

Law, Land and Identity: Property and Belonging in Colonial Kenya

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I. INTRODUCTION

This Article explores the relation between the British colonial presence in Kenya and the complex negotiations of cultural identity that accompanied it, with specific reference to the understanding of the law of property, and of dispossession and displacement. This is discussed in terms of hypotheses about the experience of the Kikuyu ethnic group, and the Mau Mau uprising. It is argued that the Mau Mau revolt was neither a race war, nor a heroic nationalist movement for independence.¹ It was, rather, a struggle for identity, spurred by the loss of land entailed by colonial legislation that underpinned 'lawfare'² and explicit and tacit violence. The unrelenting colonial pursuit of territoriality resulted in the creation of Kikuyu reserves, forced residence and labour on European farms, leaving the Kikuyu humiliated and as insecure tenants of their own traditional property, threatened by further loss of their cultural and personal identity. The rebellion that followed can be seen as an attempt to restore and reshape that identity, for which the relation between property, and individual and group identity, were crucial.

Reliance shall be placed on socio-legal research, human and critical geography, and psychoanalytic theory, to argue that an understanding of colonial dispossession and alienation requires the legal notion of land to be more deeply conceptualised. Ones' experience of land is far more complex and diversified than a traditional understanding of property law would propose; the latter imposing an analysis of land as a neutral asset of possession. In order to correctly understand the impact of the colonial encounter in Kenya, land needs to be thought of as space for self-realising action, in which identities are continually formed and reconstituted. Once land becomes theorised as

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¹ C Rosberg and JC Nottingham, *The Myth of 'Mau Mau': Nationalism in Kenya* (East African Publishing House 1966).

² Nicholas Blomley, 'Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid' (2003) 93(1) *Annals of the Association of American Geographers* 121, 128.

constitutive of social relations, we see that what was of concern for the indigenous Kenyans was not simply property and its relative rights, but the issue of belonging – the role of place in the constitution of social and cultural identities, and hence questions as to which identities should be reinforced, which should be considered out of place, and ‘how the space is to be oriented in the future’.³

This understanding of property and belonging suggests that land is implicated within broader networks, giving the law of property substance through the way in which it regulates people’s activities in space and the way this relates to their self-representation and identity. The laws regulating property have far-reaching effects, with the ability to reinforce, or damage, people’s sense of their identity and orientation within particular spaces or places. Colonial law established a foundation of ownership for colonial settlers, against which stands the indigenous sense of belonging, home and place ‘in its incommensurable difference’.⁴ Although much of the research relied upon is historical, the issues raised should not be viewed as belonging to an era of history that has now ended – indigenous subjectivity continues to ‘unsettle’⁵ the spaces of postcolonial areas such as Kenya.⁶

This Article will begin by discussing how one may understand property and the power to exclude as situated in the context of belonging and contextual continuity, enabling an exploration of the effects of property on identity. It will then move to discuss the colonial reconstruction of space in Kenya and the idea that property served as a tool of governance through the ways in which the British controlled space, and thus where people were allowed to go, and what they were allowed to do, with far reaching implications for individual and collective identity.

With specific reference to the Kikuyu ethnic group, this Article will discuss the contradictory feelings of belonging held by the settlers and the indigenous residents, with English property law forcefully disseminated to suppress the latter. This ‘legal’ dispossession is discussed in relation to identity and

³ Sarah Keenan, ‘Property as Governance: Time, Space and Belonging in Australia’s Northern Territory Intervention’ (2013) 76(3) *Modern Law Review* 464, 486.

⁴ Aileen Moreton-Robinson, ‘I Still Call Australia Home: Indigenous Belonging and Place in a White Postcolonising Society’ in Sarah Ahmed (ed), *Uprootings/Regroundings: Questions of Home and Migration* (Berg Publishing 2003) 23.

⁵ Sarah Keenan, ‘Subversive Property: Reshaping Malleable Spaces of Belonging’ (2010) 19(4) *Social Legal Studies* 423.

⁶ Interview with Dr Christian Turner, British High Commissioner in Kenya (London, 24 February 2014).

selfhood, with the settlers developing colonial law to ascertain their identities, to the detriment of the Kikuyu and their various constitutions of self-representation.

The Article will continue to argue that in order to produce a perceived hegemonic self, the Mau Mau insurgency transpired as a violent negotiation of collective identity, inextricably linked to property and the sense of belonging.

The Article will conclude that the Mau Mau uprising demonstrates that the law of property has a deeper dimension, as it plays a significant role in the processes by which we assign meanings to our own perceptions and behaviours. It will therefore suggest that the law must engage more deeply with the spatial to comprehend its centrality, requiring a re-articulation of law itself.

II. (RE)CONCEPTUALISING PROPERTY

This Section sets out the ideas and understandings of space that will be relied upon throughout the Article, discussing legal and philosophical work to explore the concept of property, and the power to exclude, moving to discuss its implications and connections with individual and collective identity. It will discuss the ways in which property may be understood and will draw on Hegelian and Lockean theory to situate the self in particular networks and relations of ownership, allowing us to reconceptualise property centred on belonging, which forms the basis of our analysis concerning the colonial encounter in Kenya and the Mau Mau uprising.

Despite exhaustive and extensive legal and philosophical work, 'property' remains difficult to define. Indeed, theorists such as Waldron have asserted that property is an essentially contested concept.⁷ There is, however, some consensus that, most significantly, property gives the subject the power to exclude. Thus, Merrill asserts that 'the right to exclude others is a necessary and sufficient condition of identifying the existence of property'.⁸ The works of Cohen have embraced the analysis of those such as Demsetz to argue that the essence of property is 'always the right to exclude others'.⁹ The key to property therefore lies in the *in rem* nature of the right to exclude – property is 'good' against the

⁷ Jeremy Waldron, *The Right to Private Property* (OUP 1990).

⁸ Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730, 731.

⁹ Adam Mossoff, 'The False Promise of the Right to Exclude' (2011) 8(3) *Econ Journal Watch* 255, 256.

world. Indeed, Penner defines property itself as ‘the right to determine the use or disposition of a ... thing ... in so far as that can be achieved or aided by others excluding themselves from it’.¹⁰ This intangible power to exclude has far reaching material effects, including the dispossession and the appropriation of indigenous Kenyan land that we will be discussing.

The understanding of property as a proper part or extension of the subject has a long history in Western philosophy, most prominently in the works of Locke and Hegel. Locke famously argued that every man has property in his own person, which he could develop by mixing his labour with uncultivated land.¹¹ Thus, property is seen to be an inherent part of the subject – one’s labour – and an extension of it – the land upon which one is labouring.¹² This unilateral act of appropriation does not require permission, so long as the appropriator leaves enough and as good for others. Hegelian theory centres on the contribution property makes to the development of the self – the subject only achieves selfhood through such a process of appropriation. Thus, ownership of property allows the individual to ‘supersede the mere subjectivity of personality’¹³ by translating his free will into the external sphere through so altering objects as to make them his own. This externalised will is then to be understood as property to be recognised by others, and the individual so recognised is to be regarded as a subject. Both Lockean and Hegelian theory remain influential, and although neither will be the focus here (and the former will be a point of criticism), much of this Article will be consistent with these understandings of property as an essential part of the subject.

Although some legal theorists have pointed out the socially constructed nature of property,¹⁴ it is still understood as something fixed and permanent. Property/land law has also tended to assume that space is static – a neutral asset of possession – and an inert backdrop to socio-political or legal action. But despite both the philosophical and legal separation of the subject and his/her property, the subject is in fact always connected to that which is outside it. An individual influences, and is influenced by, their relationship to a place or space. As detailed later, it is through the continuous relationship with certain meaningful spaces and objects, in relation to the self, that people are able to

¹⁰ James Penner, *The Idea of Property in Law* (OUP 1997) 152.

¹¹ John Locke, *The Second Treatise of Government* (Barnes & Noble Publishing 1690).

¹² Sarah Keenan, ‘Bringing the Outside(r) in: Law’s Appropriation of Subversive Identities’ (2013) 64(3) Northern Ireland Legal Quarterly 299, 300.

¹³ Georg Hegel, *Philosophy of Right* (George Bell & Sons 1896) 73.

¹⁴ Kevin Gray, ‘Property in Thin Air’ (1991) 50(2) Cambridge Law Journal 252.

conceive of themselves and relate to one another as full persons. Self-representation and intersubjectivity are therefore processes involving identity that are intimately connected with property – as Davies has argued, and as shown in the case of the Kikuyu, ‘having’ is inextricably linked to ‘being’.¹⁵ Behaviours or identities are guided spatially by that which ‘fits in’ or ‘is at home’ in a particular place.¹⁶ Property is not a dead or inert matter; it is informed by a relationship of belonging – a relationship that is in many ways the inverse of the power of exclusion. The power of belonging, as one might say, is the power of inclusion.

It therefore becomes necessary to look at one’s right to possess and/or exclude in the broader context of belonging and contextual continuity. Land is not simply property to be transferred in a single exchange. The activities in which it plays a role are constantly evolving, in ways that constitute social relations, and thus implicitly define who belongs where and how. According to this understanding of property and belonging, property is not defined by law alone, but through a whole variety of social norms of relations.

This enables us to see the far-reaching implications of laws regulating property and the significant power of property itself. Taken in this way, property law is not simply about property – it is situated in, and so should be conceived as a broader context of belonging, and hence a context of human norms, practices and actions. As Keenan has persuasively argued, legal appropriations are not merely a matter of bringing the colonial ‘outsiders’ in, but about reshaping what is to be understood as the outside.¹⁷

Through this discussion, it is apparent that the present conception of property law does not adequately engage with property’s deeper dimensions and so should be reconceptualised as constituting and influencing various networks of belonging, and thus identities. It is with this understanding, and this connection between identity and property, that the British appropriation of Kenyan land and its relation to the Mau Mau insurgency itself is discussed in the following Section.

¹⁵ Margaret Davies, ‘Queer Property, Queer Persons: Self-Ownership and Beyond’ (1999) 8(3) *Social & Legal Studies* 327.

¹⁶ Davina Cooper, *Governing out of Order: Space, Law and the Politics of Belonging* (Rivers Oram Press 1998).

¹⁷ Keenan, ‘Bringing the Outside(r) in’ (n 12).

III. 'I DO NOT SEEM TO TRUST OR LIKE THESE PINK PEOPLE'¹⁸

3.1 Parasites in Paradise¹⁹

This Section offers an account of the British acquisition of Kenya, and the ideological justifications that accompanied it, legitimising forceful appropriation and reconstruction of indigenous land. It will then discuss the legal processes of alienation and dispossession, arguing that property served as a tool of governance, and will finally explore the powerful effect of this on identity.

The British colonial encounter in Kenya was inspired by the early imperialist 'explorers' as the 'almost unspeakable richness'²⁰ of East Africa became visible to the European eye. The opinion began to emerge 'that one of the finest parts of the world's surface is lying waste under the shroud of malaria which surrounds it'.²¹ Explorers such as David Livingstone were represented as being the 'first' to see 'new' land; bringing about a conceptual 'emptying' of land by rewriting pre-existing space as unoccupied. This spatial (re)construction took place through a heroic narrative, in which the explorer used technical vocabulary and measurements to describe the land as vacant from his privileged position.

This can be seen as a strategy for converting space into an imaginable object that the European mind could possess. Indigenous space, dense with meanings and cultural relations, was conceptually remapped as vacant land, in 'an organised forgetting',²² that left the space desocialised and depoliticised. Indigenous individuals could thus no longer fit into this empty landscape without 'spoiling the picture', and so were depicted as if in a harmonious existence with the landscape and with nature itself – effectively as part of it.

This wholly natural space was thus suited to the introduction of European land-owning, and therefore, as persuasively argued by Ryan,²³ a whole social system that went with it. Accordingly, the Berlin Conference of 1885 purported to set out the law relating to the acquisition of authority over territory in Africa.

¹⁸ William Ochieng, *Eastern Kenya and Its Invaders* (East African Literature Bureau 1975) (quoting an indigenous Kenyan, Waiyaki Wa Hinga, describing his experience of the British invasion).

¹⁹ Ngugi Wa Thiong'o, *Detained: A Writer's Prison Diary* (Heinemann Publishers Ltd 1981) 29 (using this phrase to describe the presence of the British in Kenya).

²⁰ Verney Cameron, *Across Africa* (Harper & Brothers Publishers 1877) 179.

²¹ J Baker, 'December Issue' *The Times Newspaper* (1873) 1.

²² Blomley (n 2) 128.

²³ Simon Ryan, *The Cartographic Eye: How Explorers Saw Australia* (CUP 1996) 8.

This marked the creation of new spaces of property – the geographies of land ‘underwent a fundamental redrawing’.²⁴ Here, the European nations with an interest in Africa were given the right to partition any part of it, as long as they informed the other European nations of their intention to do so. Thus, Africa was divided into spheres of influence – to avoid confrontation, among other things, for the saving of African souls.²⁵

Such appropriation of indigenous land was not merely an act of accumulation and acquisition. It was supported and driven by ideological notions that certain territories and their residents require domination, ‘as well as forms of knowledge affiliated with that domination’.²⁶ Acquisition was justified using explicitly racial and cultural criteria to label certain states as ‘civilised’ and sovereign, and other states as ‘uncivilised’ and non-sovereign.²⁷ Non-European states such as Kenya were said to lack legal personality, and (reflecting the notion of ‘organised forgetting’ mentioned above) their land was termed *terra nullius* (land belonging to no one).²⁸ This portrayed its property as the relation between the colonial power and an inert space, diverting attention from the set of socialised relations between the colonisers and others.

The belief in the inherent inferiority of the indigenous owners legitimised military invasion and the forcible appropriation of the territory occupied by indigenous individuals. The law constructed boundaries between legitimate and illegitimate violence, and ‘socio-spatial zones where violence was tolerated’.²⁹ For colonial law, the racialised figure of the ‘savage’ played an essential role, legitimising violence by conceiving indigenous people as incapable of understanding legal rights and duties, including property law.³⁰ The ‘savages’ of Kenya – who in fact had a sophisticated and traditional understanding of the social use of land – were thus set conclusively apart from the West, their resistance deemed illegitimate. Conquest and exploitation were justified as part of a civilising mission, as the British had ‘a duty of civilising the inferior races’,³¹ kindly discharging the white man’s burden.

The justification behind such invasion lay in a profound belief in the rightness

²⁴ Blomley (n 2) 129.

²⁵ Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya* (Henry Holt & Company 2005) 5.

²⁶ Edward Said, *Culture & Imperialism* (Vintage Books 1993) 8.

²⁷ Elkins (n 25) 5.

²⁸ Yash P Ghai, *Public Law and Political Change in Kenya: a Study of the Legal Framework of Government from Colonial Times to the Present* (OUP 1970).

²⁹ Blomley (n 2) 132.

³⁰ Elkins (n 25) 7.

³¹ Robert Klein, *Sovereign Equality Among States* (University of Toronto Press 1974) 51.

of this mission, which could not be understood outside of a Euro-centric historical tradition. The British were going to shed light on the 'dark continent' by helping the 'natives' on their journey to modernity and turning them into enlightened residents. With superior British management and firm paternalistic love, Kenyans could be transformed into civilised men and women.³²

3.2 Spatial Governance

The declaration of a protectorate over much of what is now Kenya on June 15, 1885 marked the beginning of official British rule and was followed by a systematic and 'legal' process of alienation and dispossession. Again, this was made possible by the claim that the Kenyans were not civilised enough to govern themselves – and quite without the intellect to administer property rights.³³ According to this understanding, the colonial power was not stealing land, but acting as self-appointed trustees for the 'hapless natives who had not yet reached a point on the evolutionary scale'³⁴ to make decisions on their own, as later confirmed in the White Paper of 1923.

In 1883 the British were advised by the Law Officers that the exercise of protection over a state did not carry with it the power to alienate the land contained therein; a major obstacle to the colonial authorities.³⁵ Their answer, however, came in the form of the Indian Land Acquisition Act of 1894, which was extended in 1896 to allow the acquisition of land for the railway, government buildings and for other 'public' purposes.³⁶ By 1897 the Commissioner could offer certificates of occupancy to settlers valid for ninety-nine years.³⁷ This, seemingly not enough, led the Law Officers to lay out a new set of principles in 1899 whereby the right to deal with any land was accrued to Her Majesty, by virtue of her right to the protectorate.³⁸ With 1899 being a creative year for the colonial legislators, the Law Officers decided that the Foreign Jurisdiction Act of 1890 empowered the Crown to control and dispose of waste and 'unoccupied land' in the protectorates with no settled forms of government.³⁹ Unsurprisingly, most land turned out to be unoccupied on this account. In 1901 the East African (Lands) Ordinance-in-Council was enacted, conferring on the Commissioner of the Protectorate (later named Governor) the

³² Elkins (n 25) 5.

³³ Blomley (n 2) 125.

³⁴ Elkins (n 25) 5.

³⁵ Ghai (n 28) 36.

³⁶ The Land Acquisition Act 1894, s 4(1).

³⁷ The British East Africa Lands Regulations Act 1897.

³⁸ Ghai (n 28) 39.

³⁹ *ibid* 40.

power to dispose of all public lands on such terms and conditions as he might think fit.⁴⁰ Following this, in 1902, the Crown Lands Ordinance was promulgated, which provided for outright sales of land and leases of ninety-nine years duration – the land was thus ‘absorbed for settlement as necessary’.⁴¹

The relationship between the control of a population and the preservation of sovereignty over territory is an established and well-publicised one. International law has repeatedly required proof of control over an identifiable area of space before regarding a state to be sovereign.⁴² Edward Said has emphasised that the relation between imperialism and land is an essential one, stating that ‘at some very basic level, imperialism means thinking about, settling on, and controlling land that you do not possess, that is distant, that is lived on and often involves untold misery for others’.⁴³

When the British invaded Kenya, they were not merely deciding to whom the land belonged to in law; rather they were determining whose space of belonging mattered and how that space was to be shaped in the future.⁴⁴ Through facilitating extensive settler occupancy with legislation such as the Crowns Land Ordinance, the British were establishing their identities as white settlers, giving priority to their sense of belonging through the alienation of the indigenous owners. By lengthening occupancy periods and securing leases of land, they were strengthening British ownership and ensuring its permanent nature. Fanon and Ahmed emphasise that doing things depends not so much on one’s inherent capacity, but on the ways in which the world is available as a space for action – the way bodies are oriented affects what they are able to do.⁴⁵ Those such as Foucault have demonstrated that governance works not only through the channel of direct state control, but a more subtle control of identities through the medium of permissible behaviour and thoughts.⁴⁶ Actions necessarily take place within a spatial context: as Waldron contends, ‘Everything that is done has to be done somewhere’.⁴⁷ Kenyans were not free to perform an action unless there was somewhere they were free to perform it. Subjects and behaviour that did not fit correctly into the spaces constructed by colonialism were to be excluded or adjusted, through the toleration or refusal of

⁴⁰ *ibid.*

⁴¹ Geoffrey Snell, *Nandi Customary Law* (Macmillan & Company 1954) 42.

⁴² Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).

⁴³ Said (n 26) 7.

⁴⁴ Keenan, ‘Bringing the Outside(r) in’ (n 12).

⁴⁵ Frantz Fanon, *The Wretched of the Earth* (Penguin Books 1967).

⁴⁶ Victor Tadros, ‘Between Governance and Discipline: The Law and Michel Foucault’ (1998) 18(1) *Oxford Journal of Legal Studies* 75.

⁴⁷ Waldron (n 7) 296.

particular actions and ways of being. This shaped specific social norms that encouraged individuals to govern themselves in a desired way, making space a powerful tool in attempts to control the population. Harris acknowledges the importance of land as a disciplinary power of the British as 'it defined where people could and could not go, as well as their rights to land use'.⁴⁸ Indigenous land was alienated for private settlement and to build commercial railways, which in turn would encourage the arrival of more settlers. Any land alienated, whether for construction or occupation, became Crown land that was subject to the control of Her Majesty. Indigenous owners were excluded from vast areas of their own land and lost control of its use and settlement – 'the land system itself became powerfully regulative'.⁴⁹

The British were able to use the land system as a tool of governance due to the network of relationships it was a part of – property is connected to how one is able control and use space, which itself is related to cultural identity. These connections were particularly salient for the Kikuyu. The dispossession of their land and lack of resources affected where they were oriented in space, which related to what they were able to do, which in turn affected who they understood themselves to be, that is, their self-representation. As Elkins demonstrates, to be a male or female, to progress from childhood to adulthood, a Kikuyu needed land and the freedom to do certain things with it.⁵⁰ A Kikuyu man needed land to gather the resources to pay bridewealth for a wife who would give him children. This property, and family, would entitle him to certain privileges within the system of patriarchy; without it he would continue to be seen as a boy rather than as a man, a father and the head of a family.⁵¹ A female needed land to labour on and cultivate, to feed and sustain her family; without such she too was not seen as an adult. Much in line with Hegelian theory, '[a] Kikuyu could not be a Kikuyu without land'.⁵² Their property was to them inalienable, captured in the proverb '*ilmeishooroyu Emurua oolayioni*', which means that sons and land cannot be given out.⁵³ Some of the importance of these connections is illustrated by the reply Sam Thebere, a former guerrilla, gave to the question, 'Why did you join the Mau Mau?' He answered with the

⁴⁸ Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (University of British Columbia Press 1997) 83.

⁴⁹ *ibid.*

⁵⁰ Elkins (n 25) 13.

⁵¹ *ibid.* 14.

⁵² *ibid.*

⁵³ John G Galaty, 'The Land is Yours: Social and Economic Factors in the Privatization, Sub-Division and Sale of Masaai Ranches' (1992) 30 *Nomadic Peoples* 26.

twofold reply, 'to regain stolen lands and to become an adult'.⁵⁴ Thus, control of the land to which he belonged, and the possibility of Kikuyu adulthood, were naturally linked in his mind.

Thus, it is evidenced that the British encounter in Kenya and the colonial reconstruction of land enabled a conceptual 'emptying' of space, which was justified by the notion that the indigenous owners were incapable of governing their own property. Property and the land system itself were employed as tools of governance, as the dispossession and alienation of indigenous land meant that the British were able to influence individual and collective behaviour through land allocation and use. Drawing on our understanding of property and belonging, we will further see that the 'legal' dispossession of indigenous land would have profound effects, beyond the loss of relative rights – a partial loss of identity.

IV. 'THEY ARE BUILDING THEIR HOUSES WITH STONES, AND I FEAR THEY WILL STAY HERE LONGER THAN WE WISH'⁵⁵

4.1 Settling In

With the dispossession of indigenous lands and British settlement, Kenya emerged as the 'White Man's Country'. This Section discusses the increased settler occupancy and security, the very foundation of which was the alienation of the Kenyan citizens. It considers the effects of this more specifically on the Kikuyu ethnic group, arguing that Lockean theory and English property law were disseminated, disrupting previous patterns of ownership and possession formed through customary law – an integral component to Kikuyu identity.

The Section will detail the establishment of Kikuyu reserves, arguing that such control of space blurred familiar parameters between communities previously invested with meaning of distance and difference, resulting in feelings of displacement and the formation of an 'us' and 'them' within Kikuyu society.

Various agricultural policies will be examined, describing the subordination of Kikuyu land use which forced the Kikuyu to accept their place as squatters on European farms – their movement further controlled and restricted. The Section aims to illustrate the combination of various legal measures concerning

⁵⁴ John Lonsdale, 'The Moral Economy of Mau Mau: Wealth, Poverty & Civic Virtue in Kikuyu Political Thought' in Bruce Berman and John Lonsdale, *Unhappy Valley: Conflict in Kenya & Africa*, vol 2 (East African Educational Publishers 1992) 315.

⁵⁵ Moreton-Robinson (n 4).

property and land use and their powerful effects on collective and individual identity, which we will later discuss as the foundation of the Mau Mau revolt.

Following British acquisition settlers were soon to arrive, building themselves a small piece of England in a foreign land. By 1905, nearly 3,000 settlers had landed, acquiring estates of enormous size; with aristocrats such as Lord Delamere receiving title to approximately 100,000 acres and acquiring another 60,000 a few years later.⁵⁶ Many settlers such as Michael Blundell were quick to become members of the Kenya Legislative Council, having a direct input to the colony's laws and regulations.⁵⁷ The Council hastily assured that there would be ample land and labour to support settler production, both of which would of course come from the Kenyans. The settlers successfully lobbied for greater security in their new land, and their leases in the Highlands were extended from 99 to 999 years.⁵⁸

The foundation of the apparent entitlement to Kenyan space and territory owed itself to a belief predicated on a profound racial superiority.⁵⁹ This was aptly demonstrated by a settler in Kenya, Margery Perham, who wrote, 'I think I now understand the immigrant community. To own a bit of this virgin country; to make it a house; to feel the sense of singularity, of enhanced personality that comes from having white skin among dark millions'.⁶⁰ The settlers perceived themselves to be acquiring both land and belonging, against the background of the displaced indigenous, who were losing both.

Although undoubtedly many ethnic groups were affected by the colonial policies forcibly opening up their land for settlement, there is no better illustration than the Kikuyu, who lost over ninety-four square miles of their rich highlands (later to become known as the White Highlands) to the settlers.⁶¹ Contrary to the common misconception that 'African communities only began to come to grips with the concept of limited land during the colonial period',⁶² the Kikuyu, as we shall see, had a complex traditional system of norms and customs governing the use of land. The Kikuyu had previously relied upon

⁵⁶ Elkins (n 25) 10.

⁵⁷ *ibid* 12.

⁵⁸ *ibid* 11.

⁵⁹ See Cheryl Harris, 'Whiteness as Property' (1993) 106(8) *Harvard Law Review* 1707 (raising the question of whether one's skin colour is itself property).

⁶⁰ Margery Perham, *East Africa Journey: Kenya and Tanganyika, 1929-30* (Faber & Faber 1976) 190.

⁶¹ Elkins (n 25) 12.

⁶² Elizabeth Colson, 'The Impact of the Colonial Period on the Definition of Land Rights' in Victor Turner (ed) *Colonialism in Africa 1870-1960, Profiles of Change: African Society and Colonial Rule* (CUP 1971) 193.

negotiations of territorial expansion to ease population pressures or to soothe internal civil struggles. However, with the coming of colonial rule, they found themselves 'hemmed in on all sides'.⁶³

The very foundation of the settler community was the alienation of Kenyan land – settlers were determined to make it their home, albeit with the concession that 'there will possibly be somewhat of a crush later'.⁶⁴ After much lobbying, settlers obtained further assurances about the racially exclusive, and more permanent, nature of white settlement in the Highlands.⁶⁵ The Crown Lands Ordinance 1915 and the Kenya (Annexation) Order in Council 1920 iterated that no 'native' rights were reserved, and the Kenya Colony Order in Council 1921 reserved the Kikuyu's land for the Crown. The Report of the East Africa Commission 1925 thus stated that 'the legal position appears to be that no individual native and no native tribe as a whole has any right to land in the Colony which can be recognised by the courts'.⁶⁶ Thus, any legal rights or title the Kikuyu held in their land, whether communal or individual, had disappeared in law, and were superseded by the apparent rights of the Crown. The disinheritance of the Kikuyu from their land was swiftly completed, confirmed in the case of *Wainaina*⁶⁷ in which it was held that all rights to their land had been stripped from the indigenous owners, and those rights were vested in the Crown, leaving the Kenyans tenants of what they justifiably understood as their own property and exiles in their own country.

Conceiving of property as a relationship of belonging, capable of being described, formalised and organised by law, but *not* ultimately constituted by it, encourages a clearer understanding of property law as highly culture-specific. English property law was widely disseminated, with few questions asked about the previous pattern of relationships this system had disturbed.⁶⁸ It was declared that such relationships did not give rise to legal title, as the British were both unable and unwilling to translate indigenous patterns to their English counterparts. As colonisation spread British law and culture across the Empire,⁶⁹ such understanding of property spread on a supposedly Lockean basis, and the Kikuyu were not recognised as proper self-owning subjects, however much they seemed to mingle their labour with the local soil.

⁶³ Elkins (n 25) 14.

⁶⁴ Ainsworth to Wright (DC/MKS/10A/1/2, 12 July 1905).

⁶⁵ Elkins (n 25) 12.

⁶⁶ Report of the East Africa Commission (CAB/24/173, 1925) 23.

⁶⁷ *Wainaina v Murito* [1922] 9 KLR 102.

⁶⁸ Alison Clarke and Paul Kohler, *Property Law: Commentary and Materials* (CUP 2005) 138.

⁶⁹ Eugene Cotran, 'The Place and Future of Customary Law in East Africa' (1996) 5(19) Commonwealth Law Series 72.

Simultaneously, the Kikuyu did not regard the British claim to their land as justified by the British forcefully taking control and implementing their own kind of agriculture.

Varied networks of belonging and contradictory conceptions of property existed in both hybridity and ambiguity within the same space, but with the European understanding being enforced, and where necessary with violence, through the law. As the legal system was the root of settler land title, the law overwhelmingly protected non-indigenous property.⁷⁰ The Government Land Act 1915 further dispossessed Kikuyu inhabitants of their land, whilst introducing the English law of conveyancing by registering deeds to European settlers, requiring title to be traced back to the government grant. The Torrens system of title was subsequently introduced by the Registration of Title Act 1919, giving settlers an indefeasible title to their registered property.⁷¹ Such measures established the rights of white settlers, to the exclusion and detriment of the Kikuyu inhabitants.

The Kikuyu however, asserted that they had customary rights of ownership for their families and descendants; legal rights they termed *githaka*. The holding of *githaka* rights bestowed full control and tenure security to the owner, which could not normally be removed.⁷² The Kikuyu law determined that original use and longevity of residence in an area provided a *ngundu* (land claim), which had been passed down through generations, with different sub-branches and estates. Many of those alienated by colonial law from their land nonetheless believed they had lineage rights to it, which gave them absolute ownership, with rights of cultivation and management held in perpetuity.⁷³ The British were happy to ignore 'any rights existing under customary law',⁷⁴ but were forced to acknowledge some evidence of proprietary interests, deciding that these were rights of occupancy rather than ownership.⁷⁵ Thus former *githaka* holders were informed they were instead '*ahoi* (tenants) and would be dispossessed if they did not obey the settlement rules and the instructions of the Settlement Officer'.⁷⁶

⁷⁰ Keenan, 'Property as Governance' (n 3).

⁷¹ Ghai (n 28).

⁷² Peter Dewees, *Social and Economic Incentives for Smallholder Tree Growing: A Case Study of the Murang'a District, Kenya* (Food and Agriculture Organisation of the United Nations 1993).

⁷³ *ibid.*

⁷⁴ Patricia Kameri-Mbote, 'Righting Wrongs: Confronting Dispossession in Post-colonial Contexts' (2009) 1 *East African Law Review* 103, 109.

⁷⁵ Sara Berry, *No Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (University of Wisconsin Press 1993) 113.

⁷⁶ David Throup, *Economic & Social Origins of Mau Mau: Eastern African Studies* (Ohio University Press 1987) 126.

As Singh offers, customary law itself is 'intrinsic' to the identity of an individual, providing rules and enforcement procedures, as well as punishment for breaches or violations.⁷⁷ Property is reliant upon both formal and informal authoritative practices, which give recognition to particular relations of belonging, while ignoring or rejecting others. In systematically upholding English law over Kikuyu law and custom, the British were producing a space in which the Kikuyu identities, practices and ways of life 'may not be held up in the future'.⁷⁸ As Pottage demonstrates, by privileging abstracted legal rules over local networks that had been developed and modified over many centuries, the British were removing titles 'from networks of organic or practical memory' and depositing them 'in an administrative archive, accessible and decipherable only to the index of the archive'.⁷⁹ Pottage's research thus shows that when the organic memory belongs to one set of laws (the Kikuyu) and the index of the archive to another (the British), then that removal of the title is likely to have devastating effects.

The Kikuyu continued to assert an ontological relation to their land, claiming that their land was constitutive of their being, and their property was thus inalienable. The 'legal' dispossession of the Kikuyu's land was thus not simply practically problematic, but a threat to their selfhood. The Kikuyu's knowledge and practices were 'lost in legal space', owed to the way in which the law 'divides, parcels, registers and bounds peoples and places'.⁸⁰ What was at stake was not simply a positional good; the Kikuyu were struggling to belong in their own land.

4.2 Continuing Lawfare

The white settlers were developing colonial law to reflect their control of space and place and to ascertain and strengthen their own identities. The British created a legal system that both established and reinforced particular practices and actions within their colonial space, working as a framework in which their sense of belonging was constituted. The development of the legislature mirrored the development of their identities as white Kenyans; their sense of belonging paralleled the disenfranchisement of the Kikuyu and the ongoing destruction of their alternative sense of identity and belonging. A new order of belonging was being established, as the settlers were constructing their own

⁷⁷ Kumar Singh (ed), *Tribal Ethnography, Customary Law, and Change* (Concept Publishing Company 1993) 7.

⁷⁸ Keenan, 'Property as Governance' (n 3).

⁷⁹ Alain Pottage, 'The Measure of Land' (1994) 57(3) *Modern Law Review* 361.

⁸⁰ John Borrows, 'Living between Water and Rocks: First Nations, Environmental Planning and Democracy' (1997) 47(4) *The University of Toronto Law Journal* 417, 422.

sense of self by building their houses on Kikuyu land, in effect attempting to bury indigenous rights and entitlements.

But, alternatives were provided. The Native Lands Trust Ordinance 1930 established Kenyan reserves, which were defined rural areas – eventually with official boundaries⁸¹ – similar to the homelands in South Africa or the Native American Reserves in the United States. The Kikuyu thus had their own reserves in the Central Province districts of Kiambu, Fort Hall and Nyeri. Ethnic groups in the colony were expected to live separately, with the Maasai residing in the Southern Province and the Luo in the Nyanza Province.

The establishment of the reserves was a form of disciplinary governance, underlining the fact that ‘power and space/place are deeply intertwined’.⁸² The British co-ordination of society altered the meanings of space and place, also conveying the message that the Kikuyus’ land outside of the reserves was not an indigenous place of belonging anymore; rather it was that of the British. Areas such as Murang’a, a place where the Kikuyu had previously felt free to call their own, were not simply physical places where they were now unable to go, but locations whose significance had been destroyed. Colonial law ignored the spatial parameters by which the Kikuyu assigned significance, so that the natural process by which such practices evolved, and are modified and reconstituted, were disrupted.

Once established, the reserves were ‘gazetted’, thereby giving them ‘some sort of legal status’;⁸³ but this did not restore any legal rights to Kikuyus in their land. This created a deep sense of insecurity. Familiarity and predictability are important components to a person’s life – there is a desire to live in a place that is stable; where social interaction involves what Mead refers to as a ‘conversation of gestures’; gestures that are mutually understood.⁸⁴ In addition to their dispossession, the Kikuyu desire for stability and order was so radically disregarded that their anxiety and frustration increased exponentially over time.

Some Kikuyu were able, through allegiances with the colonial government, to retain their land and even appropriate that of others. This had further social

⁸¹ ‘Government Notice No. 100’ *Kenya Gazette* (1934).

⁸² Sarah Radcliffe, ‘Popular and State Discourses of Power’ in Doreen Massey and John Allen (eds), *Human Geography Today* (Polity Press 1999) 225.

⁸³ Martin Kilson, ‘Land and the Kikuyu: A Study of the Relationship between Land and Kikuyu Political Movements’ (1955) 40(2) *The Journal of Negro History* 103, 123.

⁸⁴ Donald Bushman, ‘A Conversation of Gestures: George Herbert Mead’s Pragmatic Theory of Language’ (1998) 16(2) *Rhetoric Review* 253.

consequences in the words of General George Crook, 'Nothing breaks them up like turning their own people against them',⁸⁵ and the privilege allocated to certain members within their community became a divisive and damaging occurrence. Inside the reserves many were fostering a more certain feeling about their own identity in relation to those who remained outside of the reserve that they believed had betrayed them.

British ownership provided both the means and landscape through which particular behaviour could occur, and it is the response to this behaviour – the indigenous reassertion of rights – that produced a perceived hegemonic collective self. Thus, an 'us' formed – those who recognised the grievance and shared responsibility alongside the collective frustration felt towards dispossession. In perceived opposition was the 'them' who were felt to have betrayed 'us' for the privilege of retaining or acquiring property in accord with colonial law and practice and who were no longer seen as part of the collective.

With insufficient land to live on, many Kikuyu migrated to find shelter in the Mau Forest, which was straddled by both the Maasai and the Ogiek who were struggling to establish ownership following their own dispossession by the Anglo-Maasai treaties of 1904 and 1911. The area assigned to the Maasai was not freely open to the different and distant understanding of the Kikuyu, and vice versa. Property and land clearly become invested with a further meaning, emphasising the distance and difference between what is close and what is far away.

Moreover, the idea that many communities 'wish to be open to all comers ... where anyone can automatically belong',⁸⁶ was not necessarily true of pre-colonial Kenyan communities. There was undoubtedly the appearance of equilibrium amongst Kenyan communities, with much focus on the social order and cohesion. However, this 'mutual good-will characteristic'⁸⁷ has been over-emphasised, an idealisation perhaps due to sympathetic postcolonial discourse, but rather misguided in its implications, as it undermines the complexity of the individual in his/her social and cultural context, it is unlikely that there was such a 'Garden of Eden from which colonial intervention caused Africa to fall'.⁸⁸ Thus, despite the promotion of the idea that 'membership was fluid',⁸⁹ it

⁸⁵ Douglas Porch, *Imperial Wars: From the Seven Years War to the First World War* (OUP 2005) 108.

⁸⁶ Davina Cooper, 'Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32(3) *Law & Social Inquiry* 625, 654.

⁸⁷ Snell (n 41) 12.

⁸⁸ Sally F Moore, 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts' (1992) 26 *Law & Society Review* 11, 16.

in fact remains true that Kikuyu, Maasai and Ogiek spaces were distinct and contested, meaning their sense of self was constructed in relation to their individual areas and their position in relation to others.

When people belong somewhere, they are usually out of place somewhere else, and how one imagines these spaces and boundaries significantly influences how we construct perceptions of self and other. As Susan Smith has argued, people define themselves and label others partly as a means to an end – ‘an end which is often about access to, and control over, symbolic and territorial resources’.⁹⁰ Through our everyday lives we constantly negotiate space, positioning ourselves socially, politically and physically in relation to others. Forced into a new space, the Kikuyu constructed an introverted sense of place, where imaginings of there (the Mau Forest) and here (Southern Kiambu) created a sense of self.

Here, one may draw on Melanie Klein’s psychoanalytic object-relations theory. In this account the self is socially positioned, and there are internalised representations of others as good or bad objects.⁹¹ The self seeks to identify itself with the good objects and to dissociate itself from the bad and keep them at a distance.⁹² The process of locating badness at a distance from the self, in ‘bad’ others, is described as projection. This is the process by which the kind of good ‘us’ opposed to a bad ‘them’ was created among the Kikuyu in the reserves, by contrast with the ‘loyalists’ who had retained their property. The effect of such identification and projection is to create a sense of parameter – the boundaries of the self may be defined in terms of good and bad objects, and hence good and bad groups, to whom the self is felt to be related. This, it may be argued, can be extended to an understanding of property. Thus, the creation of difference is not just an expression of anxiety about people who we see as ‘not like us’; it is also a manifestation of negative feelings about spaces that are ‘not like our space’.

To avoid tension and encroachment onto other ethnic groups, many families dispersed to distant areas in Nairobi to seek help from even more distant relatives. Such separation disturbed how the Kikuyu imagined their community – a group of people (an ‘us’) bound together by ‘some kind of belief stemming from particular historical and geographical circumstances in their

⁸⁹ Mbugua Wa-Mungai (ed), *(Re)Membering Kenya: Vol.1 Identity, Culture and Freedom* (Twaweza Publications 2010) 38.

⁹⁰ Susan Smith, ‘The Cultural Politics of Difference’ in Doreen Massey and John Allen (eds), *Human Geography Today* (Polity Press 1999) 133.

⁹¹ Jay Greenberg, *Object Relations in Psychoanalytic Theory* (Harvard University Press 1983).

⁹² *ibid.*

own solidarity'.⁹³ In the Report of the Kenya Land Commission, Elders had described the dispersion of their group as 'causing great loss to the Kikuyu community'.⁹⁴ The cultural certainties disturbed through the blurring of familiar lines between 'here' and 'there' resulted in a feeling of displacement. Whether the collective connection to land is regarded in a structuralised sense or indeed an essential connection between space and culture, it is nonetheless partially severed.

4.3 The Story of the Squatter

As British lifestyle and agriculture developed, the legal system catered to the different modifications and progression of British identity and the building of another 'us' – the white collective. In Central Province, the Kikuyu, who had retained enough land, adapted by increasing their maize production and selling it in the developing internal market.⁹⁵ The British were not slow to understand the significance of this threat, and they sought to limit Kenyan agricultural production. Legislation such as the Outlying Districts Ordinance 1902 (now the Outlying Districts Act) and the Special Districts Administration Ordinance 1934 (today the Special Districts Administration Act) meant that Kenyans were prevented from growing the most profitable crops such as coffee, tea and sisal. Each of these legislative steps was not simply putting down words, but strengthening the British variants of identity, as farmers, as employers and as superior white Kenyans. They were building on their collective 'us', expanding the law to enable them to 'fit in', or 'be at home' in Kenya, reinforcing their belonging.

These measures subordinated Kikuyu land use and agriculture, while the British were left with more land than they possibly could farm. Consequently, British and European employers relied upon coercion by the colonial government to recruit Kenyan labour from the Kikuyu population, then living on the margins of what had been their own land. The government's guarantee of 'cheap and bountiful kikuyu labour'⁹⁶ was based on a complex set of laws aimed at driving Kikuyu to European settler farms, described as 'working for their own extinction, since every hectare of trees they plant is a hectare of their birth right lost forever'.⁹⁷

⁹³ Gillian Rose, 'Performing Space', in Doreen Massey and John Allen (eds), *Human Geography Today* (Polity Press 1999) 250.

⁹⁴ Report of the Kenya Land Commission 126.

⁹⁵ Elkins (n 25).

⁹⁶ *ibid* 15.

⁹⁷ Towett Kimaiyo, *Ogiek Land Cases and Historical Injustices 1902-2004* (Kenyatta University Publishing 2004) 12.

To force the Kikuyu to accept their place on the European farms, the government promulgated The Hut Tax Regulations of 1901 and the Hut and Poll Tax Ordinance of 1910, together amounting to the payment of nearly twenty-five shillings, the equivalent of almost two months wages at the going local rate.⁹⁸ This led to the practice of squatting, a form of sharecropping that provided the Kikuyu access to alternative fertile land outside of their reserves. Thousands of Kikuyu left for the White Highlands with their families to settle on European farms, where in return for labour they were able to graze their livestock and cultivate a plot of land. In the Kiambu district, as early as 1911, seventy-five farms were reported to contain between 15,000-20,000 Kenyans.⁹⁹ This caused the settlers to fear that the squatters would start to demand tenant rights, since 'land within that area should be reserved for the support and maintenance of a white population'.¹⁰⁰ But they were reluctant to end squatting, as their economy had come to depend on it. To soothe such concerns, the government introduced the first of several Resident Native Labourers' Ordinances in 1918 – which drastically reduced squatter wealth by limiting the amount of cattle they could own and the size of their tenant farms on European land, whilst increasing the number of days they were required to work for their settler landlords. The Ordinance of 1937 transferred virtually all responsibility for the squatters to settler-controlled district councils, imposing new limits on cultivation and restricting each squatter family to only one or two acres. The power granted to the settlers meant that they were in fact able to forcefully remove the indigenous even from their positions of labourers, with more than 100,000 squatters being repatriated between 1946 and 1952.¹⁰¹

The movement of the indigenous workers was rigidly controlled. The Registration of Natives Ordinance (1919) required all Kenyan men leaving reserves to carry a *kipande* (passbook) with name, fingerprint, ethnic group, past employment history and current employer's signature.¹⁰² Individuals had to carry these cards at all times, and failure to answer the question '*Wapi kitambulisho?*' (Where is your ID?) in the affirmative resulted in a fine, imprisonment or both. Unsurprisingly this became one of the most detested symbols of British colonial power,¹⁰³ felt as another tactic to separate and

⁹⁸ Elkins (n 25) 16.

⁹⁹ David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of the Empire* (Weidenfeld & Nicolson 2005) 78.

¹⁰⁰ Alice Kurgat, 'Change and Continuity: Land and Identity Construction in Eldoret West District, Kenya' (Land Policies in East Africa: Technological Innovation, Administration and Patrimonial Stakes International Conference, Kampala, 2-4 November 2011) 4.

¹⁰¹ Anderson (n 99) 30-31.

¹⁰² Mbugua Wa-Mungai (ed), *(Re)Membering Kenya: Vol. 1 Identity, Culture and Freedom* (Twaweza Publications 2010).

¹⁰³ Although this was, controversially, reintroduced in 1980 with the Registration of Persons Act.

rigidify ethnic boundaries and groups, 'so as to rule and oppress them'.¹⁰⁴ As one recalls 'I was no longer a shepherd but one of the flock, going to work on the white man's farm with my *mbugi* (goats bell) around my neck'.¹⁰⁵

This discussion highlights the various ways in which land law was implemented to control Kikuyu behaviour, and the devastating effects of this on collective and individual identity. As we will see, such legislative violence regulating the Kikuyu's use of space, and thus understanding of self, served as the catalyst for reactive violence, and the Mau Mau uprising.

V. 'WE WANT OUR LAND, THE EUROPEANS HAVE TAKEN TOO MUCH'¹⁰⁶

5.1 The Dawn of the Rebellion

This Section argues that the aforementioned 'lawfare'¹⁰⁷ triggered members of the Kikuyu community to radicalise their traditional oathing ritual, developing a collective identity in response to their dispossession and alienation. It will discuss the formation of the Mau Mau, and the increasingly violent acts committed against their dispossessors in their struggle to regain their property and the right to belong in their own land.

The combination of *kipande* laws signifying British control of indigenous use of space, together with the re-introduction of the Kikuyu to the spaces that had once been those in which – as they had not forgotten – they had truly belonged, produced a double insult to Kikuyu identity. The Kikuyu were no longer those at home, but those displaced, and no longer shepherds but goats. They were in their own property as visitors, on their own land as tenants, and in their own fields as employees. They had little alternative but to find new and perhaps more extreme ways to fight off this destruction of their way of life. Grappling with their sense of selfhood, place and all that their space embedded, the Kikuyu sought to redress their grievances against the Europeans and those they saw as African agents of colonialism. Humiliated and dispossessed but living – albeit like 'goats'¹⁰⁸ – where they felt themselves to belong, the Kikuyu began to form a new identity as insurgents, fighting for their land.

¹⁰⁴ Wa-Mungai (n 102) 37.

¹⁰⁵ Elkins (n 25) 16.

¹⁰⁶ Dagoretti Political Record Book, Report of the Land Committee, vol 1 (1905) (quoting a Kikuyu Elder expressing his grief).

¹⁰⁷ Blomley (n 2).

¹⁰⁸ Elkins (n 25) 16.

Rebellion grew slowly but fervently, but early attempts to be heard were quashed through the 'catch-all piece of colonial legislation',¹⁰⁹ the Removal of Natives Ordinance of 1909, which gave the authority to remove of citizens without recourse to a proper trial.¹¹⁰ However, in 1943 a group of several thousand Kikuyu squatters, who had been forced to resettle in an area called Olenguruone, were threatened with yet another eviction from the government.¹¹¹ This triggered the residents to radicalise the traditional Kikuyu legal practice of 'oathing'. Typically, oathing was used to forge solidarity during times of war or internal crises – morally binding the men together in the face of challenge.¹¹² This was modified into an effort to develop a collective identity and fight the injustices of their dispossession. By 1950 mass oathing had spread rapidly, detected by the African Affairs Department as an 'illegal oath ... to evict all Europeans from the country'.¹¹³ At this point, 1,250,000 Kikuyu had ownership of just 2,000 square miles, while 30,000 British settlers owned 12,000 square miles.¹¹⁴

Although the Mau Mau are often depicted as a unified force, the reality was that of diversification, splitting and discontent within the movement. Young militants began splitting from the moderate political elite (Kenya African Union), disappointed in their efforts to attain significant reforms or redress their grievances. The militants' demand for *ithaka na wiyathi* (land and freedom) successfully connected the dissatisfied rural and urban Kikuyu.

Remaining squatters in the White Highlands found hope in the fight to reclaim their land, as well as the poor in Nairobi and those left in the Kikuyu reserves. As evictions from Olenguruone began, the oath reached the Kikuyu of Nairobi and central Kenya. Here it was taken up and promoted by the leaders of the urban militants, a group who would later become known as the *Muhimu* (important) and would form Mau Mau's central organising committee.¹¹⁵

The oathing ceremony required the participant to pass through an arch of banana leaves and strip naked. The oath administrator would then ask, 'Do you agree to become a Kikuyu, a full Kikuyu, free from blemish?' which, if answered in the affirmative, would be followed by the ingestion of goat meat.

¹⁰⁹ Anderson (n 99) 35.

¹¹⁰ *ibid* 16 (quoting the Removal of Natives Ordinance of 1909 no. 17 of 100).

¹¹¹ *ibid* 43.

¹¹² Elkins (n 25) 54.

¹¹³ *ibid*.

¹¹⁴ Anderson (n 99) 10.

¹¹⁵ Gretha Kershaw, 'Mau Mau from Below: Fieldwork and Experience, 1955-57 and 1962' (1991) 25(2) *Canadian Journal of African Studies* 274.

The administrator would then ask if the candidate wanted to know the secret of the Kikuyu people and went on to tell the history of the Kikuyu and their goals of land and freedom. They were then asked to vow 'If I reveal this oath to any European may this oath kill me', the breaking of such would invoke the wrath of Kikuyu creator god Ngai.¹¹⁶ As the movement progressed, Mau Mau leadership devised seven different oaths, each level representing greater commitment to the movement. After the fourth oath, the participant was bound together with fellow initiates using goat intestine, then cut on his arms and compelled to lick blood from the wounds of his fellow oath takers.

This ceremony can be seen as a negotiation of identity; a symbolic stripping of an imposed identity and a need to reaffirm whom they understood themselves to be amidst 'a song of self and others'.¹¹⁷ This, for them, was directly related to regaining their land and laying a claim to their property. As one man illustrates, 'After taking the blood, one felt how a woman feels towards her harvest ... That was how someone who had taken the oath felt about his land. He could do anything to protect it, even if it meant death'.¹¹⁸ As in the instance of Sam Thebere cited above, who joined the Mau Mau to regain his land and become an adult, property and identity were joined in the sense of belonging.

Although commonly described as a war that pitted oppressive British forces against noble Kenyan nationalist rebels,¹¹⁹ the Mau Mau insurgency was in fact more complex. Within Kikuyu society it took the form of a civil war, as so-called 'loyalists' from among the community forged alliances with the colonial government. As Branch illustrates, the sheer number of loyalists should not be underestimated, and one should not assume that the division between opponents and supporters of the Mau Mau revolt were pre-determined by existing social, political or economic separations within Kikuyu society.¹²⁰ Branch argues, '[A] more subtle explanation is needed'¹²¹ – the motivations of loyalists were far more complex than too often assumed.

Branch illustrates the complexity of the loyalist/Mau Mau divide, explaining that at different stages of the war, most Kikuyu were both supporters of Mau

¹¹⁶ Daniel Branch, *Defeating Mau Mau, Creating Kenya: Counterinsurgency, Civil War, and Decolonisation* (CUP 2009) (showing an example of an oathing ceremony; the various questions and vows varied).

¹¹⁷ Chinua Achebe, *No Longer at Ease* (Random House 1960) 66.

¹¹⁸ Elkins (n 25) 27.

¹¹⁹ See Rosberg (n 1).

¹²⁰ Branch (n 116) 11.

¹²¹ *ibid.*

Mau and allies of the government,¹²² and occasionally both simultaneously. Some sought to exploit the conditions of war, while others were driven by revenge, the majority of the Kikuyu however simply sought to survive.¹²³ Similarly, Kershaw suggests that it was the violence and its consequences that produced and shaped the identities of Mau Mau and loyalist, and not those identities that drove the conflict.¹²⁴

Thus, behaviour of both the insurgents and the loyalists was informed by the fluctuating dynamics of the conflict – what Kalyvas terms the ‘logic of violence’.¹²⁵ These complex dynamics produced new formations of individuals and temporary allegiances that cut across prior divisions. Such allegiances were determined in conditions of anxiety and violence and were initially more fluid than generally assumed; it was with the growth of violence that individuals were forced to pick sides. Thus, at the beginning of the movement, the majority of the Kikuyu population was neither loyalist nor Mau Mau; their behaviour a response to the need to survive rather than an ideological choice, lending the civil war its chief characteristic – ambiguity.¹²⁶

It is submitted that the violence of the Mau Mau uprising indeed forced many Kikuyu individuals to align themselves with either the insurgents or the loyalists, but the cause of the conflict stems from the connections between property, space and identity that have been identified, which repeatedly formed part of both the legislative and physical violence of the British, and that fostered the indigenous reassertion of rights and the Mau Mau revolt.

5.2 The Idiom of Blood

In January 1952 the Mau Mau movement escalated into open violence in Nyeri, and there were eleven cases of arson in the Aguthi and Thengenge areas. In the following month there was an outbreak of fifty-eight grass fires on the European farms in the nearby Nanyuki district, destroying several thousand acres of valuable grazing land. The destruction of property was followed by violent attacks on perceived ‘loyalists’, with the first bodies found floating in the Kirichwa river in Nyeri, shot and mutilated and left for weeks. This was followed by a second wave of attacks on ‘loyalists’, including government headmen, those who worked in the local courts as clerks and interpreters, and

¹²² *ibid* 100.

¹²³ *ibid* 11.

¹²⁴ Kershaw (n 115).

¹²⁵ Stathis Kalyvas, *The Logic of Violence in Civil War* (CUP 2006).

¹²⁶ Branch (n 116) 97.

people who had given evidence or provided the police with information on Mau Mau activities.¹²⁷

By early September there had been twenty-three known assassinations and many others missing. Non-Kikuyus living on white farms were deemed a threat to the secrecy and solidarity of the movement, resulting in the brutal murder of those such as Mutuaro Onsoti.¹²⁸ Onsoti was attacked by four squatters, who took his body and forced his neighbours and friends to take a *panga* (machete) and hack the corpse, and then touch his flesh and touch their hands to their lips.¹²⁹ The passer-by who had reported the body to the police was killed a few weeks later. By then, two more police informers had been murdered in Kiambu, and a chief's messenger in Murang'a had disappeared. His body was later found, strangled, mutilated and tossed into the river.¹³⁰ August saw the further murders of three pro-government Kikuyu at Rumuruti for refusing to take the oath, eight murders in Murang'a and a dramatic wave of killings and assaults in Nyeri, where a curfew was imposed in the Aguthi location through the enactment of the Public Order Ordinance of 1952. A detachment of police were sent out from Nairobi to try to stem the rising tide of violence.¹³¹

As the violence increased the government passed the Collective Punishments Ordinance in 1952, where collective fines were to be charged against communities who refused to co-operate with police investigations.¹³² This was not well received and was followed by a wave of arson attacks on farm buildings and the maiming and disembowelling of hundreds of settler-owned livestock. This seemingly shocked the white settlers more than the deaths of twenty or so Kenyans had, and on October 1952 Governor Baring cabled London to request that a State of Emergency be declared. He informed London of the 'deteriorating situation', warning that 'drastic legislation' might be needed in order to regain control.¹³³

On September 23rd, seven existing ordinances were amended. Among measures that allowed for the protection of witnesses by the police, restrictions on traffic movement at night and the control of printing presses, changes to the

¹²⁷ Anderson (n 99) 45.

¹²⁸ Elkins (n 25) 76.

¹²⁹ *ibid* 77.

¹³⁰ Anderson (n 99) 46-47.

¹³¹ Frank Corfield, *The Origins and Growth of Mau Mau: An Historical Survey* (Government of Kenya 1960) 19.

¹³² Anderson (n 99).

¹³³ Corfield (n 131) 21.

rules of evidence were promulgated. It was now permitted for a senior police officer to attest a prisoner's confession and for this to be accepted as evidence before a court.¹³⁴ The next day, not coincidentally, there was a further spate of Mau Mau activities, leading up to the murder of Chief Waruhiu wa Kungu of the Kiambu district – the government's Paramount Chief for Central Province. This was one Kenyan murder that unnerved even the white highlanders. If the colonial state could not protect their 'tower of strength',¹³⁵ who was safe from Mau Mau?¹³⁶

Indeed, the settlers were not safe. In 1953 many of the Mau Mau returned to property they rightfully thought of as theirs, serving typed eviction notices on British settlers, giving them seven days to vacate their farms.¹³⁷ Returning to their place of belonging, but in circumstances of dispossession and humiliation, the Kikuyu had established a tightly cohesive community; an 'us' determined to regain what had been stolen from them. The Mau Mau were reasserting their identity in their space of belonging, attempting to gain the power and forms of control that came with it; because, as one of the leaders of Mau Mau lamented, 'It is the property of Africans!'¹³⁸ In these circumstances, their words explicitly conflicted with the claims of ownership of the British who still called Kenya home.

The first European victim to be murdered was Eric Bowker who had taken up his farm in the Rift Valley as a retirement home.¹³⁹ He was hacked to death as he lay in his bath, and the news circulated through the European community quickly. The next victims were the Meiklejohns, who were cut on the head and body and left to die, both unrecognisable owing to the extent of their injuries. Subsequent attacks against white settlers were met with demands for more draconian law and action, with the promise of vigilantism if this did not occur. It was however, the slaughter of the Ruck family at their farm in Kinangop in January 1953, which was to be the 'definitive moment of the war'¹⁴⁰ – at least for the white highlanders. Mr. Ruck's domestic staff lured him onto his farm, pretending to have caught a Mau Mau suspect. As he emerged, an assailant hacked at his legs with a heavy *panga* until he fell, followed by his wife who

¹³⁴ Anderson (n 99) 44.

¹³⁵ District Commissioner Kennaway, Chiefs' Character Book (DC/KBU/11/1, Kenya National Archives 1952).

¹³⁶ Anderson (n 99) 56.

¹³⁷ ES Atieno Odhiambo and John Lonsdale (eds), *Mau Mau & Nationhood: Arms, Authority & Narration* (Ohio State University Press 2003) 91.

¹³⁸ EUL Gen/1786/3: Dedan Kimathi, 9 September 1953.

¹³⁹ Anderson (n 99) 92.

¹⁴⁰ *ibid* 93.

had come to his aid. A farm worker, Muthura Nagahu, who came running to assist the family was killed too, his body left on the lawn where he fell. Lastly, the attackers viciously hacked the Rucks' six-year-old son, breaking through the lock on the door to get to him.¹⁴¹ The details of the violent and 'disproportionate' reaction of the British and Kenyan Home Guards are important, but outside of the scope of this Article.

VI. 'GRIEVANCES HAVE NOTHING WHATEVER TO DO WITH THE MAU MAU, AND MAU MAU HAS NOTHING WHATEVER TO DO WITH GRIEVANCES'¹⁴²

Descriptions of the Mau Mau insurgency as characterised by 'indiscipline and random violence',¹⁴³ leads me to believe that despite the prominent connection between law and geography, the laws' engagement with space remains to be explored.

The original interpretation, offered initially by colonial authorities, and later their apologists, explained Mau Mau as rooted in a 'mass psychosis' affecting a tribe left unstable as a consequence of their journey towards modernity. Although failing to acknowledge the justness of Kikuyu grievances, this does partially recognise the importance of the effects of legislation on belonging. Still it ignores the fact that the Mau Mau's acts were the violence of those displaced in a space they traditionally considered home.

In the early 1960s, anthropological studies began to challenge this explanation. These identified the factors lying behind the insurgency as 'the increasing deprivations resulting from rapid socio-economic development in the colony which, among the peoples of Kenya, fell disproportionately on the Kikuyu'.¹⁴⁴ This work definitively departs from the belief that the Mau Mau were a group of savages with irrational terrorist impulses. Nonetheless, the connections between colonial law, Kikuyu property and space of action, and Kikuyu identity remain to be described.

It has been argued that if these connections were sufficiently iterated, what was seen as indiscipline and random violence would be seen to have an underlying logic, and one that depends upon the relation between law, property and identity. As stressed from the outset, the law should not be seen as an empty or

¹⁴¹ Elkins (n 25) 40.

¹⁴² Lonsdale (n 54) (quoting the Kenyatta trials).

¹⁴³ Anderson (n 99) 51.

¹⁴⁴ Bruce Berman and John Lonsdale, *Unhappy Valley: Conflict in Kenya & Africa*, vol 2 (East African Educational Publishers 1992) 227. See also Roseberg and Nottingham (n 1).

objective category. It has a direct bearing on the way in which power and control are deployed and thus the ways social life and identity are constituted.

Sarat may not be incorrect in his assertion that 'law is a creature of both literal violence, and imaginings and threats of force, disorder and pain ... in the absence of such ... there is no law'.¹⁴⁵ The violence entailed by the colonial laws dispossessed and alienated the Kikuyu from their land and ultimately caused the intense revolt amongst their community. When the law provided for British entitlement and ownership, the reaction was justifiably passionate, as it had given priority to the wrong set of belongings. As Broche-Due has asserted, '[V]iolence enacted is but a small part of violence lived'.¹⁴⁶ Space matters to such violence; being more than a passive template, land was not the background to the Mau Mau movement – it was at the heart of it.

The British were attempting to construct their own identities through the dispossession of the Kikuyu, strengthening their sense of belonging through the disenfranchisement of others. They were appropriating identities, by reshaping the spaces that hold up those identities,¹⁴⁷ and the Kikuyu would later do the same.

In returning to their spaces of belonging, the Mau Mau partly re-appropriated their identity, asserting their sense of entitlement against the foreign other or those they saw as collaborators in their own displacement. The Kikuyu were 'caught within relations of dispossession, alienation and ownership that did not allow for mutual recognition',¹⁴⁸ giving rise to dramatic rupture. The Mau Mau movement itself was defined and joined by a sense of belonging to their land and the idea that they would fight to reclaim their own freedom to be the people who they took themselves to be in their own place.

Overall, in this analysis, Mau Mau insurgency demonstrates that the law of property has a deeper dimension, as it plays a role in human psychology and the processes by which we assign meanings to our own perceptions and behaviours. Insofar as this is accepted, we should accept that the study of law has not fully apprehended the centrality of space/place and its network of

¹⁴⁵ Austin Sarat and Thomas Kearns (eds), *Law's Violence* (Michigan University Press 1993) 1.

¹⁴⁶ Vigdis Broche-Due (ed), *Violence and Belonging: The Quest for Identity in Post-Colonial Africa* (Routledge 2005) 1.

¹⁴⁷ Keenan, 'Bringing the Outside(r) in' (n 12).

¹⁴⁸ Brenna Bhandar, 'Plasticity and Post-Colonial Recognition: Owning, Knowing and Being' (2011) 22(3) *Law and Critique* 227, 228.

relations and power, and it has failed to 'experiment with its spatiality'.¹⁴⁹ This has practical consequences: the injustices of the dispossession of indigenous owners remain a problem that is 'echoing around in current policy in Kenya'.¹⁵⁰ The Truth, Justice and Reconciliation Commission of Kenya 2008 has attempted to follow in the footsteps of South African mediation, but 'legal' land-grabbing issues remain 'hugely relevant'.¹⁵¹ The 'pandora's box'¹⁵² of tensions and competing claims of the Kikuyu and others is still being dealt with as the law attempts to redress 'colonial misdemeanours'.¹⁵³

VII. CONCLUSION

This Article began with a theoretical rethinking of the idea of property and expressed the need to focus on the inverse of the power to exclude – the sense of belonging. This is a powerful and important part of identity, and it means that property is indeed 'not just the soil'¹⁵⁴ but all that is connected to it. This theoretical position was demonstrated through an account of the British acquisition of Kenya, and the reconstruction of space, with the land system employed as a tool of governance through controlling and restricting indigenous movement and use of land. These ideas were discussed with regard to collective and individual identity, making reference to the development of the British settler identity, alongside the disenfranchisement of the Kenyan owners and their sense of belonging.

This Article examined the forceful dissemination of English property law and various agricultural policies that enabled the recurrent dispossession and alienation of the indigenous residents, arguing that the Mau Mau was a movement of the displaced, who formed a unified group and fought not simply to regain their physical place, but their right to belong – and the power and control of their own individual and cultural identity that comes with it.

Through an engagement with the relationship between the land and the Kikuyu, it is clear that the law *must* engage more deeply with the spatial than contemporary understandings of concepts such as jurisdiction and sovereignty and the transference of physical space; space is not simply another parameter

¹⁴⁹ Andreas Philippopoulos-Mihalopoulos, 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space' (2010) 5 *Law, Culture and the Humanities* 205.

¹⁵⁰ Turner (n 6).

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ John Hill, *At Home in the World: Sounds and Symmetries of Belonging* (Spring Journal Books 2010) 575.

for law, nor a background against which law and its consequences takes place. The legal conception of property should include an understanding of the networks of belonging and an ontological claim to indigenous land. Thinking about the human use of space and what it means to us should force a philosophical re-articulation of law.

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