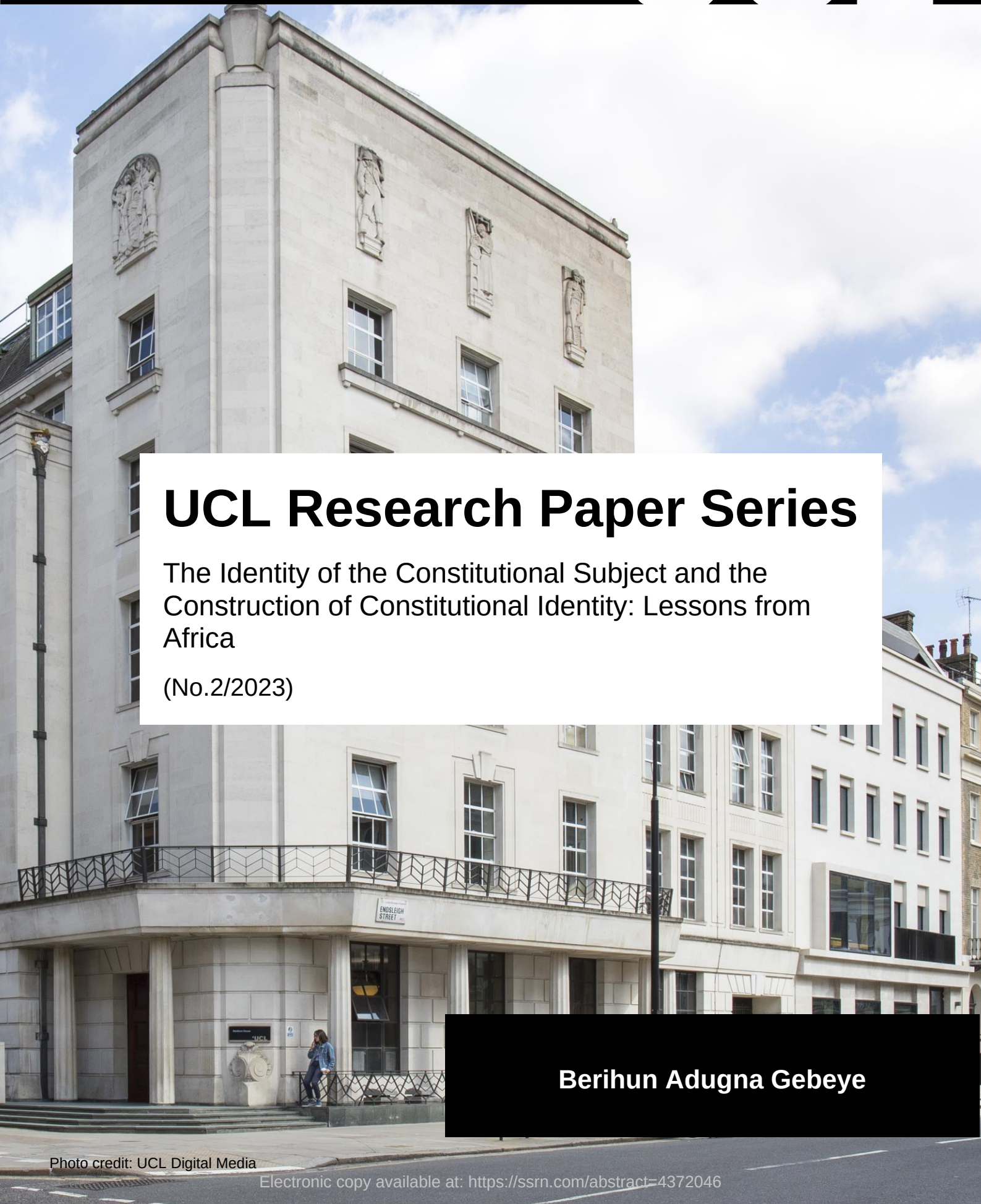
UCL FACULTY OF LAWS



UCL Research Paper Series

The Identity of the Constitutional Subject and the Construction of Constitutional Identity: Lessons from Africa

(No.2/2023)

Berihun Adugna Gebeye

Photo credit: UCL Digital Media

The Identity of the Constitutional Subject and the Construction of Constitutional Identity: Lessons from Africa

Berihun Adugna Gebeye*

Abstract

In this article, I introduce a degree of novelty into the scholarship on the nexus between constitutional identity and the constitutional subject. I do so by pluralizing both the territorial space constitutional identity exists and the constitutional subject it interacts. Drawing from the African Union continental constitutional framework, the Ethiopian national constitutional experience, and the Nigerian subnational constitutional practice, I show how the three-tiered political identity of the constitutional subject – Pan-African, national, and subnational- shapes the construction of constitutional identity at various levels differently. While the Pan-African identity of the constitutional subject assists in imagining a cosmopolitan constitutional identity at the continental level, the sub-national identity of this same constitutional subject supports the establishment of a unique constitutional identity at the national (Ethiopia) and subnational (Nigeria) levels. I demonstrate how the identity of the constitutional subject and its accompanying social and political movements offer a relevant material for the construction of constitutional identity, and how this, in turn, may shape, facilitate, or complicate the practice of constitutionalism in the African context.

Keywords: constitutional identity, constitutionalism, constitutional subject, Africa, African Union, Ethiopia, Nigeria

1. Introduction

While constitutional identity has many close affinities with other constitutional and political ideas,[1] it has unique ties with the constitutional subject, the people, for two main reasons. First, constitutionalism as a theory of government and way of life revolves around the 'poles of identity and difference'.[2] Internally, this means the poles of identity and difference between the governor and the governed, as well as among the latter. Externally, this refers to those between the people

*Lecturer in Law, Faculty of Laws, University College London. Email: b.gebeye@ucl.ac.uk. I am grateful to Adrienne Stone, Stijn Smet, Philipp Dann, Zim Nwokora, Elisa Arcioni, Cheryl Saunders, Patrick Emerton, Emilio Meyer, Tímea Drinóczi, Yaniv Roznai, Jaclyn Neo, Pietro Faraguna, Julian Scholtes, Ewan Smith, Megan Donaldson, Colm O'Cinneide, Carsten Gerner-Beuerle, Isra Black, Maria José Schmidt-Kessen, Marie Laur, Juliana Cesario Alvim Gomes, and Tibor Tajti for their comments and suggestions on an earlier draft. I also thank the participants of the Workshop on Constitutional Identities at the Melbourne Law School Centre for Comparative Constitutional Studies, Faculty Research Seminar at the UCL Faculty of Laws, and the Brown Bag Seminar at the Department of Legal Studies of Central European University for their feedback and comments from which this article has benefited immensely. I am grateful to the two anonymous reviewers of the journal for their constructive feedback and invaluable suggestions.

[1] See Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021) Chapter 3.

[2] Michel Rosenfeld, 'Introduction' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press 1994) 4.

within and beyond the constitution's reach. Second, the constitution has to first *define its subject* to provide *the rule* within which its subject has to live.[3] But the constitution cannot define and rule the subject alone. The identity of the constitutional subject also shapes that of the constitution and how its rules may apply in practice in time and place. The standard way of understanding both constitutional identity and the constitutional subject is through the prism of the state: that constitutional identity is the propriety of the state, and the constitutional subject is the *We the People* that constitutes it. According to the standard view, there is both a singular territorial space and conception of peoplehood within which constitutional identity arises and operates. In this article, I introduce some novelty to the scholarship on constitutional identity by pluralizing both the territorial space in which it exists and the identity of the constitutional subject it interacts drawing from three African cases studies: the African Union *continental* constitutional framework, the Ethiopian *national* constitutional experience, and the Nigerian *subnational* constitutional practice. I particularly focus on how the plural political identity of the constitutional subject shapes the construction of constitutional identity at continental, national, and subnational levels differently.

The constitutional subject I focus on in this article has a three-tiered political identity: continental, national, and subnational. At the top is a continental identity shared by all Africans without any hesitation that 'we are Africans', at the bottom is a strong ethnic one that 'we are Oromo' or 'we are Yoruba', and in the middle is a national one that 'we are Nigerians' or 'we are Ethiopians', which not many can truly affirm, unlike the other two.[4] Due to such three-tiered political identity, the constitutional subject (the people) in Africa has a dynamic view of community, territory, and sovereignty at the sub-national, national, and continental levels. Therefore, the identity of the constitutional subject I discuss in this article is not related to some common national identity that emanates from a shared culture, language, religion, or worldview, unlike the case in Europe.[5] Rather, it concerns an identity punctuated by a three-tiered political identity where there is either a lack of or contestation about a common national identity. In such circumstances, as I show in this article, we must account for the identities of the constitutional subject *below* and *above* national identity to understand how such identities of the constitutional subject shape the construction of constitutional identity at different levels. Herein lies Africa's experience with and contribution to the theory and practice of constitutional identity and my point

[3] See also Martin Loughlin and Neil Walker, 'Introduction' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007); Elisa Arcioni, "We, What People?' Constitutional Identity in Australia' (2017) This Century's Review, 2, 34-36.

[4] Francis Mading Deng, *Identity, Diversity, and Constitutionalism in Africa* (US Institute of Peace Press 2008) 31-32.

[5] J.H.H. Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3 International Journal of Constitutional Law 173, 184.

of departure in the investigation of the nexus between the constitutional subject and constitutional identity.

In this article, I explore and examine how the identity of the constitutional subject helps to construct a constitutional identity from moments of constitutional imagination to constitution-making to practice using the African Union, Ethiopian, and Nigerian constitutional experiences respectively. I argue that the constitutional subject's dynamic view of community, territory, and sovereignty, on the one hand, and its unique account of history, politics, and international relations, on the other, makes it an interesting site for understanding how constitutional identity is formed in the region. While the constitutional subject's continental identity assists in imagining a cosmopolitan constitutional identity through the African Union, the sub-national political identity of this same constitutional subject has set in motion a unique constitutional identity at the national (Ethiopia) and subnational (Nigeria) levels. In Ethiopia, the rejection of a common national identity as a people during constitution-making has brought about a novel idea of *We the Nations, Nationalities and Peoples* which sets in motion a formally and substantively different type of constitutionalism than the one that operates with the logic of *We the People*. In Nigeria, an Islamic system of government develops from and co-exists with constitutional democracy at the subnational level in some northern states, and these states have defined themselves as both *democrats* and *Muslims* who can live within the dictates of sharia and constitutional democracy. Through these three case studies, I demonstrate how the identity of the constitutional subject assists in constructing constitutional identity and how this, in turn, may shape, facilitate, or complicate the practice of constitutionalism. I start with a brief introduction to the notion of constitutional identity and its construction and continue to explore and examine how the identity of the constitutional subject aids in creating different constitutional identities at the continental (African Union), national (Ethiopia), and subnational (Nigeria) levels in this order.

2. Constitutional Identity and Its Construction

Constitutional identity is both a descriptive and normative concept.[6] As a descriptive one, as Michel Rosenfeld has observed, constitutional identity emanates from the very fact of having a

[6] It could be deployed to protect or advance as well as to erode or destroy liberal constitutionalism. See for example, Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 European Law Journal 457-473; R. Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies 59; Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 German Law Journal 534-556.

constitution (written/unwritten[7]) and from its contents (such as the nature of the state, form of government, and type of recognized rights) and operating circumstances.[8] Or, as Gary Jeffrey Jacobsohn has argued, constitutional identity could be a result of a dialogical process of the disharmonic constitution.[9] In the descriptive sense, constitutional identity is something that gives some unique character to a constitutional order and that encapsulates its central ethos. As a normative concept, constitutional identity is something that should be protected and safeguarded and, precisely because of this, it helps to set up additional boundaries within the constitutional order for constitutional change within which some popular, legislative, and executive actions and practices are (im)permissible. In its normative sense, therefore, constitutional identity both sits at the core of the constitutional order of a polity and regulates permissible or impermissible constitutional change along with its speed, intensity, and nature in time and place.

But how does constitutional identity (be it in its descriptive or normative conceptions) come into being? What is its origin story? Thus far, there are two main theories that explain how constitutional identity could emerge or develop in a polity. The first theory is advanced by Jacobsohn and the second by Rosenfeld. According to Jacobsohn, constitutional identity emerges through experience and its driver is disharmony: 'a disharmony manifest either in the disjuncture between a constitution and a society or between commitments internal to a constitution'.[10] In his own words,

> a constitution acquires an identity through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Rather, identity emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past.[11]

Jacobsohn takes the constitution as the primary frame of reference in developing his theory of constitutional identity. Moreover, the dialogical process that activates the formation and development of a constitutional identity is set in motion when there is a disharmony between the core commitment(s) of a constitution and its external environment.[12] For Jacobsohn, constitutional identity then emerges from the practice of a disharmonic constitution.

---

[7] For the broader implications of written and unwritten constitutions, see Jeff King, 'The Democratic Case for a Written Constitution' (2019) 72 Current Legal Problems 1.

[8] Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 758; Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010).

[9] Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).

[10] Jacobsohn (n 6) 149.

[11] Ibid. 7.

[12] Ibid. 13-14.

Rosenfeld, on the other hand, argues that constitutional identity emerges from a dialectic process that constantly weaves together the two facets of self-identity, sameness and selfhood, with 'the aim to unify all those that are encompassed within a single constitutional order'.[13] For him, constitutional identity arises from the complex processes of constitution-making, constitutional interpretation, and constitutional construction, and its driver is *lack*. He posits that 'constitutional identity first emerges as a lack that must be overcome through a discursive process that relies on three principal tools: negation, metaphor, and metonymy'.[14] Through negation, the constitutional subject rejects and repudiates its pre-constitutional and other relevant identities.[15] Metaphor offers a tool for constructing a positive identity by emphasizing similarities to the constitutional subject and it helps to fill the void created by negation.[16] Metonymy positions the constitutional subject in a state of difference and contiguity, consequently, instilling lack.[17] The dialectic process of negation, metaphor, and metonymy 'reprocesses the pre-constitutional and extra-constitutional ones into a serviceable, flexible, and adoptable constitutional identity'.[18] For Rosenfeld, unlike Jacobsohn, the identity of the constitutional subject is the engine for the production of constitutional identity. As the people must grapple with questions of sameness and selfhood on a constant basis by living in a bounded polity, such a dynamic process produces a constitutional identity which is alienated from and congruent with the national identity.[19]

Despite their differences in method and approach, Jacobsohn and Rosenfeld have a complementary aim and similar fundamental assumptions.[20] Their goal is to show how the concept of constitutional identity (in addition to the constitution) could provide additional legal, political, and sociological tools for understanding, overcoming, and managing the challenges of diversity in political life within a polity made up of strangers. Their overreaching goal is to demonstrate how constitutional identity has helped create some form of common unity and cohesion in a polity.[21] For this, Jacobsohn turns his attention to the disharmonic constitution, that is, the constitution's relation to itself and society, and Rosenfeld focuses on the identity of the constitutional subject, that is, the people's relation with itself and the constitution. But the disharmonic constitution could

[13] Rosenfeld, *The Identity of the Constitutional Subject* (n 5) 27-36.
[14] Rosenfeld, 'Constitutional Identity' (n 5)) 759.
[15] Michel Rosenfeld, *The Identity of the Constitutional Subject* (n 5), 46-51.
[16] Ibid. 51-53.
[17] Ibid. 53-56.
[18] Rosenfeld, 'Constitutional Identity' (n 5) 759.
[19] Rosenfeld, *The Identity of the Constitutional Subject* (n 5) 10.
[20] See also Michel Rosenfeld, 'Deconstructing Constitutional Identity in Light of the Turn to Populism' in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: Essays on Constitutional Identity in Honor of Gary Jacobsohn* (forthcoming).
[21] For instance, see Jacobsohn (n 6) Chapter 4 and Rosenfeld, *The Identity of the Constitutional Subject* (n 5) Chapter 1.

be a site for the generation of constitutional identity only when it has the necessary construction material, that is, constitutional (judicial) practice. Indeed, in the United States, India, Israel, and Ireland, Jacobsohn's case studies have sufficient constitutional (judicial) practice to develop and test his theory of constitutional identity. However, Jacobsohn's theory has some limitations in dealing with jurisdictions that do not have sufficient constitutional (judicial) practice (for example, as in much of Africa), unlike his examples: does this mean that these jurisdictions do not have a constitutional identity? Essentially, does this mean that constitutional identity only arises in an environment of liberal constitutional practice? I do not think so.[22] At least in the descriptive sense, everything that exists has an identity although such identity may change due to internal and external factors. Additionally, as Princeton historian Linda Colley has noted, constitutions (including the liberal ones) have not been innocent devices since they began forming and reshaping legal and political systems across countries and continents since the mid-18th century.[23] So, limiting the notion of constitutional identity to liberal constitutions or to some of their liberal ethos could be unreflective of and/or may conceal the identity of constitutions, at least as an empirical matter. Furthermore, surely, disharmony within and beyond the constitution could create the conditions for the emergence of constitutional identity. But, as this article demonstrates, harmony or congruence at the constitutional and societal level could also assist in establishing a constitutional identity. Like constitutional practice, constitution-making could well be a site for the building of constitutional identity. As with constitutional institutions such as courts, the constitutional subject could be an agent that triggers and produces constitutional identity.

Similarly, Rosenfeld builds his idea of the constitutional subject based on the notion of the nation-state projected as 'imagined communities': that is, one composed of strangers tied by some conceptions of community, territory, and sovereignty.[24] But the idea of the nation-state and its attendant constitutional vision and politics are particular to a Euro-American setting. The state in much of the global south such as Africa has a different texture and nature with a diametrically divergent concept of community, territory, and sovereignty.[25] While Rosenfeld's account of the identity of the constitutional subject offers a sophisticated theoretical lens through which to

[22] See also Bui Ngoc Son, 'Globalization of Constitutional Identity' 26 Wash. L. Rev 3, 463-534, outlining what he considers a 'socialist constitutional identity' most prevalent in Vietnam, Laos, China, North Korea, and Cuba.
[23] See Linda Colley, *The Gun, the Ship and the Pen: Warfare, Constitutions and the Making of the Modern World* (Liveright Publishing Corporation 2021).
[24] Rosenfeld, *The Identity of the Constitutional Subject* (n 5) 11-12.
[25] See Berihun Adugna Gebeye, *A Theory of African Constitutionalism* (Oxford University Press 2021) Chapter 3.

examine constitutional identity, its underlying assumptions of community, territory, and sovereignty must be further contextualized.[26]

At least in the African context, the imagination of a political community has often been occurring at three levels (sub-national, national, and continental) simultaneously following the aforementioned three-tiered political identity, which requires us to think differently about the notion of people, territory, and sovereignty in the construction of constitutional identity.[27] This is simply because although the superimposition of a colonial constitutional system over pre-colonial Africa set in motion fundamentally new constitutional systems based on the Westphalian (national) and post-Westphalian (regional and sub-regional[28]) models, people in many African states have retained some core aspects of their pre-colonial political identity, whether along ethnic, religious or regional lines. And this ethnic- or religious-based political identity has been the main site of political mobilization that has shaped national constitutional systems. While the sub-national identity does not bring about a distinct constitutional form of its own in many African states, it nonetheless is a site for the formation of national constitutional identity and a key determinant of how much states could contribute to continental integration, and hence, to the establishment of continental constitutional identity. Yet, as this article demonstrates, the Nigerian experience clearly shows that a sub-national constitutional identity is conceivable and practicable. This article contributes to and expands the scholarly conversation about the study of constitutional identity by introducing the multiple identities of the constitutional subject and the accompanying social and political movements as a location for the building of constitutional identity, to which I now turn.

3. *We the People of Africa*: Constructing a Continental Constitutional Identity

In 2013, the African Union (AU) adopted Agenda 2063 during the Golden Jubilee celebrations of the formation of the Organization of African Unity (OAU) in 1963. Agenda 2063 aims to provide a framework for addressing the continent's perennial problems: how to realize full self-determination in political, cultural, and economic terms in a changing world. It views the political unity of Africa, which includes the free movement of persons, goods, and services under

[26] See also Philipp Dann, Michael Riegner, and Maxim Bönnemann, 'The Southern Turn in Comparative Constitutional Law: An Introduction' in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020).

[27] See also Wale Adebanwi, 'Africa's 'Two Publics': Colonialism and Governmentality' (2017) 34 Theory, Culture & Society 65.

[28] See, for example, Michèle Olivier, 'Conceptualising AU Law within the Constitutional Framework of the AU' in Olufemi Amao, Michèle Olivier, and Konstantinos D. Magliveras (eds*), The Emergent African Union Law Conceptualization, Delimitation, and Application* (Oxford University Press 2021); Sègnonna Horace Adjolohoun, 'The Making and Remaking of National Constitutions in African Regional Courts' (2018) Africa Journal of Comparative Constitutional Law 1, 35-70.

continental government institutions, as the culmination of Africa's integration process and as the best way to realize the outstanding African quest for full self-determination as well as to assert their rightful place in the world.[29] Following familiar phrases in constitutional preambles, Agenda 2063 starts with 'We the people of Africa and her Diaspora' as it presents the key aspirations and visions for 2063.

But what is the driving force behind the persistent search for continental political unity? How do African states plan to form a continental polity? Moreover, what do they want to do with it? As with any political project, there may be multiple and often multifaceted reasons behind the African quest for continental unity and integration.[30] Two of these reasons are relevant for our purpose here. The first is related to identity and associated with the idea of Pan-Africanism. The second is related to the search for a constitutional arrangement that responds to the limits of the Westphalian state and its normative and institutional infrastructure in delivering the promises of self-determination.

The OAU, AU and now Agenda 2063 are all animated by the idea of Pan-Africanism.[31] While Pan-Africanism may have several iterations as a category of both practice and analysis, it is principally related to the notion of liberation, integration, and a vision of a world free from domination.[32] As a conception of liberation and integration, Pan-Africanism is rooted in as well as being a reaction to the transatlantic slave trade and slavery and the attendant emergence of global capitalism, colonialism, and anti-African racism that subjected Africans in the diaspora and on the African continent to various forms of unfreedom, domination, and extraction.[33] Viewed in this light, Pan-Africanism considers African unity both as a means of reconnecting with the past to fill the void created by slavery and colonialism and as a political ideology of liberation, not only from colonialism and its legacies, but also from the imperial presidency that further weakened the capacity of the postcolonial state and deepened the fragmentation of the people along ethnic, religious, and regional lines.

As a vision of a world, Pan-Africanism considers that one free from domination and hierarchy is possible and even achievable by 2063 or in its immediate aftermath if Africa is united

---

[29] The African Union, 'Agenda 2063: The Africa We Want' (2015) 2 Aspiration 23 https://au.int/Agenda2063/popular_version accessed May 23, 2022; see also Oluwaseun Tella, 'Agenda 2063 and Its Implications for Africa's Soft Power' (2018) 49 Journal of Black Studies 714.

[30] See, for instance, Kwame Nkrumah, *Africa Must Unite* (FA Praeger 1963); Kurt B. Young, 'Africa Must Unite Revisited: Continuity and Change in the Case for Continental Unification' (2010) 57 Africa Today 43.

[31] See Hakim Adi, *Pan-Africanism: A History* (Bloomsbury Publishing 2018).

[32] See Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (Princeton University Press 2019) 5-9; Opeyemi Ola, 'Pan-Africanism: An Ideology of Development' (1979) 4 Présence Africaine 112, 66-95; Hakim Adi, *Pan-Africanism: A History* (Bloomsbury Publishing 2018).

[33] Adi (n 47) 16-19.

to solve its problems by itself and if it plays its role in international affairs. In this sense, Pan-Africanism is a framework of cooperation and solidarity among Africans, in addition to the African states and diaspora, as well as the rest of the world for creating and maintaining the conditions of freedom within and even beyond the continent.[34] This means that African states can no longer stay indifferent to what is going on within and outside of the continent, from violent conflicts to climate change.[35] As Adom Getachew brilliantly writes, Pan-Africanism in this sense is a project of world-making beyond empire and the nation-state, and the AU and Agenda 2063 could be considered some concrete manifestations of this project. Whether this project, indeed, could materialize is a different line of inquiry and beyond the scope of this article.

Nonetheless, the continental integration project and its attendant constitutional framework are deeply *identitarian*. Moreover, this is partly why membership to the OAU and AU have been open to any African state without a substantive condition like the European Union. Even Agenda 2063 extends as far as including the African diaspora all over the world in its Pan-African vision and aspiration. It is identity and the place and position they (and people like them) occupy in the world that bind generations of Pan-African leaders, from Henry Sylvester Williams[36] of Trinidad to W.E.B. Du Bois[37] of the United States, who pioneered Pan-Africanism, to Kwame Nkrumah[38] of Ghana and his contemporaries who brought Pan-Africanism to the African continent and gave it a viable institutional form in the OAU in Addis Ababa, to Muammar Gaddafi[39] of Libya who helped to transform the OAU into the AU, to Thabo Mbeki of South Africa whose 'I am an African' speech (on the occasion of the adoption of the new constitution of South Africa) reinvigorated the idea of African renaissance,[40] to the contemporary African leaders who adopted Agenda 2063. The 'African identity' and the concomitant quest for dignity, recognition, and development have been the engine of Pan-Africanism and its cosmopolitan constitutional vision.

But identity is not the only motivation for this continental project. There is also a *constitutional* rationale, which is related to the limit of the Westphalian state for freedom and full self-determination in the African context. Internally, the experiment of the nation-state, especially

---

[34] See also Getachew (n 29).
[35] Consider the speech of Martin Kimani, Kenyan Ambassador to the United Nations, on the Russian invasion of Ukraine. For details, see https://www.npr.org/2022/02/22/1082334172/kenya-security-council-russia accessed May 24, 2022.
[36] See Marika Sherwood, *Origins of Pan-Africanism: Henry Sylvester Williams, Africa, and the African Diaspora* (Routledge 2010).
[37] See W.E.B. Du Bois, *The World and Africa and Color and Democracy* (Oxford University Press 2014).
[38] See Nkrumah (n 45).
[39] See Maano Ramutsindela, 'Gaddafi, Continentalism and Sovereignty in Africa' (2009) 91 South African Geographical Journal 1.
[40] See Mompati Vincent Chakale and Phemelo Olifile Marumo, 'Mbeki on African Renaissance: A Vehicle for Africa Development' (2018) 15 African Renaissance 179.

in the first two decades following independence, revealed that the apparatus of domination and extraction is alive and well, despite the end of colonialism. The replacement of multi-party democracy by one-party systems and the separation of powers by personal rule soon after independence greatly hampered the emancipatory promise of self-determination and the capacity of the state for societal transformation.[41] Externally, due to their unequal and onerous membership of the community of nations, African states and governments have assumed a 'dual accountability' to both their people and 'the international community' at the end of colonialism, which could generate, and indeed has produced, some fundamental limitations in fully executing their constitutions and exercising democratic sovereignty, even when they have the political will and are fully committed.[42] The generation of Pan-African leaders then and now have understood that, to use Nkrumah's phrase, "[t]o get it alone' will limit our horizons, curtail our expectations, and threaten our liberty'.[43] It has been clear that addressing the postcolonial condition of internal democratic deficit and external vulnerability requires thinking through and beyond the postcolonial state.[44] Essentially, Africa needs a new continental constitutional solution something like the kind included in the norms and institutions of the AU and Agenda 2063. Yet, it is this Pan-African idea that Africans share a common past, future, and destiny that makes a continental constitutional action and practice imaginable and possible.

If the foundation of the Pan-African constitutional project has an *identitarian* core, its vision is universal, and its ethos is cosmopolitan precisely because it is animated by the idea of *constitutionalism*.[45] Democracy, human rights, and the rule of law – the 'constitutionalist trinity' of global constitutionalism[46] – are the systems and norms through which the Pan-African constitutional project aims to deliver its promises of full self-determination.[47] Whether total self-determination could be realized through global constitutionalism is again an open question and beyond the scope of this article. Regardless, from the Constitutive Act of the AU to the subsequent charters and protocols, to the sub-regional organizations, and to Agenda 2063, all are determined to adopt, promote, and consolidate the universal values of human rights, democracy, and the rule of law. Global constitutionalism is one of the toolkits that the Pan-African constitutional project devises to respond to the problems of the postcolonial condition of internal democratic deficit

[41] See Gebeye, *A Theory of African Constitutionalism* (n 22).
[42] Gebeye, A Theory of African Constitutionalism (n 22) 216.
[43] Kwame Nkrumah, *Africa Must Unite* (FA Praeger 1963) xvii.
[44] See also Aziz Rana, *The Two Faces of American Freedom* (Harvard University Press 2014) 131-40.
[45] See Martin Loughlin, Against Constitutionalism (Harvard University Press 2022).
[46] See Mattias Kumm and others, 'How Large Is the World of Global Constitutionalism?' (2014) 3 Global Constitutionalism 1.
[47] See Gebeye, *A Theory of African Constitutionalism* (n 22).

and external vulnerability.[48] The AU considers democratic governance within member states and other sub-regional levels to be necessary contributories to the bigger stream of Pan-Africanism that flows to the ocean of freedom and progress. To this end, the Pan-African constitutional project has developed several normative and institutional architectures to support and defend constitutional democracy within member states as it also charts a continental path toward freedom, dignity, and development in the 21st century.[49]

The end points of the Pan-African constitutional project (if there is such a thing), then, are freedom, dignity, development, unity, and peace, while global constitutionalism (democracy, human rights, and the rule of law) is both the road to get there and the system to maintain them. Ironically, the Pan-African constitutional project not only shares and advances the Euro-American constitutional solution to the African postcolonial predicament, but also seems to accept the directional account of history and the liberal response to world peace. While the early accounts of the Pan-African continental integration considered federalism and the formation of a United States of Africa (and hence the sacrifice of national sovereignty for the sake of a continental union) as the best response to external interference and a mechanism for developing a self-reliant economy drawing from the United States of America, the contemporary Pan-African project of the AU and Agenda 2063 finds the European Union's experiment of supernationalism (that is, the mutual dependence of national and supranational sovereignty) more relevant for the continent's old and new challenges.

While the rise of populism and democratic backsliding especially since the last decade overshadows Francis Fukuyama's optimistic view of the future of democracy, the AU seems to take the *End of History* story seriously. Indeed, as Tom Ginsburg argues in his recent book *Democracies and International Law*, 'Africa appears to be further along than other regions in both its articulation of a normative framework and also in its willingness to use outcasting as a force in the service of democracy'.[50] If the AU follows through on its path of integration and democratization along with its Agenda 2063, around 2.5 billion people (i.e., more than a quarter of the world's population)[51] could live in a democratic continental polity by 2050. After all, democracy could well be the dominant and preferred system of government in much of the world, at least in the 21st

[48] Berihun Adugna Gebeye, 'Global Constitutionalism and Cultural Diversity: The Emergence of Jurisgenerative Constitutionalism in Africa' (2021) 10 Global Constitutionalism 40, 53-55.
[49] See Micha Wiebusch and others, 'The African Charter on Democracy, Elections and Governance: Past, Present and Future' (2019) 63 Journal of African Law 9; for a comprehensive understanding of these norms and institutions, see Olufemi Amao, Michèle Olivier, and Konstantinos D. Magliveras (eds), *The Emergent African Union Law: Conceptualization, Delimitation, and Application* (Oxford University Press 2022).
[50] Tom Ginsburg, *Democracies and International Law* (Cambridge University Press 2021) 180.
[51] The Economist, 'Africa's Population Will Double by 2050' The Economist Special Report https://www.economist.com/special-report/2020/03/26/africas-population-will-double-by-2050 accessed May 24, 2022.

century. But if the Pan-African identity of the constitutional subject helps to imagine a cosmopolitan constitutional identity at the continental level, its sub-national political identity plays a different role at the national and subnational levels as the Ethiopian and Nigerian experiences show respectively.

4. We the Nations, Nationalities and Peoples of Ethiopia: Constructing a National Constitutional Identity

The idea of *We the People* is an iconic expression of democratic constitutionalism in the modern world. This is because the *We the People* defines, at least in theory, both the geographical space in which it exists and the socio-economic and political order it operates.[52] It is both an empirical manifestation and a legal and political custodian of sovereignty.[53] Most importantly, the idea of *We the People* embodies and ushers in singularity and unity in a universe of individual and communal diversity that makes collective political action and practice in a certain territory imaginable and possible.[54] The idea of *We the People,* one of the great American constitutional exports, has structured constitutional design and practice in many parts of the world.[55] Many written constitutions start with the phrase *We the People*. But not the Ethiopian constitution, which starts with *We the Nations, Nationalities, and Peoples*. This preambular phrase distinguishes the Ethiopian constitution from many others around the world and confers it with its own unique identity. While *We the People* projects an idea of political community based on a singular and unified conception of peoplehood, *We the Nations, Nationalities, and Peoples* rests on the rejection of such singular conception of peoplehood and the resultant constitutional paradigm.[56] As a result, a constitution based on the idea of *We the Nations, Nationalities, and Peoples* sets in motion a formally and substantively different type of constitutionalism than one that operates with the logic of *We the People*. The constitution of *We the Nations, Nationalities, and Peoples* in Ethiopia is both a reaction of and a response for the constitutional subject (the different peoples) that has inhabited the country.[57]

There are several factors that induce constitution-making in a polity, from socio-economic crises to regime collapse, from revolutions to defeat in war, and from liberation to state

[52] See Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press 2020); Zoran Oklopcic, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press 2018).
[53] See Joel Colon-Rios, *Constituent Power and the Law* (Oxford University Press 2020).
[54] See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Rev ed, Verso 2006); Adeno Addis, 'Constitutional Preambles as Narratives of Peoplehood' (2018) 12 ICL Journal 125.
[55] Tom Ginsburg, Nick Foti and Daniel Rockmore, "We the Peoples': The Global Origins of Constitutional Preambles' (2014) 46 George Washington International Law Review 305, 122.
[56] See also Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Red Sea Press 1997).
[57] See also Jon Abbink, 'The Ethiopian Second Republic and the Fragile 'Social Contract'' (2009) 44 Africa Spectrum 3.

fragmentation.[58] The main factor that induced the making of the 1995 constitution of Ethiopia was the so-called the 'nationality question'.[59] This concerned the nature of the Ethiopian state and the pre-existing ethnic relations in the country. In the 1960s and 1970s, a radical student movement group advanced the idea that Ethiopia was a 'prison house of nationalities' like Tsarist Russia and that it marginalized many of its ethnic groups in its socio-economic, cultural, and political make-up. These students claimed that Ethiopia only represents the 'Amhara-Tigre' (Ethiopia's two ethnic groups) in its culture, religion, and psychological make-up, while marginalizing its other ethnolinguistic groups, of which there are more than 80, in its nation-building project. The solution to the nationality question, they proposed, was the recognition of the right to self-determination, including the right of each nationality or ethnic group to secession. The removal of the military regime that ruled Ethiopia from 1974-1991 by ethnonational armed groups who shared similar views with the radical student movement in 1991 created an opportunity for them to write a new constitution and to address the nationality question.[60]

The authors of the 1995 constitution of Ethiopia did not rely on some reading of sovereignty or political authority which traditionally rests on the idea of the people in the singular.[61] The constitution-making process involved the innovation of two imagined political communities. The first of these is the so-called Nations, Nationalities, and Peoples (NNPs), a collective name for ethnic groups,[62] while the second is the Federal Democratic Republic of Ethiopia (FDRE). Unlike most constitution-makers in the contemporary world, the Ethiopian constitution-makers have engaged with the idea of constituent power in a two-stage process. The first involved the transformation of ethnic groups into political communities (NNPs) with a defined territory, people, and sovereignty. The second process involved the coming together of the new political communities (NNPs) to form another one called the FDRE. Here, it is important to reiterate that both the NNPs and FDRE are political communities in the sense of the Andersonian account of 'imagined political communities'.[63] The right to self-determination that includes secession offered

[58] Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 Duke Law Journal 364, 370-371; Ming-Sung Kuo, 'Between Fact and Norm: Narrative and the Constitutionalisation of Founding Moments' in Richard Albert, Menaka Guruswamy and Nishchal Basnyat (eds), *Founding Moments in Constitutionalism* (Hart Publishing) 14-15.

[59] See Bahru Zewde, *The Quest for Socialist Utopia: The Ethiopian Student Movement, c. 1960-1974* (James Currey 2014).

[60] See Semahagn Gashu Abebe, *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology and Democracy in Ethiopia* (Routledge 2014); Andreas Eshete, 'Implementing Human Rights and a Democratic Constitution in Ethiopia' (1993) 21 Issue: A Journal of Opinion 8.

[61] See, for instance, Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge University Press 2017).

[62] Ethiopian Constitution 1995, Article 39(5).

[63] For a detailed discussion see Berihun Adugna Gebeye, 'Citizenship and Human Rights in the Ethiopian Federal Republic' in Adem Kassie Abebe and Amen Taye (eds), *Reimagining Ethiopian Federalism* (Ethiopian Constitutional and Public Law Series Vol. 10, Addis Ababa University 2019).

the Ethiopian constitution-makers the necessary foundational basis and frame of reference to reject the idea of *We the People* that had animated the Ethiopian state until 1991 and to imagine a different Ethiopia anchored with the notion of *We the Nations, Nationalities, and Peoples.*[64] As a result, the constituent power that inaugurated the constitution derived its authority from the sovereign powers of NNPs, not from the Ethiopian people as a single and unified one, as manifested in the opening paragraph of the preamble. The import of this constitutional undertaking is that Ethiopia is a polity of Nations, Nationalities, and Peoples.

The preambular aspiration and vision, the nature of the federation, the human rights and citizenship architecture, and the design of democracy, among many other unique features of the constitution, reveal how the idea of *We the Nations, Nationalities, and Peoples* has ushered in a formally and substantively different type of constitutionalism than a constitution based on the idea of *We the People*. Consider the preamble, for example.

> We, the Nations, Nationalities and Peoples of Ethiopia… in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development… have adopted this Constitution; *the fulfillment of this objective requires* full respect of individual and people's fundamental freedoms and rights, to live together on the basis of equality and without any sexual, religious or cultural discrimination; [and] further convinced that by continuing to live with our rich and proud cultural legacies *in territories we have long inhabited*, have, through *continuous interaction* on various levels and forms of life, built up common interests and have also contributed to the emergence of *a common outlook*. [Emphasis added].

These pronouncements in the preamble tell at least three main stories about the constitution and its vision. First, as noted above, it makes clear that there is a clean break from the past in the sense that, as Fasil Nahum rightly observes, '[t]his is not the constitution of the Ethiopian citizens simply lumped together as a people' but instead the 'Ethiopian citizens are first categorized in their different ethnolinguistic groupings and then these groups come together as authors of, and beneficiaries from, the Constitution'.[65] Hence, the primary subjects of the constitution are NNPs, not individual citizens. Second, while rule of law, democratic order, peace, and socio-economic development in one economic community are the *ends* that NNPs aim to achieve under the constitution, respect for individual human and democratic rights are the *means* employed to advance these. As a result, the enforcement of human and democratic rights is contingent upon their service to the rights and interests of NNPs. Third, and finally, Ethiopians have historically interacted and developed some common outlooks primarily as NNPs and, accordingly, they should continue to live together as such. The preamble's account of peoplehood and its treatment of

[64] Andreas Eshete, 'The Protagonists in Constitution Making in Ethiopia' in Goran Hydén (ed), *Constitution-Making and Democratization in Africa* (Africa Institute of South Africa 2001) 69-78.
[65] Nahum, (n 53) 51.

individual human and democratic rights makes the Ethiopian constitution unique among many around the world.[66]

Precisely because the Ethiopian constitution is one for the NNPs, they can secede from Ethiopia at any time to form their own sovereign state whenever they wish. Article 39 of the constitution recognizes the right to (unconditional) self-determination, including the right of each ethnic group or nationality to secession.[67] Indeed, one of the NNPs, Eritrea, chose secession in 1993 as part of a transitional political settlement, a political settlement that also permeated and acted as the blueprint for the making of the 1995 constitution. Unlike examples elsewhere, which built their federal systems on the notion of the indivisibility of the state, Ethiopia established its federalism on the recognition of its divisibility if it is ever needed.[68] Although the recognition of the right to secession is at odds with the very idea of federalism as a covenant toward 'a more perfect union' or 'indivisible state' as in the United States, Germany, Nigeria, India, or Switzerland, Ethiopia opted to construct its federal system based on this normative commitment that could lead to its potential disintegration.[69] Precisely because of this, the Ethiopian constitution does not intend to provide for a 'permanent framework of government' for the state, unlike many others worldwide.[70] Like international treaties, such as Article 50 of the Treaty on the European Union, which include a provision for withdrawal for a member state if there is such a desire, the Ethiopian constitution has included a withdrawal provision from the federation under Article 39. The logic is simple. NNPs are sovereigns who can decide to remain or exit the federation at any time based on their own terms, almost as states could withdraw their membership from an international treaty. Constitutional politics for the past two and a half decades, especially after the outbreak of war in northern Ethiopia in November 2020, have brought the prospect of another secession into the horizon. Currently, Tigray (one of the constituent units of the federation), may well consider exiting the Ethiopian federation, as Eritrea did in 1993. If Tigray decides to secede from Ethiopia, it does not need to fight for it as Eritrea did for some 30 years, at least in principle and as a matter of constitutional law. It must simply follow the procedures provided in Article 39.

If the recognition of the right to self-determination, including secession, distinguishes the Ethiopian constitution from any other in the world today, its unique architecture for citizenship,

---

[66] See also Adeno Addis, 'The Making of Strangers: Reflections on the Ethiopian Constitution' 2022 38 Journal of Developing Societies (forthcoming). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871221

[67] For background and context, see Alem Habtu, 'Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution' (2005) 35 Publius 313.

[68] See also John M. Cohen, "Ethnic Federalism' in Ethiopia' (1995) 2 Northeast African Studies 157.

[69] See Alemante Selassie, 'Ethnic Federalism: Its Promise and Pitfalls for Africa' (2003) 28 Yale Journal of International Law 51-107.

[70] Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 4.

human rights, and democracy makes it even more different. As the constitution brought together two imagined political communities in a single constitutional space, there are two sites of citizenship: NNPs and the FDRE. The result is that individual membership to the FDRE requires prior membership to one of the NNPs. In other words, membership of an individual to the FDRE is no longer automatic, but conditional. Without a membership to or identification with one of the NNPs, it is impossible to be Ethiopian as a matter of *constitutional design*. One must be, for instance, a Somali, Oromo, Amhara, or a member of one of the 80 ethnolinguistic groups *first* to be a member of the political community we call Ethiopia. Because membership to one of the NNPs is a condition precedent to being a member of the FDRE (as citizenship of a member state is a requirement for European Union citizenship), the NNPs (ethnicity) become a primary site of citizenship for accessing the rights and opportunities available within the FDRE on an equal basis. However, as a matter of practice, not everyone neatly belongs to one of the NNPs, nor are those who do not belong to or do not want to identify themselves with one of the NNPs foreign nationals. It simply means that they may not receive equal respect and concern, unlike those who identify with one of the NNPs.[71]

The existence of two imagined political communities in one constitutional space has not only rendered citizenship or political membership to the Ethiopian state conditional, but has also made human rights instrumental. This is because, as Hannah Arendt famously observed in *The Origin of Totalitarianism*, human rights essentially depend upon membership to a political community.[72] To have human rights, Arendt has noted, individuals must be more than human beings – they must be a member of a political community. 'The right to have rights', i.e., the right to be a member of a political community, fundamentally determines the range and enforcement of rights an individual has in time and place. In the Ethiopian context, as individuals are primarily or expected to be members of the NNPs and the FDRE by extension, the NNPs are the main site for the enforcement of human rights. Here, again, those who neither neatly belong to one of the NNPs nor identify themselves with one of the NNPs may not enjoy their human and democratic rights recognized under the constitution on equal terms with those who are members of one of the NNPs. Furthermore, as noted above, the enforcement of individual human and democratic rights is contingent upon and linked with their service to the rights and interests of NNPs. Consequently, the respect and protection of individual human and democratic rights may wax and wane depending upon ethnic affiliation (as well as geographic location, as we shall see below) and

[71] For more on equal respect and equal concern, see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).
[72] Hannah Arendt, *The Origins of Totalitarianism* (The World Publishing Company 1962) Chapter 9.

the needs of the NNPs in time and place.[73] For instance, if strong protection of human rights aligns with the rights and interests of the NNPs, human rights could be strongly protected and enforced. Otherwise, they could become a secondary consideration.[74]

Most importantly, the constitution redraws the internal boundaries and administrative units of Ethiopia based on ethnicity so that each of the NNPs can participate in shared rule at the federal level and practice self-rule in the territories they have inhabited at the sub-national ones. Precisely because ethnicity is the foundation of and operating orbit for Ethiopian federalism, it is known as ethnic federalism.[75] Although Ethiopia includes more than 80 ethnolinguistic groups, they were originally supposed to live within nine regional states.

Intra-Regional Ethnic Diversity in Ethiopia

Regional States	Ethnic Groups						
Amhara	Amhara (91%), Agew (5%), Oromo (3%), Other (2%)						
Oromia	Oromo (87%), Amhara (7%), Gurage (1%), Somali (1%), Other (4%)						
Tigray	Tigrawi (96.55%), Kunama (0.7%), Irob/Saho (0.71%), Other (2.4%)						
SNNPR	Surma (0.17%)	Zeyise (0.10)	Gidecho 0.03%)	Arbore (0.04%)	Geleb	Kore (1.01%)	Gedeo (4.92%)
	Gurage (7.52%)	Hamer (0.31%)	Gewada (0.43%)	Basketo (0.52%)	Burji (0.37%)	Alba (1.35%)	Bena (0.17%)
	Kembata (3.81%)	Shinasha (0.01%)	Dawro (3%)	Bumi	Dime	Tembaro (0.64%)	Shekicho (0.44%)
	Kafficho (5.43%)	Wolaita (10.71%)	Gacho	Nao (0.05%)	Tsemay (0.13%)	Hadyia (8.02%)	Alba (1.35%)
	Qebena (0.29%)	Gamo (6.96%)	Derashe (0.19%)	Bench (2.33%)	Yem (0.5%)	Konta (0.54%)	Amhara (2.79%)
	Konso (1.46%)	Sidama (19%)	Me'enite (1%)	Mareko (0.38%)	Oida (0.05%)	Ari (1.89%)	
	Gofa (2.39%)	Oromo (1.57%)	Silte (5%)	Desenech (0.32%)	Surma (0.11%)		
Afar	Afar (90.3%), Amhara (5.22%), Argoba (1.5%), Other (2.98%)						
Gambella	Anyawaa (21.17%), Nuer (46.65%), Mejenger (4%), Amhara (8.42%), Oromo (4.33%), Other (18%)						
Benishangul-Gumuz	Berta (25.90%), Gumuz (21.11%), Shinasha (7.5%), Mao (2%), Koma (1%), Agew (5%), Amhara (21.25%), Oromo (13.32%), Other (2.92%)						
Harari	Hareri (8.65%), Oromo (56%), Amhara (22%), Somali (3.87%), Gurage (4%), Other (2.92%)						

[73] See Yonatan Tesfaye Fessha, 'The Original Sin of Ethiopian Federalism' (2017) 16 Ethnopolitics 232.
[74] See Berihun Adugna Gebeye, 'Toward Making a Proper Space for the Individual in the Ethiopian Constitution' (2017) 18 Human Rights Review 439.
[75] See Assefa Fiseha, 'Theory Versus Practice in the Implementation of Ethiopia's Ethnic Federalism' in David Turton (ed), *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (James Currey, Ohio University Press and Addis Ababa University Press 2006).

Somali	Somali (97%), Other (3%)

Source: FDRE Population Census Commission (2008).[76]*NB: This is the latest official data as Ethiopia has not conducted a national census since 2008.*

The recent secession of the Sidama and the Southwest Ethiopian People's Region from the Southern Nations, Nationalities and People's Region (SNNPR) increased the number of member states to 11. In particular, seven of the regional states (Tigray, Afar, Amhara, Oromia, Somalia, Harari, and Sidama) out of 11 are named after a major ethnic group.[77] The constitutions of these regional states have created a socio-economic, cultural, and political order for the ethnic group after which they are named, despite the presence of different ethnic groups in all these states, as the above table shows.[78] In practice, in these states, the dominant ethnic group considers their respective state to be their own 'ethnic homeland' that primarily belongs to them alone. The four remaining ones that are not named after a single ethnic group are also ethnocratic. For example, the Benishangul-Gumuz regional state constitution identifies five ethnic groups as sole owners of the regional state, although there are many ethnic groups in large numbers, as can be seen from the above table, who live there.[79] While the Southwest Ethiopian People's Region and the SNNPR are multi-ethnic at the regional level, the various zones, districts, and *kebele* (lowest administrative unit) that constitute the regions predominantly belong to one ethnic group, consequently excluding others from political life and civil society as in other regional states.[80] As the plethora of scholarship on this issue attests, minority ethnic groups in different regional states have been rendered 'second-class citizens at best and unwelcome aliens at worst' and subjected to an ethicized 'local tyranny'.[81] Here, almost every ethnic group is a victim if they live in a different region or do not have one of their own, which is predominantly the case in the country. To use the words of Oren Yiftachel, what ethnic federalism then constituted is an ethnocracy (*rule by ethnos*), not a democracy (*rule by demos*).[82]

[76] Zemelak Ayitenew Ayele, *Local Government in Ethiopia: Advancing Development and Accommodating Ethnic Minorities* (Nomos 2014) 122.
[77] The notable exception in this regard is the state of Harari that is named after the minority Harari ethnic group, which constitutes 1/7 of the population of the Harari state.
[78] See also Yonatan Tesfaye Fessha and Christophe Van der Beken, 'Ethnic Federalism and Internal Minorities: The Legal Protection of Internal Minorities in Ethiopia' (2013) 21 African Journal of International and Comparative Law 32, 41-43.
[79] The Benishangul-Gumuz Constitution, 2003, Article 2.
[80] See Christophe Van der Beken, 'Federalism in a Context of Extreme Ethnic Pluralism: The Case of Ethiopia's Southern Nations, Nationalities and Peoples Region' (2013) 46 VRÜ Verfassung und Recht in Übersee 3.
[81] Solomon A Dersso, *Taking Ethno-Cultural Diversity Seriously in Constitutional Design: A Theory of Minority Rights for Addressing Africa's Multi-Ethnic Challenge* (Martinus Nijhoff Publishers 2012) 215; Assefa Fiseha, 'Theory Versus Practice in the Implementation of Ethiopia's Ethnic Federalism' in David Turton (ed), *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (James Currey, Ohio University Press and Addis Ababa University Press 2006) 136.
[82] See Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (University of Pennsylvania Press 2006).

By now it may be clear that the idea of *We the Nations, Nationalities, and Peoples* in Ethiopia has ushered in a formally and substantively different type of constitutionalism than a constitution based on the idea of *We the People*. The making of the 1995 constitution based on the idea of *We the Nations, Nationalities, and Peoples* is Ethiopia's point of departure in the experiment of constitutionalism in the contemporary world and best encapsulates how the identity of the constitutional subject may help construct a national constitutional identity. The notion of *We the Nations, Nationalities, and Peoples* defined the central tenets of the constitutional dispensation in 1995 and has deeply influenced social and political imaginary since then, as well as entangling the constitutional subject with complex issues of peoplehood and identity, on the one hand, and those of democracy, human rights, and the rule of law, on the other.[83] If we consider *We the Nations, Nationalities, and Peoples* as one (or even the main) aspect of Ethiopia's constitutional identity, it does not necessarily pose normative challenges to global constitutionalism, at least in the way the Nigerian experience with sharia does, as we shall see below. But the plural account of peoplehood it broadcasts and the concomitant act of inclusion and exclusion it requires pose a challenge to the practice of global constitutionalism, i.e., democracy, human rights, and the rule of law. Even though Ethiopia's constitutional identity may not contradict the cosmopolitan constitutional values of the Pan-African constitutional project, its plural account of peoplehood and the accompanying constitutional paradigm have created challenges of coordination[84] among the constitutional subjects, as manifested in the war in the northern region and the ethnic tensions and violent conflicts throughout the country.

5. We are Muslims and We are Democrats: Constructing a Sub-national Constitutional Identity in Nigeria

If the sub-national identity of the constitutional subject in Ethiopia helps to redefine constitutional identity at the national level, it creates a sub-national constitutional identity in Nigeria. Out of the 36 states of the Nigerian federation, 12 of them have operated under the dictates of both Sharia and the constitution, a practice dubbed shariacracy (the adoption of both sharia personal and criminal law as the foundation of governance in these states[85]), soon after the inauguration of the 1999 constitution. The constitution outlines the norms and institutions for the practice of

[83] See Yohannes Gedamu, *The Politics of Contemporary Ethiopia: Ethnic Federalism and Authoritarian Survival* (Routledge 2021).
[84] See Gillian K. Hadfield and Barry R. Weingast, 'Constitutions as Coordinating Devices' in Sebastian Galiani and Itai Sened (eds), *Institutions, Property Rights, and Economic Growth: The Legacy of Douglass North* (Cambridge University Press 2014) 130-137.
[85] Ali A. Mazrui, 'Shariacracy and Federal Models in the Era of Globalization: Nigeria in Comparative Perspective', in Edward R. McMahon and Thomas Sinclair (eds), *Democratic Institution Performance: Research and Policy Perspectives* (Greenwood Publishing Group 2002) 66.

democracy in a secular republic.[86] But shariacracy in the 12 states arose from and developed through constitutional practice. Now the constitution of Nigeria manages and operationalizes shariacracy and constitutional democracy in a single polity. Such constitutional development and experience not only distinguish the Nigerian Fourth Republic from the previous three, but also place a unique mark on the sub-national constitutional identity of the 12 sharia-implementing states. Most importantly, shariacracy emerged from the dialogical interactions of societal forces and state institutions within the boundaries of constitutional law and politics. It is the constitutional subject, not apex courts as the case in many liberal democracies, that has led the construction of this constitutional identity by engaging in and living through the normative and institutional infrastructure of its constitutional world.[87]

The dialogical process that has led to the rise of shariacracy is situated in the socio-political conditions created by the new democratic dispensation in 1999 and facilitated by the norms and institutions included in the new constitution. The socio-political conditions are related to, first, the return to civilian rule under the leadership of Olusegun Obasanjo, a southern Christian and the first non-Muslim popularly elected president of Nigeria, who achieved a shift of power from the north to the south and concomitantly instilled the feeling of marginalization in the north.[88] Second, the establishment of the Fourth Republic has been followed by the revival of cultural self-determination as manifested in Yoruba nationalism, Igbo confederal demands, and the north's return to sharia as a cultural and religious identity partly as a response to the waves of centralization since independence that have altered the power dynamics among these three groups at different times.[89] The normative and institutional aspects of the constitution are related to the recognition of religious rights and federalism, which have brought about sharia as a complementary normative and institutional order for practicing rights and containing corruption with the objective of delivering development, social justice, and good governance.[90] The intersections of regionalism (north-south), ethnicity (Hausa-Fulani, the Yoruba, and the Igbo), and religion (Christianity-Islam) defined the political development of Nigeria and its constitutional path even before its

[86] See the Constitution of Nigeria 1999, Section 10, which provides that "The Government of the Federation or of a State shall not adopt any religion as State Religion."
[87] See also Robert M. Cover, 'The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4.
[88] Mazrui, (n 85) 63.
[89] Ibid.
[90] Brandon Kendhammer, 'The Sharia Controversy in Northern Nigeria and the Politics of Islamic Law in New and Uncertain Democracies' (2013) 45 Comparative Politics 291, 297-98; Mohammed HA Bolaji, 'Between Democracy and Federalism: Shari'ah in Northern Nigeria and the Paradox of Institutional Impetuses' (2013) 59 Africa Today 92, 111; see also Matthias Krings, 'Conversion on Screen: A Glimpse at Popular Islamic Imaginations in Northern Nigeria' (2008) 54 Africa Today 45.

independence from colonial rule. Shariacracy, then, is a result and a continuation of this dynamic intersection and dialogue among the constitutional subjects within the new constitutional order.

This is precisely why, although Nigeria has the largest Muslim population in Africa (more than any other Arab country),[91] sharia has been reintroduced within the framework of a liberal democratic constitutional system.[92] Ahmed Sani Yerima ran for the governorship of Zamfara state promising to implement sharia through the state's legislature.[93] Two months after his inauguration, he set up a law review committee and, based on its recommendations, he put forth a bill to fully implement sharia penal law in the state through the adoption of sharia penal and procedure codes, and to reorganize the judiciary in line with the tenets of sharia. The State House of Assembly adopted the law. Following Zamfara, 11 other northern states adopted sharia into their criminal law domain, including Kano, Katsina, Niger, Bauchi, Kaduna, Sokoto, Borno, Gombe, Kebbi, Jigawa, and Yobe. In addition to the extension of sharia into the criminal justice system, sharia has also been central in the public policy priorities of these northern states with respect to the enforcement of rights, delivery of social justice, and economic development, as well as in holding government officials accountable.[94] In order to shape the culture and principles of governance in light of the tenets of sharia, institutions such as Shari'ah, Zakkah, and Hubusi commissions, as well as a Hisbah board, have been established in these states.[95]

Shariacracy has not only been implemented in a liberal constitutional system, but it also accepts the supremacy of the constitution. The 12 sharia-implementing states justify the reintroduction of sharia into their states based on different sections of the constitution itself, not by rejecting its existence or supremacy.[96] For instance, they defend shariacracy with reference to sections 2(2) (which proclaims that Nigeria shall be a federation), 4(7) (the legislative powers of the State House of Assembly), 6(2 and 4) (the power of the State House of Assembly to establish courts), 38 (freedom of religion), and 277 (the jurisdiction of the sharia court of appeal). Although the constitutionality of shariacracy is a contentious matter in Nigerian political and public life, it has been claimed that its advancement has a constitutional basis.[97] Furthermore, all of these states affirm the supremacy of the constitution along with their sharia reforms. While it would be

[91] Mazrui (n 85) 63.
[92] Rotimi T. Suberu, 'Religion and Institutions: Federalism and the Management of Conflicts over Sharia in Nigeria' (2009) 21 Journal of International Development 547, 552.
[93] Kendhammer (n 90) 294.
[94] Ibid. 298.
[95] Mamman Lawan, 'Islamic Law and Legal Hybridity in Nigeria' (2014) 58 Journal of African Law 303, 312-313; Rasheed Oyewole Olaniyi, 'Hisbah and Sharia Law Enforcement in Metropolitan Kano' (2011) 57 Africa Today 70.
[96] See Vincent O. Nmehielle, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality Is the Question' (2004) 26 Human Rights Quarterly 730.
[97] Ibid. Lawan (n 95); Suberu, 'Religion and Institutions' (n 91); Bolaji, 'Between Democracy and Federalism: Shari'ah in Northern Nigeria and the Paradox of Institutional Impetuses' (n 90).

problematic, to say the least, to claim that the full implementation of sharia would be compatible with some aspects of the constitution, shariacracy is not advanced on the premise that sharia is a supreme form of law and that it is not subject to the standards of positive law. The premise is that shariacracy arises out of 'harmony' between the constitutional order of Nigeria and the cultural and religious experiences of its Muslim constitutional subjects in the sharia-implementing states.

Fundamentally, and most importantly, the proponents of sharia are not radical Muslims like Boko Haram (who reject the constitutional system and want to create an Islamic state of Nigeria), but rather politicians who rely on the democratic votes of the people for their access to, and time in, government office.[98] Indeed, these politicians were responding to the grassroots demand of Nigerian Muslims for the reintroduction of sharia as a full system of governance in their own respective regions after many years of interruption.[99] From the establishment of the Sokoto Caliphate by Jihadist Sheikh Usman Dan Fodio in 1804, sharia was fully operational in the northern region until the British limited its application to civil matters subject to the repugnancy clause.[100] Despite demands for sharia in the public domain after independence, the political and military elites of northern Nigeria who dominated the national politics did not allow it any official expression.[101] Now that power has shifted to the south, some northern politicians see an opportunity in the reintroduction of sharia in the new political dynamics of the country. Essentially, sharia has become part of their democratic (electoral) politics in the new constitutional order. This is because governors such as Ahmed Sani Yerima of Zamfara and his counterparts in the 11 sharia-implementing states proposed shariacracy within the prism of the federal constitutional structure; they did not demand shariacracy for the whole of Nigeria, or even for all of northern Nigeria. Furthermore, even if Zamfara inspired some other northern states to adopt shariacracy, not all of the northern states have introduced sharia reforms, nor have those which have always followed the Zamfara model.[102] Out of the 19 northern states, 12 have chosen to implement sharia reforms and they have taken one of three approaches.[103] The first is the Zamfara model, followed by the majority of states, which reintroduces sharia and its court system by

[98] Suberu, 'Religion and Institutions' (n 91) 553.
[99] See Sarah Eltantawi, *Shari'ah on Trial: Northern Nigeria's Islamic Revolution* (University of California Press 2017).
[100] Bolaji (n 90) 98; for details, see Anthony Stephens Johnston, *The Fulani Empire of Sokoto* (Oxford University Press 1967).
[101] Suberu, 'Religion and Institutions' (n 91) 548-52; See also Andrew Ubaka Iwobi, 'Tiptoeing through a Constitutional Minefield: The Great Sharia Controversy in Nigeria' (2004) 48 Journal of African Law 111.
[102] Daniel Plang, 'Sharia Penal Laws in Northern Nigeria: A Review', in Etannibi E.O. Alemika (ed), *Human Rights and Shariah Penal Code in Northern Nigeria* (Human Rights Monitor 2005) 69-136; Mohammed Laden, 'Legal Pluralism and the Development of the Rule of Law in Nigeria: Issues and Challenges in the Development and Application of the Sharia', in Jibrin Ibrahim (ed), *Sharia Penal and Family Laws in Nigeria and in the Muslim World: Rights Based Approach* (Global Rights 2004) 57-113.
[103] Suberu, 'Religion and Institutions' (n 91) 553.

dissolving area courts; the second is the Kaduna/Gombe model which establishes sharia and customary courts – for Muslims and non-Muslims, respectively – by abolishing area courts; and the third is the Niger/Kebbi model which maintains area courts which have jurisdiction on persons who profess to follow the Islamic religion or consenting non-Muslims.[104] Thus, shariacracy has been fully implemented with the federal constitutional structure.

Equally with its advancement, shariacracy has been practiced within the institutional frameworks of the federation. In addition to the federal character principle which permeates the legislative and executive composition of the states, including the political party system, the federal allocation of resources for the implementation of shariacracy is further evidence that it has been implemented within the constitutional framework. The sharia-implementing states rely on the Nigeria Police Force, the single police force of the federation, for the enforcement of their sharia criminal justice systems. Furthermore, they submit their legislative undertakings and judicial practices to higher courts of the federation. In the light of these circumstances, the practice of shariacracy is presumed to be consistent with the constitutional system of Nigeria. On normative grounds, however, it is not consistent with some of the constitutional rights enshrined under the Nigerian constitution. A series of sharia cases affirm that shariacracy cannot exist without violating some human rights.[105] For instance, Buba Jangebei was amputated for stealing a cow in 2000 in the state of Zamfara, and Amina Lawal was sentenced to death by stoning for adultery in 2002 in the state of Katsina (although the decision was later reversed on procedural grounds) – both according to sharia law.[106]

By following the path of constitutional jurisgenesis rather than the jurispathic constitutional alternative, the constitutional subject in the 12 sharia-implementing states and the Nigerian state have created an identity that accommodates elements of sharia with constitutional democracy at the sub-national level. As a result, such a constitutional identity has not only maintained the political and social unity of Nigeria, but has also created possibilities for identifying and magnifying the shared visions and values between sharia and constitutional democracy, including in protecting rights, rendering justice, fighting corruption, and ensuring good governance. The use of procedural grounds by apex sharia courts to overrule the decisions of the lower sharia courts (for example, as in the case of Amina Lawal), the selective and conscious advancement of the tenets of sharia law compatible with the constitution by the sharia-implementing states, and the emergence of Muslim civil society that aims to advance the aspects

[104] Ibid. 553-554.
[105] See Nmehielle (n 96).
[106] J. Isawa Elaigwu and Habu Galadima, 'The Shadow of Sharia over Nigerian Federalism' (2003) 33 Publius: The Journal of Federalism 123, 123; Iwobi, 'Tiptoeing through a Constitutional Minefield' (n 125) 143.

of sharia law more favorable to human rights, justice, and good governance, while being willing to critique those aspects that may be discriminatory as well as the huge budgetary, police, and judicial power of the federal government, mean that the sub-national constitutional identity creates more incentives for complementarity rather than non-complementarity.[107]

Most importantly, the rise and operation of shariacracy within constitutional democracy not only has created a sub-national constitutional identity in the 12 sharia-implementing states, but it has also become one of the elements of the Nigerian constitutional identity that defines what it means to live within the Nigerian constitutional order. Seen in this light, the constitutional subject has helped construct even a national constitutional identity, which is procedurally and normatively open to accommodating a plural conception of rights, justice, and values. As a result, what is constitutionally permissible and what is not cannot simply be determined by an attachment to either the liberal tenet of the constitution or the cultural milieu of the constitutional subject. It is the dynamic dialogical interaction in time and place that dictates what the constitutional practice or outcome should look like. Such a constitutional identity has transformed not only the relationship between the sharia-implementing states, their people, and the federal government, but also the Nigerian people and polity. Today, so it seems, the issue is not whether sharia is compatible with the Nigerian constitution. Instead, it is about how to harness the best of 'the Islamic and democratic nature of the state' at the sub-national level in the sharia-implementing states and from the broader constitutional order of the polity.

6. Conclusion

The three-tiered political identity of the constitutional subject has played a different role in the construction of constitutional identity at continental, national, and subnational levels. At the continental level, the Pan-African political identity has both helped to construct the *demos* necessary for a viable constitutional experiment and articulate the constitutional values and principles that bind it. Such political identity has brought together over 1.4 billion people who speak more than 2000 distinct languages, practice Christianity, Islam, and numerous indigenous religions, and live in diverse geographical and climate conditions in the institution of a 'continental polity' with a cosmopolitan constitutional vision based on the values of democracy, human rights, and the rule of law to achieve their outstanding quest for freedom, dignity, and development. Precisely because of this, unlike the European Union, the AU has no difficulties in defining itself along the lines of *demos* as 'We the people of Africa' in Agenda 2063. Additionally, unlike in Europe, national

[107] See Rotimi Suberu, 'The Sharia Challenge: Revisiting the Travails of the Secular State' in Wale Adebanwi and Ebenezer Obadare (eds), *Encountering the Nigerian State* (Palgrave Macmillan 2010) 217-241.

constitutional identity is neither a limit to nor claimed against a continental constitutional identity, which, in turn, has eliminated (at least for the time being) the challenges of constitutional identity that spring from it in advancing continental integration and instituting a cosmopolitan constitutional order. But the subnational political identity of the same constitutional subject presents a different dynamic to the conception of *demos* at the national level and constitutional values and principles at the subnational level as the Ethiopian and Nigerian experiences show respectively. Because of plural subnational political identity, Ethiopia has established a constitutional system based on the idea of *We the Nations, Nationalities and Peoples* that rejects the singular conception of peoplehood and the resultant constitutional paradigm. For similar reasons but in a different way, Nigeria has accommodated Sharia and democracy at the subnational level although such system was not originally anticipated in its constitution. The cosmopolitan character of the AU's constitutional framework, Ethiopia's conception of plural peoplehood within the prism of *We the Nations, Nationalities and Peoples*, and Shariacracy in the 12 sharia-implementing states of northern Nigeria constitute constitutional identity at continental, national, and subnational levels respectively both in the descriptive sense of encapsulating the fundamental aspects of each constitutional system and in putting additional barriers for constitutional change.

Surely, the continental, national, and subnational constitutional identities discussed in this article have different normative implications for the practice of democratic constitutionalism. In the case of the AU, the cosmopolitan constitutional identity has helped to develop several normative and institutional frameworks to support and defend constitutional democracy within member states as it also charts a continental path toward freedom, dignity, and development in the 21st century. In Ethiopia, the constitutional identity around the notion of *We the Nations, Nationalities, and Peoples* and the accompanying constitutional paradigm have created challenges, including coordination among the constitutional subjects and the practice of human rights. In Nigeria, the institutionalization of shariacracy and the empirical emergence of 'the Islamic and democratic nature of the state' at the subnational level in some northern states pose some challenges to human rights. Despite such varied normative implications, the emergence of these constitutional identities shows that the (re)construction of a normatively desirable constitutional identity (whatever it maybe) is within the reach of the constitutional subject and contingent upon the strength of its social and political mobilization in time and place. The import of this is that the identity of the constitutional subject and its accompanying social and political movements not only offer a relevant material for the study of constitutional identity, but they are also the engine for the construction of constitutional identity at different levels in the region.