mortgage law, among them the 2001 Financial Institutions (Recovery of Finances) Ordinance is important. This ordinance addressed changing needs of the financial industry, particularly credit and mortgage enforcement. This ordinance simplified and speeds up the procedure for recovery of loans by financial institutions as compared to the more than a century old Civil Procedure Code, 1908.[50] Therefore it is not only a special law for the financial industry; but also, a constructive step of Pakistan towards the goal of decolonizing the law.

6. Concluding Remarks

In conclusion; the decolonial critique of legal changes in colonized contexts brings to the forefront the negative impact of Western legal codification, which is characterized by coercive aspects and marginalization. It suggests that colonial remnants should be subjected to reconsideration and the creation of new post-colonial legal systems that will reflect the wealthy historical and cultural elements of the societies instead of the colonial legacy, which unenthusiastically still prevails. Decoloniality embraces a revolutionary lens that makes it possible to comprehend the deep background of colonialism on the legal system and its legacy in developing countries. Western legal thought is being questioned by it, and it should recover and modernize indigenous legal traditions, thus a more just and equitable global legal order will be created. Pakistan inherited the legal system of British India but even after passing three quarters of a century

[50] The Financial Institutions (Recovery of Finances) Ordinance, 2001.

some of very important statutes are those from the colonial era, Transfer of Property Act 1882 is one of them. The national legal order of Pakistan is based upon the principles of common law, hence the economy base on interest / *riba*; although many efforts have been made to decolonize the law and erase the element of interest / *riba* from economy but the destination is still far away; To establish a national legal order for Pakistan, which would be based upon Islamic principles as well as informed with contemporary discourse of decoloniality, more sincere efforts are need of the hour not only from government but also from Islamic scholars, academia, intellectuals and economists.

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