Constitutional Crowdsourcing to reconcile Demos and Aristos

Abstract

After the Icelandic experience of constitutional crowdsourcing (2009-2012), members of the state's legal community, parliamentarians and policymakers affirmed that the constitutional draft was unrealistic, unenforceable and against the legal and political tradition of the Nordic country. On the other hand, other legal expertise argued that the main institutions of the state, political parties and the economic and intellectual elite betrayed the will of the people and provoked the failure of the first constitutional crowdsourced experience. This paper analyses this constitutional experience, the reasons of its failure and whether can be a model to be followed by post-colonial constitutional experiences in Africa.

Introduction

After the failed Icelandic experience of constitutional crowdsourcing (2009-2012), members of the state's legal community, parliamentarians and policymakers affirmed that the constitutional draft proposed by the constitutional council of 25 citizens and approved unanimously on 27 July 2011 was unrealistic, unenforceable and against the legal and political tradition of the Nordic country. According to these legal experts, the final approval of that constitutional draft would have plunged the country into a lack of legal certainty. The fully ex-novo character of the constitution would also disenable judges to use jurisprudence to resolve the legal penumbras created by the potential application of the text. The people of Iceland focused excessively on the constitutional accommodation of human rights, leaving aside other essential factors that a constituent process might take off. On the other hand, other legal expertise and argued that the main institutions of the state, political parties and the

economic and intellectual elite betraying the will of the people provoked the failure of the first constitutional crowdsourced experience.

This paper remarks how revolutionary and innovative the constitutional crowdsourcing experience was. From Solon, Ephialtes and Cleisthenes that laid out the foundation of democratic Athens, to modern constitutions that have been penned by few people, regardless of the political system in which it is framed, been liberal democracies or authoritarian states. Derrida stated there is a sort of "semantic indeterminacy" at the core of democracy, and constitutional crowdsourcing might be a way to intervene in this indeterminacy. The Icelandic example seems to enlighten that there is a way to mediate between the Demos and Aristos when talking about the writing of *Politeia*. The paper follows analysing the Icelandic experience from a critical perspective identifying the elements that ended with the crowdsourced constitution. The final segment of the paper aims to provide different elements to improve the constitutional crowdsourcing experiment to be considered in future constituent processes around the world based on the Icelandic experience.

Icelandic society and academics are extremely polarized on the constitutional issue and the role developed by the different agents in the constituent process; therefore from a formal perspective, the paper tries to give voice to both poles and simulates a Judgment between a Plaintiff, *Demos* (representing "We the People"), the entitled sovereign in the majority of our constitutional documents) and a Respondents *Aristos* the political, economic and intellectual aristocracy and elites, who occupies the position of the ancient monarch in modern constitutional democracies. The Court in charge to issue the verdict is composed by final readers of this paper in a sort of universal jury or global (*Dikasteria)*.

The Judgment

(Demos v. Aristos)

Demos is represented by Pericles, *Aristos* by Thucydides. Claims are made in the application and submission presented by the parties. In its application, the following claims were made by the Demos, "to accept constitutional crowdsourcing as normative constituent process to be able to define legitimately our political systems as constitutional democracies" and "to consider Aristos as the unique responsible of the failure of the Icelandic constitutional crowdsourced experience."

On the basis of the facts and legal arguments presented by his representatives, *Aristos* respectfully requests the participants of the Court to adjudge and declare that the constitutional crowdsourcing method cannot be considered a form of constituent process because of the danger of giving to the common people the draft of *Politiea*, the basic and most important legal norm of the state. It also requests from the Court a declaration of responsibility against *Demos* in the Icelandic experience.

a) Historical and factual background.

Pericles in representation of the plaintiff has expressed the following facts: The plaintiff first wants to clarify that current constitutional systems cannot be defined as "democracies", and that states and constitutions are using the term "democracy" to define themselves and to maintain a purely fictional notion. Our current "democratic" systems, in the best case scenario, are republics, representative democracies or polyarchies (Dahl). The plaintiff bases its argumentation in three main lines of argumentation: 1) the mistrust on *Demos* capabilities in politics is unjustified and comes from different events throughout history; 2) the concept *Demos* as "we the people" is an inclusive concept and there is no discrimination of any sort and 3) *Aristos* is using *Politeia* to protect caste interests. The case of Iceland is an excellent demonstration of this extreme.

The plaintiff states that the tension that we judge today is a long standing issue; that the relationship between the parties has been fluctuating and

changes according to the concrete historic period and place. However at the present time, when there are more "democracies" worldwide than ever before, and when constitutional democracy is considered the best possible system, the definitive involvement of *Demos* into the constitutional realm is not only desirable, but necessary. The representation of *Demos* remarks that if *Demos* is not included today in the constitutional sphere, it is because of several reasons, some of them related with an ancient mistrust, that modern *Aristos* does not hesitate to use. The list of grievances is long, too long to be compelled in a judicial claim. But in order to exemplify this phenomena, Solon remarks three different moments: a) the birth of the democratic system and the first political classifications and hierarchies; b) the foundation and legal juridification of the first modern "constitutional republics" in the United States in 1776 and in France 1789 and finally, c) the attribution of liability to democracy for allowing the victory of fascism in Germany, Italy, Austria, but also later in Portugal, Greece, Hungary, Romania and Albania, and the systemic weakness to defend the system against the new terrorist threats.

Since its appearance, *Demos* has been suspicious and not desirable by the political and economic elites that were ruling the Attican city-states. In this sense, Solon, Demosthenes, Ephialtes and Cleisthenes, the champions of democracy (see Mogens Herman Hansen, Martin Ostwald, McIlwain) introduced democratic measures against the rule of a King or *Aristos*. Solon with the cancellation of indebtedness and mortgages of the landholders citizens demonstrated that democracy is related not only with a quantitative number of rulers, but also with a qualitative reason. Ephialtes giving the sovereignty to the people in the implementation of a new tribal organization system, creating the council of five hundred and reducing the role of the *aeropagus,* demonstrated how difficult it was to implement democratic improvements in a political system that was already conceived for, and by ruling elite. Regardless of democratic measures that allowed more people to participate in political decision making process without discrimination. A democratic measure does not exclude the ruling elite, because *Aristos* is also a constitutive part of *Demos*. On the contrary *Demos* is not part of *Aristos*, and the opposition of all democratic

improvements in ancient Athens, but also in the 21st century are focus to protect caste´s and political parties´ interests.

From the beginning, democracy has been criticised by both qualitative and quantitative perspectives. According to deflectors, democracy cannot work qualitatively because the ignorant and passionate masses cannot deal with questions that require a certain degree of proficiency and knowledge. Quantitatively, democracy is incapable because a great number of people taking decisions imply necessarily uncertainty, instability and an extreme additional difficulty to make decisions. The evidence of these charges are the first classifications of political systems. Plato, Aristotle, Polybius and Cicero placed democracy under other forms of government, Kingship and Aristocracy, and defined the system as a bad form of government. The role and placement of democracy in these classifications, that we still analysing centuries later, is relevant for this Judgment because it evidences the mistrust in the capabilities of *Demos*, but also because these political classifications are categorising political systems defined as *Politeia* (constitutions).

The polities' classifications started with Plato, who distinguished six types organised in pairs, kingship, tyranny, aristocracy, oligarchy and bad and good democracy. Plato considered that of constitutions there are, so to speak, two mother forms from which we can rightly say that the others have been derived. One of these we may properly call monarchy, and the other democracy. In the case of democracy, the Platonic classification remarks that some of the stereotypes that *Aristos* has been using to protect his own interests. The well-known myth of the Cavern and the need of a King Philosophe to guide the blind masses to see the light of knowledge and exit from the cavern of ignorance. As we will see later in this Judgment, this is translated into the Icelandic parliamentarians, and the king philosophes must guide the ignorant Icelandic inhabitants of Iceland in the drafting of the modern *Politeia*.

Aristotle also used the term "constitution" in reference to the different forms of government. *Politeia* related to the nature of men as a political being *zoon politikon* (ζ_ον πολιτικόν), and the word "constitution"

generally meant the form of government of man as a political animal. In the third book of the Politics, we also find the renowned classification of constitutions, were the political power from the aristocracy will be transformed into oligarchy, then into tyranny and then transitioned towards democracy. Even when Aristotle demonstrated less hostility to the concept of democracy than Plato, he also theoretically favoured aristocracy against democracy.[1] The accusations and disfavours to *Demos* continued in the work of Cicero and Polybius.

These classifications have place democracy under other political forms of governments for centuries and centuries later, the framers of the first modern written constitution of the world, opted for a Republican (mixed system) after studying the texts of Plato, Aristotle, Plutarch, Cicero and Polybius, among others. The second relevant moment that the plaintiff remarks as example of the continuous mistrust in *Demos* is related with the foundation of the first "constitutional republic" in 1776 and the distinction that the French revolutionaries did between Nation and Demos.

The decision made by the framers of the American constitution of 1776, to establish a mixed constitution instead of a constitution through a popular executive power, has been crucially important for the rest of the constitutional systems around the world. The federalists were aware of the transcendence of the moment. In this sense, Alexander Hamilton considered the founding moment as determinant to know "*whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force*".[2] As we do in this trial, we analyse the possibilities to enable *Demos* to participate actively and without intermediaries in the drafting of a constitutional text. The first constituent process is relevant in this process, as the ancient melody played by Plato and Cicero sounded strongly and clearly in the elites that monopolized the process in the United States.

[1] Carrie-Ann Biondi, 'Aristotle on the Mixed Constitution and its Relevance for American Political Thought' (2007) 24 Social Philosophy and Policy 176
[2] A. Hamilton and others, *The federalist papers* (Clinton Rossiter ed, New American Library 1961) No. 1

The constitutive documents of the new country in the United States were written and thought by wealthy white men and fearing democracy. The Federalist Papers have been consolidating over time by an elite of academics, judges, lawyers, excluding and dismissing fundamental rights of the "others", such as Native Americans, African Americans and other minorities. A literal interpretation of Madison's famous words on factions in *The Federalist Papers, 10, 14 and 49* will be enough to argue the doubts of the Founding Fathers about the role of the *Demos* in politics.[3] Also Locke was referring to landholders and not democratic citizens.

The fallacy has been continuing. The constitutional texts around the world are using the terms "democracy", "popular" and "We the people" instead of partitocracy, aristocracy or representatives. There are some exceptions, where the text says (We, the representatives of the people (Ecuador or Argentina). But Article 1.2 of the Italian Constitution of 1947; Article 3.1 of the Portuguese Constitution of 1976 and Article 1.2 of the Spanish Constitution of 1978; and the preambles of 'we the people' of the United States of American, the Republic of South Africa, Republic of India, Republic of Korea are good examples of this constitutional delusion.

According to all these texts, there is only a legitimate sovereign, the people, and therefore another subject of sovereignty (*Aristos*) is unconstitutional. If a constitutional text declares, '*we the people*, from whom all powers come', this *de facto* relocation of the sovereign power is unconstitutional. This constitutional inaccuracy came onto the scene more severely when we deny the Demos to draft the constitutional text. In these concrete examples, the usurpation of sovereignty breaches not only the preamble (politically, but not juridical, binding), but also constitutional dispositions. Besides this unconstitutional constitutionality, *Aristos* has introduced new juridical concepts, new rules and theories to prevent a possible appliance of these constitutional articles and principles, such as the notion of the 'programmatic articles', meaning that some concepts, the ones that Aristos decides, are not legally enforceable as such.

[3] Ibid No. 10, 14 and 49

Another element used to build up suspicion on the role that the plaintiff can play in politics is related with the distinction between the people and the nation established during the French revolution. After the revolution, the nation is a group of citizens with political power sovereignty. There is overlap between the concept of nation, people and the state to which the nation delegates its sovereignty. In the new French Republic, the sovereign is the nation, because according to Sieyès and Montesquieu democracy was not possible in France because of the quantitative issue. The nation is the organised people. , and to these arguments it can be argued that there is no nation without people. But the paradox came when the concept of nation instituted to include and protect the interests of the third estate, and was misinterpreted by Aristos to distinguish the terms of sovereignty, the nation, and the people. The principle of national sovereignty is, according to Carré de Malberg, the foundation of the modern state. It implies an evolution and transformation of the exercise of power, by difference with the monarchical principle and the principle of popular sovereignty. It is based on a representation of the sovereign nation.[4]

The plaintiff considers that this shows how the concept of nation was used to justify a republic and not a democracy, when national sovereignty as an abstract concept requires the mediation of the representative institutions to be effective. The result is again to exclude *Demos* in favour of the representatives.

The weak democratic commitment of the revolutionaries is also expressed in the Declaration of the Rights of Man and of the Citizen of Paris 1789. In this predominant legal and political text, there is only a reference to "the people" in the preamble, "*the representatives of the French people, organised as a National Assembly",* it follows declaring in Article 3 that, "*the principle of all sovereignty resides essentially in the nation. Nobody may exercise any authority which does not proceed directly from the nation"* and it concludes affirming in Article 16, "*a society in which the observance*

[4] Éric Maulin, 'Carré de Malberg et le droit constitutionnel de la Révolution' (2002) 328 Annales historiques de la Révolution française 5

of the law is not assured, nor the separation of powers defined, has no constitution at all", avoiding any democratic reference or link to the concept of constitution.

The following transcendent moment to demonstrate the mistrust against Demos is the widespread accusation of responsibility because of the rise of Nazism and Fascism. The claim remarks as arguments the work of Hannah Arendt on totalitarism, the denaturalisation of individuals, the aesthetic negativity in the work Horkheimer and Adorno, Neumann, Kirchheimer and the loss of freedom in Marcuse and Fromm among others to show the lack of responsibility of *Demos*. The plaintiff refuses any sort of responsibility on the hijacking of the concept and essence of democracy by totalitarian regimes. He also quotes the work of Jennifer Gandhi, Abel Escribà and Adam Przeworski and others to demonstrate that dictatorships use democratic institutions to obtain political stability and to increase the survival of the authoritarian regime. Even though the applicant denies any sort of responsibility, he responds to the accusation stating that from 1952 several legal systems have improved mechanisms to protect democratic institutions, just like the Militant Democracy. These mechanisms also solve Popper´s paradox of democracy and the majority rule.

In German constitutional law, Militant Democracy protects the liberal democratic order (*freiheitlich-demokratische Grundordnung*). This order is the fundamental basis of the German constitution and describes the basic principles of the moral values and political structures on which the liberal and democratic state of law is established. [5] The protection is even more important when political parties have consolidated their hegemony in politics and mediated the public constitutional organs. As early as the 1930s, sociologists Karl Loewenstein and Karl Mannheim were thinking about a democratic construct they called *streitbare Demokratie*, which can be roughly translated into Militant Democracy. Their theories, which were based on the undermining of the democracy in the Weimar Republic by the Nazis were kept in mind during the drafting of the Basic Law.[6] Militant

[5] Eckart Thurich, *Pocket Politik - Demokratie in Deutschland* (Bundeszentrale für politische Bildung 2011)
[6] K. Mannheim, *Diagnosis of Our Time: Wartime Essays of a Sociologist* (Kegan Paul Trench 1943) 49; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 The

Democracy allows limitations on freedom of speech, political participation, and political pluralism while leaving core values unalterable. The limitation of certain fundamental rights seems to be justified on the basis of the protection of a democratic system. This democratic paradox is generated by two conflicting ideas. Firstly, idea that a democracy is based on the free market of ideas, where every party is entitled to express its opinion and to participate in equal conditions to the rest of the parties, and on the other hand, the idea that a democracy is entitled to defend itself against its enemies.[7]

Roughly speaking, the concept of Militant Democracy refers to the fact that political parties cannot use the democratic tools (democratic participation and benefits) to destroy democracy. The theory was initiated after World War II with the decision of the German Federal Constitutional Court of 1952 on the Socialist Reich Party. According to the Court, a political party may be removed from the political process only if it rejects the supreme principles of democracy.[8] A similar theory has been applied in other countries. In some cases, the submission of political parties to the democratic standards has been constitutionalised, in others it has been set in an *ad hoc* law or developed by the judiciary.

With this background from the origins of democracy, the plaintiff considers that in current representative democracies, republics, the only way to reconcile Demos and Aristos is introducing and improving progressively direct democratic tools into the system. In the new technological era (Manuel Castell), e-democracy offers a new range of possibilities to implement and improve direct democracy. From an epistemological perspective, e-democracy ends with the "size" counter argument against democracy, according to which in big states it was no possible to apply direct democratic tools. Among all the potential direct democratic tools, *Demos* considers constitutional crowdsourcing as the most transcendent

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[7] Suzie Navot, 'Fighting Terrorism in the Political Arena the Banning of Political Parties' (2008) 14 Party Politics, 746

[8] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham NC; Duke University Press 1997) 219

because it affects *Politeia* and it will redress the use of *Nomos* by *Aristos* against Demos.

In 2015 saw the celebration of the 800th anniversary of the promulgation of the Magna Carta an example of the use of Nomos in favour of Demos. It is a good moment to recover its spirit in constitutional matters. The Icelandic case shows once again how *Aristos* denies this possibility using the same ancient arguments that have been exposed briefly in the claim by the plaintiff. *Aristos* cares on democratic progress in a second term, his first concern is and has been always to maintain the caste benefits and interests.

b) Thucydides in representation of the respondent

The response to the complaint deals with the same facts remarked by the applicant in its legal claim and ends remarking why *Demos* cannot be included in the constituent process without the lead of the representatives. First of all, the representation of *Aristos* wants to express his complete opposition with the facts and claims of *Demos*. The interpretation exposed in the claim can be defined as democratic despotism because of the fervent and too uncritical adherence to the doctrine of the sovereignty of the people.

The claim does not distinguishes between different sorts of democracy (representative and direct), it simply limits democracy to the direct rule of the people. This dogmatic restriction does not allow the definition of a democratic regime with some way of attributing every major political decision to the people, either because they take part in making it, or because it depends on their consent.[9] In this sense, the restrictions on the Icelandic constitutional crowdsourcing format disabled any sort of political party or parliamentarian participation in the process following this definition of dogmatic dichotomy.

According to the plaintiff, in a very Schmittean reductionism of political alternatives, there is only democratic friend – enemy, democracy or

[9] Roger Scruton, *A Dictionary of Political Thought* (Macmillan, London 1982) 131

authoritarianism. Paradoxically, the definition that *Demos* is using of democracy is also very Schmittean. The respondent does not need to remark the role that Schmitt had in the Nazi regime and his lack of democratic commitment.[10] Schmitt, as the claim does, defines democracy as a state form as well as a governmental or legislative form where there is identity of ruled and ruler, governing and governed, commander and follower.[11] This definition precludes the possibility that inside the democratic state the distinction of ruler and being ruled produces a qualitative difference.[12] Consequently, the power or authority of those who rule may not be based on some higher qualities that are not easily obtained by the people. This sort of equality will mean homogenisation and therefore will end destroying difference and freedom. It also denies any sort of recognition to those who are specialised and intellectually more prepared; those who are really capable for taking concrete decisions in benefit for the majority that require expertise and knowledge. Schmitt´s definition follows the conceptualisation of democracy that appeared in the ancient political classifications that the plaintiff exposes. The claim seems to forget that these classifications were based in real political experiences in Sparta and other city-states of the Attica. The claim of *Demos* also omits that democratic experiences have always failed and the response to the democratic claim was authoritarianism.

According to the respondent, democracy is regarded as fatally flawed in that it allowed the ignorant masses to determine public policy – which in his view was a specialised function that could be properly performed only by the few men of philosophic talent who had been selected in youth and trained for the task.[13] Democracy tends to undermine the expertise necessary to properly governed societies. In a democracy, he argues, those who are expert at winning elections and nothing else will eventually dominate democratic politics.[14] Democracy tends to emphasise this expertise that is

[10] See Yves Charles Zarka, *Un détail nazi dans la pensée de Carl Schmitt* (Presses Universitaires de France, Paris 2005)
[11] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer ed and tr, Durham NC: Duke University Press 2008) 264
[12] Ibid
[13] Scott Gordon, *Controlling the State : Constitutionalism from Ancient Athens to Today* (Harvard University Press 1999) 76
[14] Plato, *The Republic* (New York: Penguin Classics 2006)

necessary to properly govern societies. The reason for this is that most people do not have the type of talents that enable them to think well about the difficult issues that politics involves.[15]

When talking about constitutional tasks, the respondent considers necessary to remark the distinction between; democracy as the government of opinion (*doxa*) instead of that of knowledge (*episteme*). Plato supplies a mathematical reinforcement by proposing a straight line divided into two equal parts, one to represent the visible order, the other the intelligible, each part divided again in the same proportion, symbolising degrees of comparative clearness or obscurity. In other words and applied to our case, to draft a constitution requires *episteme* (ἐπιστήμη) something that the demos lacks.

The claim follows accusing the drafters of the Constitution of the United States of America. The respondent agrees that the framers opted for a mixed system after studying the texts of Plato, Aristotle, Plutarch, Cicero and Polybius, among others, and analysing the traumatic experiences of pure democratic constitutions. The first goal of the drafters was to assure political stability (*Mikte*). The best choice, if not the unique, was clearly to build up a constitutional republic instead of a democracy, meaning inevitably, the failure of the new political project, a failure that would have more devastating effects than the French revolutionary fiasco, because the Constitution of the United States of America was jurifying a new state.

The argument of the applicant is pure anachronism and does not take into account the effects of the war of independence and the tension between the northern and southern states. The plaintiff does not mention that one of the major defendants of the role of *Demos* instead of *Aristos* in the onset of the French Revolution was Robespierre, who justified the reign of terror when tens of thousands were executed. Robespierre´s speech of February 5, 1794 is an allegation in favour of "democracy" and he states that terror

[15] Available at: http://plato.stanford.edu/entries/democracy/#DemDef, 15 December 2011.

was a consequence of the general principle of democracy.[16] The Jacobin´s commitment and alliance with *Demos* also appears in Article 25 of the French Constitution of 1793, that defines popular sovereignty (in the sense of population as sum of all individuals) as opposed to the national sovereignty (nation as an abstract body) that appeared in the French constitution of 1791. The respondent also considered it necessary to remark how successful in democratic terms, have been the constitutions and states were *Demos* was defined as a unique sovereign in terms of "popular republic", such as the Soviet constitutions, the Constitution of People's Republic of China or the constitution of the Democratic People´s Republic of Korea, Article 2 of the constitution of 1948 disposed that the state power of the Republic belongs to the people". The Green Book of Gadhafi too urged for direct democracy.

Aristos refuses responsibility for allowing the rise of authoritarian regimes through democratic channels. The answer proportionated by the plaintiff to Popper´s democratic paradox consists in Militant Democracy and respect to human rights as a new co-substantial element of democracy. But democracy was a prominent idea among democratic politicians of the Weimar Republic,[17] and democracy seems not to be prepared to give a proper answer to the new threats in Europe, such as le *Front National* in France, the *Dansk Folkeparti* in Denmark, the *popular* association Golden Dawn in Greece or the neo-Nazi party Togetherness-National Party in Slovakia. Other "democratic" experiences have allowed the rise of illiberal Islamists movements such as the Muslim Brotherhood in Egypt. All these cases seem to show that Popper´s paradox is not solved at all, but on the contrary, *Demos* cannot deal with some political and legal topics without the "correction factor" of Aristos.

The contradiction is even greater because Militant Democracy is, in its very essence, undemocratic. In other words, democracy is protected by undemocratic measures, which are applied and decided by non-democratic institutions, such as constitutional Courts. The European Court of Human

[16] See Maximilien Robespierre, *Discours par Maximilien Robespierre - 17 Avril 1792-27 Juillet 1794* (Charles Vellay ed, Gutenberg E-books 2009)
[17] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Durham NC: Duke University Press 2008) 266

Rights (ECtHR) has stated repeatedly that the Militant Democracy principle is to limit it to extreme cases.[18] The claim does not mention the problems that direct, immediate democracy could raise in the context of highly pluralistic and differentiated societies are not exposed and Demos seem to think that they could be solved with recourse to e-democracy, as it is maintained that "From an epistemological perspective, e-democracy ends with the "size" counter argument against democracy".

The last issue that the respondent wants to argue is related to the lack of reference to the last

The issue in the Court: The Icelandic experience of constitutional crowdsourcing

The facts: It is widely acknowledged that the constituent process of Iceland between 2010 and 2013 was an innovation in modern constitutional history (Thorarensen, Gylfason, Bergsson, Ginsburg, Elkins et al). As Elkins, Ginsburg and Melton affirm, Iceland´s constitutional-making process was extremely innovative and participatory.[19] The proposed draft reflected significant input from the public and would mark an important symbolic break with the past; it would also be at the cutting edge of ensuring public participation in ongoing governance.[20]

The constituent process followed the largest banking and institutional collapse in history. October 2008 is remembered by the present generation of Icelanders as the month of collapse, fall and bankruptcy of country as a financial earthquake followed by a tsunami of economic, political and social consequences.[21] Considering the dimension of its economy, the Icelandic banking collapse was the largest that any country has suffered; the economic and social previsions were negative, a deep recession was

[18] See So, for example, the European Court of Human Rights (ECtHR) in *United Communist Party of Turkey v. Turkey* (1998) App no 19392/92 (ECtHR, 30/01/1998) and in *Herri Batasuna and Batasuna v. Spain* (2009) App no 25803/04 and 25817/04 (ECtHR 30 June 2009)
[19] Zachary Elkins, Tom Ginsburg and James Melton, 'A Review of Iceland's Draft Constitution' [2012] The Comparative Constitutions Project
[20] Ibid
[21] Elvira Méndez Pinedo, *La revolución de los Vikingos* (Planeta 2012) 41

expected to follow, and inflation peaked the following year.[22] The answer of the people to this economic panorama was public awareness, basically breaking its silence and getting involved by different means, public discussions, publishing press articles, blogs, creating documentaries, demonstrating and promoting citizens´ awareness.[23] Several months later, with the publication of a report of the committee of inquiry on the banking collapse ended with the criminal prosecution of the former Prime Minister and the people responsible of the crisis.[24]

The public consciousness also pointed out the need to rewrite the constitution of 1944; a text that kept the flavour of an "imposed constitution" and initially thought as a temporary document.[25] Obviously a text dated on 1944 did not include many provisions on direct democracy and crowdsourcing and after several amendments the constitution allowed the public to vote on bills that have been returned by the Parliament by the President; a feature that only the Constitution of Monaco of 1962 has.[26] However, even though the constitution did not provide these sort of tools, even after the people´s victory in the banking collapse, the new claim was focus on a re-foundation of the state.

The first popular action aiming to reform the constitutional text was the National Assembly or national "brainstorming session" organised by a collective of grassroots movements in 2009.[27] The debate focused on the definition of the values of Iceland and promoted participatory democracy. Of the participants from the National Assembly, 1,200 were randomly selected from the Icelandic census, and 300 were deliberatively selected among political institutions.[28] The event constituted the seeds for a major deliberative enterprise, to popular amend the constitution. This aim concurs with the post-bankrupt government agenda to establish a constitutional council to amend the Constitution.

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[22] Ibid 48-49
[23] ibid 90
[24] ibid 114
[25] Balvin Thor Bergsson and Paul Blokker, 'The Constitutional Experiment in Iceland' in Kalman Pocza (ed), *Verfassunggebung in konsolidierten Demokratien: Neubeginn oder Verfall eines Systems?* (Nomos Verlag 2014) 155
[26] Elkins, Ginsburg and Melton (n24)
[27] Bergsson and Blokker (n30) 159
[28] ibid

The Act on Constitutional Assembly adopted in June 2010 not only stipulated the election mandate of a Constitutional Council, but also proposed a Constitutional Gathering on constitutional issues.[29] The National Gathering was therefore mandated to gather information from citizens on the main themes and core values, laying the groundwork for a potential new constitution. The outcome of more than 128 roundtables were 950 randomly selected Icelanders participated was the identification of eight main issues for a new Icelandic constitution (country and nation; morality; human rights; justice; well-being and equality).[30] In autumn 2010, twenty-five ordinary citizens were chosen by their fellow citizens to serve on a new constitutional council that would formulate a new constitution.[31] At the same time, a constitutional committee of seven members was appointed. The candidates ran modest campaigns, and politicians were explicitly excluded from candidatures. The turnout was particularly low at just under 36%, with observers stating that procedures had been far from flawless.[32]

This led in December 2011 to three complaints to the Supreme Court which on 25 January 2011 suggested to annulling the elections.[33] The decision of the Supreme Court took into consideration formal defects such as the huge dimension of the ballot papers, and general confusion.[34] The decision of the Supreme Court annulling a democratic election because of formal amendable errors created some controversy. According to *Demos, it* is a clear example of unjustified judicial activism. The Supreme Court was recovering its parcel of sovereignty.

After a heated debate, the Althingi decided to install a Constitutional Council by means of parliamentary appointment that will follow with the constitutional reform.[35] The Parliament and the Government decided not to repeat the elections, but to appoint the same 25 members (citizens) that were chosen at the null election with the same goal to draft a new

[29] ibid 163
[30] ibid
[31] Elkins, Ginsburg and Melton (n24) 1
[32] Bergsson and Blokker (n30) 164
[33] Pinedo (n26) 130
[34] ibid
[35] Bergsson and Blokker (n30) 165

constitutional text.[36] This decision is also considered by the plaintiff as a new and decisive affront to the Icelandic constitutional revolution. This decision is considered by the plaintiff as controversial for several reasons. First, at the end of the day, the institutions were conferring to the same twenty-five people the same functions for which they had been elected in the annulled elections. Second, the government and the parliament were perfectly able to ask for a new election, but as the Supreme Court did earlier, the decision consisted not only to participate in the process, but to lead it.

In other words, *Aristos* took the lead of a constitutional process where it was not invited. The respondent justifies this decision on a very low turnout which introduces doubts on the legitimacy of a constituent process that normally requires qualified rates of participation, procedural problems and the decision of the highest Court of the country nullifying the election. According to the respondent, this experience shows that Demos cannot participate alone in a constituent process. On the opposite side, the plaintiff argues that this decision is a betrayal of an *Aristos* wounded by his explicit exclusion of the process. The plaintiff wants to remark that a low turnout is not a cause of invalidation of a democratic election; that there was no evidence of the existence of non-amendable procedural problems. *Demos* also ask whether it was not possible to correct the alleged procedural problems and repeat the elections, keeping popular leadership instead to substitute the role of people by the political parties. Nevertheless the Council started to work in April 2011 on the basis of a wide range of materials, including the conclusions of the National Gathering.[37] Citizens were able to provide comments and suggestions online to the website that the Council opened while the draft proposals.[38] The nature of the process changed decisively, from a paramount and pioneer constitutional crowdsourcing experience to an e-consultative experience. This sort of consultation is not unique or revolutionary, and it can be comparable with the constitutional e-consultation performed in Morocco and in Egypt.[39]

[36] Pinedo (n26) 130
[37] ibid
[38] Bergsson and Blokker (n30) 165
[39] See the online platforms reforme.ma and marsad.ma and dostormisr.com in Egypt.

The Constitutional Council delivered a constitutional project report to the Parliament consisting of more than seven hundred pages. The decisions were taken unanimously by all the members of the Council.[40] This fact is very illuminating and an excellent empirical answer to those who disqualified Habermas´ requirement of unanimity in his Principle of Discourse to the legitimation of legal norms.[41] Seyla Benhabib affirms, the application of a rule of consensus based on the criterion of unanimity makes us suspect that this requirement will be met only if minority points of view are silenced.[42] Habermas introduces unanimity as a general requirement that rests on the basic idea of the citizens' self-legislation. Citizens are subjected to the law as addressees, but at the same time should also be understood as the creators of the law. In order to put the idea of self-legislation into practice, citizens must reach a unanimous consensus using rational speech. Habermas's theory rests on a strict ideal recognition of the autonomy of the participating individuals. This recognition must be produced among the citizens who participate in the process of approving the rule, and must not suffer interference from public opinion. Habermas does not mention any system of representation because he is looking for a direct, universal democracy, applicable to law. The fact of having to choose a representative erodes this activity of direct democracy, even though it facilitates the viability of the democratic system and decision-making.[43] After all, the Icelandic experience seems to do justice with Habermas´ principle of discourse.

The Parliament decided to submit into a non-binding referendum on the constitutional project that might be approved by a new Parliament in the future. The referendum was held in October 2012 with a turnout of 49 percent, and a 67 percent of those who voted declared their support for

[40] Pinedo (n26) 131
[41] Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics* (Ciaran P. Cronin tr, Cambridge, MA: MIT Press 1993)
[42] Seyla Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy' in Seyla Benhabib (ed), *Democracy and Difference Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press 1996) 77
[43] Habermas (n46)

the Bill.[44] The question on the ballot was, "*Do you want the proposals of the Constitutional Council to form the basis of a legislative bill for a new constitution?*" With this formulation, as Gylfason points out, in case of a yes win, the parliament was also obtaining support to the bill and its keys provisions.[45] But according to the plaintiff, the Althingi was also obtaining democratic legitimacy to the hijacking of the constitutional crowdsourcing that was conducted months earlier that lead to the Judgment of the Supreme Court. The non-binding character of the referendum potentially caused a bias in the work of the Constitutional Council, who knew that their draft would have to be ratified by the Parliament, and not by the general public.[46] The unanimity achieved in the process was broken by the intervention of a no direct democratic agent.

On 16 November 2012, the Chair of the Constitutional and Supervisory Committee of the Icelandic Parliament asked the Venice Commission, a group of European legal expertise, to provide an Opinion on the Bill for a new Constitution of Iceland. The draft opinion of the Venice Commission analysed in detail the constitutional bill, welcomed some of the innovations introduced by the constitution (i.e. the Preamble).[47] However, the Venice Commission had several critical points regarding the bill, stating that numerous provisions were formulated in too vague and broad terms. The proposed institutional system was rather complex and marked by a lack of consistency, and the human rights provisions would need to increased precision and substantiation as to the scope and nature of the protected rights and related obligations.[48] The Venice Commission ended by proposing that, "*it might be considered appropriate to focus the current process on amending, at this stage, the procedure in force for revising the Constitution – rather complicated under the current Constitution – and leave to the future parliament the task of continuing the work of constitutional revision under the new procedure, taking the time needed to*

[44] Thorvaldur Gylfason, 'Constitutions: send in the Crowds' <https://notendur.hi.is/gylfason/Iceland%20constitution%20Challenge%203.pdf> accessed 30-03-2015
[45] ibid
[46] Hélène Landemore, 'Inclusive Constitution-Making: The Icelandic Experiment' [2014] Journal of Political Philosophy
[47] See Opinion draft 702/2013 of the Venice Commission on the draft new constitution of Iceland, CDL(2013)005
[48] ibid

consider the comments and questions raised by the various stakeholders, including the Venice Commission, and improve the Bill accordingly".[49]

The conclusion proposed was pragmatic and adapted to the Icelandic political times, but the final decision rested on the Icelandic institutions. Some of the suggestions of the Venice Commission were incorporated into the Bill but at the same time gave arguments to those who were against the Bill and the whole constitutional crowdsourcing. After the amendments to the text, the Bill was ready to be submitted to a final vote in the parliament, and despite the recommendation of the Venice Commission, a majority of MPs wanted to pass the Bill before parliament was dissolved in time for the next election.[50] According to the plaintiff, political partisan interests and major economic sectors of the island (fishing, aluminium and food industry) commenced an intensive lobbying campaign in order to ensure that the voting on the constitutional bill would not occur. Some political parties were openly and not so openly against the whole crowdsourcing process. The strong economic sectors were against the Bill because Article 34 of the draft changed the fishing quota system that favoured the big fishing industries. Two other major economic sectors of Iceland, energy and natural resources could have also been affected by a constitutional bill that hampered their caste and economic privileges.

The last session of the legislature was the last opportunity to submit the bill in that legislature. In an attempt to ensure that the constitutional Bill would have to be brought to a vote, the parliamentarian Margrét Tryggvadóttir presented the Bill put forward by the parliamentary committee. But the Parliament's Speaker, Ásta Ragnheidur Jóhannesdóttir, in a very controversial move, violated the parliamentary procedure (according to Demos, but completely justified according to Aristos) putting

[49] ibid
[50] Thorvaldur Gylfason, 'From Collapse to Constitution: The Case if Iceland' CESifo Working paper No 3770 <http://www.cesifo-group.de/portal/page/portal/DocBase_Content/WP/WP-CESifo_Working_Papers/wp-cesifo-2012/wp-cesifo-2012-03/cesifo1_wp3770.pdf> accessed 30-03-2015

the Bill to a vote without presenting the amendment, thereby failing to bring the constitutional bill to a vote.[51]

The parliamentary election of 27 April 2013 produced a coalition government of the former opposition parties that were against the constitutional Bill that wanted to avoid the constitutional reform. In 2015, the crowdsourced and institutionally intervened constitutional bill is out of the way and it seems the Icelandic people have been content with this.

The conclusions: The plaintiff concludes that the Icelandic experience shows that the people of Iceland have been betrayed by the institutions that "represent" them. The main acts of betray consisted in:

a) The decision of the Supreme Court voiding a democratic election because of formal amendable errors.
b) The parliament decision to install a Constitutional Council by means of parliamentary appointment instead of ordering the repetition of the elections.
c) The parliament decision to consider the referendum on the constitutional bill as non-binding.
d) The act of the President of the Parliament breaching the parliamentary procedural rules avoiding the possibility to vote the constitutional bill on the last parliamentarian session.

According to the plaintiff, the Icelandic constitutional crowdsourcing model failed because of private and partisan interests. The final constitutional draft that was submitted to the Parliament for approval was amended after the Venice Commission opinion, putting the public in conversation with their elected representatives.[52] On the protection of horizontal rights protection, the Icelandic draft was among the very few constitutions that delved into the rights of the disabled and even fewer into sexual orientation.[53] Therefore, the constitution of 114 articles and a temporary provision was ready to be applied. According to the plaintiff, the failure was the writing of article 34 stated that natural resources were the property of the state and challenged the privileges of the economic

[51] ibid
[52] Elkins Elkins, Ginsburg and Melton (n24) 2
[53] ibid

elites of the country. Demos claim that the defendant must be condemned for being the solely or individually responsible for the failure of the Icelandic constitutional crowdsourcing experience. He also claims to the Court to do a statement promoting the people´s constitutional authorship and the constitutional crowdsourcing as a model of reference for further constituent processes.

According to the respondent *Demos,* incapacity in constitution-making is evidenced in:

a) Low rates of participation in a referendum on a draft constitution for which the results of the parliamentarian elections confirm this fact.
b) Unjustifiable exclusion of politicians and major institutions of the crowdsourcing process instead to propose an inclusive system.
c) The final draft was not only technically deficient with vague and indeterminate concepts, but also against the legal tradition and jurisprudence of the country and against the legal identity of Iceland and impossible to apply.
d) Article 34 of the constitutional Bill was an unjustifiable intromission of the state into the private sphere. The nationalisation of the natural resources was a theft to the private industry of Iceland.

The defendant concludes that the Icelandic experience shows that *Demos* could not successfully approve the constitutional text. The popular initiative only achieved a very low turnout of just fewer than 36 percent showing the real "democratic" involvement of the Icelandic population and opens serious doubts on the legitimacy of the text. Knowing that constitutional approvals demand qualified majorities in parliaments and high rates of participation in referenda. In comparative terms, the Icelandic Bill had lower support than the constitutional referendum of 2014 in Egypt after a military coup, with a participation of under 39 percent and very far off the Spanish referendum of 1978, with a total turnout of over 67 percent, or the 76 percent participation in the plebiscite on the draft Constitution of Ireland of 1937. The lack of democratic support in the Icelandic constitutional process was confirmed

in the elections of April 2013, where the opposition parties won the election, who were against the constitutional crowdsourcing.

A second argument is related to the draft is the Venice Commission was clear in their conclusions. To this end, it is necessary to add that the constitutional Bill did not follow the Icelandic constitutional tradition proving a legal acculturation that would make impossible the enforcement of the text by a Supreme Court that would not be able to apply its own jurisprudence, but to decide ex-novo to reset the legal system. This fact is especially transcendent if the constitutional text, as the Venice Commission pointed out, is too vague and has a multiple broad terms, some of them affecting the human rights charter.

The defendant claims that *Demos* must be condemned of being the sole person responsible for the failure of the Icelandic constitutional crowdsourcing experience. It also claims to the Court to protect *Politiea* of the people´s intrusion.

4- constitutional crowdsourcing in Africa

5- Conclusion

Constitutional crowdsourcing is a method of providing legitimacy to a constitutional text, to really place the people in a position to lead the way. After the French revolution, constitutions rested on a "constituent power", the body of the people from whom the constitution´s authority emanates.[54] The constituent power presupposed a *Demos* or a Nation. Normative and practical difficulties arose when there is a pre-existing Demos that can exercise the constituent power.[55]

[54] Mark Tushnet, 'Constitution-Making: An introduction' (1986) 91 Texas Law Review 1983
[55] ibid

The Icelandic experience changes this scheme and eludes the presupposition, and *Demos* acted directly in the constituent power. From a strict theoretical point of view, there are multiple theories to attribute legitimacy to a constitution, "contractualism" (from Rousseau to Bell, Gaus), "consensual acceptance" (From Hume to Barnett) both are symbolic ways to bestow legitimacy on the constitution. While 'procedural-dialogical legitimacy' (Luhmann, Habermas, Ackerman), 'rule of recognition' (Hart, Green, Raz, Kutz) and 'constitutional authorship' (Kramer, Tushnet, Post, Siegel, Waldron, Whittintong) focus on constitutional processes and discourse, and the role that citizens may play in the approval and amendment of a constitution.

Following the methodology of this paper, the only possible conclusion is a decision that is in your hands, but in order to assume the burden of the decision, my verdict is that constitution crowdsourcing may change the role that Demos may play in constituent processes. It is necessary to include people's hopes and expectations in the constitutional text but the draft of a constitutional text requires a technical knowledge, coherence and functionality that only can be given by expertise.

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