

EUROPEAN EXTRATERRITORIALITY IN SEMICOLONIAL ETHIOPIA

HAILEGABRIEL G FEYISSA*

Scholarly discussions regarding European legal imperialism in semicolonial nations of the modern era have not considered Ethiopia. China, Japan and other Middle and Far Eastern nations have been the dominant, if not exclusive, objects of historical studies in European extraterritoriality. Furthermore, there appears to be a consensus that both the rise and decline of European extraterritoriality in the semicolonial world (effected through ‘mixed courts’) only form part of the history of the pre-Second World War international law system. Nonetheless, a forgotten strand of European extraterritoriality overstayed the Second World War in semicolonial Ethiopia. Apart from aiming to restore visibility to Ethiopia’s unknown experience with European extraterritoriality, this study tries to explain the late arrival, the gradual resurgence and the post-Second World War decline of European extraterritoriality in Ethiopia. It argues that European extraterritoriality in Ethiopia, which was weak during the first third of the 20th century, reached its zenith in the post-Second World War period, but was miscast as a modernisation project, rather than a colonial one.

CONTENTS

I	Introduction.....	1
II	Extraterritoriality, Semicoloniality and Mixed Courts	3
III	The Making of Semicolonial Ethiopia: 1889–1906.....	5
IV	Weak Extraterritoriality: 1908–1936	7
V	Exalted European Extraterritoriality: The 1942 <i>Anglo–Ethiopian Agreement</i>	13
VI	The Mixed Benches of the High Court and Supreme Imperial Court of Ethiopia.....	20
VII	Conclusion	27

I INTRODUCTION

This article examines Ethiopia’s experience with European legal imperialism. By legal imperialism, I refer to both Western capitalist nations’ policies of dominating juristic developments in their former colonies and/or informal

* PhD Candidate, The University of Melbourne (Melbourne, Australia); former Assistant Professor, Bahir Dar University, School of Law (Bahir Dar, Ethiopia). Email: hfeyissa@student.unimelb.edu.au. The author wishes to thank Professor Pip Nicholson and Dr Jennifer Beard (University of Melbourne), Professor Martti Koskenniemi (University of Helsinki), Professor Diamond Ashiagbor (SOAS, University of London) and members of the IGLP Writing Workshop Group 3 (Cape Town Workshop, 18–23 January, 2016), particularly Cyra Choudhury (Florida International University), Maj Gasten (Copenhagen Business School), Roseline Njogu (Riara University), Rachel Rebouché (Temple University Beasley School of Law), Ann-Charlotte Martineau (Max Planck Institute of Luxembourg), Stephanie Lämmert (European University Institute), Cait Storr (Melbourne Law School), and Mai Taha (Harvard Law School). I also want to thank Helen Pausacker of the Asian Law Centre (University of Melbourne) for proofreading the article, the peer reviewers for their comments on earlier versions of the article and the editorial team at the *Melbourne Journal of International Law*.

empires, and the historical processes and outcomes of such policies.¹ I focus on a well-known instrument of legal imperialism: extraterritoriality. In this paper, extraterritoriality is taken to mean the exercise of judicial jurisdiction (often through the instrumentality of ‘mixed courts’ and ‘consular courts’) by a (powerful) state over its or other nations’ citizens in another state.² In particular, I focus on the treaty regime and practice regarding mixed courts in semicolonial Ethiopia.

The aims of the article are to restore to visibility Ethiopia’s forgotten experience with European extraterritoriality within international law scholarship and to offer (tentative) explanations for the late arrival, gradual resurgence and subsequent decline of European extraterritoriality in Ethiopia. Situating itself within the historical and legal discourses on European extraterritoriality in the semicolony, the article attempts to explicate the treaty regimes and practice of mixed courts in 20th-century Ethiopia.

Although existing historical narratives limit the Ethiopian experience with European extraterritoriality to only the first third of the 20th century, during which a weak extraterritoriality existed, I will show how the anglicised High Court and Supreme Imperial Court of Haile Selassie’s Ethiopia were instruments of European extraterritoriality that (unlike in other semicolonial jurisdictions of Asia and Africa) extended the regime’s lifespan beyond the Second World War. The article argues that European extraterritoriality in Ethiopia increased in strength when, following British paramountcy, Ethiopia was forced to appoint foreign judges to its High Court and Supreme Imperial Court. In other words, European extraterritoriality in Ethiopia reached its peak in between 1941 and 1965 when similar semicolonial African and Asian nations had already escaped it. Though its effective abolition can be linked to legal Westernisation, European extraterritoriality in Ethiopia died out relatively quickly after Ethiopia underwent a posturing legal modernisation.

The article proceeds as follows. Part II provides a brief overview of the nexus between extraterritoriality, semicoloniality and the regime of mixed courts. This is followed by a discussion of the emergence of a semicolonial empire in tropical Africa during the ‘scramble for Africa’. The *Franco–Ethiopian Treaty of Amity and Commerce of 1908* (‘*Klobukowski Treaty*’) which, I argue, represents the first meaningful attempt by Europeans to extend their extraterritorial jurisdiction into Ethiopia, is examined in Part IV. That Part argues the regime of extraterritoriality envisaged by the *Klobukowski Treaty* was weaker than similar regimes in late 19th-century and early 20th-century semicolonial Asia and Africa. It also offers tentative explanations for the relative weakness of European extraterritoriality in Ethiopia during the first third of the 20th century. This is followed by two Parts that in turn closely look at the treaty regime for, and practice of, British extraterritoriality in Ethiopia during and after the Second World War (1941–circa 1965) to illustrate why British-sponsored

¹ Such a conception of Western legal imperialism is within the bounds of the initial uses of the concept in the social sciences: see H L Wesseling, ‘History of Imperialism’ in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social and Behavioural Sciences* (Elsevier Science, 2001) 7226, 7227.

² Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge University Press, 2010) 2.

extraterritoriality did not, as the dominant narrative would have us believe, deliver Ethiopia from European extraterritoriality. Instead, the article argues, European extraterritoriality in Ethiopia was at its strongest during and after the Second World War before it gradually declined following Ethiopia's massive legal modernisation projects of the 1960s.

II EXTRATERRITORIALITY, SEMICOLONIALITY AND MIXED COURTS

Extraterritoriality institutionalised through mixed courts systems assumes semicoloniality; that is, the absence of formal colonialism. As will be elaborated in the next Part, Ethiopia was semicolonial in the sense that it — like non-colonised African and Asian countries — did not completely escape European legal imperialism. Most importantly, the absence of formal colonialism did not preclude Ethiopia as well as other semicolonial countries from being controlled (by powerful European actors) through the cost-efficient technologies of imperialism, including 'mixed courts'.³

Semicoloniality is habitually formalised by unequal treaties — treaties that deviate from the principle of the sovereign equality of contracting states and hence 'favour one or some of the contracting parties instead of creating reciprocal and equivalent rights and duties for all the contracting parties'.⁴ Treaty ports (where 'the Western way of living and doing business were protected'), mixed courts, fixed-tariff rates favouring the Western nation in the treaty and most-favoured nation clauses are major characteristic features of unequal treaty regimes, such as the 1842 *Treaty of Peace, Friendship and Commerce between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China* ('*Treaty of Nanking*').⁵ Unequal treaties between European powers and their informal empires were not only non-reciprocal and largely trade-related, but also procured on the basis of European prejudices about non-Western legal institutions, which Teemu Ruskola aptly conceptualises as 'legal orientalism'.⁶

Because they were embedded in what public international lawyers conceive of as unequal treaties, mixed courts occupy an unpleasant space in the legal history of semicolonial Asian and African nations. They are examined most often in tandem with loss of sovereignty, legal orientalism and (coerced) legal

³ See, eg, Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press, 1984) 130–63; John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade' (1953) 6 *Economic History Review* 1. For a further example of the use of imperialist technologies, see Peter Jackson, 'The Performative State: Semi-Coloniality and the Tyranny of Images in Modern Thailand' (2004) 19 *Sojourn* 219.

⁴ Werner Morvay, 'Unequal Treaties' in Rudolf Benhardt (ed), *Encyclopedia of Public International Law* (North-Holland, 1984) vol 7, 514–7. See also Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 *Nordic Journal of International Law* 335, 342–9.

⁵ John K Fairbank, Edwin O Reischauer and Albert M Craig, *East Asia: The Modern Transformation* (Houghton Mifflin, 1965) 150. See also Rose Sydney Parfitt, 'The Unequal Equality of Sovereigns: A Brief History of "Peripheral Personality"' (Jean Monnet Working Paper No 20/13, New York University School of Law, 2013) 24–9; Craven, above n 4, 342–9.

⁶ Craven, above n 4, 344–5; Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Harvard University Press, 2013) ch 1. See also Teemu Ruskola, 'Legal Orientalism' (2002) 101 *Michigan Law Review* 179.

Westernisation.⁷ Under legal orientalism's construction of the Europeanisation of a legal system as the ultimate 'standard of civilization',⁸ a semicolonial entity needed to undergo legal Westernisation before graduating into a family of sovereign nations free from (European) extraterritoriality.⁹ Negotiating out of unequal extraterritorial treaties was not an easy and smooth affair — it required decades of negotiations and a series of legal modernisation projects.¹⁰ Japan's was the first successful legal Westernisation to result in the abolition of European extraterritoriality in 1899.¹¹ Commentators on European extraterritoriality emphasise 1943, the year China was freed from the vestiges of European extraterritoriality, as marking the end of the era of mixed courts in the semicolony.¹² Nevertheless, the actual abolition of extraterritoriality in some countries, including Ethiopia, was achieved decades after the establishment of the post-Second World War reorganisation of international law.¹³

Mixed courts were rare in 20th-century Africa. Though African polities had long been targeted by unequal treaties contemplating extraterritoriality,¹⁴ by what Martti Koskenniemi has dubbed the 'demise of informal empire in Africa' (after the Berlin Conference of 1884–85),¹⁵ the era of mixed courts in Africa appeared to have come to an end. The most widely known exceptions were the Mixed Courts of Egypt (1875–1949).¹⁶ Ethiopian mixed courts (1922–circa 1965), the subject of this article, have not been considered within the context of international legal scholarship on European extraterritoriality and, as a result, remain unknown.¹⁷

Mixed courts (such as the Special Court of Ethiopia and the mixed benches of the High Court of Ethiopia) are functionally comparable. These extraterritorial courts guaranteed the legal privileges of Europeans in semicolonial Asian and African states. Crucially, they enabled the exoneration of Europeans from the legislative and judicial jurisdiction of the relevant semicolonial state. To that extent, mixed courts all over the semicolony are analogous. Still, no regime of

⁷ See, eg, Heinrich Scholler, *The Special Court of Ethiopia, 1920–1935* (Franz Steiner Verlag Wiesbaden, 1985); F C Jones, *Extraterritoriality in Japan and the Diplomatic Relations Resulting in its Abolition: 1853–1899* (Yale University Press, 1931); Ruskola, *Legal Orientalism*, above n 6; Gong, above n 3; Kayaoğlu, *Legal Imperialism*, above n 2.

⁸ Gong, above n 3, 128.

⁹ See, generally, Gong, above n 3; Kayaoğlu, *Legal Imperialism*, above n 2.

¹⁰ See Kayaoğlu, *Legal Imperialism*, above n 2; Jones, above n 7; K C Chan, 'The Abrogation of British Extraterritoriality in China 1942–43: A Study of Anglo–American–Chinese Relations' (1977) 11 *Modern Asian Studies* 257.

¹¹ Jones, above n 7; Kayaoğlu, *Legal Imperialism*, above n 2, ch 3.

¹² See, eg, Turan Kayaoğlu, 'The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality' (2007) 51 *International Studies Quarterly* 649, 657.

¹³ See, eg, Husain M Al Baharna, *British Extra-Territorial Jurisdiction in the Gulf: 1913–1971* (Archive Editions, 1998).

¹⁴ Kayaoğlu, *Legal Imperialism*, above n 2.

¹⁵ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge University Press, 2002) 116–21.

¹⁶ See, eg, David D Peck, 'Mixed Courts of Egypt' in Peter N Stearns (ed), *Oxford Encyclopedia of the Modern World* (Oxford University Press, 2008); Nathan J Brown, 'The Precarious Life and Slow Death of the Mixed Courts of Egypt' (1993) 25 *International Journal of Middle East Studies* 33.

¹⁷ Discussions with Matthew Craven and Martti Koskenniemi, both of whom have studied European extraterritoriality as part of their legal scholarship, have suggested international legal scholarship is yet to adequately address the topic of extraterritoriality in black Africa.

mixed court is exactly the same as another from a different space and time. As will be seen below, the two regimes of mixed courts in Ethiopia were different in significant ways. Similarly, Ethiopian mixed courts can be contrasted with their functional equivalents elsewhere that were, for instance, either structurally autonomous (from the semicolonial state) or appended to judicial organs in the West.¹⁸

III THE MAKING OF SEMICOLONIAL ETHIOPIA: 1889–1906

Modern Ethiopia, in terms of its present day territorial limits, emerged during the ‘scramble for Africa’ (1881–1914). Arguably an Italian protectorate between 1889 and 1896,¹⁹ the then new empire-state avoided defeat by Italy at the Battle of Adwa (1896) thereby remaining formally independent during the colonisation of Africa until its invasion by Italy in 1935.²⁰ An ‘unequal’²¹ member of the League of Nations, the African empire had, as Rose Parfitt puts it, ‘a hybrid international personality’²² that played its part in legitimating more than a decade of occupation and domination by first Italy (1936–41) and then Britain (1940s).²³

Though not invited to the Berlin Conference (1884–85) that was called to ‘coordinat[e] the “Scramble for Africa”’,²⁴ Ethiopian rulers of the early 20th century were effectively competing in the scramble for the Horn of Africa region with their European counterparts, in particular Britain, France and Italy.²⁵

Italy, a latecomer European colonialist that missed out on the bonanza of European imperialism in the ‘new world’ before the second half of the 19th century, was the single most important European capitalist power desperate to exclusively dominate Ethiopia.²⁶ Italy’s attempt to establish protectorateship over Ethiopia through a trinket treaty, which some commentators on European imperialism have interpreted as a very late attempt to ‘scrap[e] the bottom of the barrel’ of European imperialism,²⁷ was defeated at the Battle of Adwa.²⁸ The defeat forced Italy to recognise the sovereignty of Menelik II (who ruled between

¹⁸ See, eg, Kayaoğlu, *Legal Imperialism*, above n 2, 6; Nathan J Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press, 1997) 26–31.

¹⁹ Carlo Giglio and Richard Caulk, ‘Article 17 of the *Treaty of Ucciali*’ (1965) 6 *Journal of African History* 221. But see Sven Rubenson, ‘The Protectorate Paragraph of the *Wichale Treaty*’ (1964) 5 *Journal of African History* 243.

²⁰ See Bahru Zewde, *A History of Modern Ethiopia: 1855–1991* (James Currey, 2nd ed, 2001) 79–83.

²¹ Parfitt, ‘The Unequal Equality of Sovereigns’, above n 5.

²² Rose Parfitt, ‘*Empire des Nègres Blancs*: The Hybridity of International Personality and the Abyssinia Crisis of 1935–36’ (2011) 24 *Leiden Journal of International Law* 849, 850.

²³ Zewde, *A History of Modern Ethiopia*, above n 20, 179.

²⁴ James S Read, ‘African Law, Sub-Saharan’ in Stanley N Katz (ed), *The Oxford International Encyclopedia of Legal History* (Oxford University Press, 2009) 75, 76.

²⁵ See, eg, Harold G Marcus, ‘Imperialism and Expansionism in Ethiopia from 1865 to 1900’ in L H Gann and Peter Duignan (eds), *Colonialism in Africa: 1870–1960* (Cambridge University Press, 1969) vol 1, 420; Edward C Keefer, ‘Great Britain and Ethiopia, 1897–1910: Competition for Empire’ (1973) 6 *International Journal of African Historical Studies* 468.

²⁶ Rubenson, above n 19; Robert L Hess, ‘Italian Imperialism in Its Ethiopian Context’ (1973) 6 *International Journal of African Historical Studies* 94; Harold G Marcus, ‘A Preliminary History of the *Tripartite Treaty* of December 13, 1906’ (1964) 2 *Journal of Ethiopian Studies* 21.

²⁷ Gallagher and Robinson, above n 3, 15.

²⁸ Gong, above n 3, 120–1.

1889–1913) over the Ethiopian Empire. Before a change of policy during Mussolini's reign (specifically, the 1930s), Italy was apparently content with a semicolonial Ethiopia not dominated by other European powers, notably France.²⁹

Similarly, the British — who appeared stunned by Menelik II's triumph over the Italians (whom the British had expected to make good their bid for colonial empire in Ethiopia³⁰ and march into what they considered their colonial territory)³¹ — were pursuing a policy of discouraging France from turning Ethiopia into a protectorate or an exclusive informal empire.³²

Based at Djibouti (the nearest sea outlet to landlocked Ethiopia), France was perhaps the most influential European power at Menelik II's court during the post-Adwa period.³³ Further, although capitalists from various European nations were actively 'hunting'³⁴ for concessions in post-Adwa Ethiopia, it was perhaps the French that dominated the 'imperialism of free trade'³⁵ and culture in Ethiopia during the early decades of the 20th century.³⁶ Although this situation had worried the Italians and the British for a decade after the Battle of Adwa, France finally agreed with the two powers in 1906 to a scheme that 'no single [European] capital would dominate Ethiopia'.³⁷ In other words, Ethiopia — which, since the Berlin Conference, had been a potential colony — was assured (at least tentatively) its semicoloniality through, first, its victory over Italy in 1896 and, secondly, the 1906 *Tripartite Treaty* between the three European imperialist powers that had shown the most interest in the black African empire which was not yet integrated into the capitalist world.

²⁹ Shiferaw Bekele, 'Some Notes on the Genesis and Interpretation of the *Tripartite Treaty*' (1985) 18 *Journal of Ethiopian Studies* 63, 64.

³⁰ Harold Marcus, *A History of Ethiopia* (University of California Press, 1994) 101.

³¹ Keefer, above n 25.

³² Bekele, above n 29; Harold G Marcus, 'A Background to Direct British Diplomatic Involvement in Ethiopia, 1894–1896' (1963) 1(2) *Journal of Ethiopian Studies* 121, 122; Edward C Keefer, 'Great Britain, France, and the Ethiopian *Tripartite Treaty* of 1906' (1981) 13 *Albion* 364.

³³ Marcus, 'A Preliminary History of the *Tripartite Treaty*', above n 26.

³⁴ Bahru Zewde, 'Concessions and Concession-Hunters in Post-Adwa Ethiopia: The Case of Arnold Holz' (1990) 45 *Africa: Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente* 365.

³⁵ I owe this expression to Gallagher and Robinson, above n 3.

³⁶ Growing French economic and cultural presence in early 20th-century Ethiopia partly explains why it was France (not Italy or Britain) that was the first to show interest in imposing extraterritoriality on semicolonial Ethiopia (see Part IV for further discussion). For more on the relatively strong influence of the French (as opposed to the Italians and the British) in the economic and cultural (law included) life of early 20th-century Ethiopia, see Antoinette Iadarola, 'Ethiopia's Admission into the League of Nations: An Assessment of Motives' (1975) 8 *International Journal of African Historical Studies* 601, 613–7; Bahru Zewde, *Pioneers of Change in Ethiopia: The Reformist Intellectuals of the Early Twentieth Century* (James Currey, 2002) ch 2; Zewde, 'Concessions and Concession-Hunters', above n 34; Bekele, above n 29; J Vanderlinden, 'An Introduction to the Sources of Ethiopian Law from the 13th to the 20th Century' (1966) 3(1) *Journal of Ethiopian Law* 227, 235–6, 249.

³⁷ Bekele, above n 29, 74.

IV WEAK EXTRATERRITORIALITY: 1908–1936

Two years after first agreeing with Italy and Britain regarding the semicoloniality of Ethiopia, France (the European imperialist power with the most economic interest in Ethiopia) succeeded in committing Menelik II to a capitulatory agreement which marked the beginning of extraterritoriality in modern Ethiopia. Although similar treaties of amity and commerce with extraterritoriality clauses were not uncommon in 19th-century Ethiopia (more appropriately Abyssinian kingdoms),³⁸ the *Klobukowski Treaty* remained the ‘only legal basis’ of European extraterritoriality in Ethiopia until 1936.³⁹ Even Great Britain — the leading European power with a vast informal empire — needed to refer and invoke the ‘most-favoured nation’ clause under this or other relevant treaties in order to claim jurisdiction over British subjects in Ethiopia.⁴⁰

Apart from extending extraterritorial privileges to French citizens and protégés in Ethiopia, the treaty fixed Ethiopian taxes on French goods at 10 per cent.⁴¹ As numerous Western countries had already concluded trade treaties (which included most-favoured nation clauses) with Imperial Ethiopia, the privileges granted to French nationals and goods were extended to virtually all foreigners in Ethiopia.⁴² Crucially, Africans, Arabs, Indians and East Europeans, who monopolised foreign trade in Ethiopia for much of the first half of the 20th century, were extended extraterritorial privileges under British and French protection.⁴³ For our purposes, the most relevant provision of the *Klobukowski Treaty* is art 7. An English translation of the Amharic version of art 7 reads:

Until such time that the Ethiopian legal system is Europeanised, criminal or civil disputes involving French citizens or its protégés will remain under French consular jurisdiction. However, ‘mixed cases’ (civil or criminal) involving French and Ethiopian subjects will be tried by an *Ethiopian judge working in consultation with the French consul* or his agent. Should the defendant be an Ethiopian subject, Ethiopian law applies. Should a defendant be a French subject, French law applies. If a decision cannot be agreed, the court of the Ethiopian

³⁸ Abyssinian kingdoms were traditional polities that existed in the northern half of today’s Ethiopia. Best identified by their Orthodox Christianity and Ge’ez civilisation, these kingdoms and their political culture served the modern-day Ethiopian state as the template for its national identity: see John Markakis, *Ethiopia: The Last Two Frontiers* (James Currey, 2011) ch 1; Teshale Tibebu, *The Making of Modern Ethiopia: 1896–1974* (Red Sea Press, 1995) ch 1. Some of these kingdoms maintained treaty relationships with European powers: see, eg, Hess, ‘A Preliminary History of the *Tripartite Treaty*’, above n 26; Tamiru Wondimagegnehu, ‘Tewodros II and the Regime of Extra-Territoriality under the *Anglo–Abyssinian Treaty* of 1849’ (1989) 14 *Journal of Ethiopian Law* 91.

³⁹ Heinrich Scholler, ‘The Special Court of Ethiopia 1922–1936: Mixed Jurisdiction as an Instrument of Legal Development’ in Sven Rubenson (ed), *Proceedings of the Seventh International Conference of Ethiopian Studies* (Institute of Ethiopian Studies, 1984) 381, 385.

⁴⁰ *Ibid* 386.

⁴¹ Richard Caulk, ‘Ethiopia and the Horn’ in A D Roberts (ed), *The Cambridge History of Africa: Volume 7 — From 1905 to 1940* (Cambridge University Press, 1984) 702, 709.

⁴² Marcus, *A History of Ethiopia*, above n 30, 122; Scholler, ‘The Special Court of Ethiopia 1922–1936’, above n 39, 385.

⁴³ Caulk, above n 41, 709.

emperor shall be approached for final ruling. The French consul shall harbor arrested or convicted French subjects when the underlying matter involved only French subjects.⁴⁴

This article of the *Klobukowski Treaty* fulfils the basic attributes of extraterritorial treaties alluded to earlier, namely non-reciprocity, legal orientalism and trade-relatedness. It is not at the same time concerned with the extraterritorial jurisdiction of the Ethiopian Empire over its citizens in France. Further, the proviso in art 7 that ‘until such time that the Ethiopian legal system is Europeanised’ is an attestation that the *Klobukowski Treaty*, like its equivalents elsewhere, was predicated on European assumptions about the inferiority of the legal culture of semicolonial entities. It is also useful to mention that the *Klobukowski Treaty* was agreed to with the hope of augmenting Ethio–French cooperation in trade and capitalist ventures, notably the Addis Ababa–Djibouti Railway. The materialisation of the railway, which is regarded as one of the very few successful illustrations of European economic imperialism in early 20th-century Ethiopia,⁴⁵ had been delayed due to disagreement over, inter alia, the French government’s takeover of what Ethiopian rulers had thought was a private undertaking.⁴⁶ Even though the Ethiopian emperor granted a concession to French capitalists towards the end of the 19th century, the construction of the railway into Ethiopia’s political and commercial capital was suspended until after Ethiopia and France settled remaining issues in the 1908 *Klobukowski Treaty*.⁴⁷ Even so, the railroad reached Addis Ababa almost a decade after the *Klobukowski Treaty* was agreed, thereby slowing the integration of the Ethiopian economy into the capitalist world.⁴⁸

From the terms of the Amharic version of the *Klobukowski Treaty*, the limits on Ethiopia’s jurisdiction over foreigners appear less extensive. In particular, mixed cases (civil cases between foreigners of different nationalities, and between Ethiopians and foreigners) were to be tried by an Ethiopian court. Moreover, the decisions of this Ethiopian court were subject to appellate review by the court of the Ethiopian emperor. Seen from the perspective of some semicolonial nations of the same period, European extraterritorial jurisdiction over mixed cases in early 20th-century Ethiopia was weak from the start.

⁴⁴ Author’s translation. The Amharic and French versions of art 7 of the *Klobukowski Treaty* are appended to Jon R Edwards, ‘“...And the King Shall Judge”: Extraterritoriality in Ethiopia, 1908–1936’ in Sven Rubenson (ed), *Proceedings of the Seventh International Conference of Ethiopian Studies* (Institute of Ethiopian Studies, 1984) 373.

⁴⁵ For more on the limited success of European capitalism in early 20th-century Ethiopia, see Bahru Zewde, ‘The Fumbling Debut of British Capital in Ethiopia: A Contrastive Study of Abyssinian Corporation and the Ethiopian Motor Transport Company Ltd’ in Sven Rubenson (ed), *Proceedings of the Seventh International Conference of Ethiopian Studies* (Institute of Ethiopian Studies, 1984) 331; Zewde, ‘Concessions and Concession-Hunters’, above n 34; J Calvitt Clarke III, ‘A Japanese Scoundrel’s Skin Game: Japanese Economic Penetration of Ethiopia and Diplomatic Complications before the Second Italo–Ethiopian War’ in Svein Ege et al (eds), *Proceedings of the 16th International Conference of Ethiopian Studies* (Norwegian University of Science and Technology, 2009) 219.

⁴⁶ Caulk, above n 41, 708–9; Marcus, *A History of Ethiopia*, above n 30, 107; Zewde, *A History of Modern Ethiopia*, above n 20, 101.

⁴⁷ Bekele, above n 29, 64; Caulk, above n 41, 708–9.

⁴⁸ Zewde, *A History of Modern Ethiopia*, above n 20, 101.

For instance, a corresponding provision of the 1855 *Treaty of Friendship and Commerce between the British Empire and the Kingdom of Siam* ('Bowring Treaty') would place civil cases in which the defendant was a British subject under the jurisdiction of the British Consul alone (not even a mixed court).⁴⁹

The weakness of the European extraterritoriality regime in early 20th-century Ethiopia is not limited to the terms of the unequal treaty which, as seen above, appears weaker than comparable unequal treaties of the same period. The institutionalisation of a regular mixed court as envisaged in the treaty itself took more than a decade. A court — identified by commentators on European extraterritoriality as the first regular mixed court in Ethiopia — appeared in 1922. Between 1908 and 1922, mixed cases were heard (on an ad hoc basis) by representatives of the Ethiopian government and the European consul concerned and, if unresolved, referred to the Ethiopian emperor for final decision.⁵⁰ While consular courts of various European nations assumed jurisdiction over cases between their respective subjects, Ethiopian emperors continued to reserve (and sometimes test) their judicial sovereignty over Europeans in Ethiopia.⁵¹ Although Europeans were not entirely satisfied with this state of affairs, they apparently did not push Ethiopia harder to give effect to art 7 by establishing a regular mixed court. In fact, Europeans were more worried about the impending death of Ethiopia's first emperor, Menelik II (who by then was bedridden), and the implications of his death for their 'sphere of influence' as set out in the 1906 *Tripartite Treaty*.⁵² Hence, neither Ethiopia nor the Europeans felt pressured to seek the institutionalisation of a regular mixed bench as envisioned under art 7 of the *Klobukowski Treaty* — composed of an Ethiopian *judge* and a resident European *consul* — until after the end of the First World War.

The succession struggle that followed the death of Menelik II (in 1913) was concluded with the gradual ascendance to power of the Regent Ras Tafari (Emperor Haile Selassie I since 1930).⁵³ And, with the end of the First World War (which obviously kept European imperialists busy with other pressing matters), the urge to commit Ethiopia to a more robust regime of extraterritoriality was gaining momentum. In the meantime, the growing penetration of European capital after the First World War created a demand for a robust mixed courts regime.⁵⁴ Yet, Ras Tafari — who by then was turning the African empire into a more centralised absolutist state⁵⁵ — responded to the demand by simply implementing art 7 of the 1908 *Klobukowski Treaty*.⁵⁶

⁴⁹ See the terms of the relevant articles of the *Bowring Treaty* as cited in Francis Bowes Sayre, 'The Passing of Extraterritoriality in the Siam' (1928) 22 *American Journal of International Law* 70, 71.

⁵⁰ Scholler, 'The Special Court of Ethiopia 1922–1936', above n 39, 389–90.

⁵¹ Edwards, above n 44, 375–7.

⁵² Marcus, 'A Preliminary History of the *Tripartite Treaty*', above n 26; Bekele, above n 29, 66.

⁵³ Marcus, *A History of Ethiopia*, above n 30, 116–29.

⁵⁴ Edwards, above n 44, 375.

⁵⁵ Bahru Zewde, 'Economic Origins of the Absolutist State in Ethiopia (1916–1935)' (1984) 17 *Journal of Ethiopian Studies* 1, 10. See also Guluma Gemedo, 'The Rise of Coffee and the Demise of Colonial Autonomy: The Oromo Kingdom of Jimma and Political Centralization in Ethiopia' (2002) 9(3) *Northeast Africa Studies* 51.

⁵⁶ Edwards, above n 44, 375.

Named the ‘Special Court’ to evade analogy with similar courts in the semicolonial world (eg the Mixed Court of Egypt),⁵⁷ this court heard mixed cases for a little over a decade (1922–35).⁵⁸ Run by *Ethiopian* judges (with no formal training in European laws), the Special Court gradually extended its jurisdiction beyond citizens of countries claiming extraterritoriality.⁵⁹ Although Europeans continued to push for a more independent mixed court run by European judges, the Special Court continued to function in a manner that, some argued, assured Ethiopia’s judicial sovereignty over foreigners until its demise in 1935.⁶⁰ Though cases between foreigners and Ethiopians were tried in the presence of the relevant European consul, the possibility of appeals to the emperor’s court (*Chilot*)⁶¹ meant the Special Court did not attain the extraterritorial character sought by European imperial powers and in essence remained ‘an Ethiopian institution’.⁶² Moreover, a study suggests that the Special Court widely applied traditional Ethiopian laws towards which European consuls unsurprisingly showed disdain.⁶³

As noted, the *Klobukowski Treaty* mandated that civil and criminal mixed cases be decided according to the national laws of the defendant. Accordingly, though the tendency to apply local laws known to Ethiopian judges was dominant, the Special Court also applied French, British, Italian, American, Turkish and other foreign laws.⁶⁴ The Special Court’s application of foreign laws in such cases is, in my view, the most important marker of the Ethiopian court as a variant of mixed court. Otherwise, the facts that it was run by local judges untrained (at least formally) in European law, its decisions were revisable by Ethiopia’s emperor and it habitually resorted to Ethiopian traditional laws, seem to suggest the Special Court of Ethiopia was a weak variant of mixed court that did not give European extraterritoriality the wide leeway of the notorious mixed courts of Egypt, Japan, and China.⁶⁵

One may, thus, ponder why Ethiopia — unscathed by European (legal) modernity — was able to get away with a less cumbersome extraterritoriality regime during the heyday of the system in other parts of the semicolonial world? Although a definitive explanation requires further research, I suggest the following propositions as tentative answers.

As noted, extraterritorial treaties are basically trade-related. European extraterritoriality was aggressive where European business and capital presence

⁵⁷ Ibid.

⁵⁸ Scholler, ‘The Special Court of Ethiopia 1922–1936’, above n 39.

⁵⁹ Ibid 385.

⁶⁰ Edwards, above n 44, 375.

⁶¹ For more on the *Chilot* (Crown) jurisdiction of Imperial Ethiopia’s rulers, see Robert Allen Sedler, ‘The *Chilot* Jurisdiction of the Emperor of Ethiopia: A Legal Analysis in Historical and Comparative Perspective’ (1964) 8 *Journal of African Law* 59.

⁶² Marcus, *A History of Ethiopia*, above n 30, 132.

⁶³ Scholler, *The Special Court of Ethiopia, 1920–1935*, above n 7, 92 (noting that ‘the Special Court’s decisions refer to a large extent to the traditional Ethiopian law institutions’).

⁶⁴ Scholler, ‘The Special Court of Ethiopia 1922–1936’, above n 39, 389.

⁶⁵ For comparison, see Hong Lysa, ‘Extraterritoriality in Bangkok in the Reign of King Chulalongkorn, 1868–1910: The Cacophonies of Semi-Colonial Cosmopolitanism’ (2003) 27 *Itinerario* 125; Brown, *The Rule of Law in the Arab World*, above n 18, 26–9; Jones, above n 7; Thomas B Stephens, *Order and Discipline in China: The Shanghai Mixed Court, 1911–27* (University of Washington Press, 1992).

were strong.⁶⁶ However, European capital and human penetration was very low in landlocked Ethiopia. The capital Addis Ababa was basically a ‘feudal camp’ which, unlike the treaty ports of semicolonial Asia, was not frequented by European capitalists.⁶⁷ Before the arrival of great numbers of Italians during Mussolini’s demographic colonisation project of 1936–41,⁶⁸ the European population in Ethiopia is reported to have stood at around 5000; and, unlike other African or Asian polities where European extraterritoriality existed, Ethiopia was relatively unsuccessful in attracting European capital(ists).⁶⁹ Ivory and coffee were Ethiopia’s major export items, and India and Japan (as opposed to Europe) were its major trading partners.⁷⁰ The Ethiopian market was yet to develop a taste for European products and services.⁷¹ The *gebbar* system — an effective feudal economy for an African Empire content with extracting tribute from its peasant society — can also be mentioned as one of the main reasons why the Ethiopian ruling class and their European partners were less obsessive about capitalist modernisation (and, hence, extraterritoriality) during the period under discussion.⁷²

Secondly, since at least the Berlin Conference of 1884–85, the political environment did not favour semicoloniality in Africa. European powers active in the Horn of Africa region preferred converting Ethiopia into a formal empire which, if constituted, obviously made a regime of mixed courts unnecessary. Crucially, Italy’s attempts to formally colonise Ethiopia (first in the late 19th century and then in the 1930s) may add some weight to the second proposition that Europeans sought *formal* empire in Ethiopia. Even when the expectation that Italy would turn Ethiopia into its colony was first defeated in 1896 (at the Battle of Adwa), Europeans continued to doubt the survival of Ethiopian independence and hence bypassed Ethiopia’s rulers in agreements over Ethiopia’s future — the 1906 *Tripartite Agreement* being a case in point. Remarkably, Europeans continued to ‘regard Ethiopia as an Italian preserve’ notwithstanding Italy’s defeat at Adwa and its subsequent recognition of Ethiopia’s sovereignty.⁷³ In a manner that may perhaps evince the abhorrence of European imperialism for black African semicoloniality, Europeans were more interested in regulating each other’s moves in Ethiopia than in assuring Ethiopia a relatively respectable semicolonial status.⁷⁴

⁶⁶ This was particularly the case in Asia. See Fairbank, Reischauer and Craig, above n 5, 128–46.

⁶⁷ Ronald J Horvath, ‘Towns in Ethiopia’ (1968) 22 *Erdkunde* 42, 50.

⁶⁸ Haile Larebo, ‘Empire Building and Its Limitations: Ethiopia (1935–1941)’ in Ruth Ben-Ghiat and Mia Fuller (eds), *Italian Colonialism* (Palgrave MacMillan, 2005) 83.

⁶⁹ Floyd Dotson and Lillian O Dotson, ‘The Economic Role of Non-Indigenous Ethnic Minorities in Colonial Africa’ in Peter Duignan and L H Gann (eds), *Colonialism in Africa, 1870–1960: Volume 4 — The Economics of Colonialism* (Cambridge University Press, 1975) 565, 566–73, 612; Caulk, above n 41, 729.

⁷⁰ Marcus, *A History of Ethiopia*, above n 30, 126.

⁷¹ Caulk, above n 41, 708; Richard Pankhurst, ‘Ethiopia and the Great Transformation’ (2004) 7 *Aethiopia* 84, 106.

⁷² Zewde, ‘The Fumbling Debut of British Capital in Ethiopia’, above n 45; Marcus, *A History of Ethiopia*, above n 30, 106–7.

⁷³ Zewde, above n 34, ‘Concessions and Concession-Hunters’, 370.

⁷⁴ For more on the concerted efforts of Italy, France and Britain to partition Ethiopia into their respective spheres of influence and the consequences for the precariousness of Ethiopia’s independence, see Marcus, *A History of Ethiopia*, above n 30, 91–146; Iadarola, above n 36.

Thirdly, and perhaps most importantly, the nationalism of Ethiopian rulers might have been the single most important contributing factor for the weakness of European extraterritoriality in Ethiopia during the first third of the 20th century. Buoyed by his victory over European power at the Battle of Adwa, Ethiopia's first emperor, Menelik II, was too stubborn to succumb to the demands of European powers for a full-fledged international mixed court in Ethiopia.⁷⁵ The emperor who, in the late 19th century, was tricked by a European power into signing a treaty that would have possibly turned his empire into a protectorate,⁷⁶ appeared to have learnt his lesson. According to Scholler, Menelik II's 'strong aversion to and suspicion of anything that partook of an international nature' played a significant role in determining the limited scope allowed to European extraterritoriality under the *Klobukowski Treaty*.⁷⁷ However narrow, the extraterritorial jurisdiction of the Special Court was enough to offend the pride of post-Menelik Ethiopian nationalists who were noticing the decline of extraterritoriality in other parts of the world.⁷⁸ Even Haile Selassie I, who, as seen above, was instrumental in the institutionalisation of the Special Court, demanded (albeit to no avail) the amendment of the 1908 *Franco–Ethiopian Treaty of Amity and Commerce*.⁷⁹ Hence, Europeans' demand for a strong mixed court system could not convince Haile Selassie I, who preferred to cling to the existing treaty framework, insisting that 'Ethiopia's own legal traditions permitted "civilized" judgments'⁸⁰ and hence merited freedom from extraterritoriality in any form.

For legal historians of European extraterritoriality in Ethiopia, 1922–35 represents the only juncture where a kind of mixed court functioned in modern Ethiopia.⁸¹ This brief Ethiopian experience with a weaker system of mixed court was followed by a brief interlude in which the Italian colonial judicial system was implemented which understandably made the Special Court redundant. Between 1936 and 1941, Ethiopia was incorporated into Italian East Africa, a colonial empire that included Eritrea and Italian Somaliland, both of which had been colonised since the 1890s.⁸² In dominant legalistic narratives, Italian rule in Ethiopia constituted invasion of a sovereign member of the League of Nations by another member in breach of the principle of collective security.⁸³ It came to an end when, following Italy's declaration of war on France and Britain in the Second World War, Britain — which previously had accepted Italian sovereignty over Ethiopia — launched an attack on Italian forces in Ethiopia and the rest of Italian East Africa.⁸⁴ As Italian East Africa was liberated from Italy in 1941,

⁷⁵ For more on the political struggle over the terms of the *Klobukowski Treaty*, see Scholler, *The Special Court of Ethiopia, 1920–1935*, above n 7, 29–37.

⁷⁶ Rubenson, above n 19.

⁷⁷ Scholler, 'The Special Court of Ethiopia 1922–1936', above n 39, 385–7.

⁷⁸ Edwards, above n 44, 376–77.

⁷⁹ *Ibid.*

⁸⁰ Marcus, *A History of Ethiopia*, above n 30, 126.

⁸¹ Edwards, above n 44, 377; Scholler, 'The Special Court of Ethiopia 1922–1936', above n 39.

⁸² Caulk, above n 41, 736.

⁸³ But see Parfitt, '*Empire des Nègres Blancs*', above n 22, 850 (arguing the Italian invasion of Ethiopia 'might have resulted from actions that were *in accordance with*, rather than in violation of, interwar international legal norms') (emphasis in original).

⁸⁴ Marcus, *A History of Ethiopia*, above n 30, 151–2.

Emperor Haile Selassie I (r 1930–74), who was in exile in England during Italian occupation, returned to Addis Ababa to resume his limited sovereignty over Ethiopia under British paramountcy.⁸⁵

Although France sought the reinstatement of the Special Court after Ethiopia's independence from Italy in 1941, it never succeeded.⁸⁶ Italian occupation and Ethiopia's rapid liberation from it is taken as the final nail in the coffin of the era of mixed courts in Ethiopia. If this is true, Ethiopia's easy escape from European extraterritoriality was, therefore, faster and less agonising than those of China, Japan and Turkey. As Kayaoğlu has superbly demonstrated, these formerly semicolonial countries not only needed to negotiate protracted deals but also undertake more serious Europeanisation projects of law and legal institutions in exchange for Western powers' acquiescence to end extraterritoriality.⁸⁷ However, as I shall show below, the 1942 *Anglo–Ethiopian Agreement*⁸⁸ put in place a stronger system of mixed courts that actually lasted until Ethiopia's (late) legal modernisation projects of the 1960s.

V EXALTED EUROPEAN EXTRATERRITORIALITY: THE 1942 *ANGLO–ETHIOPIAN AGREEMENT*

For the British, the quick liberation of Ethiopia from Italy implied the revision of their policy in regard to the government of Emperor Haile Selassie I, which they helped restore. Crucially, the British considered that there had been an undesirably 'premature independence', in which Italy — a 'civilised' European power with complete sovereignty over Ethiopia previously recognised by Britain⁸⁹ — had been replaced by a group of 'uncivilised' African feudal fiefs (who the British believed had 'neither the understanding nor the local institutions to enable them to protect themselves').⁹⁰ A British colonial officer who signed the *Anglo–Ethiopian Agreement* on behalf of Great Britain wrote Ethiopia was a

glaring example of what premature political independence means ... when it is no more than the independence of a small group of competing political factions at the centre to do what they like to the mass of the people, who have neither the understanding nor the local institutions within their control to enable them to protect themselves [let alone Europeans in their territory].⁹¹

Despite officially recognising the sovereignty of Haile Selassie I over Ethiopia, the British were very clear that 'a period of transition must elapse

⁸⁵ Sterling Joseph Coleman Jr, 'No Independence without Sovereignty! The Resistance of Emperor Ḥaylā Šəllase I to the British Occupation of Ethiopia (1941–1944)' (2010) 13 *Aethiopica* 46.

⁸⁶ Aberra Jembere, *An Introduction to the Legal History of Ethiopia: 1434–1974* (Shama Books, 2012) 118.

⁸⁷ See, generally, Kayaoğlu, *Legal Imperialism*, above n 2.

⁸⁸ *Anglo–Ethiopian Agreement of 31st January 1942*, reproduced in Margery Perham, *The Government of Ethiopia* (Faber & Faber, 2nd ed, 1969) appendix E ('*Anglo–Ethiopian Agreement 1942*').

⁸⁹ British recognition of Italy's sovereignty over Ethiopia was aimed at keeping Fascist Italy from joining Nazi Germany: see John H Spencer, *Ethiopia, the Horn of Africa, and US Policy* (Corporate Press, 1977) 6; Marcus, *A History of Ethiopia*, above n 30, 142.

⁹⁰ See Theodore M Vestal, 'Consequences of the British Occupation of Ethiopia during World War II' in Barry J Ward (ed), *Rediscovering the British Empire* (Krieger Publishing, 2002) 43, 56 n 14.

⁹¹ *Ibid.*

before Ethiopia can hope to maintain its independence unaided'.⁹² Furthermore, the British believed they had 'military interests' in Ethiopia which, according to an official document, included:⁹³

- the protection of some 40 000 Italian civilians in Ethiopia (from Ethiopians);
- placing certain parts of Ethiopia ('reserved areas') under direct British military control; and
- leaving the remainder of the country under the *nominal* control of the emperor, whose task is to re-establish his authority and put into operation the machinery of government.

These British policy priorities were translated into the 1942 *Anglo-Ethiopian Agreement*. The *Agreement* which, I believe, satisfies Craven's three factors of inequality in 'unequal treaties',⁹⁴ was prepared by the British themselves. For reasons discussed later, Haile Selassie I, who appropriately suspected the terms of the *Agreement* 'would render the status of Ethiopia indistinguishable from that of a Protectorate',⁹⁵ was powerless to reject the treaty. On the other hand, despite acknowledging that the arrangement may be interpreted as envisaging a protectorate-like status for Ethiopia, the British insisted that their policy for Ethiopia was only 'that it shall be re-established as speedy [sic] as possible as a native state under its own ruler, involving [the British government] in a minimum political responsibility and as slight a burden as possible on the British exchequer'.⁹⁶ Moreover, despite the British government's declared policy of assisting Ethiopia renovate its state machinery, they also apparently believed in the importance of discouraging Haile Selassie I from 'setting up a complicated form of centralised administration on western lines' for this did not 'fit more happily into the social system of Abyssinians'.⁹⁷ The British did not only believe in the undesirability of the complete Westernisation of the Ethiopian state but

⁹² War Cabinet, United Kingdom, *Committee on Policy in regard to Ethiopia* (Report, FO 371/27525, 8 November 1941) ('*Policy in regard to Ethiopia*').

⁹³ *Ibid.*

⁹⁴ Craven, above n 4, 350–80.

⁹⁵ *Policy in Regard to Ethiopia*, above n 92.

⁹⁶ Public Record Office, *Final Policy Paper on Ethiopia*, 12 December 1941 (Archive, Institute of Ethiopian Studies, Addis Ababa University).

⁹⁷ *Ibid.*

also advised Ethiopia to embrace ‘legal duality’ like colonial regimes in the rest of tropical Africa.⁹⁸

Although the protection of Westerners (mainly Italians) in Ethiopia was one of the military interests of the British in Ethiopia during the Second World War, the imposition of extraterritoriality through a mixed court system was not apparently the direct policy priority of the British. Extraterritoriality was in essence seen as an instrument for weeding out Italian and French influence in Ethiopia. A British policy paper reads:

Although this matter [jurisdiction over foreigners in Ethiopia] is not one that has been considered as a direct British interest it requires examination in the light of the probability that the French and possibly other powers will seek to resuscitate the *Klobukowski Treaty*, which formed the basis of the form of extra territorial jurisdiction for foreigners up to the Italian occupation. By the Agreement now to be signed judicial safeguards are provided for the foreigner by a reform of Ethiopian legislation under the guidance of a British judicial advisor and by the option open to the foreigner to have his case heard in the High Court, on the bench of which at least one British judge will sit.⁹⁹

This British policy on extraterritoriality was codified by art 5 and the annex of the 1942 *Anglo–Ethiopian Agreement*. Article 5 reads:

- (a) Jurisdiction over foreigners shall be exercised by the Ethiopian Courts constituted according to the draft Statute attached hereto as an Annex, which His Majesty the Emperor will promulgate forthwith and will maintain in force during the continuance of this Agreement, except in so far as it may require amendment in any manner agreed upon by the parties to this Agreement.

⁹⁸ Ethnic Amharas, who in Ethiopia assumed a role similar to the British in pre-independence British Africa, constituted only around a fourth of the total population of the empire Menelik II built towards the end of the 19th century. As each tribal community in the Amharas’ newly built empire ‘had its own system of customary law’, its emperors needed to regulate their colonial differences at the grassroots level: Norman J Singer, ‘A Traditional Legal Institution in a Modern Legal Setting: The *Atbia Dagnia* of Ethiopia’ (1970) 18 *UCLA Law Review* 308, 311. Consequently, the administrative and legal structure that emerged at the beginning of the 20th century was, like colonial regimes in the rest of Africa, characterised by legal duality (ie indirect rule). This meant that Amhara governors in non-Amhara localities ‘had to rely on indirect rule through local leaders ... whose tasks included ... settling disputes’: Dena Freeman, *Initiating Change in Highland Ethiopia: The Causes and Consequences of Cultural Transformation* (Cambridge University Press, 2002) 31, 31. And, as Singer has pointed out, ‘almost all litigation presented to the government courts in the first half of the 20th century came from [ethnic] Amhara’: Singer, above n 98, 311. Aspects of this pre-1941 Ethiopian legal duality were retained. The British who, under the *Anglo–Ethiopian Agreement 1942*, laid the basis for the statutory constitution of mixed courts in Ethiopia, also prescribed the formalisation of legal duality through the *Atbia Dagna* (local judge) courts. Hence, one may consider that the British suggestion to formalise the local judge courts in Ethiopia was an attempt to share (with Ethiopia) its experience with native courts in British Africa. See generally Singer, above n 98; John Cohen and Peter Koehn, *Ethiopian Provincial and Municipal Government: Imperial Patterns and Postrevolutionary Changes* (Michigan State University, 1980) 30–7; Freeman, above n 98. See also *Anglo–Ethiopian Agreement 1942* annex (‘*Draft Administration of Justice Proclamation*’). For more on legal duality (and native courts) in British Africa, see Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton Press, 1996) ch 4; Richard Roberts and Kristin Mann, ‘Law in Colonial Africa’ in Kristin Mann and Richard Roberts (eds), *Law in Colonial Africa* (James Currey, 1991) 3, 19–23.

⁹⁹ *Policy in regard to Ethiopia*, above 92.

- (b) *Any foreigner* who is a party to any proceedings, civil or criminal, within the jurisdiction of a Regional, Communal or Provincial Court, may elect to have the case transferred without additional fee or charge to the High Court for trial. Provisions to this effect shall be included in the Rules of Court.
- (c) In the hearing by the High Court of any matter to which a foreigner is a party at least one of the British Judges mentioned in Article 2(a) shall sit as a member of the Court.
- (d) His Majesty the Emperor agrees to direct that foreigners shall be incarcerated only in prisons approved for the purposes by the Commissioner of Police appointed in accordance with Article 2(a).¹⁰⁰

On the other hand, pt VIII of the annex reads:

- 21. For the better examination of laws submitted to Us for enactment there is hereby established a *Consultative Committee for legislation*, which shall comprise Our Judicial Advisor, the President of the High Court [both of whom were actually jurists from Britain or its former colonies], and three persons having recognised legal qualifications or being qualified by reason of long judicial experience and sound knowledge of law to be especially appointed by Us. The duty of such Committee shall be to draft laws upon Our directions to review the draft of any proposed law. No law shall be submitted to Us for enactment unless it is accompanied by a certificate signed by a majority of the members of the said Committee certifying that the law to which the certificate relates is not repugnant to natural justice and humanity and is a fit and proper law to be applied without discrimination to Ethiopians and foreigners alike ...
- 24. It is hereby declared that no court shall give effect to any existing law which is contrary to natural justice or humanity, or which makes any harsh or inequitable differentiation between Our subjects and foreigners.¹⁰¹

Unlike the 1908 *Klobukowski Treaty*, the 1942 *Anglo–Ethiopian Agreement* was translated into practice almost immediately. The entire annex to the *Anglo–Ethiopian Agreement* was enacted, without any change at all, in the *Administration of Justice Proclamation No 2/1942*.¹⁰² Not repealed or superseded by mid-20th-century Ethiopia's 'voluntarily' received¹⁰³ modern legal codes, the proclamation established the basic structure of the court system in Imperial Ethiopia.¹⁰⁴ As a by-product of British-led judicial reform, Ethiopia thus established a four-tiered judicial system, composed of the Supreme Imperial Court, the High Court, the Provincial Court and Regional and Communal Courts. This structure was further elaborated to include other levels of courts into the centralised state court structure at the top of which was the Crown Court (*Zufan Chilot*) over which Emperor Haile Selassie I presided to hear appeals from the

¹⁰⁰ *Anglo–Ethiopian Agreement 1942* art 5 (emphasis added).

¹⁰¹ *Draft Administration of Justice Proclamation* pt VIII cls 21 and 24 (emphasis added).

¹⁰² Compare annex of the 1942 *Anglo–Ethiopian Agreement* with the *Administration of Justice Proclamation No 2/1942*, Proc. No 2/1942, *Neg. Gaz.*, Year 1, No 2. See also Perham, above n 88, 154.

¹⁰³ M B Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, 1975) 360–409.

¹⁰⁴ Kenneth R Redden, *The Legal System of Ethiopia* (Michie, 1968) 132–3.

lower courts. The hierarchy of the Ethiopian court system was thus (in descending order):¹⁰⁵

- (i) Crown Court (*Zufan Chilot*);
- (ii) Supreme Imperial Court;
- (iii) High Court;
- (iv) Governate General (*Teklay Gizat*) Court;
- (v) Provincial (*Awraja*) Court;
- (vi) District (*Wereda*) Court;
- (vii) Sub-District (*Miketil Wereda*) Court; and
- (viii) Local Judges (*Atbia Dagna*) Courts.

The 1942 *Administration of Justice Proclamation*, a post-liberation legal reform, has often been described as marking the end of capitulation and the restoration of Ethiopia's judicial and legislative sovereignty over foreigners residing in its territory. Writing in the 1940s, British commentators Christine Sandford and Margery Perham underlined the reorganised Ethiopian judiciary, notably the British-led Ethiopian High Court and Supreme Imperial Court, as a significant departure from the Special Court.¹⁰⁶ In particular, Sandford opined:

The [*Anglo–Ethiopian Agreement* that established the mixed benches of the Supreme Imperial Court and High Court] boldly cut the country free once and for all from the shackles of capitulations in any form. The old special court, a species of mixed tribunal, which had existed prior to the Italian occupation for the trial of cases in which foreigners were involved, was not allowed to reappear. Foreigners were to be given no privileges in law.¹⁰⁷

Similarly, scholars who studied extraterritoriality in 20th-century Ethiopia remained uncritical of the British episode in the 1940s. In fact, one of the two authors who examined the Special Court (1922–36) thought the British-led judicial reform 'restored [Emperor Haile Selassie's] legislative and judicial prerogative over foreigners'.¹⁰⁸

Notwithstanding Sanford's denial or Edwards' mistaken interpretation of the post-liberation legal reform, the aim of the unequal *Anglo–Ethiopian Agreement*, like the *Klobukowski Treaty* before it, was to sustain European privileges in law in prematurely independent Ethiopia. Britain — which, as noted, identified the protection of Italians in Ethiopia as one of its military interests during the Second World War — also found it appropriate to suspend Haile Selassie I's legislative and judicial prerogative over foreigners in general until at least the to-be-reconstructed Ethiopian legal system guaranteed their interests and wellbeing. The policy documents that informed the 1942 *Anglo–Ethiopian Agreement* clearly show that the mixed benches as well as the 'Consultative Committee for Legislation' were predicated on the same legal orientalist logic that had long governed semicolonial Asia and Africa's relations with European imperial powers.

¹⁰⁵ See Jembere, above n 86, 220–1.

¹⁰⁶ Christine Sandford, *Ethiopia under Hailé Selassié* (J M Dent & Sons, 1946) 122; Perham, above n 88, 158. See also Norman Bentwich, 'Ethiopia Today' (1944) 20 *International Affairs* (Royal Institute of International Affairs 1944–) 509, 515.

¹⁰⁷ Sandford, above n 106, 122.

¹⁰⁸ Edwards, above n 44, 377.

Although the 1942 *Anglo–Ethiopian Agreement* has often been sympathetically contrasted with the 1908 *Klobukowski Treaty*, the former is in fact more capitulatory than the latter. It required Ethiopia to retain British judges in its two most superior courts of the Imperial era. Further, unlike its precursor, the *Anglo–Ethiopian Agreement* created a legislative committee composed of British jurists that screened laws to be applied by Ethiopian courts against the often stereotypical repugnancy test. British extraterritoriality also covered a much wider scope than that of their European partner three decades earlier. As noted, the *Klobukowski Treaty* did not guarantee a mixed court that either exclusively applied European laws or retained European professional judges. Furthermore, it left ample leeway for Ethiopian emperors to preserve (amidst the growing frustration of Europeans) their judicial and legislative sovereignty over Europeans in their jurisdiction. In contrast, the *Anglo–Ethiopian Agreement* institutionalised in Ethiopia a mixed court system that not only retained professionally-trained European jurists but also applied (almost exclusively) Western laws. Further, as will be seen below, the foreign jurists of the mixed courts (that is, the various benches of the High Court and Supreme Imperial Court of Haile Selassie I's Ethiopia) were not only interpreting the law but *making* the law. This is a very interesting consideration in terms of the imperial history of international law.¹⁰⁹

As noted, the *Anglo–Ethiopian Agreement* was negotiated immediately after the British defeat of Italy in Ethiopia. This is, in my view, the major explanation for Ethiopia's transition to a stronger treaty regime of European extraterritoriality during the period in which mixed courts were being dismantled in what were believed to be the last two strongholds of extraterritorial courts after the First World War: Egypt and China. Post-Italian occupation Ethiopia was less powerful and assertive than it had been under Menelik II, when the *Klobukowski Treaty* was negotiated. Haile Selassie I who, as seen, wished to leave the *Klobukowski Treaty*, appeared less troubled by the extraterritoriality clauses of the *Anglo–Ethiopian Agreement*. The Emperor, who needed the British more than the latter needed him, was pragmatic enough to accept limited sovereignty in exchange for a relatively stable future. In contrast, the position of the British in Ethiopia was bolstered by their direct participation in liberating Ethiopia from Italian colonial rule. And Ethiopia, for the British, was a subject of British extraterritoriality — a territory freed from colonial rule by an Axis power — and its fate was to be decided as soon as the Second World War ended.¹¹⁰ Asserting immediate legislative and judicial sovereignty over Europeans was therefore not a top priority for the less powerful Haile Selassie I. According to his American legal advisor, British extraterritoriality was the least onerous of compromises to be made in avoiding adverse British reactions in other policy priority areas, such as the reacquisition of 'reserved areas', where British military occupation was intact until 1955.¹¹¹

¹⁰⁹ I thank Dr Jennifer Beard (Melbourne Law School) for drawing my attention to this.

¹¹⁰ Christopher Clapham, *Haile Selassie's Government* (Longmans, 1969) 21. See also Robert Gale Woolbert, 'The Future of Ethiopia' (1942) 20 *Foreign Affairs* 535, 541–3.

¹¹¹ John Spencer, *Ethiopia at Bay: A Personal Account of the Haile Selassie Years* (Reference Publications, 1984) 148.

Accompanied by a less official protectorateship relationship, British extraterritoriality in Ethiopia was more profound than usually thought and must be understood in light of the wider history of British paramountcy in Ethiopia. Though denied in official British policy, commentators on the Anglo–Ethiopian relationship during and after the Second World War have persuasively demonstrated that Ethiopia was a de facto British protectorate for at least the duration of the Second World War.¹¹² Some even claim that complete liberation of Ethiopia from British paramountcy was not achieved until at least the middle of the 1950s when the British military finally pulled off from its last post in eastern Ethiopia.¹¹³

Ethiopia was officially freed from British extraterritoriality before the end of the Second World War when, in 1944, the terms of the 1942 *Anglo–Ethiopian Agreement* were amended¹¹⁴ as follows:

Jurisdiction over British subjects, British Protected Persons and British Companies shall be exercised by the Ethiopian Courts constituted according to the Statute for the Administration of Justice issued by His Imperial Majesty the Emperor in 1942 and the Rules of Courts issued in 1943, provided (a) that in Article 4 of Section III of the Statute there shall be substituted for ‘judges of British nationality’ the words ‘judges of proven judicial experience in other lands’, and (b) that, in hearing by the High Court of any matter, all persons shall have the right to demand that one of the judges sitting shall have had judicial experience in other lands.¹¹⁵

Although Britain no longer required Ethiopia to retain British judges in its courts, the extraterritorial application of British law in Ethiopia did not change a great deal as a result of the above amendment. Nor did Ethiopia seem to mind British judges in its higher courts (including tax appeal commissions) until the 1960s.¹¹⁶ Even then, the terms of the 1944 *Anglo–Ethiopian Agreement* that still assured the judicial privileges of British subjects (if not other foreigners) in Ethiopia cannot be taken as a significant upturn in Ethiopia’s judicial sovereignty. Besides, the fact that non-British foreigners were extended the benefit of British extraterritoriality¹¹⁷ decades after the signing of the 1944

¹¹² Woolbert, above n 110, 549 (describing early-1940s Ethiopia as ‘a de facto British protectorate’); Spencer, *Ethiopia, the Horn of Africa, and US Policy*, above n 89, 8–9; Vestal, above n 90; Getahun Mesfin Haile, ‘Yä-Ingiliz Gizé or British Paramountcy in Dire Dawa (Ethiopia), 1941–1946: Notes toward a History’ (2002) 9(2) *Northeast African Studies* 47.

¹¹³ Richard Pankhurst, ‘Decolonization of Ethiopia, 1940–55’ in UNESCO, *The Decolonization of Africa: Southern Africa and the Horn of Africa* (1981) 119. Note, however, that doctrinaire international lawyers would perhaps be troubled by the use of the term protectorate to describe the dependent relationship between Ethiopia and Britain during the period under discussion. In particular, some elements of the juristic meaning of protectorateship may be missing in the Anglo–Ethiopian relationship. See, eg, Mirja Trilsch, ‘Protectorates and Protected States’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, at February 2011).

¹¹⁴ See *Anglo–Ethiopian Agreement of 19th December 1944*, reproduced in Perham, above n 88, appendix F (‘*Anglo–Ethiopian Agreement 1944*’).

¹¹⁵ *Anglo–Ethiopian Agreement 1944* art 4(1).

¹¹⁶ Redden, above n 104, 194. See also *Mosvold (Ethiopia) Ltd v Inland Revenue Department* (1967) 4 *Journal of Ethiopian Law* 122.

¹¹⁷ See discussions of selected judgments of the mixed court below.

Anglo–Ethiopian Agreement hints at the irrelevance of that agreement in actually constraining British extraterritoriality.

VI THE MIXED BENCHES OF THE HIGH COURT AND SUPREME IMPERIAL COURT OF ETHIOPIA

Our understanding of the mixed benches of the British era is limited. Apart from marginal reference to the appointment of British judges to post-1941 Ethiopian courts, attempts to document the working of the mixed benches or to analyse them within the context of European extraterritoriality are missing.¹¹⁸ Although the earliest issues of the *Journal of Ethiopian Law*, a leading law periodical in Ethiopia, reported cases from these benches, it is not clear how many cases were produced by the mixed benches. Moreover, there seems to be no appetite among Ethiopian legal historians (some of whom are proud Ethiopian nationalists bent on celebrating Haile Selassie I as a model of how to modernise a legal system of an African nation without colonial history) to subject the reported judgments of the mixed benches to historical research.¹¹⁹ The reconstruction in this section is mainly based on cases reported in the *Journal of Ethiopian Law* between 1964 and 1973 and some accounts left by commentators on the social and political developments of the British era in Ethiopia.¹²⁰

Before their complete Ethiopianisation (circa 1965), the Supreme Imperial Court¹²¹ and High Court of Ethiopia were, as per the 1942 *Anglo–Ethiopian Agreement*, made up of mixed benches composed of British and Ethiopian judges. These are the ‘Ethiopian’ courts where foreigners were advised to have their cases tried; unlike the hierarchical lower courts, the High Court and the appellate Supreme Imperial Court were comprised of British judges that could not be suspected of primitiveness. According to Perham, by 1944 three out of 21 High Court judges were British.¹²² All the rest were Ethiopians. Mixed cases were, according to the 1944 *Anglo–Ethiopian Agreement*, tried by a bench composed of two Ethiopian and one British judge.¹²³ Apparently, this gave Ethiopian judges the conjectural majority. The numerical advantage of Ethiopian

¹¹⁸ See, eg, Muradu Abdo, *Legal History & Traditions Textbook* (Justice and Legal System Research Institute, 2007) 253.

¹¹⁹ If Ethiopian(ist) legal historians have been little bothered about European extraterritoriality in Ethiopia, they have, however, never failed to glorify the role of Haile Selassie I in bringing Ethiopia out of legal primitivism: see, eg, Jembere, above n 86, 289; Redden, above n 104, 202 (positing that Haile Selassie I ‘will certainly be recorded by history as one of the great figures of the 20th century along with Churchill and Kennedy’ for his contribution in the development of Ethiopia’s modern legal system).

¹²⁰ To the best of my knowledge, Margery Perham’s *The Government of Ethiopia* (first published in 1949) remains the only attempt to recount the experience of the mixed benches of the British era. Her modernist account portrays the mixed bench as a success, considering the different background (modern and traditional) of British and Ethiopian judges that worked together: see Perham, above n 88, 156–7.

¹²¹ The *Anglo–Ethiopian Agreement 1942* prescribed that the Supreme Imperial Court of Ethiopia, an appellate court, shall comprise High Court judges that, as noted, included judges of British nationalities: *Anglo–Ethiopian Agreement 1942* pt II. As these judges of the Supreme Imperial Court were nominated by the President of the High Court (who himself was a British), the assignment of British judges to the Supreme Imperial Court was systematically guaranteed.

¹²² Perham, above n 88, 156.

¹²³ *Anglo–Ethiopian Agreement 1944*.

judges was, however, qualitatively less significant as the British judge in practice hardly found himself in a minority.¹²⁴ On top of that, the president of the High Court continued to be a British judge notwithstanding the fact that Ethiopia was free (after 1944) to elect a non-British judge.¹²⁵

These British jurists also formed the elite class of foreign legal advisors with exclusive power over legislative matters in Haile Selassie I's Ethiopia until at least the amendment of the *Anglo–Ethiopian Agreement* in 1944. However, the legislative committee that was constituted by the 1942 *Anglo–Ethiopian Agreement* functioned (arguably with no less authority) until 1955.¹²⁶ Also, note that some of these jurists served as members of the Imperial Codification Commission (1954–60) which oversaw the codification of Haile Selassie I's six codes.¹²⁷ The Maltese William Buhagiar (one of the last British-sponsored foreign judges to leave Ethiopia),¹²⁸ the Palestinian Nathan Marein (who authored two English monographs on the statist Ethiopian legal system)¹²⁹ and the British Sir Charles Mathew (the drafter of the 1961 *Criminal Procedure Code* of Ethiopia)¹³⁰ were among the most notable British-sponsored jurists to serve on the mixed benches.

Theoretically, Haile Selassie I's Crown Court was the most authoritative judicial organ in Imperial Ethiopia during the period between 1941 and 1974.¹³¹ However, this did not seem to affect the British-sponsored benches. According to a former Palestinian judge of the mixed bench, the discretionary power of the emperor seldom troubled them.¹³² The judicial jurisdiction of the emperor mainly mattered when an appeal involved the death penalty and, hence, the mixed benches generally had the first and last judicial word in Haile Selassie I's Ethiopia, especially when cases involved Europeans.¹³³

Decisions of the bench were written in Amharic and English, including when the parties to the dispute were neither Ethiopian nor British.¹³⁴ The Amharic and English versions were not considered translations of one another. Instead, they were regarded 'as independent judgements based upon common agreement among the judges as to the principles and final outcome of each case'.¹³⁵ In other words, in a jurisdiction where Amharic judgments had always been considered to

¹²⁴ Perham, above n 88, 157.

¹²⁵ Ibid 154.

¹²⁶ Jembere, above n 86, 118.

¹²⁷ Ibid 196.

¹²⁸ Malta Migration, *Buhagiar, William (4.4.1909–14.3.1982)* <<https://perma.cc/FG77-YWTC>>.

¹²⁹ Nathan Marein, *The Judicial System and the Laws of Ethiopia* (Royal Netherlands Printing and Lithographing, 1951); Nathan Marein, *The Ethiopian Empire — Federation and Laws* (Royal Netherlands Printing and Lithographing, 1955).

¹³⁰ Heinrich Scholler, 'Criminal Procedure Code' in Siegbert Uhlig (ed), *Encyclopaedia Aethiopica* (Harrassowitz Verlag, 2003) vol 1, 814.

¹³¹ Sedler, 'The *Chilot* Jurisdiction of the Emperor of Ethiopia', above n 61, 69.

¹³² 'Palestine Man Chief Judge to Haile Selassie: Nathan Marein Often Has First and Last Words on Law', *The Times Record* (New York), 7 January 1949, 18. See also N E Mustoe, 'Modern Ethiopia' (1960) 61 *African Affairs* 216.

¹³³ Ibid.

¹³⁴ 'Reports' (1964) 1 *Journal of Ethiopian Law* 2.

¹³⁵ Ibid 2.

precede any other versions, opinions written in English became (during the period under discussion) no less valid.

British extraterritoriality allowed Britain to effectively impose its legislative will on Ethiopians, Italians and any foreigner in Ethiopia.¹³⁶ The mixed bench was apparently a platform for the extraterritorial application of English law, even when Ethiopian or other foreign law could possibly have been relied upon. A closer look at two decisions of the mixed benches — *Facondo v Pedretti* (decided in 1958)¹³⁷ and *Debassai v La Fondiaria Fire Insurance Co* (decided in 1965)¹³⁸ — illustrate this.

Facondo v Pedretti involved a dispute over a restraint of trade clause in a contractual agreement between three Italian businessmen who had been in a partnership and had remained in Ethiopia following Ethiopia's liberation in 1941. Under the contract, which also dissolved the partnership, Pedretti, a former partner of Facondo and Trenzio, agreed 'not to open or sell his labour to any workshop' in Dire Dawa, a town in eastern Ethiopia. Nevertheless, Pedretti, together with another businessman, started a garage business in the town. As a result, Facondo and his partner Trenzio sought the enforcement of the restraint of trade clause.

The High Court held that the clause was 'invalid and that no damage could arise'.¹³⁹ Facondo and Trenzio appealed to the Supreme Imperial Court. A panel of three judges, two Ethiopians and one Briton, confirmed the judgment of the High Court. In dismissing the appeal, the mixed bench relied on English common law rules regarding restraint of trade. The bench ruled that the contractual clause that the appellant sought to enforce was prima facie void but could nonetheless be enforced should Facondo and Trenzio, the parties for whose benefit the restraint was imposed, prove the restraint was reasonable to protect their interests and public policy. A leading English case on restraint of trade, *Herbert Morris Ltd v Saxelby*,¹⁴⁰ was cited to support the bench's reasoning.

In line with English jurisprudence, the bench distinguished between two types of contractual restraint of trade: (1) restraint of trade between vendor and purchaser; and (2) restraint of trade between employer and employee (or partners) terminating their contractual relationship.¹⁴¹ As the agreement between the three Italians belonged in the latter category, the court reasoned that the appellants were not 'entitled to protect [themselves] from competition per se'.¹⁴² The court concluded:

because the agreement between the appellants and the respondents was not an agreement for the purchase of [business] so as to entitle them to the protection of their proprietary rights and to protect themselves from competition per se; and ... because the restriction is unlimited in time and the appellants have not

¹³⁶ See *Anglo-Ethiopian Agreement 1942* art 5 and annex. See also *Hallock v Hallock* (1968) 5 *Journal of Ethiopian Law* 28.

¹³⁷ *Facondo v Pedretti* (1964) 1 *Journal of Ethiopian Law* 6.

¹³⁸ *Debassai v La Fondiaria Fire Insurance Co* (1966) 2 *Journal of Ethiopian Law* 276.

¹³⁹ *Facondo v Pedretti* (1964) 1 *Journal of Ethiopian Law* 6.

¹⁴⁰ *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.

¹⁴¹ For more on the English common law on contracts in restraint of trade, see Richard Stone, *The Modern Law of Contract* (Routledge-Cavendish, 2008) 493–505.

¹⁴² *Facondo v Pedretti* (1964) 1 *Journal of Ethiopian Law* 6, 8.

shown that this restriction as to time goes no further than is required for the protection of their business ... the agreement is null and void as being in restraint of trade.¹⁴³

Debassai v La Fondiaria Fire Insurance Co is another case from the mixed bench of post-Second World War Ethiopia's Supreme Imperial Court. Unlike *Facondo v Pedretti*, it was heard after Ethiopia codified all but one of its six codes in 1957–65.¹⁴⁴

At issue was the enforceability of an arbitral award entered against an Italian insurance company by an arbitrator alleged to have been guilty of misconduct. Debassai, an Ethiopian truck owner, held an insurance policy with the respondent, La Fondiaria Fire Insurance Company. The policy covered various risks including accidental collision or overturning. Debassai, who alleged his truck was damaged as a result of a collision and overturning on 20 June 1960, disputed with the insurance company over the occurrence of insured risk. As the policy provided for arbitration of disputes arising out of the policy, two arbitrators were appointed and began to hear the case. Yet, it was only one of the arbitrators who finally entered the arbitral award in favour of the insured. La Fondiaria Fire Insurance Company — which the author suspects was related to the Italian insurance company La Fondiaria Assicurazioni¹⁴⁵ — appealed to the High Court. The court partially set aside the award, holding that the arbitrator had exceeded his jurisdiction in awarding the insured party Ethiopian \$24 500 in damages.

Debassai, as well as the insurance company, appealed against the order of the High Court on different grounds. Debassai's appeal was based on the argument that the arbitrator acted within his jurisdiction and that the High Court was wrong in interfering with the award, which in terms of the arbitration agreement, was final. The appellate court, sitting as a mixed bench of Ethiopian and British judges, upheld that the High Court was right in interfering with the arbitration, not least because the arbitrator had been guilty of misconduct for 'either he disregarded the terms and conditions of the insurance policy ... or he ha[d] wrongly interpreted the legal effects of such terms and conditions'.¹⁴⁶ In view of that, the Supreme Court modified the decision of the High Court regarding damages.

In deciding whether the action of the arbitrator amounted to 'misconduct' and hence judicial review of arbitral awards was appropriate, the court relied on its earlier practice and English jurisprudence:

There can be no question that, although in the [arbitration agreement] it is agreed that the award shall be final, there are occasions (and this has been the constant practice of these Courts) when the award or part of it can be challenged in a court of law. The *Civil Code* has no provision on this point and neither have the

¹⁴³ Ibid 8.

¹⁴⁴ These were the *Maritime Code* (1960), *Commercial Code* (1960), *Penal Code* (1957), *Civil Code* (1960) and *Criminal Procedure Code* (1961). The *Civil Procedure Code* was promulgated in 1965.

¹⁴⁵ According to the data on the webpage of Unipol Sai Corporate, its subsidiary La Fondiaria Assicurazioni 'was one of the most well-known brands in the Italian insurance market': Unipol Sai Assicurazioni, *Fondiaria-Sai* <<https://perma.cc/57JJ-BW9P>>.

¹⁴⁶ *Debassai v La Fondiaria Fire Insurance Co* (1966) 2 *Journal of Ethiopian Law* 276, 279.

existing rules of civil procedure; this is a matter, however, which should be considered in the enactment of a new *Civil Procedure Code* [which was eventually enacted in 1965]. Generally, however, it may be said that the grounds on which an award can be set aside are — (a) that the arbitration award has been improperly procured, as for example, where the arbitrator is deceived, or material evidence is fraudulently concealed; (b) that the arbitrator or umpire misconducted himself.¹⁴⁷

Like *Facondo v Pedretti*, *Debassai v La Fondiaria Fire Insurance Co* affirms the dominant place of English law as a source of law in post-1941 Ethiopia. Crucially, it suggests that Ethiopia's national codification project of the mid-20th century did not automatically cut Haile Selassie I's most superior courts' dependence on British laws and jurisprudence. The two judgments also demonstrate Ethiopia's continued struggle in asserting authority to speak the law as a form of sovereignty against even the citizens of its archenemy Italy. This was so despite Ethiopia officially emerging from (British/European) extraterritoriality decades earlier.

In line with English legal tradition, the mixed benches sometimes invoked their previous judgments as authority.¹⁴⁸ In some cases, 'recourse to the system most common on the European continent' was found more appropriate than English law.¹⁴⁹ The application of English law or reference to continental jurisprudence must have been, the author believes, the general trend in commercial and civil cases as Ethiopia did not have a body of law that could survive the repugnancy test set out in pt VIII of the *Anglo-Ethiopian Agreement*. Incidentally, some cases indicate the wariness of the mixed bench in extending extraterritorial application to some foreign (Western) laws.¹⁵⁰

It must be underlined that the mixed benches were not always indifferent to Ethiopian laws, particularly since the enactment of Ethiopia's mid-20th-century legal codes. *Debassai v La Fondiaria Fire Insurance Co*¹⁵¹ may demonstrate this. Though the bench rendered its decision based on English jurisprudence, its reference to the 1960 *Civil Code* (which it found inapplicable for reasons other than the *Code* being repugnant) suggests Ethiopian laws were gaining weight before the mixed benches since at least Ethiopia's codification of laws in the 1960s. In contrast, it is unclear if the benches were sympathetic to Ethiopian custom. My review of the few published mixed bench judgments seems to suggest otherwise.

With the complete departure of British judges in the middle of the 1960s, Ethiopian judges began to ignore foreign sources of laws even when it mattered most for litigants. In this regard, *Desta v Giovanni* (decided in 1972),¹⁵² where the High Court of Addis Ababa denied the litigants' request for the recognition of patent right over a disputed invention, is instructive. The Court reasoned that unless and until a special law governing patents and their enforcement was passed, a request for the application of principles of law non-existent in Ethiopia

¹⁴⁷ Ibid 278.

¹⁴⁸ See, eg, *Shatto v Shatto* (1964) 1 *Journal of Ethiopian Law* 190.

¹⁴⁹ *Hallock v Hallock* (1968) 5 *Journal of Ethiopian Law* 28, 28.

¹⁵⁰ Ibid 29.

¹⁵¹ *Debassai v La Fondiaria Fire Insurance Co* (1966) 2 *Journal of Ethiopian Law* 276.

¹⁵² *Desta v Giovanni* (1973) 9 *Journal of Ethiopian Law* 227.

was 'valueless'.¹⁵³ Similarly, in *J & P Coats Ltd v Ethiopian Sewing Thread Factory* (decided in 1971)¹⁵⁴ — a case involving a British company — the High Court preferred to depart from the mixed bench era practice of applying British law. Although it acknowledged the absence of law applicable to the matter at hand, the High Court found it appropriate to 'consult and construe available provisions of domestic law so as to make them applicable to such circumstances'.¹⁵⁵ Hence, in the early 1970s, a new trend of dealing with mixed cases was holding ground: the management of cases with foreign elements solely by Ethiopian judges and through Ethiopian (though imported) laws.¹⁵⁶

What outlived the departure of the last British judge in Addis Ababa courts was the Europeans' legal orientalist attitude. *Bensons Confectionary Ltd v Agents of Dofanti Ltd* (decided in 1973)¹⁵⁷ is a case in point. A British company selling candy in Ethiopia sought to have an Italian competitor barred from using its trademark in Ethiopia — a country where it argued illiterate customers might confuse trademarks that it claimed were easily distinguishable by customers in Europe. In rejecting the plea of the British party, the High Court — which was only a few years previously 'the mixed court' — reasoned:

[It does] not consider it proper for the plaintiff to institute a case on the ground that the customers in the importing country are illiterate. Basically, it is believed that customers in every country have comparable intelligence to distinguish the goods they buy. Since there is only one word on the covers of the candies, even the illiterate customers can take the words, Bensons and Denta, on the covers as distinguishing marks. The plaintiff should have refrained from instituting an action on the ground that the trade-marks confuse the customers in the country to which they are exported and being sold, while the same trademarks have not been a cause of dispute in the country from where they come, and without any evidence showing an improper, clear, and glaring practice of unfair competition by the defendant.¹⁵⁸

Bensons Confectionary Ltd v Agents of Dofanti Ltd shows the coming of age of the Ethiopian judiciary that for decades was, being under the spell of European imperialism, unable to authoritatively speak Ethiopian laws vis-à-vis Europeans. Decided towards the end of Haile Selassie I's long reign (1930–74), it also marked the arrival of Ethiopia's turn to adjudicate cases involving subjects of its previous European protectors. Finally, the case may even be a reminder that the attitude of legal orientalism will always be with us. Despite legal codification, judicial reform and opening its market to European commodities under prejudicial terms, Ethiopia (in the eyes of some Europeans) will always

¹⁵³ Ibid 230.

¹⁵⁴ *J & P Coats Ltd v Ethiopian Sewing Thread Factory* (1973) 9 *Journal of Ethiopian Law* 73.

¹⁵⁵ Ibid 73.

¹⁵⁶ It must, however, be noted that the departure of British judges did not automatically result in a commencement of a new era where only laws enacted in accordance with Ethiopia's constitution were enforced. See, eg, *Mamalingas v Zapula* (1967) 4 *Journal of Ethiopian Law* 45, where the appellate court of the post-British era cared to discuss the English common law approach to employment injury, albeit it ultimately preferred the civil law approach which it considered comparable with Ethiopia's traditional approach.

¹⁵⁷ *Bensons Confectionary Ltd v Agents of Dofanti Ltd* (1973) 9 *Journal of Ethiopian Law* 234.

¹⁵⁸ Ibid 236.

lack something. That lack will persist, even when related to a triviality like candy, a commodity hardly attractive to the locals of Haile Selassie I's empire.

It is not uncommon to read accounts that glorify the mixed benches of the British decade as an ally-assisted effort to professionalise Ethiopia's infant metropolitan legal system as part of post-war reconstruction and bureaucratisation.¹⁵⁹ Overwhelmed by the lack of resources and legal technologies to construct a monolithic nation out of multiple peripheries (with which Addis Ababa maintained only patrimonial ties),¹⁶⁰ Haile Selassie I too was grateful of British imperialism, for it was at the same time helping him consolidate his hold on the Horn of Africa empire. Hardly divorced from its centuries-old agrarian civilisation without urbanism,¹⁶¹ post-Second World War Ethiopia was in need of British assistance to transform its patrimonial-cum-feudal governance structure. Further, the fact that it had long been resistant to European cultural penetration¹⁶² meant the pressure to keep pace with the rest of the world¹⁶³ was so intense that extraterritoriality (disguised as judicial assistance) was not necessarily unwelcome, as it permitted the state to eventually appropriate the juristic means to sustain its rule over diverse societies in its territory. This may explain the emperor's practice of honouring his British judges with Imperial medals¹⁶⁴ (instead of bemoaning their presence) and the overpowering of the prolonged British extraterritoriality in Ethiopia by a discourse of legal modernisation.

Lastly, the 1960s which, as seen, witnessed the decline of British extraterritoriality in Ethiopia, are emphasised in Ethiopia's legal modernisation literature for the massive importation of European laws (codification) and the beginning of US-funded legal education.¹⁶⁵ The simultaneous decline of extraterritoriality and institutionalisation of legal modernisation through codification and legal education in the 1960s takes Ethiopia's experience closer to other semicolonial nations (which escape from European extraterritoriality is

¹⁵⁹ Abdo, above n 118, 253.

¹⁶⁰ For more on the patrimonial nature of the early 20th-century Ethiopian state, see Donald Donham, 'Old Abyssinia and the New Ethiopian Empire: Themes in Social History' in Donald Donham and Wendy James (eds), *The Southern Marches of Imperial Ethiopia: Essays in History and Social Anthropology* (Cambridge University Press, 1986) 3.

¹⁶¹ Frederick C Gamst, 'Peasantries and Elites without Urbanism: The Civilization of Ethiopia' (1970) 12 *Comparative Studies in Society and History* 373.

¹⁶² See J M Roberts, *Europe: 1880–1945* (Longman, 2nd ed, 1989) 33 (noting that 'only Tibet and Ethiopia [remained] unresponsive to European politics, ideas and technology' in the first third of the 20th century).

¹⁶³ See *Civil Code* (Ethiopia) Proc No 165 of 1960, Preface (where Emperor Haile Selassie I noted his nation's mid-20th-century codification project was largely motivated by the desire to 'to keep pace with the changing circumstances of this world of today': at v).

¹⁶⁴ See, eg, Malta Migration, above n 128.

¹⁶⁵ See, eg, Jembere, above n 86; Redden, above n 104; Hooker, above n 103, 360–409; René David and John E C Brierley, *Major Legal Systems in the World Today* (Stevens & Sons, 3rd ed, 1985) 570–2; John H Beckstrom, 'Handicaps of Legal-Social Engineering in a Developing Nation' (1974) 22 *American Journal of Comparative Law* 697; John H Beckstrom, 'Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia' (1973) 21 *American Journal of Comparative Law* 557; Norman J Singer, 'Modernization of Law in Ethiopia: A Study in Process and Personal Values' (1970) 11 *Harvard International Law Journal* 73; Robert Allen Sedler, 'The Development of Legal Systems: The Ethiopian Experience' (1967) 53 *Iowa Law Review* 562; René David, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' (1963) 37 *Tulane Law Review* 187.

linked with legal modernisation projects). Like its Japanese and Turkish equivalents, Ethiopia's late legal modernisation projects were undertaken under the shadow of European extraterritoriality and, hence, have often been (mis)conceptualised as 'voluntary reception'.¹⁶⁶ Although it is beyond the scope of this article, the unfolding of Ethiopia's 'voluntary reception' as normatively less successful than the comparatively more successful Japanese or Turkish legal modernisation¹⁶⁷ may in part be explained by the peculiar history of European extraterritoriality in Ethiopia which is, inter alia, a function of the value of the semicolonial entity to the capitalist economic order.

VII CONCLUSION

European extraterritoriality arrived in Ethiopia when European imperialism in the form of free trade was taking a new turn; that is, scrambling for tropical Africa.¹⁶⁸ Throughout the first three decades of the 1920s, Ethiopia's independence was thus precarious. Though Menelik II commanded a level of respect from European powers following his triumph over Italy in 1896,¹⁶⁹ the nation's semicoloniality remained delicate amidst continued European interest in converting it into a formal colony. Hence, it is no surprise that Ethiopia was a (de facto) protectorate of European powers for at least a decade between 1889 and 1955. That notwithstanding, a weak regime of European extraterritoriality emerged in 1908 when Ethiopia and France signed the unequal *Klobukowski Treaty*. The resultant mixed court system was in line with Ethiopian interpretation¹⁷⁰ of the treaty that, despite European protestation, did not always guarantee the protection of Europeans from 'uncivilised' Ethiopia and its laws. As noted, the wider leeway afforded to Ethiopia by the *Klobukowski Treaty* may, inter alia, be explained by Ethiopia's insignificance to the capitalist world order and its precarious semicoloniality. 'Rule not trade' (ie formal empire) as opposed to 'trade not rule' (ie extraterritoriality) appears to have dictated European relations with early 20th-century Ethiopia.¹⁷¹ As a result, Ethiopia escaped a more intrusive extraterritoriality regime that in other semicolonial states culminated in an earlier massive reception of Western legal technologies.¹⁷²

When European extraterritoriality in Ethiopia reached its apogee under British paramountcy, it was primarily intended to fill the void left by the departure of the Italians (who rhetorically justified their invasion of Ethiopia in terms of, inter alia, the African empire's 'primitive state of legal development')¹⁷³ and the decision of the British not to reinstate the weaker Special Court of the pre-Italian period. Accordingly, though predicated on the idea that semicolonial Ethiopia's legal culture was inadequate to provide protection for foreigners from 'civilised'

¹⁶⁶ Hooker, above n 103, 360–409.

¹⁶⁷ Ibid. See also, Antony Allott, *The Limits of Law* (Butterworths, 1980) ch 6.

¹⁶⁸ Gallagher and Robinson, above n 3, 15.

¹⁶⁹ See, eg, Harold G Marcus, 'The Black Men Who Turned White: European Attitude towards Ethiopians, 1850–1900' (1971) 39 *Archiv Orientalni* 155.

¹⁷⁰ For more on the European interpretation of art 7 of the *Klobukowski Treaty*, see Edwards, above n 44.

¹⁷¹ Craven notes unequal treaties in the age of informal empires were explicitly concerned with 'trade not rule': Craven, above n 4, 345.

¹⁷² See, generally, Kayaoğlu, *Legal Imperialism*, above n 2.

¹⁷³ Gong, above n 3, 128.

Europe, the preconditions for the abolition of extraterritoriality in Ethiopia were different from those practised in some semicolonial nations. When the British partially released Ethiopia from extraterritoriality in 1944, Ethiopia's legal modernity was nowhere near to that of, for example, Turkey or Egypt. The fact that Imperial Ethiopian rulers, who in the 1920s and 1930s complained about weaker extraterritoriality, acquiesced to the continuity of British-imposed extraterritoriality beyond 1944 may also evince Ethiopia's declining power and cultural self-confidence in a time of vanishing extraterritoriality and growing legal modernisation in other parts of the semicolonial world. Still, the actual decline of extraterritoriality in Ethiopia (as elsewhere) may be linked to its (otherwise late) legal modernisation projects of the 1960s.

Finally, the High Court and Supreme Imperial Court of Haile Selassie I's Ethiopia may rightly be viewed as some of the last mixed courts in the semicolony, even though they have often been emphasised as a self-initiated modernisation project. As noted, these courts retained mixed benches composed of British and Ethiopian judges, applied European laws (notably English) and protected foreigners from 'repugnant' Ethiopian laws and their custodians (lower Ethiopian courts). These were the primary functions of mixed courts in the semicolony.