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Democracy as a Trust

Political economy and philosophy of the social contract and its failures

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This article proposes that the social contract is a trust-agreement of power because political organization implies a commission of confidence from the citizens to the authorities, through which they administer in their name public goods of diffuse ownership that belong to everyone but cannot be administered by everyone simultaneously, like it occurs in a private trust (where someone manages a patrimony for the benefit of another). From that relationship between governors and citizens arises a paradigm of duties and expectations – relative to that delegated confidence– that frame the fiduciary democracy. This is some sort of “improved representative democracy”, as it inscribes itself in the frame of the tradition of representative democracy of liberal and republican origin, but proposes certain mechanisms of direct democratic involvement –especially for the purpose of vertical accountability– that can make political representation more functional and coherent.

Introduction

The political history of mankind is also the story of what citizens have been forced or forbidden to do along the centuries. Power, the prime matter of politics, is the capability of coercing others to do what one decides.

Similarly, along the progress of history, several narratives, not necessarily political, have dealt with the problems that for the flesh and blood human being –the individual– coexistence with power entails. These encompass founding myths as ancient as *The Book of Job* (wherein God uses his omnipotence so frivolously that he even bets with the devil on the fate of his most faithful creature) up to popular cultural demonstrations such as the film series *Star Wars*, in whose third episode Anakin Skywalker becomes Darth Vader, thus explaining that the “dark side of the Force” consists in letting oneself be carried away by the willful desire of accumulating power.

These narratives have in common the description of narcissisms (as well as extreme narcissists) which in their unbridled hunger for imposing their will finally

manage, precisely, to concentrate power disproportionately to oppress their equals. The history of democracy, within political history, is the history of how those concentrating-power narcissisms are limited by the rest of citizens, who constitute the potential victims or past victims of the concentration of power. The history of democracy –of liberal democracy at least– is the history of the consecration of freedom and of individual dignity.

But while a tyrant is who *par excellence* employs concentrated power to impose his most eccentric and extravagant crazes (and history provides countless examples, from Caligula and Nero to Stalin and Hitler), there exist other forms, even within apparently democratic structures, of denaturing the logic of collective action understood as a guarantee of individual freedom, as it will be seen towards the end of this paper.

In a democracy, of course, those mechanisms acquire much better intentioned appearances than outright totalitarian narcissism. Left and right clamor for certain values that have to be imposed by the force of law. But the concrete measures that these interventions foster –quotas, taxes, censorship, or whatever other imperative or inalienability rules (in Guido Calabresi’s nomenclature¹)–, restrict freedom or burden other people’s patrimony posing a moral (philosophical) dilemma and a practical (economic) challenge, since these interventions penalize not only legitimate but also desirable activities, such as the unfolding of productive activities and wealth generation.

Good intentions are usually the adequate alibi for introducing this type of measures, whatever political tag is used to do so (conservative, socialist, or even liberal²). In this way, in societies with a strong Puritan identity such as the United States, individual rights were violated even once the culture of human rights had long been established. For example, it was only in 2003 that anti-sodomy³ laws, which had been ratified as recently as 1986⁴, were declared unconstitutional. In another sense, today we are witnessing how egalitarian voluntarism –understood as referred to the material field and not only limited to equal protection by the law– has wrought havoc in Europe due to the wasteful voracity of welfare States that have endangered their own viability as well as discredited the democracies that host them.

While in the first case democracy proved mean in recognizing negative freedoms such as the right to one’s sexual identity, in the second, democracy becomes a boaster of its promises of an unsustainable welfare. Both undermine and discredit the democratic

¹ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-14 (1972).

² Perhaps because of this Alasdair MacIntyre accuses liberalism (or liberalisms) of being “emotivists”. See e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* 23 (Univ. of Notre Dame Press 2d ed. 1984)

³ *Lawrence v. Texas*, 539 U.S. 558 (2003) 41 S. W. 3d 349

⁴ *Bowers v. Hardwick*, 478 USA 186 (1986)

system and the ideals that support it, as I will argue later. And they do so because they betray the confidence that citizens deposit in their government. I therefore suggest that the social contract is a trust by which power is delegated, and the best way to understand it and put it into practice is through some specific mechanisms of direct participation. This paradigm can be labeled “fiduciary democracy”.

This concept does not pretend to refound political democracy. Nor does it constitute a kind of hybrid or balance between the models of representative democracy, on the one hand, and direct or participative democracy, on the other. This proposal inscribes itself, clearly, within the representative democracy of liberal and republican origins. It does admit, however, certain mechanisms of direct participative democracy that make political representation more functional and coherent and allow for a better concretion of the trust foundations of political organization. In that sense, the fiduciary democracy I propose is an “improved” representative democracy.

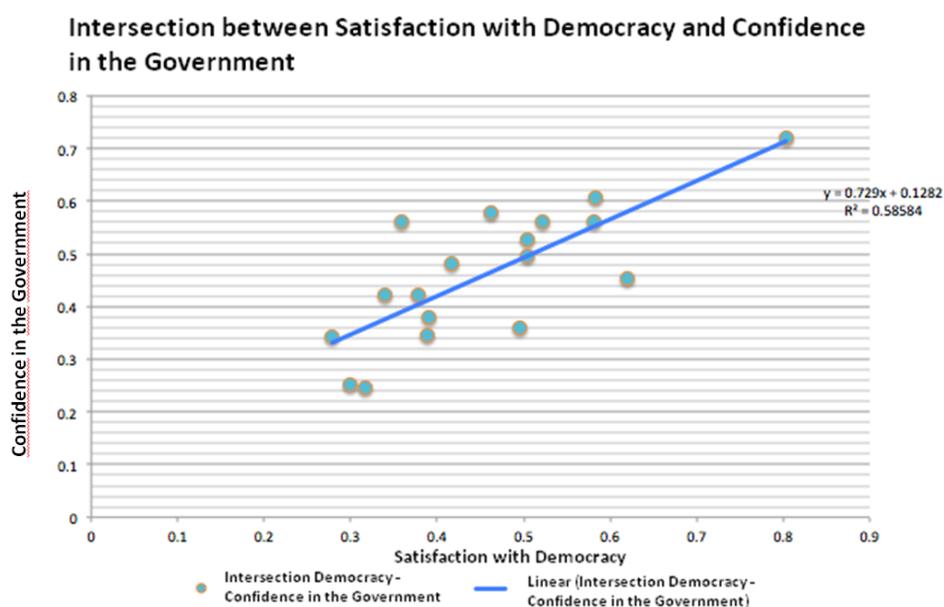
The proposal of this paper is based on verifying –descriptively– the relevance of the trust-agreement elements in the historical construction of the existent democracy. However, due to the fact that those elements are present in an intuitive manner and not sufficiently explicit, a deeper level of meditation is required about the consequences that those elements entail. I will, therefore, embark on an effort to establish the bases for this meditation and employ them to develop with a more normative perspective the first outlines of the institutional reinforcements that a democracy which is conscious of its fiduciary essence could adopt to perfect itself.

In the first section of this paper I focus on the importance of confidence within the social fabric. The second section tries to delve more deeply into the anthropological foundations of confidence as the basis of collaboration, which derives in a fiduciary structure that articulates political life as a collaborative scope for the thorough realization of individuals. The third section explains the nature of public goods which constitute themselves in the raw materials of the political mandate. Starting from the aforesaid, the fourth section explains with greater precision why the social contract is a trust and what implications follow, so as to establish reasonable limits to political intervention and, therefore, to coercion. The fifth section lands the aforesaid in the structure of a functional-fiduciary democracy; that is, it specifies the principal elements and consequences of the social contract being a democratic trust. Finally, the sixth section analyzes the recurrent cases in which the social contract fails in the way in which it is usually applied, whether by excess or defect of the fiduciary components that support it.

1. A Political Economy of Social Confidence and Collaboration

It is not too controversial to affirm that a high degree of interpersonal confidence between citizens should result in social cohesion that benefits governability, including a non-democratic one. Thinkers such as Alexis de Tocqueville⁵ and more recently Francis Fukuyama⁶ have insisted on this assertion. An important correlation also exists between a higher degree of interpersonal confidence and the functionality of democracy⁷.

Thus, in the following graph it is possible to observe the tendency that countries where their citizens show more confidence towards their authorities also present a higher level of satisfaction with democracy, as data from Latinobarómetro shows⁸.



Once the relationship between confidence and democracy is confirmed⁹, it is worthwhile to reflect on the implications this entails. On one hand, we are satisfied with democracy, which is a system of accumulation of political preferences whose principal attribute, at least in the liberal tradition of the modern world, is to limit the power of the government.¹⁰ In other words, when people can trust their authorities there is also a

⁵ 5032 ALEXIS DE TOCQUEVILLE, LA DEMOCRACIA EN AMÉRICA 165, 172-214 (Fondo de Cultura Económica 1978).

⁶ See FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY, 10-11 (Free Press 1995).

⁷ ROBERT D. PUTNAM & ROBERTO LEONARDI, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (Princeton Univ. Press 1993). See also MARK E. WARREN, Ed., DEMOCRACY AND TRUST 3-5 (Cambridge Univ. Press 1999).

⁸ COOPERACIÓN LATINOBARÓMETRO, LATINOBARÓMETRO INFORME 2010 (2010)

⁹ However, it does not seem possible to argue that interpersonal confidence generates by itself democracy, in other words, that it weakens authoritarianism or that it makes democracy viable when it is non-existent, as the Chinese case would demonstrate. Democracy would rather seem to stabilize existent democracies.

See TANG WENFANG, INTERPERSONAL TRUST AND DEMOCRACY IN CHINA. (2004).

¹⁰ NORBERTO BOBBIO. DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER. (Univ. of Minn. Press 1989).

higher degree of satisfaction with the mechanisms by which power is both delegated and limited.

We then have that for political delegation to work, what and how much power is delegated is not an anecdotic result; but substantial. That comes as no surprise, since somehow modern political thought has been facing this confirmation, ever since Hobbes and Locke developed their divergent positions about the intensity of power that should be legitimately entrusted to the State¹¹.

The challenge of democracy then consists in finding the mechanisms that ensure the level of collaboration aimed to preserve the individual freedoms without falling into excesses. The functionality of the political system will depend upon those mechanisms because they will serve as the base for their reliability, their credibility.

In my opinion, neither the existing purely libertarian approaches –that emphasize the contractual component derived from the decontextualized freewill– nor the “progressive” or socializing (liberal in the American sense) approaches –based on a universal sense or intuition of duty– convincingly explain why human beings organize themselves politically the way they do, delegating what they do delegate, and sacrificing what they do sacrifice in that choice to obtain the benefits they obtain. I suggest that the logic behind the political mandate –particularly when it is democratic– does not merely obey to circumstantial, pragmatic (convenient) nor cultural causes, but rather to causes profoundly rooted in human psychology.

The idea of confidence as a basis for political organization acquires in this proposal a dimension different to the mere justifications of state interventions to argue in favor of social cohesion¹². On the contrary, this paper proposes that the State should focus on its fiduciary duties, which derive from the expectations of reasonable delegation in relation to its objective elements (public goods) and subjective elements (relationship between authorities and citizens).

Instead of answering to abstract notions such as “the common good” –which ultimately mean little or nothing– these relationships concretize objective loyalties, based on specific ends, positions and interests. This generates a logic that can be described in a compatible way with modern game theories. In them, one analyzes the way in which the interests of diverse “agents” differ or coincide, as a prolegomenon for the design of incentives which may align or reconcile those interests. Regarding political mandates, as

¹¹ See *e.g.*, THOMAS HOBBS, LEVIATHAN 86 (Bobbs-Merrill 1958); 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 124-146 (New Am. Libr. 1965).

¹² In fact, not even a correlation can be stated –less so a causality– between greater state interventionism or wealth redistributing activism and the population’s index of confidence. According to Edelman Trust Index for the years 2011, 2012 and 2013 the countries with higher index of confidence include both highly interventionist countries such as Brazil, Mexico and India and countries that favor economic freedom such as Hong Kong or Singapore.

in any other cases in which an agent acts on behalf of a principal, it is evident that the misalignment of interests is not only a latent danger, but also a frequent one. Corruption cases are their bear witness. A typical agency problem occurs when the agent (government) who has to act to benefit its principal (citizens) does not necessarily have the incentives to do so.

In order to analyze how the fiduciary relations of the government work, it becomes imperative not only to appeal to the Public Choice Theory –which explains how politicians are economic agents who maximize benefits and not merely good souls, chiefly dedicated to the service of others and to the pursuit of the common good¹³– but also to the theories that analyze the logic of the relationship agent-principal, the use of which is more extended in the analysis of private organizations, particularly limited liability companies. This happens because in public limited companies, especially when they are widely held public companies, a misalignment of the interests of the owners-shareholders (principal) and those of the managers of the firm (agent) occurs.¹⁴

In fact, the bigger the delegation, that is to say, the more disengaged the principal becomes of the matters he has entrusted to his agent, the bigger the probability that a misalignment of interests happens and, therefore, a deviation from the mandate that may take the form –in the political trust-agreement– of corruption or abuse of power (as authoritarianism, intrusion or abuse of powers).

This malfunction of democracy happens to be apparently so common that Guillermo O’Donnell suggested it even constitutes a species within the genre of democratic regimes. This author called “delegative democracies” those in which whoever wins an election can govern practically how he pleases, during the whole period of his mandate, with no limitation other than that derived from the truly existent relationships of power (namely, factic powers) but without major institutional restrictions, and particularly, without horizontal accountability mechanisms –that is to say, without effective checks and balances from the other established powers in a scheme of effective separation of powers–¹⁵. These dysfunctional democracies contradict each other, but at the same time are a bad imitation of representative democracies where accountability effectively occurs, especially horizontally, says O’Donnell, but this paper will also emphasize on the importance of vertical accountability. In this way, the political trust democracy would also incorporate some specific direct participation mechanisms of the

¹³ 100 JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 244-47 (Univ. of Mich. Press 1965)

¹⁴ Rafael La Porta, et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3, 3-27 (2000).

¹⁵ Guillermo A. O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY at 55, 55-69 (1994).

principals (citizens) that not only generate better accountability but are also more responsive to the fiduciary nature of the delegation of confidence.

In other words, what we find is that the problems of delegative democracies derive, in fact, from the constitutive or structural elements of the act of delegation of confidence, posing perverse incentives for those who receive the political mandates to betray the confidence of their principals. However, those structural elements are not invincible since legitimate and functional democracies do exist. What happens is that they have managed to canalize more effectively the requirements of the delegation of political confidence. This, as I suggest later, owes itself to a better comprehension and channeling of the subjective and objective elements of the political mandate. The first are related to the anthropological bases that determine the behavior of the subjects involved –principal and agent–. The latter, refers to the nature of public goods which are assigned in a trust. Let us analyze, then, the subjective element so as to explain later the nature of public goods assigned in a trust.

2. The “collaborative gene”: fiduciary anthropology

The subjective element of the fiduciary structure of public life and coexistence is our proneness to delegate and accept the delegation of public goods through political systems. Human beings, thus, have an intrinsic tendency to rely on others to achieve certain objectives (and act egotistically for others). Usually, this describes contractual relations, where the considerations are reciprocal. But in certain circumstances, collaboration happens to be so evidently complex, that it would not seem to be so easily ascribable to a mere exchange of goods and services. This suggests the existence of a “meta-contractual” scope that explains the alluded proneness.

In this section I will try to inquire why human beings have a tendency to collaborate socially and delegate politically, although they are also individualists in the search of the satisfaction of their own needs and preferences. I begin from the libertarian premise that nobody has the right to transfer the cost of their happiness to others, nor the duty to assume the cost of others’ happiness as a moral principle, but I confirm that in reality we seem to be programmed to do both things, at least regarding some very close fellow humans like our relatives. This dilemma was investigated at the time by Adam Smith who in his *Theory of Moral Sentiments* appeals to empathy –or sympathy– to try to articulate the bases of a vision of the human being as an individualist and altruist simultaneously, which when applied to society results in the fact that economic freedom ends up producing generalized welfare, amongst other reasons, because suppliers position themselves in the place of their consumers when they design the products and services

they offer¹⁶. However, scientific advances like evolutionary anthropology and neuroscience nowadays allow scrutinizing the mechanisms that explain collaborative individualism with a greater level of precision, though not with absolute certainty and objectivity. I will therefore employ references to certain scientific evidence to suggest certain probable coincidences; however these have not been proven.

Simplifying, it could be suggested that human beings carry a kind of “collaborative gene” that explains why the recurrent use of collaborative formulas, even more complex and encompassing than contractual ones, is proper of our species. If the human species is the only rational one and, thus, the only free one, it is at the same time one of the most collaborative ones. In fact, according to Harvard biologist and mathematician Martin Novak, the human being is the most collaborative species on the planet¹⁷. But there are species like ants or bees, as collaborative but unintelligent (and not free at all). However, human collaboration, absolutely dependent on the confidence factor, probably finds its cause in a series of rational as well as emotional factors.

In fact, the intellectual and emotional complexity of *homo sapiens* have a common cause, which we could refer to as “the biped curse”. The western myth *par excellence* –The Book of Genesis– tells the story that when the first human beings were “expelled from Paradise” women were condemned to give “birth in pain”, and men to “win their bread with the sweat of their brows”. Beyond the sexism of the assignation of the provider roll as something eminently masculine, the cause of both things: giving birth in pain and physical-manual labor is clearly the same: walking erectly. To do so, it was necessary to narrow the hips, which in turn determined that giving birth became so painful. But that, in turn, freed the front extremities from the walking function and allowed the development of the capability of manipulating objects with the hands (opposable fingers), something directly related to the enormous growth of the brain (due to the development of manual capabilities that generate all types of protean functionalities)¹⁸.

Getting food, via hunting and recollection initially, and then through agriculture, instead of having it at an arm’s length in the trees, is what the Bible seems to refer to with the curse derived from the expulsion from Paradise. But the protuberant brain (protected by a hard skull) which makes possible all these human activities makes it even more painful to give birth. And both things –narrow hips and big brains– determine the comparatively premature birth of human beings, such as the first psychologists observed

¹⁶ ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Metalibri 6th ed. 2006) (1790).

¹⁷ Martin Novak, *Why We Help*, SCI. AM, Jul. 2012, at 22.

¹⁸ Rolian Campbell, Daniel E. Lieberman & Benedikt Halgrimsson, *The Coevolution of Human Hands and Feet* 64 EVOLUTION 1558, 1558-68 (2010).

in their time¹⁹. Indeed, when born, ours is one of the less developed and less apt for independent life species²⁰. Also due to the aforesaid, we are one of the species where a most intense dependence upon ones parents can be observed, which –as is evident– triggers a very complex emotionality, as well as the intellectuality that accompanies it, derived from the superior brain of *homo sapiens*. We have then, that the cause of our complex rationality is the same as the cause of our complex emotionality, and even modern neuroscience situates in the same region of the brain those systems which determine reasoning and decision-making and those which determine emotions and feelings²¹.

This intensifies fiduciary duties of parents towards their children, since they cannot help themselves on their own, and require that their freedom be initially administered by their parents. The cost of reason is the physical and emotional dependence (the parental/filial externality). This particular genesis of our species allows us to be more intelligent and skillful –more adaptive– but at the same time it makes us initially more dependent and for a longer time. This allows us to reach farther, but depending first on others and assuming the duty of carrying the children. Even though the aforesaid does not cancel the individualist nature of human beings, especially during adulthood, it does reveal clearly that they also unfold themselves in a consubstantial collaborative facet.

The parent-child relationship which is one in which, by definition, one depends on the other, is in fact a fiduciary relationship (of confidence). A child's survival depends on the fiduciary expectation, on the confidence that their parents will take care of them. And they begin to become conscious of themselves within that scheme, thus they acquire notion of their individuality in a situation of fiduciary expectation towards their parents; namely, awaiting from them certain acts of support. In that sense, the human brain has in some way been designed (hardware) or programmed (software) to expect certain things in exchange for others, with no apparent reciprocal symmetry. At least in the short run. Because, perhaps, the explanation that allows one to understand this sort of collaborative individualism is related to the fact that that reciprocity is differed in time. Namely, parents take care of their children under the implicit (and perhaps unconscious) expectation that, when elderly, their children will take care of them. This hardly works under a purely contractual –rational– logic because the consideration is too differed in time, and contractual relations work better in a specified period (that is the reason why every contract with an unspecified period can be dissolved without a cause by any party: contractualism repudiates perpetuity.) Therefore, what more or less guarantees the

¹⁹ SIGMUND FREUD & JAMES STRACHEY, CIVILIZATION AND ITS DISCONTENT, 17-18 (WW Norton & Co. 2005)

²⁰ *Id.*

²¹ ANTONIO DAMASIO, EL ERROR DE DESCARTES, 92-94 (Critica 2010).

fulfillment of the filial consideration is the elevated emotional component –gratuity and love– in the relationship between parents and children, that turns out to be a better marker of the fiduciary duty than conscious memory.

Well now, these duties and fiduciary expectations project themselves to other relationships different from the parent-child relations of the individual with others. For example, a certain collaboration is required, which we can brand as fiduciary, to obtain something apparently as selfish as physical pleasure. Indeed, the generation of endorphins benefits from relations with others, from sexual intercourse or eroticism, or simply from tenderness.

On another level, the fiduciary logic extends also to political relations, to the political system, in which we can also verify fiduciary duties and expectations. But it is worthwhile to discard, as of now, that the former implies an absolute universal solidarity, with all the ethical consequences that this could entail. The ideal of universal solidarity derives from the improvable Christian idea of universal love. But as Ortega and Gasset wisely pointed out, love is the architect of hierarchies²²; in other words, the differentiation between those who deserve it and those who do not deserve it is consubstantial to love. If one cannot love his neighbor as himself, much less all other neighbors equally, it is neither possible to be universally solidary like collectivism nor socialism pretend. Neuroscience has been confirming it, as it has started to uncover the mechanisms through which the brain develops altruistic feelings and it has not found any evidence of some sort of unconscious community within humanity, but instead many hints that those feelings and collaborative mechanisms that develop from them orient themselves ultimately towards the survival not of the species but of the individual; in other words, the human being always ends up taking advantage –even if it is differed– from their relations with others, which does not mean they stop being sincere²³.

All those mechanisms, then, configure a constitutive predisposition towards collaboration, to which I refer when I propose the existence of a kind of “collaborative gene” in human beings. Note that the genetic reference does not imply, as Richard Dawkins explains, the subjection to remediless determinism. That something has a genetic origin simply implies that it exists in the physical-chemical constitution of the species, a set of elements (not literally a gene) whose presence usually has the consequence of favoring a certain type of behavior. But this predisposal can be perfectly made to grow, be

²² J. ORTEGA Y GASSET, OBRAS COMPLETAS 18 (Revista De Occidente 1973).

²³ DAMASIO, *supra* note 21, at 150-53, 207-09, 233-35.

neutralized, diminished and in an extreme, annulled by exogenous elements during foster²⁴.

So that when I refer to the collaborative gene in the human species I am in no case suggesting that there exists a predetermined political system whose origins are genetic. Not because it is unimaginable, or theoretically impossible that a gene might lead us to organize ourselves politically in a specific way (as may happen with ants and bees), but because the extension in time and the number of generations that have passed since man organizes himself politically does not seem to last enough to explain a genetic mutation that incorporates that type of organization²⁵. It should be pointed out that the existence of a gene –not only collaborative, but any type of gene– does not allow to make conclusions about the profitability of this gene for the species as a whole, as Dawkins points out, but only exclusively for that gene, or as well, for the individual who carries it²⁶. That is, if we apply this logic to the hypothesis of a collaborative gene, it is not possible to conclude that the gene exists for the benefit of the human species as a whole, therefore, neither can it be concluded that there is a kind of biology of universal solidarity. That is why Dawkins elaborated the term “the selfish gene”²⁷.

At best we could then conclude that the gene induces us to have social organizations. But political systems, and within them, the different types of democracy, are contingent cultural solutions. Democracy is a collaborative form, and thus is in some way consequence of the gene, but this does not mean that we are genetically democratic. In some way, the fiduciary democracy that is being proposed entails an organization that responds better than other systems to the anthropological needs that explain social collaboration. However, this does not mean that we are genetically obliged to organize ourselves in a fiduciary democracy.

Otherwise, within our species, genetic endowment, including those features common to all individuals of the species, is not homogenous. Not all human beings are equally collaborative. There is a variable range of congenital collaborative intensity, which in each case, besides, can be altered in practical behavior by exogenous factors as it has been said. Therefore, our species and its cultures generate a wide range of individuals: some totally lacking in empathy (psychopaths literally) up to the contrary, beings dedicated completely to others in the style of Mother Teresa of Calcutta. Culturally, in some way or in great measure because of the influence of Christianity, we have favored mother Teresa's: those persons that embody altruistic excess and the sacrificial moral in favor of

²⁴ RICHARD DAWKINS, THE EXTENDED PHENOTYPE: THE LONG REACH OF THE GENE 12-13 (Oxford Univ. Press 1999).

²⁵ *Id.* at 27-28.

²⁶ *Id.* at 28-29.

²⁷ RICHARD DAWKINS, THE SELFISH GENE (Oxford Univ. Press 2006).

others²⁸. This occurs to such an extent that several forms of political organizations –like the welfare States– have been structured around such a world view (see further in section 6).

But let us assume that, besides the cultural distortion in favor of exacerbated altruism as a moral value, the collaborative gene predisposes the majority of human beings to medium degrees of aptitude and preference for collaboration, which, are, in turn, affected by cultural factors. As it happens, among average individuals, those who decide to assume leadership, not only political but also entrepreneurial, are those who have that aptitude more developed. For example, studies about leadership have concluded that whoever assumes leadership positions usually have a more responsible attitude, even in a guilty sense, than the rest²⁹. This could imply that responsibility could be a typical characteristic of leaders. This responsibility could also be translated as conscience that people expect or have fiduciary expectations of one. Therefore, it is consubstantial to leadership to have a sense of fiduciary responsibility, the acceptance or assumption that one should do something for others. But, as previously stated, that does not imply denying that all agents also act in their own benefit³⁰. Precisely, it only implies that these leaders maximize benefits or accomplish satisfaction of their preferences through an equation in which they assume the job of making decisions for others, and in exchange must deal with the responsibility that this entails. Leaving problems unresolved disturbs them, thus they prefer to solve them themselves.

Therefore the political economy of how the government works, under the logic that politicians are also benefit maximizers (Public Choice), is not altered by this verification. It only explains what type of benefits they choose to maximize.

3. Public goods and the delegation of power

As Mancur Olson pointed out: “A state is, before anything else, an organization that provides its members, the citizens, with public goods.”³¹ In other words, if there were no public goods to manage, it would be very difficult to justify the existence of the State and the imposition of the monopoly of the use of legitimate force. As force is violence, and

²⁸ These people, however, find their own individual satisfaction –maximization of benefits, economists would say– in altruism. It is not that they stop putting their individual preferences before others, it is an individual preference to dedicate oneself to others' welfare, as neuroscience also suggests (*see supra* note 23).

²⁹ Therefore, according to *Business News Daily*,: “Becky Schaumberg, a Stanford doctoral candidate in organizational behavior who conducted the research, said in group discussions guilt-prone members seemed to the rest of the group to be making more of an effort than others to ensure everyone's voice was being heard to lead the discussion and to generally take charge. ‘The group was picking up on those behaviors,’ Schaumberg said.”

Chad Brooks, *Good Boss Study Suggests Guilt is Key Ingredient*, BUSINESS NEWS DAILY, April 30, 2012.

³⁰ There are several studies about the psychological mechanisms that demonstrate the inclination to individualist behavior. *See e.g.*, SIMON LAHAM, *THE JOY OF SIN 58 passim* (Constable and Robinson Ltd. 2012)

³¹ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 15 (Harv. Univ. Press 1965).

civilization consists in minimizing physical violence, a civilized society should also tend to minimize the State. For that to happen it is imperative to have its scope of action correctly delimited, which ultimately depends on how public goods are defined. This because it has been verified that the temptation to understand extensively public goods in order to justify greater government intervention always exists.

Public goods were defined by Paul Samuelson as collective consumer goods³². These are goods produced for all or otherwise are not produced at all, because the cost of excluding everyone from their use is so high, that such exclusion is impossible. It is intrinsic to its physical or conceptual nature –but not moral; that is usually an ulterior distortion– that these goods cannot be subject to exclusive and excluding appropriation. But that is not enough for a good to be classified as public. The other typifying characteristic for a good to be public is that it does not have consumption rivalry. That is, that the generalized consumption of that good does not generate its exhaustion. These two characteristics, however, are relative because they can change, and in fact they do change throughout history, since technological advances have a way of modifying human capacity to exclude third parties in the use of a good, as well as consumption rivalry. Thus, for example, the moment in which a public good, such as the air, would become susceptible of being “parceled out”, immediately that good, within the borders of the parcel that would allow to exclude it would in turn become perishable.

In any case, goods can evolve from being public to being private. For example, water used to be a public good and even now many people find it difficult to accept not the convenience but the necessity of administering its exploitation through the recognition of private titles over it, given the increasing sensation of its relative scarcity (in comparison to other times in which it was considered an inexhaustible good). Highways are another example that a few years ago could only be public; but today there are automatic systems that identify vehicles in transit on a highway which allow charging for using it and therefore, in effect, privatize it.

From what already has been said it can be inferred that a tendency to reduce the number of goods collectively owned should exist, and therefore also the delegation of power to manage those goods by reason of their nature. In other words, a public good is matter for state administration as long as it cannot be turned into a private good, and until that happens. Whenever it can become a private good, it is returned to its original owners, that is, the citizens³³. This is consistent with the idea that the government is a trust, as it is

³² Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. 387, 387-89 (1954)

³³ Thus, for example, in the privatization of a good that before could only be perceived as public, let us say, the highway, it is not that each citizen receives his aliquot share of the highway, but that the price the concessioner pays, rewards each contributor,

common for a trust to have a limited period of validity, something is given to be administered until the owner can administer it himself, although, generally, in a private trust the cause which makes it impossible for the owner to directly administer the goods at stake has often more to do with subjective limitations of the owner (lack of age or inability) than with the nature of the goods entrusted. In the logic of public companies, which also obeys to a fiduciary structure as has been mentioned above, the commission to the administration is much more directly linked to the nature of the goods that are entrusted to the management. In any case, the delegation of confidence as an anthropological phenomenon as it has been discussed in the previous section seems to have a temporal and shrinking foundation. If the origin of collaboration lies in the relationships that allow the survival of the helpless human being because of his premature birth, that trust begins to vanish with time as part of it includes to prepare the child to manage its own life. Life is the evolution from absolute communion (with the mother, in the uterus) to the absolute solitude of death, which is faced without company. Custody, then, must serve not to perpetuate dependency but to allow for independence. If we apply that logic to politics, democracy must generate citizens who are increasingly independent and free, not increasingly dependent and protected. The State should, therefore, be retreating instead of growing.

That is a why a fiduciary democracy demands diminishing intervention of the State, although it should become increasingly efficient. However, what can be observed in reality is precisely the opposite, namely, increasing intervention as technology also favors renewed forms of intervention and control, even though elephantine States including the always well-intentioned welfare States, result, on the contrary, increasingly inefficient. In history and politics there are plenty of examples where generalized good intentions are confused with the public nature of goods. For example, I reckon that it is a mistake to assume that such a thing as a public good constituted by the yearning of a generalized material welfare exists. Welfare is not a public good, it is a private aspiration. It depends, to begin with, on subjective preferences that are not objectively standard. And it can only be achieved through the generation of wealth, a process that can occur individually as well as collectively, but whose collective attainment can be sustained on individual titles, that is, through a merely contractual collaboration, not necessarily fiduciary. Wealth is generated, usually, from private goods. When someone proposes an obligatory scope of shared material welfare with the argument that the mere fact of benefitting from positive externalities of coexistence generates obligations with the community, even when no

through the State, for that good. This could –really, should– redound patrimonially in favor of every citizen by way of a reduction in the tax burden, even though, unfortunately that does not always happen.

consent has been given voluntarily to such *quid pro quo*, as the Rawlsian “*principle of fairness*” proposes based on ideals of Kantian-intuitive justice (fairness), what it finally produces is not universal collaboration but an expropriation of the assets and freedom of those who do not consent to that communitarian collaboration, as Nozick well asserts³⁴.

Another example of the aforesaid is the aspiration to an assumed universal right to health absolutely free of charge. This does not constitute a public good. I do not pretend to deny the existence of public health, I simply want to trace its limits. The fight against epidemics, of course, calls for legitimate public action, inasmuch as scientific advances do not allow facing them effectively in a private manner. But that derives from the form in which diseases spread, literally (in many cases) in the air or sea, it being impossible to exclude the germs, or to prevent not their consumption but their involuntary ingestion. Of course, the fight against a public danger, like the disease that spreads in such a way has to be fought by means of sanitary actions that do constitute a public good. But that is not equivalent to the fact that goods and services –medical work– that constitute health should be distributed necessarily in a universally gratuitous way.

To propose such a thing would imply a kind of universal obligation minding the destiny of absolutely each and every human being. And, like it was analyzed in the previous section, there does not seem to exist an anthropological foundation –beyond faith– that supports this claim. As in Cesar Vallejo’s³⁵ poem, human life could only be viable this way if absolutely all fellow humans of each individual involve themselves proactively in each others’ lives. But poetry, even when it is good poetry (as Vallejo’s is) is a source neither of rights, nor of reality. Preserving life is, of course, a fair reason to display collaborative strategies, but that does not mean that one can implicitly find buried in them a scope of action similar to the maximalist aspirations implicit in the right to

³⁴ 5038 ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 95 (Basic Books 1974).

³⁵ “Al fin de la batalla,
Y muerto el combatiente, vino hacia él un hombre
Y le dijo: <<¡No mueras, te amo tanto!>>
Pero el cadáver, ¡ay! Siguió muriendo.
Se le acercaron dos y repitiéronle:
<<¡No nos dejes! ¡Valor! ¡Vuelve a la vida!>>
Pero el cadáver, ¡ay! Siguió muriendo.
Acudieron a él veinte, cien, mil, quinientos mil,
Clamando <<¡Tanto amor y no poder nada contra la muerte!>>
Pero el cadáver ¡ay! Siguió muriendo
Le rodearon millones de individuos,
Con un ruego común: “¡Quédate hermano!”
Pero el cadáver ¡ay! Siguió muriendo.
Entonces todos los hombres de la tierra
Le rodearon; les vió el cadáver triste, emocionado;
Incorporóse lentamente
Abrazó al primer hombre; echóse a andar.”

15 CESAR VALLEJO, ESPAÑA, APARTA DE MI ESTE CÁLIZ 141 (Ediciones de la Torre 1992).

universal health. As will be seen in the following parts, I do not pretend to deny that it is consubstantial to the human species to have a level or scope of collaboration with others – I do affirm, precisely, that this is the basis of the fiduciary relations that maintain social coexistence– but I do question the assertion that such collective affectation is absolutely universal.

The public goods that I just used as examples, welfare and free health, have in common that they are well intentioned aspirations, that is, generalized feelings (like solidarity) disguised as public goods. But they are not the only false public goods. There are many others, much more objective, (although not necessarily more tangible) like natural resources, and within them, the radio electric spectrum. It is common to find in legal systems, as is the case of the Peruvian constitution, assertions to the effect that underground resources like minerals and oil belong to “all” or “to the nation.” However, this is an awful way of assigning resources. It implies to understand that wealth is a group of physical objects preexisting before man appeared. But wealth in reality resides in the transformation and utilization of those goods. A mountain full of gold which cannot be extracted because of geological motives due to a determined status of technology is worth exactly zero. It starts to acquire value only when the expectation of the production of such technology appears. Therefore, human ingenuity is the absolute constituent of the value of things. Its exploitation is the only source of wealth. Hence, nothing linked to the original deposit of natural resources justifies the socialization of its entitlements, the underground is as prone to become private as the ground; it has nothing public *per se*. The same thing can be said about the radio electric spectrum. As Ayn Rand affirms, the property of this cannot constitutively belong to the State or be collective, because that property was born with the –private– discovery of radio electric waves. And it was acquired originally in the way every property is acquired: working the resource, previously unused, converting nature into civilization³⁶.

Thus, the author explains, “owner” is not the concept that describes best the role that the State should play before those goods, but “custodian”. That is to say, the agent that defines objectively the impartial rules through which the potential (private) owners can acquire them³⁷. Note the fiduciary element present in the above assertion. Indeed, a custodian is someone to whom a certain good belonging to others has been given to keep. This is what happens in reality to all goods and services of which the State is in charge. None belongs to the State originally: all are state-owned by delegation. Public property is

³⁶ Ayn Rand, *The Property Status of Airwaves* in CAPITALISM : THE UNKNOWN IDEAL 131-39 (Signet 1967).

³⁷ *Id.* at 133.

–therefore– in all cases a mere fiduciary domain, and for this reason it is always subject to accountability, because it is always executed by mandate on behalf of its citizens.

4. The “social contract” is a trust

If the congenital propensity of human beings to achieve some of their objectives through collaboration and the great difficulty to administer some goods that because of their nature are public justify a type of socio-political organization where those goods must be entrusted to a government, I propose that the nature of the so-called “social contract” which originates that government is the same or very similar to the one that in Private law originates the trust-agreement.

I do not pretend to make a judgment on the temporal or conceptual pre-existence of one or another –the private trust and the political trust– but simply to imply that both figures respond to the same philosophic, anthropologic and economic logic: the need to entrust a commission of confidence of certain goods (private in one case; public in another) whose owners cannot –usually only in a temporal way– administer them by themselves for any reasons.

Within western legal thinking, and particularly under Common law, fiduciary logic and contractual logic are not always easily compatible as Langbein admits³⁸. Partly because of this, I find that fiduciary logic may be a more appropriate approach to explain social organization than the simplistic contractual approach, which does not appear to be totally convincing to describe the interests, goods, incentives and structures at stake for the purpose of socio-political organization. It is not that contractualism is radically wrong (at its roots), but it happens to be, perhaps, insufficient. But, what additional elements, besides those merely contractual, exist in fiduciary logic that can better explain social organization? Always in the scope of Private law, the fiduciary implies the existence of supra-or-meta-contractual loyalties. The Supreme Court Judge Benjamin Cardozo’s verdict is famous as he practically “pulled out of his sleeve” the difference between merely mandatory duties and those of a fiduciary nature, to conclude that these last ones demand higher levels of loyalty than the first, even when the fiduciary relationship is established by contract³⁹. The core of the matter perhaps has to do with the fact that contractual duties have to be explicitly agreed, or else have to be taken into account in the law⁴⁰, and

³⁸ John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. at 627(1995). However, Langbein answers this idea, that attributes principally to historical reasons and secondly to economic ones, in order to restore finally the contractual nature of trusts.

³⁹ *Meinhard v. Salmon* 164 N.E. 545 (1928).

⁴⁰ But as is well known, positive or statutory law, in Anglo-Saxon law is very brief in contractual norms of the surrogate type, typical of the civil codes of the German-roman tradition, which also explains the exaggerated extension of Anglo-Saxon contracts, which is being imposed too –with less justification precisely due to the existence of codes– in the practice of Private law in Latin America.

what Cardozo apparently pretended was to extend the obligations much farther than what was originally agreed on.

With similar logic in the scope under discussion it could be said, then, that political fiduciary relations also generate loyalty obligations –from governments and governors towards the citizens– that should go farther than what was explicitly stipulated in the law and even in the Constitution. This happens to be very compatible with the ideals that inspire modern day liberal democracies (so centered on the idea of the State being at the service of the citizen) and, well understood, the concept of loyalty also aligns itself with a libertarian vision of the economy. Because the increased loyalty that is required does not translate itself into paternalist activism –as it does not happen in law of trusts– but in high standards of diligence for the commissions specifically entrusted (which do not have any reason to be deemed extensively) and above all in effective accountability that assures a correct alignment of interests between agents and principals.

As Langbein himself states, the central concern of the modern (private) law of trusts is to safeguard the beneficiaries of the trust from the eventual perils of bad behavior from the trustees (fiduciary agents or, simply, fiduciaries) who, for example, could unlawfully appropriate themselves, or badly administer the assets of the trust⁴¹. As is evident, the same concern results central to the legitimacy and efficiency of public affairs, meaning the functioning of the political trust-agreement.

The structure of any trust is that the owner of a certain good (settlor) delegates a commission of confidence to a third party (trustee), so that they dedicate themselves to administer those goods in a diligent manner –and usually increase its fruits– to assure that the good entrusted as well as its fruits are at the service of a beneficiary (trust beneficiary). It is common in a testamentary trust, for example, that the settlor and the beneficiary be different persons; but the structure of the contract also admits that both be the same person. If we translate this to the political field, we could well set out things in two alternative perspectives: the first one, historical, where the settlers are the founders of the State (let us say a Constitutional Assembly or the founding fathers in the case of the United States), who establish the political trust for the benefit of future generations (who would be the beneficiaries). The other option is one where the trust is recurring, that is to say, citizens permanently entrust public goods to the trustees (authorities), in their own benefit. In this logic, citizens are constantly settlers as well as trustee beneficiaries at the same time. Given that in the fiduciary democracy theory it will be more important to highlight the centrality of the beneficiary –citizen– than the constitutive genesis of the

⁴¹ See LANGBEIN, *supra* note 38, at 640.

trust or the determination of who is the settlor I will continue the analysis without assuming a final position about which of these two options is the more adequate one⁴².

Democracy is not the only possible political trust-agreement, although it is probably the most correct and coherent with its causes and ends. A consented dictatorship or an absolute monarchy also imply that the State manages collective goods with the approval of its citizens. But the delegation mechanisms end up being much less legitimate and functional. They do not allow for healthy accountability (but only, in the extreme, a voluntary abdication or a violent revocation)⁴³. And precisely when the trust is democratic, accountability mechanisms –derived from the increased loyalty described before– become substantial. However, like Millan and Natal assert “accountability is mentioned only tangentially in the many theories that focus on the relationship between democracy and social conditions...”⁴⁴ Besides, “the inclusion of accountability in theoretical and practical themes related to democracy is relatively recent.”⁴⁵

Accountability, as has been established in previous sections, is destined to realign incentives that naturally tend to misalign themselves due to the vicarious structure of the trust and, in general, of all the relations that have an agent and a principal. It is, as well, consubstantial to this type of relations that the agent has, roughly speaking, a greater degree of discretion. That is to say, an agent is not a mere usher who follows detailed and precise instructions, but someone who is entrusted with administrative decision-making⁴⁶. Starting from the logic of methodological individualism that the Public Choice theory informs, one can define the center of the organizational problems that occupy us with the premise that “the agent has his own interests and the principal very little capacity to monitor the actions of the agent and to exercise his power to discipline him... The basis of the problem is, generally, information asymmetry between both, and therefore, the costs of monitoring the agent –who does possess the information–, are high”⁴⁷. This derives from the nature of the goods usually entrusted, public goods that being non-exclusive in their use, and non-rival in their consumption also tend to possess diffuse features on the information available about them.

⁴² However, it cannot be overlooked, that one or another option would have, in another stadium of the analysis more linked to the daily awarding of justice, significant consequences. Thus the historic or historicist option would be compatible with the tradition of constitutional textualism that is ceaselessly defended in the United States by conservative judge Antonin Scalia. The second vision would be rather compatible with the vision of those who pledge for a more contingent constitutionalism, in the style of the “living Constitution” theories.

⁴³ *“En una democracia directa o en una monarquía autárquica no cabe la accountability. En aquella, porque quien actúa y obtiene resultados es, simultáneamente, fuente original y depositario final de la autoridad; en esta, porque la rendición de cuentas se debe solo a la divinidad; es decir, ni aún a sus representantes terrenales.”* HENIO MILLAN & ALEJANDRO NATAL, LA RENDICIÓN DE CUENTAS A LA LUZ DE LA TEORÍA-AGENTE PRINCIPAL: UN ANÁLISIS DE LA DEMOCRACIA EN MÉXICO 6 (El Colegio Mexiquense 2006).

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ “Accountability can only exist when there is margin for discretionary acting”. *Id.* at 6.

⁴⁷ *Id.* at 7

The agent-principal structure, thus, establishes a game of collaboration that, by its same characteristics, carries a high risk of being badly resolved. Applied to the government, the authorities (trustees) and the citizens (settlers) tend to display opportunistic behaviors instead of looking for pragmatic collaborative solutions, as described by the famous prisoner dilemma⁴⁸. Applied to the scope of collective action, this reveals that “if the number of people needed to propel and obtain a goal is inferior, the individual will have incentives not to cooperate because the purpose is not achieved. Then he will incur in the costs of participation without obtaining benefits...when the number of people is superior to that required for collective action to render fruits... the rational individual will chose not to participate, precisely because he can obtain the benefits without incurring in the costs, as due to the characteristics of a public good, once the objective is produced, no one can be excluded from its benefits⁴⁹.”

The aforementioned describes, or better yet, predicts the famous “tragedy of the commons” by virtue of which, either a few (politicians and their cronies) benefit from what belongs to all or, on the other hand, all are harmed by the action of those few⁵⁰. However, the economist Elinor Ostrom –Nobel Economics Prize 2009– found several specific cases of particular communities in which the collective ownership of certain (public) goods were well administered in the benefit of that community and with the effect of assuring the sustainability of those resources. What these cases have in common is well-established institutionalism defined by rules, responsibilities and above all a relatively small scope of delegation; that is, it functions in communities with strong functional and family ties⁵¹. The aforesaid suggests that a political trust usually works better the nearer the agent is to the principal. Therefore, the democratic trust works better if preferably close authorities are entrusted; that is, local governments, provided, of course, that there are accountability mechanisms sufficiently enforceable and functional in that scope. This also suggests that the best “fiduciary polis” is not necessarily one defined in cultural terms, as communitarianism would tend to favor, but one where there is a predictable institutionalization; where it is clear what the members of that group expect from one another, because in general this is followed, and confidence is not systematically betrayed. In fact, one of the main advantages of a fiduciary democracy consists in the fact

⁴⁸ This consists of a theoretical model according to which two accomplices are taken prisoners and isolated from each other. They are offered alternatives for collaboration with justice, by virtue of which, if both confess, they will have a moderately severe penalty (3 years), if none of the two confess, they will have lesser penalty (2 years), and if one confesses (betrays his accomplice) but the other one does not, the one who confesses will have the least penalty possible (1 year) and the other the greatest penalty possible (4 years). As none of the two know what the attitude of the other will be collaboration becomes extremely difficult because it implies acting without sufficient information, which generates high incentives for non-cooperation.

⁴⁹ MILLAN & NATAN, *supra* note 43, at 9.

⁵⁰ Thus, for example, abuse on the part of certain beneficiaries of social benefits in welfare States would be an example of how citizens adopt opportunistic behaviors (rentiers at the State’s cost).

⁵¹ ELINOR OSTROM, ROY GARDENER & JAMES WALKER, *RULES, GAMES AND COMMON-POOL RESOURCES* 289 (Univ. of Mich. Press 1994).

that the systematic confidence in its institutions generates great stability, not only political but also economic and social, in the long term.

5. Fiduciary democracy and its main elements

If the social contract is, or is very similar, to a trust, it makes sense to intensify the fiduciary attributes of democracy to make it more functional and legitimate, always within the representative and liberal –in the classic sense of the word⁵²– tradition, even if these attributes imply greater direct participation from the citizens.

The direct elements of democratic participation that this model would incorporate, are practically limited to accountability and do not extend beyond other forms of participation, as will be analyzed further on. If Athenian democracy was the direct participation of citizens in all or many of the State’s affairs⁵³, all the arguments developed along this paper point to the material and logical impossibility of such participation, given the nature of the public goods in question. Thus, the need for delegation mechanisms in the form of commissions of confidence that fund the fiduciary-democratic relationship has been emphasized. For example, Richard Posner argues that a liberal State consists of a representative democracy limited by the rule of law, in which citizens do not play a significant role in the adoption of complex public policies precisely because they delegate that function⁵⁴.

But it is consubstantial to the fiduciary democracy here proposed that the commission or commissions of confidence be specific, not ample. Thus, the separation of powers. In fact, in the fiduciary democracy we should talk about respective commissions of confidence or trusts, one for each State function (meaning more than one for each State power, especially in the modern, increasingly technocratic-regulator States). What defines democracy is the limitation of power. What defines the fiduciary is the delegation of confidence. The key to a good democracy, legitimate and functional, would be finding the mechanisms that allow us to approach as closely as possible the equilibrium point where powers are sufficiently delegated, and yet, adequately limited.

Fiduciary democracy or constitutionalism respond –like the theory of polyarchy, which proposes that in modern democratic systems features of Greek democracy, republicanism and liberalism converge⁵⁵– to the conceptual tradition according to which modern western democracy does not consist only in popular vote, but also in the delegation of power and in the inalienability of fundamental rights.

⁵² DAVID HELD, *MODELS OF DEMOCRACY* 56 *passim* (Polity 2006).

⁵³ *Id.* at 14.

⁵⁴ RICHARD POSNER, *LAW, PRAGMATISM AND DEMOCRACY* 140-49 (Harv. Univ. Press 2003).

⁵⁵ ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 131 (Univ. of Chi. Press 2006).

For this reason, governments are forbidden to affect the citizens' private goods which have not been entrusted. Hence, the inalienability of fundamental rights, which cannot be violated much less abolished by the majority through the pseudo-democratic referendum or plebiscite. This follows the line of any classic definition of modern democracy, which consists in limiting the power of all minorities (including the majority which is made up of a set of minorities) so that no group can run over another, alienating their rights. If the essential characteristic of the liberal democracy is to decentralize the political power of minorities and distribute it among as many hands as it is necessary, so that it becomes tremendously difficult for a small group to affect the rights of their equals, as Norberto Bobbio well affirms,⁵⁶ then the fiduciary democracy states that the way to decentralize power is by the very rules of a commission of confidence or trust-agreement, duly established in the Constitution, which is the founding or constituent document of that (political) commission of confidence. The implicit loyalties to which I have referred when explaining the fiduciary element, refer to the way explicit mandates should be interpreted. The concentration of power, therefore, would in itself break the confidence -of citizens in their governments- and would turn the commission into a usurpation of power.

But, on the other hand, as Millan and Natal affirm, the logic of accountability would not exist if there was no ample discretion⁵⁷. And as Langbein asserts, on his part, modern fiduciary law (relative to trusts) has revoked ancient laws that restricted the attributions of trustees, whose actual function consists in conducting investment programs and administering financial assets that require extensive discretion to respond to changing market forces⁵⁸. In primitive fiduciary schemes, trusts were thought of, only to preserve and transmit tracts of land, whereas now they have a much more sophisticated financial function.

Does the same happen with political trusts? On the one side, the growth and sophistication of state mandates would suggest so. On the other hand, one cannot but observe a direct relation between the complexity and the effectiveness of the commission of confidence -whatever it may be- and the greater discretion of the trustee. Thus, for example, a surgeon or a plane pilot have more responsibility for the life of the beneficiaries of their services, but also require a greater level of discretion. If one decides to travel by train he has greater freedom to revoke the transportation commission of confidence than the passenger of a plane (due to the fact that he can leave in the next station). But at the same time the train passenger must undergo a less efficient transport

⁵⁶ See BOBBIO, *supra* note 10.

⁵⁷ See MILLAN & NATAL, *supra* note 43.

⁵⁸ LANGBEIN, *supra* note 38, at 641.

process (much slower and therefore temporarily more extensive). Precisely, the bigger the delegation and the more discretion a trustee has, it is expected that the mandate be shorter. Neither a complex surgery nor a flight can last forever; even when it is possible to imagine flights and surgeries that last several hours. In their turn, because of the dedication it requires and its complexity, these generate greater retribution for whoever provides those services. In the same way, in the political scope, when power is delegated with ample discretion, the mandate has to be short.

It must be remembered that the fiduciary democracy, like any trust, implies that the power –or a specific public good– is given to administer precisely because it is impossible or very difficult for its owner –citizens in this case– to micromanage it. The trustee (the government) requires ample margin of discretion to do it effectively. In exchange, it has to account for relentlessly, but in order to exercise the mandate it cannot be frequently consulting the beneficiaries of the trust, because it threatens his commission to diligently manage what has been delegated. Hence, the equation that the more “direct public consultations imply more democracy” (as plebiscitary regimes hold) is not valid. I will sustain that consultations are democratic in as much as they fulfill accountability functions that reinforce confidence in the fiduciary system.

However, more discretion increases, in a directly proportional way, the risk of opportunistic behavior by the trustees (authorities), which in turn endangers the viability and sustainability of the political organization itself. This is so because power can be abused in the form of intrusive authoritarianism, or because public funds can be diverted in the form of corruption. Therefore, it is consubstantial to democracy that there be mechanisms for realigning the incentives, one of which is power limitation which defines the liberal democracy, and in turn contravenes the concept of discretion of the authorities. This dilemma must be resolved through the establishment of very specific mandates in the elaboration of the frameworks in which the political fiduciary or trustee should act; that is, in the accuracy of the public goods entrusted to them. Once established, a greater degree of discretion can be allowed in the administration of these goods, providing that the corresponding accountability mechanisms exist. Now, once the corresponding public good is defined, this implies in itself that it is also necessary to specify with the highest possible degree of detail who is the holder of the good; that is, the beneficiary of such good. The question then is, in each specific case, to whom does the authority who executes the commission owes his loyalty to in each specific public trust case. Who must he benefit with his actions. The whole political community, understood as the whole country, is not always the beneficiary. At the level of local governments, for example, the fiduciary loyalty corresponds to the interest of smaller communities. In an increasingly complex State in

the diversity of its commissions, the holders of public goods entrusted are also correspondingly diverse.

It is important to specify this point, because usually, the state organs and organisms mix up their mandates by way of increasing them. Thus for example, to quote a real case, not long ago the Transportation and Communications Ministry of Peru had to decide whether to renovate a telephone concession to a controverted company for the public opinion. The ministry's way to legitimate the decision of renewing the concession was to include in the contract a series of obligations for the company that not only divert themselves from the functions the company had to comply with, but also the fiduciary duties of the ministry. This was limited to extend the service coverage, but in its place, it dedicated itself to negotiate free services for a number of interest groups (retirees, bureaucrats). It could be argued that the State legitimately should try to facilitate life for these groups; but if that was the case, it was not the way to do so. The mandate of the authority that grants the renovation is not to combat poverty, nor to ease the lives of pensioners. To introduce those elements into the equation is a distortion that misses the focus of its functions. Similarly, there are equivalent examples in other sectors. For example, the free competition agency has to guarantee that there is fair and free competition; not to look after and protect national industries. The Central Bank has a mandate to look after the strength of the currency, not to propitiate the reduction of unemployment. Thus, the examples are never-ending.

Other consequences that derive from the application of the theory of the fiduciary democracy are related to questions that are important for political practice and public administration, for example:

5.1 The space for direct participation mechanisms is limited to public consultations that have to do directly with consubstantial confidence in the system. This way, consultations that serve as a remedy for the loss of faith in the authorities (for example authority revocation) are considered legitimate. Note that differently to what has recently been proclaimed in Peru with certain lightness, it is not true that revocation is a mechanism for sanctioning corruption or crime. For this, there are other figures, such as vacancy and/or criminal lawsuits. Revocation is the remedy for political disillusion. As is well known, the laws that govern false advertising do not apply to politics, and authorities are not subject to an imperative mandate as part of the foundations of representative democracy. But the abuse of these privileges could generate –and in fact does– a lack of confidence in politicians and the illegitimacy of democracy as a system. That is why revocations are the exceptional remedy

for betraying political promises. They are the sanction against misleading or false political advertising. When voters feel systematically mocked by some politician who promised exactly the contrary of what they did once in office, the beneficiaries of the trust should have the option of revoking their mandate and confidence. Another valid case for direct democratic participation has to do with the modification of the fiduciary mandate. When the principal decides to change the terms of the delegation, and in political life this is equivalent to modifying the Constitution, it is reasonable that it should occur through a referendum or public consultation. These two figures (revocation and public consultation to modify the Constitution) are included, for example, in the Peruvian Constitution of 1993⁵⁹. However, its regulation through constitutional development laws is not at all blissful and requires to be improved. For example, in the case of revocation, there is no consistency between how local revocable authorities are elected (in closed lists) and how they are revoked (individually); neither is there any consistency between the number of votes required to be elected and the number of votes needed for revocation (in theory it is possible to revoke with less votes than those the elected authority obtained to be designated), among other inconsistencies. In any case, it is worthwhile to specify here that the mechanisms for direct participation that a fiduciary democracy should favor are those which are exerted spontaneously by citizen initiative, not those that the legal system imposes mandatorily every so often or when a certain situation has been verified. As David Altman says, the first have proven to be a lot more effective and legitimate than the second that usually have resulted in undesirable consequences⁶⁰.

5.2 All public property is a fiduciary domain; that is, the State is not the original titleholder, it is merely delegated to it, and therefore, is subject to diverse limitations to its free availability, all of which derive directly from the fiduciary loyalty specifically guaranteed in the commission of confidence which

⁵⁹ But this does not imply that the Constitution of 1993 is an utter expression of fiduciary democracy. Even though I have affirmed in another paper that this Constitution should remain in force and it has won legitimacy – GONZALO ZEGARRA MULANOVICH, *Eterno resplandor de una mente sin recuerdos (constitucionales)* in *EL DERECHO VA AL CINE* 125, 125 *passim* (Cecilia O’Neill de la Fuente ed., Universidad del Pacífico 2013). –I have also argued systematically through my opinion editorials the need to introduce reforms to the Constitution to perfect the political system enshrined in it. What the suggested reforms have in common – bicameralism, voluntary vote, uninominal districts, partial Parliament renewal, etc. – is precisely to improve, under a fiduciary logic, the confidence of citizens in the government and the efficiency of this, all which would lead to greater legitimacy of the system.

⁶⁰ DAVID ALTMAN, *DIRECT DEMOCRACY WORLDWIDE* 60 *passim* (Cambridge Univ. Press 2011).

originated the fiduciary ownership that justifies the public property of that good.

- 5.3 Derived from the above, any act of corruption is at the same time an expropriation –of a fiduciary domain entrusted in a commission of confidence– and an aggravated theft, because it not only implies deciding over the property of others (the citizens in this case) but also betraying fiduciary duties. That is, incurring in a punishable disloyalty; equal to the betrayal of an unfaithful custodian or keeper (the guardian of a good who appropriates it).
- 5.4 Accountability is consubstantial to political representation –as has been extensively described– and the disintermediation of authorities and citizens (agents and principals), which requires the adoption of electoral mechanisms that guarantee this, such as the implantation of uninominal districts in parliamentary elections.
- 5.5 Governance problems or the effectiveness of public administration derive from the same misalignment of incentives that are observed in private relations between owners and managers of a public company; that is, they are agency problems or between the “agent” and their “principal”, as has also been described in detail, which can be usually rationalized through (mathematical) formulas of incentive realignment⁶¹.
- 5.6 The State should only do for the citizens what they cannot do directly for themselves, which taken to the entrepreneurial scope, implies that the State should only embark in entrepreneurial activities when citizens cannot (and this is linked to the nature of public goods, as was seen in section 3 of this paper). Thus, the theory of fiduciary democracy justifies, not only economically, but philosophically and politically the subsidiarity principle of State entrepreneurial activities consecrated, for example, in the 1993 Peruvian Constitution. According to it, and to its development in laws such as those of unfair competition, the State is forbidden to compete with private entrepreneurs. Its participation in public enterprises has to be justified exclusively in the need for certain services to be provided, and in the confirmation that nobody is doing so. But if any private company does provide that service, the State has to refrain from continuing as an entrepreneur in that business.

⁶¹ MILLAN & NATAL, *supra* note 43, at 11.

6. Main betrayals to democratic trusts

Naturally, democracy fails. The so called failures of the social contract could be labeled as betrayals in a system that emphasizes the fiduciary elements of that contract. In this section, instead of making a list of those historical failures or betrayals, I will concentrate on the more recent problems in modern democracies, particularly in Latin America. Broadly speaking, I will identify 3 recurrent types of democratic betrayal, each of them related to a different crashing or misalignment cause in regard to the commission of confidence scheme that typifies democracy.

6.1 Mercantilist Democracies

The first type of betrayal is the one traditionally observed in Latin American democracies until a few decades ago and which now appears to be declining. In them, representative democracy existed in form but it did not generate the conditions needed to assure the fulfillment of the individual-citizens through meritocratic advances in the style of democracies of the developed world, instead, power was used as an instrument to ensure the hegemony of certain social groups or oligarchies of any sort (not necessarily economic, although certainly these, as well as military, ideological, religious, and eventually labor union ones). They were not really liberal democracies, but mercantilist.

These democracies perpetuated a classist organization, sometimes an exploitive one; and, in many cases, forms of servile labor. Politics was placed at the service of group interests. The most eloquent examples that come to my mind are recent, from a historical point of view, but not descriptively in force. I am thinking of Peru previous to the state coup of General Juan Velazco Alvarado in 1968, of Ecuador before Rafael Correa assumed power, or in pre-chavist Venezuela. It is not by chance that those regimes were deposed or substituted by authoritarian populisms. The wear and tear of the mercantilist economic system –which generated perks and privileges– brings about as a corollary the discredit and delegitimization of the political system that backs it. Thus, mercantilism is substituted by populism and the democratic mechanisms by authoritarian forms. In a recent work, economists Daron Acemoglu and James Robinson describe, precisely, the rationality of the populist twist⁶². According to them, for a rational agent who belongs to the most disadvantaged socioeconomic levels, in the short term (but clearly not in the long run) a way of maximizing benefits is to chose a populism that satisfies immediate necessities and preferences even in a welfare manner, rather than to perpetuate social and economic organization schemes that close the door to access opportunities and success.

⁶² DARON ACEMOGLU & JAMES ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY (Crown Business 2012).

And that is what occurs in mercantilist democracies, which is the way we can label, for linguistic thrift, the systems which I am referring to. They all are characterized by bureaucratizing the economy and politics by establishing all types of barriers and cronyism. In a certain way, it is the world described by Hernando de Soto, Enrique Ghersi and Mario Ghibellini in their celebrated work *El Otro Sendero*⁶³, even though the country they describe historically is Peru after the Velasco populism (and a product of the same). It happened that when democracy came back, political rhetoric changed, it became strongly statist/interventionist, but the exclusionary mechanisms that kept the great majority of people out of the markets, were preserved. With fear for which I apologize beforehand, I could suggest that current verifiable versions of this type of democracy are the ones now reigning in countries such as Paraguay or Guatemala, but my distance from those countries and my superficial knowledge of their socio-political realities compel me to formulate this hypothesis in a purely preliminary manner and absolutely conditional (open to a refutation on the part of those closer to these realities).

The failure in this type of regime is sufficiently obvious, and answers graphically to the logic described along this paper: a misalignment of interests between leaders and constituents, trustees and beneficiaries, agents and principals. Take note that mercantilist democracies usually adopt the forms of traditional representative democracies (not improved or fiduciary as we use the terms). Well, under the traditional scheme of representative democracy, that completely mistrusts the direct participation of citizens and practically limits their participation to general elections only, it is difficult to establish vertical accountability mechanisms that could difficult or impede power from deviating from the interests it should represent to serve small groups of influence. These defects could be corrected by establishing more direct and precise accountability mechanisms, which would include, for example, geographical circumscriptions more bounded for parliamentary representation –which generate disintermediation between representatives and their voters– as has been suggested.

Another determining factor, no doubt, is the amplexness and imprecision of political mandates to avoid the indetermination of public action and focus clearly on its functions and their loyalty beneficiaries, looking for greater effectiveness, as was seen in previous sections.

6.2 Authoritarian populisms

Instead of rationally correcting these deficits of traditional representative democracy with more and better accountability mechanisms that respond adequately to

⁶³ HERNANDO DE SOTO, ENRIQUE GHERSI & MARIO Ghibellini, *EL OTRO SENDERO* (Editorial Oveja Negra 1987) (1986).

fiduciary logic, we observe –in part of our continent at least– a certain tendency to replace mercantilist democracies with populist authoritarianisms. This seems to be the case today in several countries of the Latin-American region, such as, Venezuela, Ecuador, Bolivia, Nicaragua, and with less intensity but with more complexity, Argentina. As it is predictable, that model constitutes the second –and, of course, more serious– type of betrayal of the democratic trust as it involves a remedy which is worse than the disease. Indeed, a misalignment of interests’ problem ends up being faced with a much more intense delegation of power.

Thus, representative intermediation is attacked through direct popular delegation. But really, the problem required ex-post control mechanisms (accountability) that returned the power to the principals (citizens) in case of power deviation, instead of exacerbating the delegation act through plebiscitary schemes that prevent accountability, because the relationship established between the agent and the principal is hopelessly marked by the absolute dispersion of interests and the diffuse (imprecise) nature of the mandate.

Authoritarian populisms usually arrive and perpetuate themselves in power through a destructive rhetoric against democratic institutions and its agents. They frontally attack the political classes that preceded them in power. They usually fund an eminently anti-political stage, in the sense in which power limitations are banished through the separation of powers of the State, on one hand; the control mechanisms or checks and balances, on the other hand; and finally almost any form of political deliberation through the effective neutralization of the majority of independent media, or, at least, the more powerful⁶⁴. This anti political interregnum could be read as a reaction of the Latin American population to the inefficiency of traditional politics, partisan and institutionalized. In this reaction, typically an overpolitization of many subjects is produced which should not be matter of the fiduciary delegation and that hyper-bureaucratize politics and/or the economy, as we have seen when we discussed the mercantilist democracy. Thus, disenchantment with bureaucratic politics makes people trust efficient and spendthrift *caudillos* (dictators) who, certainly, neither resolve the dilemmas of the imperfect delegation⁶⁵. Their typical way of legitimizing themselves is

⁶⁴Although recent modes include a certain apparent “tolerance” to opposing media, typically written ones, in as much as these do not seriously compromise the direct relationship of the dictator with the masses.

⁶⁵ *“En otro extremo, se encuentra la indiferencia de la ciudadanía y el debilitamiento de los mecanismos de rendición de cuentas, que entregan el control total de los asuntos públicos a la autoridad –el agente– y acepta todos sus resultados, siempre y cuando respete el marco legal y los procedimientos que de él emanan. Este tipo de situaciones es propio de gobiernos dirigidos por líderes carismáticos, en los cuales se deposita toda la confianza, y la accountability es innecesaria e impensable como reclamo ciudadano porque no existe el problema de agencia: aun cuando la propiedad y el control del poder se encuentran separados, la confianza en que el agente actuará en todas las circunstancias a favor de sus representados llevará a que los resultados adversos o insuficientes de su gestión obedezcan en forma exclusiva a factores ajenos a su control. Este escenario suele derivar en regímenes con varios grados de autoritarismo, en la medida en que la confianza se puede constituir un activo que permite, inicialmente, excepciones a la*

through means of plebiscitary mechanisms or direct democracy, generally established beforehand in the political system itself (that is to say, legally and constitutionally foreseen) but not spontaneously requested by the population.

Under this perverse logic, what is more frequently verified is that plebiscites are used to exceed the reasonable terms of the political commission of confidence, so as to extend it to fields which in no way justify a delegation of power, because usually there is no public good at stake, such as we have defined it in section 3 of this paper. That is to say, plebiscites in direct democracies usually serve as a pretext for governors to achieve a greater attempt to monopolize power, affecting the fundamental rights of certain minorities. In fact, these consultations are the easiest and most direct way of expropriating, not only property rights, (although, these also, of course) but also other fundamental non patrimonial rights. This is the case –for example– of certain public consultations that took place in Ecuador a couple of years ago, which dealt with themes that ranged from freedom of expression, up to the right to attend bullfights, imposing limits by virtue of which the government ended up having decisive power in relation to such areas. In other words, the government generated the fiction that these are entitlements which originally belong to the State –or the collective–, when not only they do not because of their nature, but cannot even be delegated to the State, because they are not public goods (diffuse, non-excludable and with no rival consumption), but subjective rights (private). Even though 90 per cent of the population wants it, fundamental rights such as life and property cannot be abolished. The guarantee for that is a document called the Constitution, which limits the capability of the voters to affect those rights by votes. That is to say, it establishes the terms of the trust or delegation of confidence, establishing limits for their need.

In authoritarian populisms, then, direct democracy mechanisms –instead of assuring that the actions of the agent respond to the will and interests of its principal– usually constitute in a simple way plebiscitary means to skip other representative institutions or to clear themselves from the responsibility of adopting harsh policies. Or, they simply constitute tools of populist mobilization and legitimation, as Altman asserts⁶⁶, when referring to popular consultations typically instrumented from the constituted power and not by the spontaneous initiative of citizens, as typically happens in populist authoritarianisms.

conducta legal esperada, y después, una justificación más sistemática de procedimientos fuera de la ley". MILLAN & NATAL, supra note 43, at 22.

⁶⁶ ALTMAN, *supra* note, at 86.

Many are the ways in which populist authoritarianisms betray the democratic trust. To begin with, they violate the idea of the limitation of power which supports the separation of powers, by way of emphasizing the direct and concentrated delegation. This is, perhaps, the most eloquent expression of what O' Donnell called "delegative democracy"⁶⁷. In that line, it emphasizes the fiduciary element in a perverse way by situating it only at the genesis of the establishment of a government but at the same time, practically disappearing it in successive stages, in other words, making it impossible to verify effectively the healthiest accountability mechanisms. At the same time, populist authoritarianism discredits democracy because it makes it unlikely since it incorporates the populist element in its value-promise. As Uruguayan ex president Julio Maria Sanguinetti said: "Populism is promising what cannot be accomplished". Populism is, therefore, a congenitally fraudster and liar. On the contrary, fiduciary democracy has one of its pillars in the effective accomplishment of the implicit or explicit promise in the commission of confidence awarded to the trustee or governor. Populism promises something that should not be promised, because it is not necessary –there is no public good to justify it– nor is it feasible ultimately. In this it is similar to the third type of fiduciary betrayal –the welfare State– that we shall see next, although the genesis and ways of one and the other are, of course, different. However, the logic of excessive promise is similar in both cases, so the explanation I will develop around this specific point for the welfare State is also true for populism.

6.3 Welfare States

The third model of fiduciary betrayal is, of course, the welfare State. It was originally based on the aspiration of achieving democratic societies where it would be possible to achieve equal opportunities; however, the ideal of a welfare State degenerated through history to unsustainable extremes. In fact, as a political model, it has proved its unfeasibility in the recent European crisis, where it has been seen with crystal clarity that the financing of the maximalist benefits promised by the continental European democracies was a fiction based on an unpayable debt. The fiction of that welfare –no matter how many times it was identified as a "right"– was built at the cost of a governmental leverage that presents a double problem: moral and functional.

The moral problem consists in translating present welfare costs to future generations; in other words, organizing a society where each new citizen comes into the world not with bread under his arm; but with debt under his arm. That each newborn citizen is born indebted to fulfill the increasingly hedonistic needs of his predecessors is a

⁶⁷ See O' Donnell, *supra* note, at 15.

reality that has little or nothing to do with the founding promise of equal opportunities. But as if this moral problem was not enough to reconsider the model, a second problem certainly linked to the first, has to do with the practical viability of welfare States; and is based on the demographic problem. Europe, and in general the developed world (except the United States) have population structures in the form of inverted pyramids; this is to say, where the adult population exceeds the young or new population. And the intrinsic logic of welfare States is one in which the economically active population (that is to say, the young) have to provide welfare not only for themselves and their direct dependents, but also through an ambitious social security, to all the economically inactive population, be that children, adolescents, college-age youth (which extends almost limitlessly through doctorates and post-doctorates) and retirees (who retire increasingly at younger ages). If you add this to tremendously restrictive immigration policies, including and above all, of young people in a productive age, very frequently triggered by union lobbying that attempt to restrict the entrance of workers willing to charge less than the native unionized workforce, we have a very explosive (or implosive?) cocktail.

Welfare States in Europe (and that includes Spain, which is part of Spanish America, as is obvious) are on the road to an inescapable reassessment. And those who are not, because they have survived reasonably well to the crisis –like Scandinavian countries– have already gone through reform processes in previous decades that decreased the maximalist tone to their welfare promises, for example, by relaxing the so-called labor rights⁶⁸.

But the most ambitious welfare claims of those countries who have not introduced such reforms have failed or are failing in their task, by means of excesses and the lightness of their promises. The promise of an absolute and general material welfare achieved in violation of the principle of causality in the generation of wealth –wealth does not pre-exist; it is generated by human work which authorizes whoever achieves it to appropriate the results of it– constitutes a utopian promise in Nozick's words.⁶⁹

In fact, what the maximalist –but accurate– version of the welfare State described a few lines back, ultimately promises, is a world where citizens do not have to produce their own wealth, since it is theoretically provided by the State, which for those effects is conceived as if it were no one in particular, but in the physical reality (I will not even mention economically) of the world is made up of the productive citizens.

In the welfare State, a very few, casually the harder and more skillful workers, have to finance the material wellbeing of a majority who consider that it is immoral that the

⁶⁸ According to the Economic Freedom Index of the Heritage Foundation, for example, Denmark is the ninth freer country of the world, Finland the sixteenth, Sweden the eighth and Norway (more laggard) the thirty-first (Peru is ranked 44th).

⁶⁹ NOZICK, *supra* note 34, at 297 *passim*.

productive class appropriates itself legitimately of the wealth that it has produced. This is because conversely to what is assumed too frequently, the “natural” state of man (natural in the literal sense of the word, in other words, savage, pre-civilized, pre-cultural) is poverty. Man appears poor in the world. Wealth does not consist of anything else than his intervention in the world around him in order to transform it with his intellect and his hands. Natural resources *per se* are not wealth but this is generated with their transformation through cleverness (as was seen in section 3 of this paper). Therefore, there exists no welfare “cake” that should be distributed (or redistributed) amongst all.

Implicitly lies in that extended conception a fallacy of mystic origin: the idea that natural resources have been given to the human species in trust by God. Only a vision like that one, or something very much akin, would justify the idea that the wealth that each individual generates through his transformation of the world should not be at his entire disposal; and that on the contrary, he has a fiduciary mandate by virtue of which he should “give it back” properly transformed, to other human beings who have not participated in the wealth producing process⁷⁰. But in the absence of such a theological basis –and I am assuming that a democracy is a non-confessional secular form of government–, there is no reason to conclude that the goods that do not qualify as public because of their intrinsic characteristics should belong originally to all citizens. The argument that there exists some sort of implicit universal contract that imposes on every individual obligations towards other existing persons just because we enjoy of some goods in common does not result convincing. One thing does not follow the other, especially if these obligations are formulated in a maximalist, extensive and encompassing manner. At least concerning the welfare that is generated privately or individually, from where does the “implicit” obligation to share it universally arise? To impose that redistributive maximalism⁷¹ constitutes a systemized confiscation which is not compatible with the elemental freedoms⁷².

⁷⁰ “...*todos esos esfuerzos hubieran sido vanos e inútiles, más aún, no se hubieran podido comenzar, si la bondad del Creador de todas las cosas, Dios, no hubiera antes otorgado las riquezas y los instrumentos naturales, el poder y las fuerzas de la naturaleza*”. PIUS XI, QUADRAGESIMO ANNO (1931)

⁷¹ On the other hand, a more moderate version of the redistributive momentum could be justified not only in the argument that freedom should found itself in the equality of opportunities, but also in the verification that at least some of the already distributed wealth was done so under incompatible mechanisms with complete economic freedoms, in other words, under authoritarian coercion, or under mercantilist regimes that used politics as a tool (and thus public goods) to favor illegitimately private enrichment of specific oligarchies. A restorative redistribution of confiscation which was implicit in that initial illiberal distribution would be compatible with a fiduciary democracy of libertarian stamp.

⁷² “Jobs, food, clothing, recreation (!), homes, medical care, education, etc. do not grow in nature. These are man-made value – goods and services produced by men. Who is to provide them? If some men are entitled by right to the products of the work of others, it means that those others are deprived of rights and condemned to slave labor. Any alleged “right” of one man, which necessitates the violation of the rights of another, is not and cannot be a right. No man can have a right to impose an unchosen obligation, an unrewarded duty or an involuntary servitude on another man. There can be no such thing as “the right to enslave”.

AYN RAND, *Apendix: Man's Rights* in CAPITALISM: THE UNKNOWN IDEAL 372-73 (Signet 1967).

The fallacy that the State should directly provide people with welfare (surrogating the responsibility of doing that themselves) achieves grotesque extremes in practice. As Nicholas Eberstadt points out, in the United States collecting disability payments has become a way of life. It is so extreme, that in 2011 more than 12 million North Americans of working age did this; in other words, the State subsidized a population bigger in numbers than the whole manufacturing labor force of that country⁷³.

Nobody can hold a legitimate expectation, much less a right, to be perpetually supported economically by others. Less so, if those others have no specific fiduciary duties with that person. One may think, like Rawls⁷⁴ did, that it would be fair that the creation of wealth be governed by a principle different to causality by which it is governed. But to consecrate as a political program, or even worse, as a constitutional objective, mechanisms destined to make physical laws different to how they are because we consider them unfair, is once again in words of Nozick, pure uthopia⁷⁵. But besides, it is making the (welfare) State a surrogate of the old God of Christianity; perfect in his perfection and able to transform, when his inscrutable will so esteems, what is imperfect into perfect; what is unjust into just; in the same way he transforms bread into the body of Christ⁷⁶. Physical reality can thus be transformed, but not refounded by man. He does so in search of his own welfare, and that of his more beloved beings. But he does not do it for a universal idea of equal justice that can be verified in a material sense. The human being who complains to the State that the world is not like he would like it to be and therefore requires that it be changed (to his measure) does not distinguish himself conceptually from the child who cries before his mother because the sun has gone and he would like to continue enjoying it. That is why it becomes a democratic advantage, more than a disadvantage, that constitutions and laws be brief in promises instead of maximalist. That has a great influence on their credibility, and therefore, on the legitimacy of democracy. A democracy that promises and cannot fulfill what it promises suicides itself. A democracy that is more effective than its declarations of good yearnings is strengthened.

The only universal fiduciary duty conceivable that applies to all human beings is respect for their equal freedom. If it were not true that everyone has a right for their freedom to be respected, then nobody could justify *ex ante* his right to be free. But we

⁷³Nicholas Eberstadt, *Uncle Sam as Santa*, NAT'L REV. ONLINE, www.nationalreview.com/blogs/print/335866.

⁷⁴ JOHN RAWLS, *A THEORY OF JUSTICE* 372-87 (Bellknep Press 1999).

⁷⁵ NOZICK, *supra* note 34.

⁷⁶ That is why, starting from piety of the intellectual source, or intellectual piety, thinkers have dedicated a great part of their philosophical efforts to fathom the logic that lies behind great tragedies that for the human being natural disasters, or geological or ecological disasters, etc. represent. That is also why the term "Theodicy" was elaborated to refer to divine justice intuited in the earthy activities of nature. See SUSAN NEIMAN, *EVIL IN MODERN THOUGHT* MELBOURNE (Scribe Publications 2003).

refer, as it is obvious, to a negative freedom in the terms of Isaiah Berlin⁷⁷, even if like Holmes and Sustain state, all negative freedom requires in the extreme an act (of defense, for example) by the State, and this of money to finance itself or otherwise it would not be enforceable⁷⁸.

Equal freedom is the only guarantee that we have to achieve our individual survival and start looking for our happiness (in all its possible subjective variations). But there is no mandate that socializes economic productivity and makes it a common good. Therefore, the implicit promise of the welfare State results false. Turning the private into public, through the means of expropriation or through regulations that bureaucratize economic activity constitute a rupture of confidence, an excess in the mandate.

Conclusion

The theory of the democratic trust and its paradigm of the fiduciary democracy not only seek to be a balance between representative and direct democracies (although they have elements of both), but neither do they suggest a third way between capitalism and socialism, nor a hybrid vision between an individualistic philosophy and a collectivist one. Just like this theory begins with the representative democracy to try and improve it with specific direct participation mechanisms, it also does from a libertarian vision to complement it with an explanation of the undisputed phenomenon of collaboration in the human species, insufficiently discussed on the liberal tradition from contractual positions. In that way, it attempts to provide with tools that lead to improve democracy emphasizing in its fiduciary elements –until now insufficiently served–, looking to obtain an equilibrium point where the political powers are both sufficiently delegated and adequately limited.

⁷⁷ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958)

⁷⁸ From which Sustain derives that all freedoms are positive. STEPHEN HOLMS & CASS R. SUSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (W.W. Norton & Company 2000).