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Memory, Traditionalism and Constitutionalism: Overcoming the Problem of Nation Formation in Kenya.

Charles Muiru Ngugi

Abstract:

Since the dawn of the second liberation in Kenya, as in most of Africa, in the early 1990s, Kenya has been trying to write a new constitution to replace the independence constitution which was not a product of popular negotiation. Owing to many factors, this process has, as of December 2006, stalled. However, the whole process has revealed the pitfalls inherent in forging a nation out of disparate ethnic groups. In this chapter, I argue that constitution making in Kenya is beset by many problems, not least of which are memory and traditionalism, and the conflation of the individual with community in designing the new constitution. What Kenyan communities remember about their pre-contact, colonial and postcolonial relationship with authority bears considerable impact on the prospects of not just constitution-making but also nation formation. I argue that the only way forward in the construction of the nationhood is the elevation of the individual in a context of constitutionalism and the undermining of ethnic identities and memories which at the moment dominate the political scene in Kenya.

Keywords: Kenya, Nationhood, Memory, Nationalism, Constitutionalism.

On November 21, 2005, Kenyans voted down a draft constitution presented by the government after a protracted constitution-making process that took about 10 years and consumed billions of shillings.¹ The rejection of the draft *ipso facto* confirmed the extent of ethnic divisions in Kenya.² But even more revealing was the highly contentious debate that preceded the referendum. In various sections of the media and on the Internet discussion lists, a no-holds barred exchange of views revealed that Kenyans generally put their tribal interests first and those of the country second.³ The ethnic hue of the debate was reflected in the voting patterns during the referendum; those who voted against the constitutional draft did so not because of the myriad inherent weaknesses within it, but because the draft appeared to be promoted by an ethnic group or a cluster of ethnic groups that they were opposed to. On the other hand, those who supported the draft did so not because it did not contain major weaknesses (and the draft had major drafting and technical weaknesses)⁴ but because it offered the possibility for guaranteeing their interests, including control of political power.⁵ Hence, instead of the constitutional draft

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¹ According to the *Daily Nation* of January 10, 2006, the Constitution Review Commission of Kenya cost the country Shs. 4.1 billion. However, this was but part of the cost. The process of constitution review had begun with the clamor for increased democratization in the early 1990s, and the cost of subsequent contestations only begun to be counted with the enactment of the Constitutional Review Commission of Kenya Act in 1997.

² A correspondent of the *Kenya Times*, in an article published January 6, 2006, saw the results of the referendum as a “harbinger of the heightened racial [meaning tribal] mistrust in Kenya. See “Dilemmas of Kenya’s Ethnic Relations” <http://www.timesnews.co.ke/06jan06/insight/ins5.html> The *Daily Nation* reported that 50 members of parliament had accepted, after the referendum, “the bitter truth that tribalism was deeply rooted in the country.” See Muriithi Muriuki and Richard Chesos “We have learnt tough lesson: Banana team” *Daily Nation*, December 3, 2005

³ President Mwai Kibaki captured what was really revealed by the debate when he said, on the eve of the referendum, that “we have learned more about ourselves.” See Television/radio message by H.E. President Mwai Kibaki on the need for Kenyans to maintain peace ahead of the national referendum. <http://www.communication.go.ke/documents/speech.doc>

⁴ See a series of articles written by constitutional lawyer Wachira Maina in the *Daily Nation* in early October 2005, analyzing the draft constitution presented for referendum by the government.

⁵ The outcome of the referendum indicated that the country was roughly split in half between those who favor a unitary presidential system and those who favor a federal parliamentary system with a weak presidency. Of the nearly 12 million eligible voters, only about half voted, suggesting that there may have been a section of Kenyans who did not support either proposition. But of those who voted, communities that favor federalism can generally be seen as those that want to protect their “lands” from encroachment by communities facing land pressure, who in turn support a unitary Presidential system because it is seen as offering the best prospects for allowing settlement and ownership of property anywhere in the country.

being judged solely on its vision for the future or lack of it, its contents were largely ignored, and the referendum was turned into an occasion for avenging a laundry list of memorable grievances against the postcolonial government. It was a time to “settle old scores” (Masinde 2005). As one politician put it, the constitution “was never really the issue” in the referendum but the “patch on which football was being played” (Mwiria 2005).

Although many are wont to see this historical juncture, with its free debate, as a mere turning point in Kenya’s constitutional history, a signal that Kenyan democracy has come of age, I see this event as an indication of the failure of the post-colonial Kenyan state to forge nationhood amongst its diverse ethnic groups. I am not the first to come to this conclusion. Kenyan historian W.R. Ochieng came to the same conclusion more than 20 years ago, remarking that Kenya’s greatest failure was its inability to “forge several tribes into one nation since independence” (1985: 61). More recently, it has been argued that “Kenya lacks enough glue to hold all its 43 tribes” (Mutere 2006). My concern here is why Kenya has failed to generate this glue from her own resources. This failure, I will argue, is rooted in the wildly incongruent memories of respective Kenyan ethnic groups, particularly with respect to how these groups perceive their colonial and postcolonial experience at the hands of modern state authority. It is also the end result of a curious admixture of traditionalism and modernity in both formal and informal efforts at nation building in what is fast becoming a post-modern context. To put it differently, Kenya is being constructed on a shaky foundation on quicksand. I will argue that unless the communities that constitute Kenya examine what they remember and align their memories with the idea of Kenya, determining the relative importance of each, the project of building one Kenya will always be undermined by the past of its constituent parts. The specific questions I will address here are: How do Kenyans remember their past(s) and how do these memories affect their view of the present and their vision of the future? How do memories of their past complicate the task of nation building? How does traditionalism, as remembered, and modernity, as conceived, interact in the context of nation-building?

Memory and Nation

Scholars of nation and nationalism generally agree that there is a fundamental connection between nation and memory. The French theorist, Ernest Renan, once pointed out that the soul of the nation comprised of two things: the past “the possession in common of a rich legacy of remembrances” and the present, “the actual consent, the desire to live together” with the “will to continue to value the heritage which all hold in common” (1994:17). These memories are not by themselves enough and have to be aided by a social contract and a willingness to subordinate some private and collective interests for the sake of the larger nation. Put another way, he was arguing that memory, democracy and a common culture are vital ingredients in the formation of a national identity. More recently, scholars of nations and nationalism have persisted in allocating an important role to the past and how it is remembered. Some believe that national identity is based on “historical memories” (Smith 1990: 11) as well as the long accretion of ethnic patterns and symbols (Smith 1986: 1993), while others posit that national identities are merely part of “the story we tell about the self in order to know who we are” (Hall 1996: 346). However, the value of the past is not unquestionable. For instance, Nietzsche deplored the emergence of, and obsession with, monumental history, which he saw as being potentially destructive of “man, people or a culture” (1980: 10). It is safe to say, therefore, that whether the role of memory is valorized or castigated, memory remains “the handmaiden of nationalist zeal” (Olick 1998), and will continue to be a key variable in the definition and survival of *collective identifications* in the foreseeable future. As Hastings has concluded “ While the process of nation-construction is quite certainly not a case of every ‘primordial’ ethnicity becoming in due course a nation-state, it is all the same exceedingly difficult to arrive at the latter without in some way building upon the former” (Hastings 1997: 166).

A collective identity “involves construction and reconstruction of a sense of themselves by self-identifying communities, using signs provided by their cultures...it is a process of elaboration of collective consciousness, generally involving active strategies of inclusion and exclusion: *We* are defined, in part at least, as being different from how *They* are (author’s italics, Schlesinger 1993:7). This process invariably extends through time and space, all the while involving both memory and amnesia. According to

Halbwachs, this memory is all social because people recall in response to others, using material for memory production appropriated from, and developed within, the social milieu, what he calls “social frameworks” (1992). However, the construction of a collective identity presupposes a shared memory, “a past” (Renan 1994:17)). This is a key aspect of my argument; the communities that make up Kenya, while they share a past in colonial and post-colonial contexts, have adamantly refused to evolve a shared memory that is strong enough to override particularistic memories. As Connerton has argued, “to the extent that their memories of a society’s past diverge, to that extent its members can share neither experiences nor assumptions” (1989:3). The ethnic groups that make up Kenya remember the past differently. As a result, they are unable to make assumptions about their own Kenyaness and a common future.

What complicates the process of building a single Kenya is the contingent nature of collective memory. Whenever it exists, collective memory is transmitted in corporeal or bodily ways in addition to written and oral histories in both small-scale groups in which there is an overwhelmingly direct transfer of social memory from elders to juniors, as well as in large collectivities, such as nations, where the transfer of memories is both impersonal and mediated (1989). This memory is not transmitted in static form; in commemorative ceremonies or bodily habits, it is potentially and always transformed. According to Halbwachs:

Society from time to time obligates people not just to reproduce in thought previous events of their lives, but also to touch them up, to shorten them, or to complete them so that, however, convinced we are that our memories are exact, we give them a prestige that reality did not possess (1992:51)

In other words, memory, regardless of whether it is consciously planned and performed or mentally recalled “remains in permanent evolution, open to the dialectic of remembering and forgetting, unconscious of its successive deformations, vulnerable to manipulation and appropriation, susceptible to being long dormant and periodically revived” (Nora 1989: 9). Memory is therefore not a repository of stored, retrievable images existing in some underground cellar in our thoughts, but a selective reconstruction of aspects of the past in response to present needs. Thus, what is understood to be either

typically “national” or “ethnic” is usually a highly selective account (Schlesinger 1993:7). I will argue that in this inherent susceptibility of memory to manipulation lies both its potential utility in nation building, as well as its disruptive potential to the same objective.

Constructing the nation

The idea of the nation was born in the late eighteenth and nineteenth centuries (Duetsch 1956; Kedourie 1993; Gellner 1983; Anderson 1983).⁶ Its central proposition was that a “nation,” defined as a people wielded together by common ties of culture, descent, language, and territory, should enjoy self-government within the same state (Renan 1994; Kedourie 1994). The nation is not an inherent attribute of humanity, although “it has now come to appear as such” (Gellner 1983:6). Anderson has famously defined it as “an imagined political community” in which members will never know most of their fellow members except in their minds where “the image of their communion” resides (1983). Building a nation in ethnically diverse contexts is essentially a project in constructing a collective identity from these communities, and entails replacing parochial, particularistic mentality with the wider “spiritual principle” (Renan 1994: 17) of the nation. In Africa, the project was accidentally begun by colonialism. I say accidentally because the emergence of the nation was hardly the objective of colonialism; it was an unintended consequence of this exploitative foreign intervention. In the pre-contact era, it was the *ethnie* that dominated, delineating Africa’s disparate communities. During and after colonialism, the idea of nation was enthusiastically embraced and continued by African pre-independence nationalism. Therefore, it was colonialism that “brought with it the identification of nation and state” (Werbner 1996: 12). As has been remarked with regard to Kenya, “it could not, for instance, conceivably be claimed that the mix of peoples inhabiting the British colony of Kenya, such as Lwo, Masai, Kikuyu and Turkana, had any ethnic, linguistic or historical reason to be regarded as a nation, such they were now expected to become” (Hastings 1997: 160).

⁶ The idea that the nation is a thoroughly modern phenomenon has been challenged by the likes of Smith (1986; 1994; 2001), Geertz (1963: 1994), Hastings (1997) and Armstrong (1982) whose book is tellingly titled, *Nations Before Nationalism*, to stress the pre-modern origins of nationalism. These scholars see a

The trajectory of nation-building efforts varies in time and space. It is this factor that allows for comparative analysis of the evolution of the nation across historical time and geographical boundaries. The construction of the English nation, when it happened, cannot be replicated in an African setting for obvious reasons relating to changed times and circumstances. In this regard, a crucial difference between the nation-building of Western Europe and that of Africa and much of Asia, is that the processes in Europe occurred well before the rise of popular demands for democratic rights. During the first few decades of independence, Africa attempted to build nations using the high hand of authoritarianism then condoned by Cold War politics. This approach entailed suppressing some memories while valorizing others, namely those sanctioned by the ruling elite. Nation-building during this time equaled regime-building, often aided by the intervention of bi-polar superpowers that cared more about maintaining their own sphere of influence than the proselytization of their own moralistic internationalism encoded in the language of human rights contained in international treaties that they themselves had negotiated and ratified. So strong was the grip of superpowers on African governments that it rendered an entirely new meaning to the term “postcolonial” in which the “colonial” in postcolonial was especially noteworthy. Was the colonial embedded in the supposedly free era of the postcolony? How could African states have been free when the range of political choice was circumscribed by the very coordinates of modernity, regardless of whether the state adopted capitalism or communism, both of which are, admittedly, aspects of modernity? One agrees with Partha Chatterjee that nationalism in the formerly colonized has to be understood as an integral part of colonial domination because it is constrained by hegemonic Eurocentric discourses that have meant that the “autonomous forms of imagination were, and continue to be, overwhelmed and swamped by the history of the postcolonial state” (Chatterjee 1991) which is itself a colonial state named appropriately for the contemporary times. Put another way, colonial subjugation was continued by the very adoption of European traditions of thought.

More recently, African attempts at nation building are taking place at a time when moral internationalism has reached its zenith, leading to much criticism of the fables and

persistence of ethnic sentiment and general ethno-symbolism as the best indicator that the nation is not of a recent vintage.

foibles of Africa's errant political experiments. Nation-building is also taking place without the "safety valve" of authoritarianism that enforced unity in states during the era of *parti etat* and personal rule. It is also occurring concurrently with the deepening of democracy (Mouffe 1992), a situation that has resulted in conflicting internal demands that are often antithetical to the emergence and forging of nationhood. The advent of the second liberation on the continent has ushered in unprecedented freedom. For the ethnic groups that comprise the African nation-states, time is nigh for retribution and reparation for all perceived colonial and postcolonial wrongs. It is time to remember all wrongs committed in the past and to demand justice to which everyone is entitled, even if the price of justice is national disintegration. Despite the acknowledged benefits of democracy, therefore, a peculiar situation obtains in Africa in which nations have always been threatened with destruction before they are even constructed, first by their lack of an indigenous cultural base and shared memory, second by their own institutional weaknesses and, third, by the simultaneous birth pangs of a democracy that encourages a multiplicity of contending memories that undermine prospects for a shared national memory.

The project of constructing African nations such as Kenya was the first item on the agenda of the founding fathers of African nations upon independence. Jomo Kenyatta, Kenya's first prime minister and later President expressed this goal in 1963: "I believe firmly that if this country of ours is to prosper we must create a sense of national family, *ujamaa*. We must bring all the communities of Kenya to build a united nation."⁷ These nation-building efforts involved "first, the erosion of tribally exclusive traditions; second, the attempt to erect nationally inclusive traditions; and, third, the construction of the modern state" (Mazrui 1972: 21), although the process itself did not conform to this neat linear instrumentality. This rush to elide tribal traditions and replace them with national ones without popular debate proved to be more expensive than is generally acknowledged. First, it engendered feelings of discrimination amongst some ethnic groups because the process of selecting the national lore was neither democratic nor consultative. In the case of Kenya, despite Kenyatta's stated position that all Kenyans fought for Uhuru, resentment emerged with some groups feeling, wrongly perhaps, that

⁷ *Reporter*, Nairobi, 29 June 1963, p. 10. in Ochieng & Atieno-Odhiambo (1995).

the part the Kikuyu played in the struggle for independence was better memorialized.⁸ Second, it failed to acknowledge the resilience of tribal traditions and hence their ability to return or to be reincarnated in some form. Third, this project failed to draw upon the resources inherent in age-old traditions and incorporate them in the new “nationhood” project.

The foregoing is a position with which the Indian scholar, Chatterjee, agrees. According to him, the post-colonial state succumbed to the universal directive of Capitalism’s rationality and reason. It ignored the traditions and insights of their cultures, which contributed little to the new efforts to conceive and build the new nations. This happened because, regardless of their ideological leanings, the leaders of these nation-states became convinced that modernization is the only way to proceed (1998).⁹ While the postcolonial states clearly succumbed to the pull of modernity, modernity never triumphed over traditionalism, as can be surmised from the evident remnants of traditionalism in the lives of communities living with imposed modernity (Mutahi 1996).¹⁰ This difference can also be observed in most post-colonial nations including those without geographical adjacency such as African and Asian countries.

However, there are limits to this comparison. Such limits are rooted in the peculiar historical and cultural circumstances of respective regions which often militate

⁸ I use the word “wrongly” because the Kenyatta government, as well as Daniel arap Moi’s who succeeded Kenyatta, failed to give any special place to Mau Mau in national memory. A national holiday called Kenyatta Day commemorates the arrest of Kenyatta and other nationalist leaders who were committed to constitutional means of fighting for freedom. Kenya’s Madaraka Day commemorates the granting of internal self-government and Jamhuri (Independence) observes the attainment of the republican status. Those committed to the violent overthrow of colonialism never got their national recognition. The public memories of “detention camps, of massacres, of punishments, and of dispossession were suppressed” in favor of national unity (Anderson 2005: 336). To keep the memory of Mau Mau alive, memory has been privatized, with various Kikuyu, Embu and Meru communities taking it upon themselves to build public spaces of memory such as museums, statues, educational institutions, and also through the production of movies such as Kaugi Kibaara’s *Reke Tumanwo* (Enough is Enough). The Mau Mau struggle was subsumed in broad statements like “we fought” for independence, where “fighting” also included non-violent struggle, which effectively amounted to a devaluation of the Mau Mau veterans own perception of their contribution. It is this situation that the Kibaki administration is trying to rectify by setting a side a Heroes Acre in Nairobi.

⁹ In Africa, the newly independent African states merely continued with the modernization project started by colonial authorities in the late 1940s (Cooper 2002)

¹⁰ In his hilarious satire, *How to be a Kenyan*, the late columnist “Whispers” Wahome Mutahi captures, in authentic Kenyan idiom, the various manifestations of traditionalism in contemporary Kenyan life. These range from serious mother tongue interference in spoken English to fawning deference to elders, attachment to the “soil” (land), the persistence perception of women as subordinate to men, a carnivorous love of meat, amongst others.

against generalizing and projecting theories developed in one region onto another despite their shared colonial experience. Unlike India where colonialism lasted much longer, colonialism in much of Africa was short-lived. In most African countries, “the process hardly even began until well after the First World War and only started to impinge upon most ordinary people well after the Second World War” (Hastings 1997:161). This means that African encounter and experience with the idea of a modern state and colonialism itself was remarkably short. Also noteworthy is the fact that inside the colonies themselves, colonialism was experienced differently by communities that were later expected to start thinking of this episode as the unifying common experience of their new nations — the basis on which to construct a national memory. The disparities in the intensity of interaction with colonialism between regions within states has resulted in different memories of colonialism, with whole communities bearing few or no memories of colonialism given their casual encounter with it, while others who had a more intense interaction with it, remember little else relating to that era. In Kenya, for instance, the arrival of colonialism not only put a stop to the expansion of the Kikuyu into new areas, but also resulted in the appropriation of their land in order to settle white settlers. The Kikuyu became squatters in their own land, with adverse consequences on the traditional lifestyle.¹¹ The Maasai, Meru, Kamba, Kisii, Kipsigis and the Nandi also had similar experiences as their traditional lands were particularly attractive to the white colonialists, although it could be argued that the impact of colonialism was more acute on traditionally agricultural societies that were facing intense population pressure. Contrast this with a community like Luo, Somali, Turkana or the Borana whose experience with colonialism was ephemeral because they were protected by the relative unattractiveness of their land. The memory of colonialism in all these groups will clearly not be the same, and this has implications in the forging of nationhood.

At the same time, most African countries have barely been independent for 50 years. Clearly, not enough time has elapsed to dispatch memories of traditionalism into the oblivion of antiquity, even for communities like the Kikuyu who had an intense

¹¹ It became difficult for young men to break out on their own and turn virgin land into their own property as expected. As a result, bride price became unaffordable, turning the struggle into one of not just nationalism but procreation as well (Lonsdale 2003:50). This affront on traditional life led to much resentment, which resulted in open rebellion – Mau Mau.

encounter with colonialism. As one Mazrui has remarked, “The trouble with Africa...[is] that too many cultures remained living cultures for too long, reluctant to let go of the past, absorbing the past in the present, fusing descendants with ancestors, and defying the tripartite division of time” (Mazrui 1972: 11). Despite the stress on education, increasing urbanization and emergent tribal hybridity, generational ties have not been effectively ruptured; modes of transmitting pre-colonial cultural and ethnic memory still exist. Traditionalism has not yet receded into what has been called “deep memory,” which means it remains essentially transmittable and representable (Young 1997:48). Aspects of African pre-contact cultures are therefore still very much evident today: magic, superstition, circumcision, dowry, cattle rustling, witchcraft, sacrifice to traditional deities, and divination are still practiced in some areas, and there has also been a recent upshot of what masquerades as traditional religions, such as Mungiki,¹² to mention but the most infamous. This results in a peculiar intertwining of the past with the present that complicates the process of forging one nation by undermining state-wide loyalties. As Gellner has observed, “the self-image of nationalism involves the stress of folk, folklore, popular culture, etc. In fact, nationalism becomes important precisely when these things become artificial. Genuine peasants or tribesmen, however proficient at folkdancing, do not generally make good nationalists” (1964: 154). African traditional cultures are by no means artificial in their practices, and it will take time before they become so. The existence of a citizenry that is genuinely tribal in mind but modern in outward appearance as evidenced by the excess of suits and skirts in Kenyan towns remains a major obstacle to the attainment of nationhood.

Constructing a nation out of a state like Kenya is also complicated by the particularistic nature and the multiplicity of the mythos of ethnogenesis presented by each of the tribes that make up modern Kenya. No two communities in Kenya share a common myth of origin, even those that are as linguistically related as the *Pan-Thagicu*¹³ Bantu cluster or the Nilotes. Thus, while it is possible to glean the history of the Kikuyu from

¹² Mungiki is a youth culture group within the Kikuyu community that advocates for a return to Kikuyu traditional culture. It is known for its violence, including forcible circumcision of women, snuff taking, and enactment of gory ritual improvisations of traditional Kikuyu oaths (Kagwanja 2003)

¹³ This term refers to a polyethnic cluster of culturally related Bantu communities which historians claim share ancestry from an obscure lineage called Thagicu. The communities include Kikuyu, Kamba, Meru, Embu, Chuka, Mbere, Ndia, and Gicugu. See Allen (1993)

their oral history, it is important to bear in mind that the Kikuyu are but one of Kenya's 42 ethnic groups. Their legends cannot be applied as the representative mythos of the nation without eliciting accusations of discrimination and favoritism from other groups, and neither can the mythos of others represent the Kikuyu or any other ethnicity. The great challenge remains how to merge these ethnic oral histories, or memories, into a single all-inclusive history on which the idea of one nation acceptable to, and recognizable by, all could be foisted, or how to make this multiplicity of mythos binding, or at least acceptable, to all. Unfortunately, this is a challenge that is not being attempted by the government or the academia, perhaps due to its daunting nature. As a consequence, while Renan's "will to continue to value the heritage which all hold in common" (1994:17) may be present, the situation is complicated by lack of agreement about what these values and heritage really are.

Given the above scenario in which no attempt is being made to equalize and unify the disparate pre-colonial mythos, what is being attempted is the use of a shared colonial and post-colonial experience to construct the nation. Kenya is fortunate to have waged a bitter struggle against colonial rule; the Mau Mau war in the 1950s is well known. A people willing to unite could hinge their unity on a gallant liberation struggle like Mau Mau; this is what the Americans have done with their struggle against the British. In Kenya, however, the memory of Mau Mau appears to be more divisive than unifying. While certain sections of Kenyans, the GEMA¹⁴ tribes in particular, believe that Mau Mau was critical in bringing about independence and would prefer to see the war accorded a more central role in national memory, other ethnic communities remember Mau Mau as a limited internal civil war amongst the Kikuyu themselves, and have bought into the propaganda spewed by the British colonials that the movement was atavistic and needlessly brutal, sadistic manifestation of a collective tribal pathology and therefore unworthy of being remembered as a liberation struggle. The result is that Kenya's postcolonial period has been squandered in an unproductive, unwinnable debate involving professional historians, Mau Mau veterans, Kikuyu chauvinists, politicians,

¹⁴ This acronym stands for Gikuyu, Embu and Meru Association, formed after independence to unite these three culturally and linguistically related communities. The Mau Mau cadre was derived mainly from these communities.

literary authors, journalists and virtually anybody with an opinion on the issue,¹⁵ over the actual role of Mau Mau in national liberation. You can often tell on which side a given protagonist is based on their ethnic names and the role they think their respective community played in liberation from colonialism. Successive regimes on their part, have used Mau Mau memory in an *ad hoc*, opportunistic fashion, invoking the gallantry of the war veterans when their political support is needed and ignoring the veterans and their memory at other times (Sabar-Friedman 1995).

If colonial memories are complicated, the postcolonial ones are even more so. At the time of independence, the thinking by the Kenyan founding fathers — if such a term can be used to describe leaders who came decades after the country had been founded by British colonialists — was that because the creation of European nations was very much a function of absolutist systems that standardized legal and market systems, currencies, and languages and forced culturally disparate people to use them (Welsh 43), thus imposing a single identity on them, subjecting tribally diverse Kenyans to a common experience under a similar national system offered the best chance for integrating the communities. The problem is that we tend to “experience our present differently in accordance with the different pasts to which we are able to connect that present” (Connerton 1989: 2). In Kenya, ethnic groups have experienced the Kenyan postcolony differently, not withstanding the existence of uniform national code of laws. In this regard, the experience of Kenyan communities in the postcolonial era is similar to how colonialism was experienced — varied in form and intensity across different regions. Some communities perceive themselves to have been excluded from power by other dominating, although not dominant tribes,¹⁶ while others recall certain moments in the postcolonial experience as having been golden. As a result, how different Kenyan ethnic

¹⁵ This debate was once captured in a special issue of the *Kenya Historical Review* in 1977. See “Some Perspectives on the Mau Mau Movement” *Special Issue of Kenya Historical Review* Vol.5 No.2 1977 169-172. The issue is also given comprehensive treatment by Clough (1998).

¹⁶ Although the Kikuyu, at 22 % of the national population, is the largest ethnic group in Kenya, the ethnic group does not enjoy the numerical strength that would confer to it virtual majoritarian dominance. A coalition of any of the next two largest communities would be enough to offset an exclusively Kikuyu government, not to mention that a permanent unity of all the other numerically smaller ethnicities would lock Kikuyu out of power completely. Besides, the issue of domination is not always related to numerical strength. The Kalenjin, a grouping of minority tribes from which President Daniel arap Moi hailed, was also accused of dominating other communities. Domination in an authoritarian context appears to be

groups remember their past relationship with other communities and the state itself, particularly in the post-independence era, is a major impediment to the construction of a single Kenyan nation. It is important to clarify this point further.

As already noted, what is remembered tends to be specific to different Kenyan tribes, although certain aspects of those memories might be shared across an assemblage of communities. For instance, almost all ethnic groups in Kenya regard themselves as having been neglected by successive post-colonial governments. Each, however, has its own unique remembrance of the specific wrong-doing allegedly meted to it by the government and, by extension, the community identified as having been in charge or controlling government at the time of the “offence.” To the Luo, for instance, the “Kikuyu” government of Kenya’s first President Jomo Kenyatta (1963-1978) rekindles memories of a spate of assassination of prominent Luo politicians, a purge from political power of those who were spared,¹⁷ and denial of the development largesse to which they were entitled (Atieno-Odhiambo 2003, Ouchó 2002). To the Kalenjin, the “Kikuyu” government of Kenyatta presided over what they regard as the usurpation of their land by the Kikuyu and other communities that migrated to “their” homelands. To the Maasai, the “Kikuyu” government of Kenyatta is accused of overseeing the hoodwinking of the Maasai by Kikuyu settlers who are alleged to have bought land from the Maasai at throw away prices under the much-maligned willing-seller, willing-buyer basis, a process that is disparaged as having allowed the exploitation of apparent Maasai gullibility.

During the “Kalenjin” government of Daniel arap Moi (1978-2002), the Kikuyu developed bitter memories of state policies that aimed at stopping their economic advancement (Chege 1994) and of tribal clashes in the 1990s when they were driven out of some sections of the Rift Valley province, regarded as a Kalenjin homeland. The Luo hold bitter memories against the Kalenjin presidency of Moi, during whose reign many of their number were detained, exiled or killed, the most prominent of these being Dr. Robert Ouko, the minister for foreign affairs. The Somali hold bitter memories of massacres at Wagara and other human rights abuses elsewhere perpetrated during Moi’s “Kalenjin” administration. All Kenyan communities, including the Kalenjin and the

directly linked to which community controls the coercive resources of the state at a given historical moment.

Kikuyu, have unkind memories about the government's disregard of human rights during the regimes of Kenyatta and Moi, two presidents whose contribution to national memory include numerous personal statues and educational institutions, monuments to themselves which they constructed while still in office (Kiai 2005).

The memories held by those communities do not necessarily mean they are virtual accounts of actual events, since even “innocence does not preclude a distortion of remembrances” (Levi 1986:135). These memories are therefore not always true accounts of what actually happened, but are often a trace of real events enlivened by suspicion. These suspicions are in turn fueled by a conspiracy between skewed scholarship, partisan journalism, and irresponsible politics. What is important is that these memories have hardened the identities of these respective communities at the expense of the emergent national identity. As a result, parochial, sub-national ethnic loyalties have refused to succumb to the imperatives of development and statewide loyalty. Meanwhile, leaders have continued to call for the ever-elusive national unity, and constantly railed against the “cancer” of tribalism, while pointing at the absence of large-scale violence as evidence of an emergent nationhood. The history of the Kenyan postcolony is, therefore, a fluid cascade of ethnically-based discordant memories, of what Kenya's tribes want to remember in juxtaposition with what the “national” leaders say and want the tribes to remember. It is also the history of an intense struggle between traditionalism and modernity; and this is the issue that I address in the next section.

Traditionalism, modernity and nationhood

The Kenyan state elected, at the time of independence, to continue with the modernization project begun by the colonial government. Its plans were spelt out in the independence constitution which sought to establish a modern state, as well as in subsequent policy documents such as Sessional Paper No. 10 of 1965 on *African Socialism and its Application to Planning in Kenya*, regarded as the blueprint of capitalism in Kenya despite its socialism moniker. What was described as “African socialism,” in the Sessional Paper included concepts couched in modernist language such as “political equality,” “social justice,” “equal opportunity,” and “freedom of

¹⁷ Assassinated Luo leaders included Awings-Kodhek and Tom Mboya.

conscience.” African socialism as defined was to be “adaptable to new and rapidly changing circumstances” and even more importantly, the paper admonished that progress cannot be “achieved by reverting to pre-colonial conditions.” Even the speeches of the first president, Kenyatta, are full of “forward-looking” pronouncements, an euphemism for modernization, and numerous castigations of backwardness, an oblique reference to traditionalism (Kenyatta 1964). Kenyatta himself specifically said: “It is the future, my friends, that is living and the past that is dead” (Kenyatta 1964:2). Although this statement was uttered to heal the racial wounds and suspicions made more stark by the bitter Mau Mau war and concomitant counter-insurgency initiatives, it also adequately captures Kenyatta’s privileging of modernity over his version of backwardness. He castigated the critics of this policy, and drew upon the same language to respond to attacks by his ideological enemies, saying that it was unfair to call those whose minds reside in the past “progressive” while those whose look into the future were dubbed “reactionary” (Kenyatta 1968: xv). Tom Mboya, another important leader and minister, said there was no need to change the colonial system since it was the system that “we have been used to working within” although he admitted that need may arise for “superficial innovations” without steering “a new course” since it was difficult to “create institutions which are African, yet which are appropriate for modern society” (1970:5). As a result, Kenya did not “affect a major ideological, or structural, break with the colonial state and all she did was to expand the former colonial administrative and economic structures” leading to charges that it was a “neo-colonial” state (Ochieng & Atieno-Odhiambo 1995: xiii). In a nutshell, then, Kenya’s founding fathers, in their official statements, embraced modernity line, hook and sinker.

The cost of embracing modernity was the relegation of tradition and culture into secondary importance. Although Kenyatta was himself an anthropologist of repute,¹⁸ his administration did not borrow from such traditional governance systems such as the *Njuri Ncheke* of the Meru, the *Kiama* of the Kikuyu, the *Ker* system of the Luo, or any other African traditional system. Instead, the administration invented a slew of traditions and symbols, not least of which are the Kenyan flag, the constitution, the national anthem,

¹⁸ In 1938, Kenyatta became the first East African to publish an “academic” book when he published *Facing Mount Kenya*, a personalized anthropology of his people, the Kikuyu.

Coat of Arms, national assembly, and brand new administrative and honorific titles such as “Chief” “Mheshimiwa” (honorable) “Mtukufu” (Venerable) and “Mzee” (wise elder/patriarch), as well as names of medals for distinguished service such the Head of State Commendation (HSC), Order of the Burning Spear (OBS), and Elder of the Golden Heart (EHG). English and Kiswahili, both alien to the majority of Kenyan ethnic groups, were adopted as the official and national languages respectively, in the hope that their wide usage would result in collective identity (Sure 1998). The leaders did not take seriously the wisdom in the words of an ex-Mau Mau combatant who eloquently stated: “It takes more than a National Anthem, however stirring, a Coat of Arms, however distinctive, a National Flag, however appropriate, a National Flower, however beautiful, to make a Nation”.¹⁹ The policy of Africanization was limited to the replacement of white civil servants with black ones and did not extend to the realm of modes of governance.²⁰

In substantive areas touching on state and governance, however, only in law was an attempt made to give indigenous culture pride of place with the recognition of customary law as one of the four main sources of Kenya law – the others being English Common Law, Indian law and statutes (Jackson 1984). But even here, what the founders of the post-independence nation gave tradition and culture with one hand, they took with the other. All customary laws based on the customs of any of Kenya’s 42 ethnic groups were to be subordinate to modern statutes enacted in a modernist parliament as per the modernist constitution, and such traditional laws were to be considered null and void whenever they came into conflict with the constitution. This disregard or devaluation of anything “cultural” or traditional extended to other aspects of nation building as well; for instance, the only broadcasting station in Kenya in those days, the Voice of Kenya (VOK), was forbidden from playing “tribal” music in its National Service,²¹ the only

¹⁹ Quoted in *Daily Nation* December 12, 2003 <http://63.110.5.89/News/DailyNation/12122003/Comment/Editorial1212200313.html> These words were initially stated by JM Kariuki, a fierce critique of the regime of Jomo Kenyatta, who was assassinated in 1975.

²⁰ It is possible to confuse the patriarchy rule of Kenyatta with African traditional rule. Suffice to say that traditional African rule was more consultative and that the dominance of elders was not total or absolute since the elders, unlike Kenyatta, could be challenged.

²¹ There is a generation of Kenyans, born between 1963 and 1990, what lawyer Njonjo Mue (2000), has called the “Uhuru generation,” that grew on a fare of Congolese music, being the only music that was played on National radio stations. In a country where the government saw tribal music as ethnically divisive, Congolese music, coming from outside, was seen as “neutral” and non-threatening. The recent

channel with a state-wide reach, because such music was seen as potentially ethnically divisive. Meanwhile, the state continued to pay lip service to traditional culture by establishing a ministry of culture, which, unable to define culture, ended up defining its role as the popularization of “modern” sports like soccer. The ministry was also instrumental in the establishment of amusement parks such as Bomas of Kenya, where traditional culture was apprehended in dioramas that compete for attention with live performances featuring tribal life rooted in a static anthropological presence.

Despite these efforts at suppressing traditions and culture in favor of modernity, the project of forging one nation out of the 42 ethnic groups in Kenya has failed dismally, with Kenyan politics now being regarded as the most tribal in the East African region (Ovis 2001). There are many reasons for this failure, but I submit that memory is an important factor that is often not acknowledged. The memories of diverse communities in Kenya are shaped by the practice of tribalism, which I define as a practice, akin to racism, in which the elite of different ethnic groups constitute themselves into a formation for unscrupulously accessing state and private sector wealth in the name of their tribe at the exclusion and expense of other ethnic groups with whom they share a common country. It is a narrow, localized form of nationalism *within* an African state that aspires to be a nation. Through its discriminatory practices, tribalism produces bitter memories of offence and exclusion, which presents particular difficulties for nation-building, as I have already alluded. It matters little that groups that experienced a sustained interaction with colonialism are often the ones better equipped to compete for access to national wealth. It is a peculiar situation in which the biggest victims of colonialism benefit from the fact of their victimization by the colonialists. As areas where colonialism had lesser impact become more modern, this modernity afflicts the inhabitants of those areas with a certain consciousness not dissimilar to that experienced by those whose encounter with colonialism was more sustained and intense. They start to blame their predicament, rightly or wrongly, now that the colonialists have left, on those whose experiences with colonialism accidentally imbued them with certain advantages for competing in a modernist setting: education, and perhaps more importantly, a

resurgence in popularity of Kenyan ethnic music in the recent past is a response to the opening up of airwaves to ethnic music.

commercial ethic. The communities on the receiving end of blame cannot understand why they should bear the blunt of the blame, because they see themselves as doing some good work, being the communities producing most teachers, civil servants and businessmen, who are unwittingly involved in the “civilizing” of their fellow citizens. The civilizing mission of colonialism did not disappear with *Uhuru*, and continues to elicit the same responses, not least of which is resentment.

This is perhaps what is meant by the argument that the socio-political configurations existing before European conquest have been accentuated in the postcolony, leading to a situation where “the gap between the formal attributes of borders and their economically and culturally changing properties grows ever wider” (Mbembe 2001: 86). In Kenya, this is best illustrated by conflicts over dwindling land resources, particularly in the Rift Valley province of Kenya. Here, distinctions between indigenes, the communities known to have settled or traversed particular swathes of land, and outsiders, meaning communities that have immigrated to such land, have become commonplace. It is as if internal borders are being erected, with the concomitant exacerbation of particularistic identifications, giving rise to exclusionary practices, a kind of identity closure that has resulted in inter-tribal clashes that border on ethnic cleansing. Perhaps this is the best illustration of failure of not just the project of nation building, but of the state itself in meeting its obligations. Unable to provide security to its property-owning “outsider” citizens, unable to guarantee land security to its threatened “indigenes,” and equally unable to protect the human rights of all, the relevance of the state remains questionable, thrusting to the fore the limits of the constitutional order inherited or designed at independence and pursued throughout the postcolony, and fuelling calls for a new constitutional dispensation.

An interesting aspect of this land-based conflict is that it represents an important but explosive confluence of traditionalism and modernity that threatens to undo the very foundation of the Kenyan nation. On the one hand, the “outsiders,” buyers of the land and advocates of the willing-seller, willing-buyer transactions, are clearly steeped in modernism, of which Capitalism is the best example of its rationalistic offshoot. On the whole, the communities producing the immigrant settler communities happen to be those most affected by colonialism or those with higher rates of population growth. They also

tend to be mostly traditionally agricultural communities with a strong attachment to land deriving from its economic value. Owning land and acquiring a title to it is as modern as it can get, and this is a goal that is often pursued with single-minded determination. It matters little where one acquires a piece of land, so long as such an acquisition is made. This contrasts sharply with traditional land tenure systems advocated for by the “indigene” communities, whereby land tended to be communally owned, with ownership vested in clans and extended families, and where individuals always acquired their land within areas designated as belonging to their groups. Even when land was identified with a particular individual, it was generally accepted that it was held in trust of a group. The modernist concept of property rights conflicts with this traditional system, leading to sharp divisions over “ownership.”

Those opposed to these “free” transactions over the sale of land, arguing that they are exploitative of indigenous communities, could be said to be steeped in traditionalism, since they appear to be bounded by a certain primordial sentimentality to their ancestral lands. They do not just view land as an economic resource but as a cultural artifact as well, as the burial saga of a prominent Kenyan criminal lawyer once illustrated (Cohen & Atieno-Odhiambo 1992). Memories about land revolve around where “our” ancestors are buried or where our people have grazed their cattle or hunted antelopes throughout remembered time. It becomes quite difficult to sell a piece of ancestral land to an “outsider” when so much cultural wherewithal is at stake, or when land is still perceived as a communal resource, regardless of whether it may be individually owned. The implication for this in nation-building terms is that communities cannot integrate easily. Although laws protecting the right of property ownership exist, the state can only enforce them at the pain of appearing to be insensitive to what are invariably seen as small, vulnerable, endangered, indigenous communities, who are increasingly outspoken against any perceived encroachment of their rights, and who have a ready ear in media and international organizations, most of whom are not interested in understanding the full context of such confrontations beyond their spectacle value. The modernity-traditionalism nexus extends to the land use systems adopted by different communities as well. The pastoralists keep livestock as they have traditionally done in roughly two-thirds of the country, while the farmers, herded into the remaining one-third and increasing at a

faster rate, have generally adopted modern agricultural techniques, but are hungry for more land. Needless to say, this struggle over land has adverse implications for national food security,²² over and above its consequences on national unity.

Constitutionalism and Prospects for Nationhood

Given the foregoing equal opportunity ethnic suspicion and bitter memories, how can Kenya still achieve the goal of creating one nation that it set for itself at the time of independence? The answer appears to lie in constitutionalism, the mark of a civilized polity under which power has “gained independence from the arbitrariness and capricious subjectivity of the ruler or a ruling elite” (Preuss 1995:5). Unfortunately, Kenya, while obviously not the worst case in Africa, cannot stake a claim at being the best model of the rule of law. The concentration of executive power in the presidency once led an Israel political scientist to remark: “Kenya may not be the best example of nation-building, but it is certainly an outstanding example of regime-building in Africa” (Tamarkin 1978: 298). This observation is still valid; Kenya’s presidency is still powerful despite efforts to chip at this power in recent times. Only the rule of law would establish the rules of competition and for accessing state resources in an equitable fashion, as well as guarantee individual rights, including the right to property and the right to own, sell or withhold property anywhere in the country, excepting the doctrine of eminent domain lawfully instituted, whenever executed, without undue communal pressures. The rule of law would also eliminate political assassinations and other human rights abuses. If this sounds like a naked call for liberal democracy, it probably is; it is recognition that of the many forms of democracy in existence, it is liberal democracy that Kenyans have been clamoring for.

Constitutionalism is the epitome of liberal democracy. While it may mask what might initially appear like dispossession of land for some in the short-term by guaranteeing willing-seller, willing buyer policies, it is unlikely that this “dispossession” will be abrupt and extensive, given that it will depend on forces of demand and supply. Constitutionalism also guarantees freedom and equal opportunity for all, meaning that a

²²Kenya experienced severe food shortages in 2005. Although much of the famine is attributable to drought, small scale farming has not yet reverted to the pre-1990 levels because victims of tribal clashes, which aimed at expelling “settler” communities from lands regarded as belonging to “indigenous” communities, still do not feel secure enough to return to their holdings.

system guided by constitutionalism has an inherent capacity for self-correction. Moreover, constitutionalism equalizes people and communities before the law, and gives communities the right to elect to persist in their narrow identities or to dissolve those identities in favor of new, larger ones knowing their right to do so is safeguarded under the law. It is for this reason that so much hope is invested in a new Kenyan constitution, the process of making which has stalled in the mud of politics.²³ Specifically, the challenge of writing a new constitution for Kenya, which has been facing the country since 1990s, has become so intractable primarily because of what groups remember about their past under the Kenyan banner both in the colonial and postcolonial contexts. Given their respective memories, communities refuse to compromise, fearing that past experiences might be repeated. In other words, particularistic memories are holding the Kenyan constitution-making process at ransom. Yet Kenya has no choice but to resolve the matter of its constitution. The new constitution must be one that recognizes the role of memory in nation-building and the contribution of memory to national healing and the fostering of inter-communal and inter-personal trust. As the Chairman of the Kenya Human Rights Commission has observed:

A nation that does not know or recognize its past of repression is bound to repeat that repression again. And historical amnesia cultivates impunity, easily the biggest issue that is wanting in human rights in Kenya” (Kiai 2005).

The resultant constitutional document must therefore be “a polemic against the past” (Duchacek 1968: 94) meaning that it must prevent history from repeating itself, while simultaneously mindful of being beholden or captive to that past. This critique of the past will legitimate any prescription on the country’s future direction. The resultant constitution must be a genuinely negotiated document in which all individuals Kenyans feel represented and their interests taken into account, so that diverse communities can start to live together as equals, thus beginning to build a history of shared amicable, equal progress that might result in nationhood in the long run. The process has stalled partly

²³ Since the referendum in November 2005, there have been numerous attempts to jumpstart the constitution-making process but these have floundered at the alter of partisan politics and shortsightedness. The inability of Kenyans to write their own constitution has been a cause of concern for other African

because there is too much emphasis being placed on communities, who are seen as a necessary, legitimate, alternative conferrer of citizenship (Ndegwa 1997).²⁴ The problem is that such communities come to the negotiating table with considerable memory baggage.²⁵ Their memory baggage meets with other memory baggage presented by other communities. As a result, constitution making becomes an exercise in shifting memory baggage. In order to write a new constitution, the individual must be elevated above the community. In constitutionalism, what is important is how adequately the individual is served by the constitution and the law. If the individual is protected by the constitution and the law as applied, so is that individual's community since communities are made up of individuals. The rights of the community derive from the rights of the individual. However, if a community is constitutionally protected, there is no guarantee that the individual in that community is protected. And to protect the community after protecting the individual in a constitution is not only to double in duplication, but the surest way to arrive at a bizarre Byzantine code that ceases to be a guide and intrudes into the field of statutes, policies and little regulations. If we protect the nomads or the agricultural communities in the constitution, why not protect the fishermen as well? Why not have some language to expressly protect the community of left-handed people or those with more than 1000 heads of cattle?

In the past, the community was important because it offered a measure of "protection" against arbitrary single-party, military and personal rule. This protection was mainly in the form of a sense of belonging to a group that faced the same tribulations.

states, with the African Peer Review Mechanism of the African Union offering to send experts to help draft the new constitution. Kenya has not accepted the offer.

²⁴ There is no convincing argument made why Kenyans, and other Africans by implication, require *de jure* dual citizenship, one ethnic and the other national. The sanctioning of ethnic citizenship by constitutions will apprehend the natural attrition and malleability of ethnic identities, and thus give such identities a life and a legal legitimacy they would not ordinarily have. Significantly, this advocacy fails to recognize that Western liberal democracies were not built on a foundation of constitutionally guaranteed ethnic citizenship, and that Ethiopia, the African countries that has gone the furthest in enshrining ethnic federalism in its constitution has not solved its political problems.

²⁵ In the so-called "Bomas" or Ghai (named after Prof. Yash Pal Ghai, the chairman of CRCK) constitutional draft, communities argued successfully that the independence constitution had discriminated against them. They were therefore accorded considerable rights, including special recognition, affirmative action, and special representation. These rights amounted to exacting reparation from the rest of the citizens for mistreatment many of them had no idea they had committed against the communities. Equalization of opportunity for all citizens was not considered adequate for the communities, leading to an absurd situation where some Kenyans would have made do with "equal opportunity" while paying for the affirmative action costs of "modernizing" or "civilizing" other Kenyans.

The community was where the individual run for succor after encounters with dictatorship and discrimination. It is easy to persist in this mentality, to continue to see the community, because it has provided some service to the individual in the past, as the only way to guarantee the protection of the individual. That is why Kenyans are finding it so difficult to jettison their community in order to proceed. But to inscribe this mentality in the constitution is to refuse to innovate and to be governed by short-termism. It would also to give the Mamdanian dichotomy of “citizen and Subject” (1996) a new lease of life since the existence of these categories relies heavily on the selective application of citizenship rights based on groups and their immersion into modernity. Only the elevation of the individual above the community can result in the equalization of both citizen and subject. Constitutionalism offers the best prospect for emancipating the subject and putting her at par with the citizen for the simple reason that there is no arbitrariness in the rule of law. Once the interests of the individual are protected in the constitution, the individual will cease to look upon the community as the guarantor of his interests and develop more faith in the rule of law. This approach is the only one that will help resolve the problem of constitution making in Kenya. Only this approach will allow for a constitution that functions “as an integrative means of transforming a multitude of individuals into one people, that is, into a political body” (Preuss 1995:5). And here lies the link between constitutionalism and the concept of the nation.

Conclusion

My concern in this essay has been to present a balance sheet of nation-building efforts based on the objective that Kenya set for itself at the time of independence. The reason why nationhood has not been attained, I have argued, has a lot to do with the nature of both colonial and postcolonial memory which are wildly divergent, as well as the role of tradition, and in particular how the rootedness of communities in variegated traditions makes it hard for a common outlook based on shared values and heritage to emerge. This balance sheet clearly does not add up. Can a people that remembers too much, remembers what sections of it forgets and forgets what other sections remember, a people with no collective selective amnesia, a people that cannot agree on what to remember or forget, become one? One is lead to conclude that in situations where history

has not been solidified by the passing of long stretches of time, the construction of collective memories becomes the crucial variable in the success of any efforts to collectivize identities. Owing to discordant pre-colonial, colonial and postcolonial memories, Kenya is now more tribal than ever before, despite 40 years of building a national system in which each of these tribes are subject. The emerging tribal hybridity in towns is occurring too slowly and can only result in oneness after many generations. Nigerian Chief Awolowo once remarked: "Nigeria is not a nation. It is a mere geographical expression" (Sklar 1963: 233). He might as well have been talking about Kenya. I have recommended that Kenya can overcome the problem of writing her constitution and become one nation by elevating the individual above the community, which in any case can change form and composition depending on time and circumstances, but an individual endures.

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