



[Dossier: Decolonial comparative property law]

Legal Implants: On Feudalism and Emphyteusis

Enxertos jurídicos: Sobre o Feudalismo e a Enfiteuse

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Resumo

Enfiteuse é um tipo de contrato de direito civil, originário do direito romano, pelo qual um proprietário (locador) arrenda terras, sujeito à sua manutenção e ao pagamento de uma renda anual fixa por um arrendatário (enfiteuta). Neste artigo, traçarei a história da enfiteuse na Itália. Primeiramente, focarei nos debates historiográficos do século XIX sobre a enfiteuse. Em segundo lugar, analisarei como os juristas coloniais italianos mobilizaram o feudalismo da enfiteuse para compreender e traduzir os sistemas jurídicos indígenas etíopes.

Palavras-chave: Enfiteuse; Propriedade privada; Concessões coloniais.

Abstract

Emphyteusis is a type of civil law contract, originating in Roman law, whereby a landowner (lessor) leases land subject to its upkeep and the payment of a fixed annual rent by a lessee (*emphyteuta*). In this paper, I will trace a history of emphyteusis in Italy. First, I will focus on 19th century historiographic debates on emphyteusis. Second, I will look at how Italian colonial lawyers mobilized the feudalism of emphyteusis to understand and translate Ethiopian indigenous legal systems.

Keywords: Emphyteusis; Private property; Colonial concessions.



1. Emphyteusis: Like Private Property, But Not Quite

The institution of emphyteusis, whose name derives from the Greek ‘en’ and ‘phyt-’, meaning ‘to implant’, has been commonly used for centuries in feudal systems and religious orders across the Mediterranean region. Emphyteusis is a civil law contract, originating in Roman law, whereby a landowner (the lessor) leases land subject to its upkeep and the payment of a fixed annual rent by a lessee (the *emphyteuta*). Its main characteristics are low rent, its fixed nature, and the perpetual validity of the contract.

Although this institution’s name suggests a Greek origin, it was not widely used until the late Roman empire. It has been observed that ‘the implantation of the Greek emphyteusis in Roman law was facilitated by existent Roman tenures’, which often consisted in concessions of public land (*ager publicus*) or in land leased by religious corporations (*ager vectigal*), and was later extended to private citizens (JOHNSTON, 1940, p. 325). Emperor Zeno was the first to codify emphyteusis as a separate legal institution, different from both sale and rent: According to his famous formulation, emphyteusis constituted a defined, distinctive legal concept all its own (‘conceptionem definitionemque habere propriam’). This interpretation was then adopted by Justinian and incorporated in the *Codex* (CJ.4.66.1).

Because the emphyteuta or lessee under this doctrine is obliged by law to make improvements to the land, many scholars have argued that the primary purpose of emphyteusis was to counteract land abandonment via land reclamation and the cultivation of profitable crops. But according to other scholars, the historical rationale behind emphyteusis relied instead on its ecclesiastical origin: Members of the clergy could not transfer property to their offspring and lacked the agricultural skills to tend to their estates—hence the need to have skilled workers take care of the land while also generating profits (LATTES, 1868). Indeed, emphyteusis resembles the medieval institution of mortmain (OOSTERHOFF, 1977) as well as that of *waqf* in Islamic law (ZUBAIR ABBASI, 2012). Still others regard emphyteusis as a necessary instrument of latifundism, in that it offered a corrective to the concentration of land in the hands of the few while also making it more accessible to those skilled to work it (PALERMO, 1965, p. 5).

During feudalism, hectares and hectares of land in Europe were indeed cultivated for generations under this system. At the same time, emphyteusis was a conceptual



conundrum for earlier generations of jurists because it implied an odd division between property and land management: If the emphyteuta is granted full use and enjoyment of the land *in perpetuum*, then isn't he the real owner? Medieval glossators and early modern jurists solved this problem by 'dividing' the concept of *dominium* into *dominium utile* (the emphyteuta's right to use the land) and *dominium directum* (full ownership of the land by title) (CONGOST AND LUNA, 2018).

Historians of imperfect property have observed that emphyteusis was a form of 'property on credit', or at the very least it was an alternative form of property (CONGOST ET AL., 2023; CONGOST, 2003). In early modern Europe, emphyteusis successfully facilitated access to land where credit was lacking. To a certain extent, it was a legal fiction whose rationale was to protect peasants by guaranteeing them intergenerational access to land in perpetuity. But scholars have also observed that, for better or worse, economic growth and innovation are independent of complete ownership of the land; on the contrary, they are both heavily dependent on social and cultural motivations (PEDROZA, 2020).

After the French Revolution, France abolished emphyteusis from its civil law, deeming it an 'archaic' and confusing legal institution. As the revolution had made full ownership of property one of the most important individual rights, it was argued that emphyteutic contracts did not favor the liberty of peasants, nor did they enhance the economic and agricultural development of the country. Perpetual emphyteusis was first abolished (18–19 December 1790) and then prohibited by the Code Napoleon of 1804 (art. 530).

Despite being abolished formally, emphyteusis showed some resilience, retaining an ambiguous legal status throughout the nineteenth century—with some, such as the jurist and civil code commentator Charles Demolombe, claiming that it was a sort of 'temporary property.' Emphyteusis eventually lost its perpetual character and was turned into a temporary leasehold in 1902 (FARON, 1995; VIDAL, 2008, p. 272).

All of these debates happened in the background of codification, while European jurists were crafting a monolithic notion of private property, a byproduct of a legal philosophy of individualism and liberalism (GROSSI, 1976-7, p. 201; WIEACKER, 1995). If the concept of *dominium* was loose enough to encompass its division into *utile* and *directum*, the very existence of emphyteusis seemed to threaten the concept of private property, namely that the owner must have full and unlimited enjoyment of their rights



(DE ROBILANT, 2023, p. 116). Much like there cannot be two Gods, there could only be one owner, for property was indivisible.

In what follows, I will trace a history of emphyteusis in Italy by following three lines of inquiry. First, I will focus on 19th century historiographic debates on emphyteusis. When the new Italian state sold hundreds of thousands of hectares of land previously held under ecclesiastical mortmains, most of it was sold to private owners, who then granted concessions to farmers under emphyteutic contracts, same as the local latifundists had done under the Bourbons. At the dawn of Italian unification, Italian historians and lawyers asked: How could the existence of an archaic institution like emphyteusis be reconciled with the birth of a modern state, and how could Italy's feudal past thus be reconciled with its modern present? And what, from a historical point of view, was the relationship between emphyteusis and feudalism?

Second, I will show how answers to these questions provided a legal compass in the codification debates surrounding the promulgation of Italy's first civil code in 1865. On the one hand, emphyteusis appeared as a threat to private property: Any feudal ambiguity suggesting that emphyteutic rights were on par with other property rights needed to be eliminated by the code, and enfranchisement was to be limited by appropriate legislation. On the other hand, emphyteusis was preserved for reasons of political economy: It was a useful means, albeit provisionally, by which to manage the vast quantity of land in southern Italy now suddenly burdened by the fiscal demands of the new Italian state.

Third, I will look at colonial uses of emphyteusis. By means of historical-legal comparison, Italian colonial lawyers recalled the feudalism of emphyteusis in order to understand and translate indigenous legal systems and to justify the granting of concessions for coffee plantations in Ethiopia. In the conclusion, I will offer some methodological insights on the project of decolonizing comparative law—and on the vices and virtues of joining legal with historical comparison.

1.1 Historiographic debates: Was emphyteusis feudal?

In Italy, the debate on emphyteusis went hand in hand with the project of national unification. In 1860, the Academy of Sciences in Turin announced an essay competition on the subject of emphyteutic contracts, which already regulated the management of



most of the land in southern Italy. Before unification, emphyteusis was regulated by the civil code of the Kingdom of Two Sicilies (PACE GRAVINA, 2013; 2023).

The purpose of the essay competition was to ascertain the influence of emphyteusis on the practice of agriculture in Italy as well as the relationship between emphyteusis and the liberty of peasants. The winner of the competition was Elias Lattes, a Venetian lawyer and Etruscologist, who would later become a member of the academy himself, and whose revised essay, entitled 'Studi sopra il contratto di enfiteusi nelle sue relazioni col colonato', was published in 1868. As advertised, the competition had urged contestants to investigate the relationship between emphyteusis and *colonatus* (the colonate), a similar institute also codified during the Late Roman empire. In his historical reconstruction, Lattes claims that while *colonatus* led directly to serfdom, emphyteusis seemed to preserve the liberty of peasants because it was originally reserved for *ager publicus*; it served the function of reinvigorating public finances, whereas the colonate mostly was addressed to private citizens and thus was more susceptible to potential abuses. Often, the colonate also relied on the 'transplant' of non-indigenous farmers to Roman soil—mostly captive Germans (LATTES, 1868, pp. 126, 135).

But what specifically did the liberty of peasants under emphyteutic leases consist in? Lattes frames the problem of their liberty within the historiographic category of feudalism: 'If, on the one hand, emphyteusis and colonate share feudal traits,' he writes, 'on the other hand, feudalism itself, as a system of property management, adopted an emphyteutic form' (IBID, p. 287). Feudal systems, through recourse to more stagnant hereditary laws, limited the economic potential of emphyteusis by interpreting *perpetuity as immobility* (IBID, p. 289).

Indeed, perpetuity had the advantage of guaranteeing security to farmers. But careful textual analysis of emphyteutic contracts in southern Italy bears witness to a colorful vocabulary of the metaphor for immobility par excellence: *death*.

Puglia is one of the Italian regions more heavily affected by emphyteusis, to the point that certain areas in the province of Brindisi are still held under old emphyteutic leases. The story of the small village of San Michele Salentino in the province of Brindisi is emblematic of this: A recent increase in tourism has recently attracted the interest of numerous international investors seeking to buy property in the area. At the notary, many of these investors discovered, to their surprise, that they could not technically buy the property, because it was still held under an emphyteutic contract with the heirs of Prince



Dentice di Frasso of San Vito dei Normanni, a neighboring town to San Michele. (The heirs live, to this day, in the Dentice di Frasso Castle on San Vito's main square.) Prince Dentice leased the land to a group of local settlers from neighboring villages in 1839; written in a mix of Italian and local dialect, San Michele's original contracts are now in the State Archive of Brindisi.

It has already been observed that emphyteusis shares similarities with the ecclesiastical mortmain, literally the 'dead hand'—which possibly refers to the 'dead' hand of a corporation, as opposed to natural, living persons. Reading these notarial acts on emphyteutic contracts in the archives in Brindisi further reinforces the association between emphyteusis and a recurring vocabulary of death. A few examples: In the local dialect, the word *tumulo*, an agrarian unit of measure, which comes from the Latin word *tumulus*, 'raised heap of earth, a mound,' means, so to speak, a swelling of the earth. *Tumulus* in Latin shares the same etymological root as 'tumor'; so, in a broad sense, *tumulus* means 'tomb.' For comparison, in the Sicilian dialect, the same unit of measure is 'salma,' from the Greek σάγμα, 'burden, corpse.'

Furthermore, in many contracts, the *emphyteutae* are obliged to pay a one-time entrance fee, referred to as 'il capo morto'—literally the 'dead head.' The word 'head,' *capo*, stands for 'capital', and it shares an etymological root with Latin *caput*, i.e., 'head', originally as in 'head' of cattle. Landlords would require this entrance fee, arguably, as a guarantee of the peasants' solvency. The adjective 'dead' could evoke the concept of *ammortamento*, an amortization schedule. Possible comparative examples also include the feudal *mortuagium*—a tax that the lessee pays to the feudal lord when his father dies—as well as the English *mortgage*, a 'death pledge', one that ends once the obligation is fulfilled and the payment extinguished (ARCHIVIO DI STATO DI BRINDISI, 1802-1804).¹

A comparative example might offer another enlightening interpretation. In the Spanish winemaking region of Catalunya, there is a specific type of emphyteutic contract called *rabassa morta*, which means, literally, 'dead grapevine' (FERRER-ALÒS AND CLAVERÌAS, 2018, p. 155; CARMONA AND SIMPSON, 1999). According to scholars, peasants had to farm the land until two-thirds of the vines had died; if the grafting practices used were adequate—and pre-phylloxera—this would have been an indefinite amount of time. Other notarial acts at the State Archive in Brindisi refer to similar, hyperbolic expressions of perpetuity: for example, one contract is said to be valid 'for as

¹I thank Ralf Michaels for the evocative suggestion of the mortgage as a possible comparative example.



long as the world exists' (*finché il mondo sarà mondo*) (ARCHIVIO DI STATO DI BRINDISI, 1823-4).

And indeed, the perpetuity of emphyteusis works well with perennial crops, like olives, grapevines, and coffee, that require years of intergenerational effort before yielding fruit. While we generally associate the imagery of death with the ever-fleeting precariousness of life, here, on the contrary, it conjures up an imagery of sedentariness and social immobility related to the intergenerational care of the land—or to the perpetual nature of emphyteutic contracts associated with death's eternal rest.

But another striking aspect of perpetuity is that, however we might be tempted to define it according to contemporary standards, it describes a form of ownership, unlimited over time. At the State Archive of Brindisi, I have analyzed and compared San Michele's original contracts with over one hundred similar notarial acts, concluded prior to national unification, in which illiterate peasants are presented with the complex legal intricacies of emphyteutic contracts. Careful comparison of these texts shows they all share the same final formula: 'the emphyteuta owns as a true owner' (ARCHIVIO DI STATO DI BRINDISI, 1801).

Despite the (almost formal and nominal) division between *dominium directum* and *dominium utile*, emphyteusis was not only perceived by peasants as private property, but notaries also legally crafted it as such. And as I will show in a bit, this did not go unnoticed by a few jurists from the south of Italy who were actively engaged in the debates surrounding Italy's first civil code of 1865.

According to Lattes, feudalism had endangered the very nature of emphyteusis, which was inherently designed to guarantee the freedom of peasants, agricultural development, and the mobility of capital. Ultimately, with feudalism, emphyteusis became an impediment to agricultural development, and if such is the state of things—Lattes claims—then the contemporary legislation aimed at destroying emphyteusis was justified (LATTES, 1868, p. 290).

In Lattes' analysis, emphyteusis was not feudal per se; rather, feudalism appears to have corrupted the libertarian model of Roman emphyteusis, which was based on economic freedom. A similar view of the evolution of emphyteusis is portrayed by one of the Lattes' sources, Luigi Borsari, professor of civil law at the University of Ferrara and author of a book titled *Il contratto d'enfiteusi* (1850). According to Borsari, emphyteusis was quite the sophisticated legal concept: It implied a convergence of interests between



those who owned land but did not know how to farm it and landless specialized farmers. Borsari claims that 'primitive' people have the tendency to identify with their possessions, proof of which he finds in the fact that we still considered *animus*, the possessor's soul, to be the fundamental requirement of acquiring and retaining possession. For humanity to develop emphyteusis as a legal institution, *dominium* and labor needed to be conceptually detached from one another; and in his view, this could only happen in more advanced societies. For this reason, Borsari concludes, the purpose of emphyteusis is to foster the progress of civilization (BORSARI, 1850, p. 5).

Lattes notices how these two narratives ('emphyteusis as feudal decadence' versus 'emphyteusis as civilization') went hand in hand in the activities of the new Italian parliament and how each was mobilized when needed. 'The same Parliament that coercively and absolutely ordered the abolition of existing emphyteutic leases in Piedmont, Lombardy, Marche, Umbria and Emilia,' he writes, 'simultaneously nurtured projects aimed at the conservation and diffusion of such leases in the south of Italy.' While this was due in part to the (often insurmountable) differences across Italian regions, Lattes argues that these precise legislative choices were definitely in accordance with the 'principles of the science of legislation' (LATTES, 1868, p. 323): In the aftermath of unification, the prevailing view was that emphyteusis needed to be preserved for reasons of political economy; it was a useful way, albeit provisionally, to manage the vast quantity of lands now suddenly burdened by the fiscal requests of the new Italian state. And emphyteutic contracts indeed were crucial to the formation of the socio-economic landscape of southern Italy when the new Italian state sold off hundreds of thousands of hectares of land previously held under ecclesiastical mortmains. Most of the land was sold to private owners, who then granted concessions to farmers via emphyteutic contracts, effectively continuing the practice of the local latifundists under the Bourbons.

From this perspective, one could argue, echoing Lattes, that the Italian state was acknowledging the incredible political-economic potential of emphyteusis, as well as its efficiency as an instrument of state-building, in a manner not so distant from the libertarian Roman model he was championing. But Lattes at the same time acknowledges a paradox: Whereas regarding emphyteusis as feudal is to disregard its enormous economic potential, to defend it as a fundamentally advantageous institution is, at the same time, to overlook its feudal component. As far as economic potential is concerned, the alleged agricultural advantages of emphyteusis (land reclamation and cultivation) are



to be examined in the context of the Gothic invasion of Italy: Emphyteusis certainly did ameliorate the land—in a context of general devastation (IBID).

As far as the present is concerned, Lattes concludes, two requirements would turn emphyteusis into a valid instrument for political economy: secured and free tenancy of the land on the one hand, and development of its commercial potential on the other (LATTES, 1868, p. 324). Enfranchisement of the land (i.e. the peasant's power to redeem the land from its owner by paying a sum equivalent to ten yearly rents plus interest) was an essential step in the renaissance of emphyteusis, as well as in its untapped project of social mobility. While no one prevented lessees from exercising free trade on their lands, until a progressive system of enfranchisement of the land was put in place, the general lack of credit, business acumen, and education would have discouraged peasants in southern Italy from investing in agricultural or industrial ventures.

1.2 Codification Debates: Emphyteusis, Enfranchisement and the State

In the *travaux préparatoires* for the new civil code of 1865, the theory of divided *dominium* was discarded, and it was clarified that the emphyteuta could make unlimited use 'of his own right,' not 'of his own land'. And this avoided the potential suggestion that the land was, in fact, his (CARIOTA FERRARA, 1951, p. 167).

Emphyteusis, far from being a feudal ghost, appeared to be a very concrete threat to the liberal concept of private property. There were, however, some dissenting opinions: Notably, jurists Nicola Coviello and Vincenzo Simoncelli were in favor of recognizing full property rights to the emphyteuta. Both were from southern Italy and were pupils of Emanuele Gianturco, one of the most eminent figures at the Scuola Napoletana di Diritto Civile at the University of Naples. Animated by the idea that the new legal ideas coming from France needed to be harmonized to the specificities of the Italian situation, Coviello and Simoncelli joined the codification debate. According to Coviello, while the economic purpose of emphyteusis had remained exactly the same as under Roman law, the faculties of the emphyteuta (and the modes of their legal fashioning) had expanded, and evolved over time, to the point that the emphyteuta now enjoyed a '*real property right* [my emphasis] burdened by a real onus towards the lessor' (CARIOTA FERRARA, 1951, p. 171).



From this perspective, Coviello, while acknowledging a solid Roman law framework as an interpretative foundation for emphyteusis, went even further than Lattes—beyond immobility, beyond feudalism. In his view, the enfranchisement of the emphyteuta was further proof that emphyteusis was simply to be considered private property. At any point, the emphyteuta could redeem the land from its owner by paying a sum equivalent to ten yearly rents plus interest. Simoncelli argued that the almost unlimited powers enjoyed by the emphyteuta left the owner of the property with nothing but a titular right. That the emphyteuta was a full-fledged owner, he believed, constituted the natural evolution of the concept of *dominium utile*.

Here, it is worth noticing that Coviello's and Simoncelli's legal defense of emphyteusis as private property is based on historical continuity: There is a certain consistency in the historical development of emphyteusis pointing towards an organic expansion of the emphyteuta's rights. While the guiding principle of codification in French legal doctrine insisted on breaking with the immobile, feudal past—at best scrubbing emphyteusis of its feudal component—Coviello and Simoncelli offered a more radical view. Their nuanced understanding of the Italian legal context involved not only social, economic and cultural considerations, but it also suggested that acknowledging historical agency and affording legal protections to farmers went hand in hand. There was no fracture between the feudal past and modern legal codification; if anything, immobility bore witness to a consistent, organic development of emphyteusis as a legitimate form of private property.

A similar sensibility was shared by the political economist Ghino Valenti, who in an 1889 article, entitled 'Emphyteusis and the Agrarian Question in Italy and Ireland,' expressed the view that land improvement was achieved through emphyteusis thanks to the intergenerational care and labor of farmers (VALENTI, 1889, p. 227). However, despite the best liberalizing intentions of the Italian government, the original purpose of using emphyteusis to stimulate economic growth had hardly been achieved.

According to Valenti's poignant observations, the state's incentive to private initiative had proved a failure for at least two reasons. First, investors were more interested in speculation—buying the greatest amount of land at the cheapest price possible—than in the mission of improving agriculture in the South. If the state's purpose had really been to enhance growth in southern Italy, it should have divided the land into smaller, more manageable lots and facilitated access to credit for small-scale farmers.



Second, Valenti argued that the state's choice to alienate public lands was also near-sighted, in that it locked in a loss of future public revenue; from his perspective, the state should rather have conceded the use of the land via emphyteusis directly to small-scale farmers (IBID, p. 225).

But Valenti was from the Marche region, where the *mezzadria*, a metayage system of apportioning the land into small farms, in which farmers remit half the profits to the owner, had been in place since the fourteenth century. To this day, it has significantly shaped the region's economy and landscape (ADORNATO AND CEGNA, 2013). Valenti, however, was a firm believer that small-scale farming promoted not only the economic progress of the nation, but that farmers were also the first to benefit of from such progress—especially in Italy, where the ethic of small farmers is traditionally associated with the virtues of frugality and *parsimonia*. Only in this way would the position of the emphyteuta have been convenient, because it would have directly favored those skilled and interested enough in working and improving the land. Intensive agriculture, on the other hand, required capital as well as a hyper-reliance on wage labour, neither of which was available in Italy at the time (VALENTI, 1889, p. 225).

In the south of Italy, the question of credit was also exacerbated by the fact that the Banco delle due Sicilie was institutionally separate from the national Banca d'Italia, and the state showed no intention of pouring funds into the South (CONTE, 2011). This discrepancy did not escape Antonio Scialoja, the Italian economist and future minister of finance. In a letter to Camillo Benso di Cavour, the Piedmontese mastermind behind the project of national unification, Scialoja noted that it was impossible to entirely follow the French system in matters of politics and finance, specifically because of Italy's inherent north-south divide, or in his words, 'Naples is so unlike Turin' (IBID).

Unfortunately, however, the prediction that emphyteusis would not have favored the economic development of the South turned out to be true. It is clear that enfranchisement of the land (or its facilitation as a process) was never the plan. During Fascism, in the 1942 amendment to the Italian civil code, the faculty of enfranchisement was in fact restricted and limited to 30 years after the conclusion of the contract. The rationale for this provision was to deny farmers the possibility of accumulating money fast in order to become owners of the land; instead, their resources were to be directed exclusively toward improving the land.



2. The Afterlife of Emphyteusis: Colonial Concessions

Lattes' essay showed how institutions had the ability to manipulate two opposing narratives of emphyteusis—'emphyteusis as civilization' versus 'emphyteusis as feudal decadence'—according to a political or economic agenda, sometimes even accessing both simultaneously. Similarly, in France, domestic hesitation towards emphyteusis was soon relinquished when it became clear that long-term land leases like emphyteusis could become effective colonial instruments in the production of global commodities. From this perspective, the legal history of emphyteusis is co-constitutive of commodity history (CURRY-MACHADO J. et al., 2023).

Thus, in nineteenth century legal debates, the abhorred feudal institution, now considered 'dead' in domestic legal systems, enjoyed a very successful afterlife as a facilitator of 'the great economic task of clearing the land in our overseas possessions' (*la grande oeuvre économique du défrichement de nos possessions d'outre-mer*) (VIDAL, 2008, p. 273). The real issue with emphyteusis was the danger of perpetuity: If the emphyteuta had unlimited enjoyment of the land *in perpetuum*, it became harder to maintain that he was not technically the owner; and thus, for the state or the landlord, it also became harder to eventually seize back control. Perpetuity did not make for good business. Instead, emphyteusis, now turned into a temporary lease, showed its currency, having withered at its places of origin, only to become a successful tool of colonial administration, extractivism, and large-scale agriculture outside of Europe.

The project of colonialism in the nineteenth century was largely achieved through concessions. Of a hybrid nature, these public-private partnerships were used by colonizers to pursue private business in the public interest. A recurring phenomenon in colonial contexts was that what was once called 'emphyteusis' was now called an 'emphyteutic concession' (ISTITUTO COLONIALE ITALIANO, 1929, p. 520; LA CIVILTÀ CATTOLICA, 1899, p. 767; BORSA, 1969). Given the political-economic dimension of emphyteusis, as demonstrated by the case of Italy, the association between emphyteusis and concessions is unsurprising; however, this terminological shift has—to my knowledge—gone unnoticed by most of the English-language international law literature on concessions (CRAVEN, 2019; OHLER, 2013; FOURRIER, 1915, p. 6; DE ARAUJO, 1900).²

² Fourrier describes emphyteusis as a 'prudent mode of colonization'.



Certainly there were reasons for this beyond language. One source was the conviction, widespread among jurists debating national codification, that emphyteusis was a feudal institution, one that not only did not fully amount to private property but that actually threatened its very existence. (Besides, the term ‘concession’ was perhaps more straightforward than an old Greek-sounding word.) But the same jurists who decried the ‘feudalism’ of emphyteusis in their domestic legal orders had no scruples about adopting the very same institution to manage land in the colonies. As already noted, ‘one of the preconditions for the export of capital in the nineteenth century was the parallel export of Western regimes of property rights’ (CRAVEN, 2018, p. 108; LIPSON, 1985). Exploited to the advantage of Europeans, emphyteusis became a valuable instrument of dispossession, allocation of land and resources, and large-scale agricultural production. Even though they now appeared as temporary, yet long-term, legal instruments, emphyteutic contracts were essential in the production of perennial crops such as rubber, palm oil, coffee, and sugar.

Thus, the colonial use of emphyteusis in the nineteenth century rested on a specific teleology of history. Because emphyteusis could be read as a backwards or feudal institution, it proved quite adaptable to indigenous legal systems in the colonies, where land tenure was often communal or customary, with the colonizers lamenting that ‘Africans have no contracts,’ just because their system of land management differed from Europe’s.

The French jurist and economist Paul Cauwès held just such a view, writing that ‘emphyteutic concession gives the settler a genuine right and prolonged enjoyment of the land’ (*la concession emphytéotique donne au colon un véritable droit et une jouissance prolongée* (CAUWÈS, 1893, p. 448). By renting out land via emphyteutic contracts, the state does not give away public land, but rather it profits from the surplus value of the land. Sadly, Valenti was right in his intuition that it might have been more profitable in the long run if the state had granted leases on public lands directly. But with the somewhat idyllic prospect of small-scale farming out of the picture, emphyteusis hardly benefitted farmers in large-scale agriculture. Concessions of this kind, Cauwès adds, quoting the French essayist and historian Paul Leroy-Beaulieu, ‘will be in the future a precious financial resource’ (IBID.; GEMIE, 1992).

Leroy-Beaulieu was an influential figure in these debates. His works *De la colonisation chez le peuples modernes* (1874) and *Traité de la science des finances* (1877)



are ubiquitously quoted in this period. He pointed out that those who were critical of emphyteusis often objected to its perpetual nature. Instead, in his view, it would have been more advantageous for the state to grant land concessions through a kind of *bail emphytéotique*, i.e., a 99-year lease, ‘or even [a] 150[-year lease], if the first term is too short’. At the end of this time, the state would re-enter the land and profit from its having been improved for such a long time: ‘... after a certain time, it would absorb almost all of what economists call ground rent, i.e., the part of the revenue that represents the natural and primitive fertility of the land, and which is distinct from the interest on capital or the farmer’s profits’ (LEROY-BEAULIEU, 1877, p. 65). It became increasingly clear that the surplus value of preserving the ‘natural and primitive fertility of the land’ for a century or more is the most important aspect of ground rent, one that is independent, distinct from, and inconsiderate of the ‘benefits of farmers’ (IBID).

Similar synergies between commodity extractivism and the ‘feudalism’ of emphyteusis also abound in the Belgian colonies in Congo. In building a global market for coffee and rubber, the Belgian colonizers assumed that the ‘feudalism’ of indigenous legal structures resonated with the archaism of emphyteusis. It offered a vocabulary they could exploit to obtain indigenous land via emphyteutic concessions (MAUREL, 1962).³ Antoine-Joseph Sohier, charged with reporting on customary Congolese law, wrote that, based on his observations, indigenous law was ‘une espèce de féodalité,’ a sort of feudal system (SOHIER, 1935, p. 8). Unlike ‘civilized’ European agrarian laws, in Congo, ‘agraian law did not take into account our quiritary property’ (IBID., p. 10). This led another Belgian jurist to conclude that ‘land ownership was unknown in the Congo’ (DUFRENOY, 1934, p. 66).

A similar approach was adopted in Italy by jurists writing on *diritto coloniale*—based, again, on the comparative argument that indigenous law was akin to European feudal legal systems (MONDAINI, 1907; PANZA, 2015, p. 62). Feudalism as a category helped jurists and colonizers translate the unfamiliar into more familiar concepts: For example, the Ethiopian *gult*—a land tenure system based on inheritable fiefs and concessions of imperial and ecclesiastic origin—was considered to be ‘a kind of emphyteusis’ (BROTTO, 1939, p. 26; RASSEGNA ECONOMICA DELL’AFRICA ITALIANA, 1938, p. 1129). As observed by Enrico Brotto, a government advisor charged with writing

³ ‘Dans le type Babua, le plus fréquent, la tribu garde la propriété des terres, mais les paysans ont un droit d’occupation emphytéotique. [...] Grâce au paysannat, l’administration coloniale essaya de créer une classe de cultivateurs plus ou moins propriétaires su sol, attachés à la colonisation.’



about land tenure in the eastern region of Harar, ‘today the whole of Ethiopia is an immense *gult* of the Italian State’ (BROTTO, 1939, p. 24).

Ethiopian scholars have written extensively about the *gult* system. Moved by a post-independence, developmental approach towards legal analysis—i.e., by the idea that economic development required full property rights, and that, by colonial definition, the customary law of land was always communal—these scholars also relied on a general conceptualization of the Ethiopian land tenure system as ‘feudal’, with the dominant system consisting of fiefs (TEGEGNE, 2011; HOBEN, 1973; CRUMMEY, 1980; GELAW WOLDEYES, 2017). A *gult* represented a sort of fief-holding right granted by rulers to the nobility, and *gult* holders were like the vassals of medieval Europe. If all land was managed through fiefs, this excluded, by definition, any conceptualization of private property. However, the *gult* system differed from the European model: ‘Ethiopian lords lacked direct control over the land within their fiefs,’ and their rights were limited by the rights of the peasants, collectively known as *rest* (TEGEGNE, 2011, p. 11). Such hereditary rights guaranteed peasants complete autonomy, and were quite extensive (HOBEN, 1973, p. 5-6).

Tegegne thus warns against the idea of feudalism as an analytical tool. First, once the feudal lenses are lifted, other forms of full ownership become visible (TEGEGNE, 2009; ELLIS, 1976); what we call ‘alternative forms of property’ are simply different, yet fully legitimate, forms of ownership. Second, the ‘implant’ of legal knowledge through comparison is never neutral: It is *grafted* onto existing temporal structures and historiographies. In doing so, Tegegne relies on Susan Reynolds’ work (1994): While the idea of the fief has been generally contrasted with notions of full-fledged private property, there are such forms of ownership (identifiable through a ‘checklist both of liabilities or obligations and the rights or claims of property’) that have ‘much more methodological relevance than a constraining paradigm of feudal property derived from the historical experience of the European Middle ages.’

In horticulture, grafting is always conducted at what is considered to be the appropriate stage of development of the plant. Extending the metaphor to law, ‘grafting’ implies not only a value judgment about private property (and what it is supposed to look like), but it also implies a judgment about its historical evolution. Legal ideas are not merely transplanted but are ‘grafted’ at a specific time that hindsight identifies as a rupture with what came before—in this case, feudalism versus modernity. This mode of



historical teleology is also evident in the use of concepts such as ‘pre-capitalistic’, ‘pre-literate societies’, ‘pre-historic’ etc.

Conceptually, this kind of comparative assumption, between European historical feudalism and Ethiopia’s land tenure system, is also at the heart of the concession system used by Italy: Because indigenous systems seemed not to accommodate any preconceived European idea of private property, the colonial state was authorized to act as a feudal lord, leasing land in Ethiopia through emphyteutic concessions (CUCINOTTA, 1930; LAREBO, 1994; NUZZO, 2006).

In his *Istituzioni di Diritto coloniale Italiano* (1930), Ernesto Cucinotta describes two types of agrarian concessions during the first phase of the Italian expansion in East Africa for the colonial management of Eritrea. The first type, called a ‘conditional concession’, lasted for a maximum of 30 years, after which the lessee automatically attained full ownership. These concessions were meant to appeal to the Italian middle class, as they required an initial capital investment of 1,000 liras per hectare. Here, note the echo of the ‘capo morto,’ the one-time entrance fee that southern Italian peasants were often required to pay upon signing emphyteutic contracts; such was also required here (as a guarantee of the lessee’s solvency and liquidity to sustain the farm’s expenses).

The second type of concession was a ‘perpetual concession’ for a maximum of 99 years that required the lessee to make improvements to the land. These ‘perpetual concession’ schemes echoed Leroy-Beaulieu’s suggestion of making emphyteusis endure long enough to be profitable but not of such perpetual duration that the state would lose its financial control of the land. Furthermore, the demographic target for perpetual concessions were Italian peasants and combat veterans; in this sense, the perpetual concession more closely resembled the traditional southern-Italian model of emphyteusis.

This two-tier system of concessions allows us to connect the history of southern Italy with Italy’s colonial history. The missing link between the two is emphyteusis. Unlike France and Belgium, Italian lawyers and politicians found in it a domestic reference to feudalism in southern Italy. During Fascism, Mussolini appealed to the masses of landless peasants in southern Italy by fabricating an imaginary ‘pan-Meridional Italianness.’ The concept was that the African continent was a mere extension of southern Italy: Both were ‘essentially agrarian, less evolved and less happy,’ parasitically ‘relying on state aid and the help of more fortunate sister societies for their resurrection’ (ATTI DEL CONGRESSO



COLONIALE ITALIANO, 1941, p. 287)⁴ This figment of the imagination was ‘instrumental in justifying Italian colonialism in North and Northeast Africa’, which became ‘the extreme southern Italy of and for a “greater Italy” where landless peasants were supposedly going to find their pieces of land and become less subaltern’ (TRENTO, 2012, p. 67; LABANCA, 2002).

The feudalism of emphyteusis, now rebranded as concessions, helped Fascist lawyers and politicians not only to conceptualize narratives of ‘southernness’ *inside* the Global North; but also to export the very category of southernness to the colonies, for *demographic* and *commercial* purposes.

Concerning the first aspect, Mussolini’s aim was to resettle southern-Italian landless peasants in the Italian empire. To this effect, in 1937, he set up the Ente Colonizzazione di Puglia d’Etiopia (Colonization agency of Puglia in Ethiopia), a scheme for Puglia’s landless peasants to settle in the Harar region of Ethiopia (D’IPPOLITO, 1996). The agency’s purpose was to eventually ‘elevate Apulian farmers to the status of landowners’—that is, to give them, after twenty years and through an amortization plan (*rate di ammortamento*), the land that had always been denied to them in Puglia. This payment plan directly aspired to the enfranchisement of emphyteusis, by which the lessee could redeem his interest in the land by paying a certain multiple of the annual rent (ECPE, 1941). And so it is quite ironic to observe—considering an amendment to the civil code was being discussed during those same years, according to which Apulian lessees back home could not enfranchise their land for at least thirty years—that the agency was obviously doomed and would never make it to 1957.

Organized like a military outpost, Puglia d’Etiopia lacked sufficient resources, as it was funded by the Banco di Napoli, formerly Banco delle due Sicilie (Bank of the Two Sicilies), not by the national Banca d’Italia; the settlers, having been selected through a questionable process, lived in dire conditions. The peasants who left the port of Brindisi on 10 June 1938 were not skilled farmers but rather were either combat veterans or fortune-seekers with long histories of brushes with the law.

On the other hand, the concessions turned out to be particularly helpful for commercial farming (LAREBO, 1994, chapter V). To promote systematic research on

⁴‘A me è sempre parso che la Colonia Eritrea non sia che una nuova provincia d’Italia, una—e magari l’ultima—delle provincie meridionali essenzialmente agricole, meno evolute e meno felici, che attendono dall’opera dello stato e dal concorso delle sorelle più fortunate la loro resurrezione.’



tropical environments, Mussolini instituted the Istituto Agronomico per l’Africa Italiana. The main crops the Fascist government intended to invest in were cotton and coffee, but agricultural research had also showed the wonders of the doum palm tree, a very resilient species whose nuts were heavily relied upon by the Italian button manufacturing industry as a cheaper, vegetal replacement for ivory (COMMERCIO, 1934).

Of all these commodities, the production of coffee appears to have been particularly tied to the use of emphyteutic contracts. The Fascist government was hoping to develop coffee crops in East Africa through a system of concessions to Italian settlers while still relying heavily on coffee exports from Brazil (IBID., p. 490; CINOTTO, 2023). In the nineteenth century, coffee went from niche product to global commodity, and Brazil became its main global exporter (MORRIS, 2019). This did not happen by chance but was the result of a concerted public effort: Right after independence, the new Brazilian elites successfully employed emphyteutic contracts to garner the local nobility’s interest in coffee production. This, according to Pedroza, ‘also demonstrates the vested interests within the capitalist world system in making use of exploitative work arrangements that were otherwise widely decried as archaic, backwards, and abominable’ (PEDROZA, 2020, p. 26, 29) as well as, we might add, the incredible profitability of emphyteusis as an instrument of political economy and state-building.

Ironically, however, Diana Garvis has recently showed that the underwhelming results in the production of coffee were the result, not of the allegedly ‘feudal’ production systems used by Ethiopian farmers, but of the implanted Italian agrarian rationalism. While Brazil retained its global export monopoly, ‘Italian agricultural imperialism faltered due to Ethiopian resistance—both botanical and political’ (GARVIS, 2021, p. 7). Compared to the Fascist settlements in the Harar region of Ethiopia, locally-run coffee plantations produced better coffee than Italian ones, thus ‘negating a key justification’ for agrarian colonization. ‘How could the regime claim to be conducting a civilizing mission in Africa,’ Garvis observes, ‘if their coffee plantations lagged behind local production?’ Much like history, the irony of feudalism is that it repeats itself: first as tragedy, second as farce.



3. Conclusion: Emphyteusis and Decolonial Comparative Law

As recently argued by Bandeira Galindo, ‘legal historians can offer a crucial contribution to the debate on legal transplants if they convince comparative lawyers that, besides a spatial dimension, a transplant also implies a specific conception of time that encompasses both the space of experiences and the horizon of expectations’ (BANDEIRA GALINDO, 2014, p. 144).

As I have showed in this paper, the history of emphyteusis lends itself particularly well to this type of methodological reflection. The question is not really whether history deserves citizenship rights in the field of comparative law; as I have showed, it was the use of historical comparison that offered conceptual aid to a certain—colonial—version of comparative law in the first place. Santi Romano, in his famous *Corso di diritto coloniale* (1918), vindicated the importance of ‘colonial comparative law’, which is to say, of comparing practices and doctrines from different European colonial powers to find institutional solutions for colonial administration (ROMANO, 1918, p. 25; ZOLLMANN, 2014).

More specifically, while indigenous legal systems showed a vitality and legitimacy that predated and reached beyond the colonial, they were still framed as ‘feudal’, as if time outside of Europe had frozen *before* Europe. Geographical comparison is never neutral; as observed by Galindo, transplants are to be interpreted across space *and* time. In order to decolonize disciplinary practices and conceptual legal vocabularies, the challenge, then, is to be clear about the historical teleologies we rely upon and about the sources we take for granted when writing comparative legal histories. As argued by Adébsí, ‘decolonization for us, therefore, means to upend the illusion that the present teleology of Euro-modern law and the law school are a departure and not a continuation from the past’ (ADÉBSÍ, 2023, p. 147). The story of emphyteusis reveals an underlying current in comparative legal history—a *trait d’union* between feudalism and modernity, between local and global histories, and between Global North and Global South, challenging the very validity of these dichotomies. From this perspective, the very etymology of ‘emphyteusis’ (‘to graft, engraft, implant’: COMFORT, 1937, p. 3) suggests that it is not just a transplant—the transfer of an already functioning system to another via imitation—but rather, it is an implant; that is, something implanted on an already existing temporal structure.



As I have showed through my analysis of feudalism and emphyteusis, such assumptions about history and time, alternating between fabricated immobilities and fractures, inform our understanding of the law. Consequently, in my future research, I aim to expand on the colonial legacy of emphyteusis. For example, the story of emphyteusis intersects with the history of coffee again, in modern times, in Rwanda: As of 2013, the government of Rwanda has been leasing land via emphyteutic contracts to both foreign and domestic investors who are willing to establish coffee farms on its territory. In another marketing operation of nation building, such leases are subject to the leaseholder further developing the 'Rwandan brand' of arabica coffee, a delicacy among coffee specialty enthusiasts (GOR, 2013). Similarly, Côte d'Ivoire, Madagascar and Cameroon all use emphyteutic contracts to attract foreign investors (CHAMBRE DE COMMERCE & D'INDUSTRIE DE CÔTE D'IVOIRE, 2021; ECONOMIC DEVELOPMENT BOARD OF MADAGASCAR; DÉCRET N. 2018/736). More research is needed to assess the legal economic, and environmental impact of such contracts, especially emphyteusis' links with deforestation. To mention one prominent case in Cameroon: the indigenous Bagyeli communities' legal action against the palm oil corporation Biopalm, to which the State of Cameroon has granted a land concession via an emphyteutic lease (NGEUNGA, 2020).

Contrary to its interpretation as an archaic legal institute, emphyteusis shows a fascinating resilience over time and across contexts that would each deserve more scholarly attention. It does not exist in a mythological feudal past but rather is very much a part of our present. Writing the history of emphyteusis can be read as an exercise in delinking private property (MIGNOLO, 2007; SALAYMEH & MICHAELS, 2022). The very existence as well as the conceptual challenge offered by emphyteusis shows that private property *can* be enjoyed fully without full ownership; that it can be divisible in time and in space (its enjoyer being different from the owner, whether in perpetuity or not); and that the terms of such enjoyment can be unequal and exploitative, just as those of private property *stricto sensu* can be too (HARRIS, 1993; BHANDAR, 2018). The problem, perhaps, lies more in the possessive rather than in the relational nature of both institutes.

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The data that support the findings of this study are available from the corresponding author, upon reasonable request.

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