

TRUST-CONTRACT DEMOCRACY

Political economy & political philosophy of the social contract and its failures

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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 another one decides.

Similarly, along the progress of history, several narratives—not necessarily political—have posed problems that for the flesh and blood human beings —individuals—mean living with the established power that be. These problems encompass founding myths as ancient as *The Book of Job* (wherein God uses his omnipotence so frivolously that he even bets with the devil about the destiny of his most faithful creature) up to popular culture presentations such as the movie saga *Star Wars*, where (in the 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 come what may.

These narratives have in common the description of narcissisms (as well as extreme narcissists) which in their unbridled hunger for imposing their will finally achieve their desire of concentrating power disproportionately, thereby oppressing the people. The history of democracy, within political history, is the history of how those narcissisms concentrating power are limited by those citizens who constitute the potential victims or ex

victims of the concentration of power. The history of democracy is the history of the consecration of freedom and of individual dignity, which paradoxically, are made viable collectively through cooperation.

Part of transitional justice is that fledgling democracy achieve its intrinsic objectives, and above all, that it avoids the peril of a new fall into authoritarianism. Of course the possibility exists –even in a democracy– that structuring a collectivist discourse will endanger the thorough development of the individual. Even though a tyrant utilizes concentrated power to impose his most eccentric and disproportionate whims (and history provides innumerable examples of this, from Caligula and Nero to Stalin and Kim Jong Un) other forms exist, even within apparently democratic structures, of denaturalizing the logic of collective action, understood as a guarantee of freedom and individual dignity, as will be seen at the end of this paper.

In a democracy, of course, those mechanisms acquire much better intentioned appearances than outright totalitarian narcissism. Left and right assert values that have to be imposed by force of law. But the concrete measures that these interventions sponsor—quotas, taxes, censures, or whatever other imperative norms or inalienability rules (in Guido Calabresi's nomenclature¹), restrict freedom or tax other people's patrimony in a way that poses a moral (philosophical) dilemma and a practical challenge, since these interventions penalize activities not only legitimate but also desirable, such as productive activities and wealth generation.

¹ CALABRESI, Guido, and A. Douglas Melamed. "Property rules, liability rules, and inalienability: One view of the cathedral." *Harvard Law Review* (1972):1089-1128, p. 1111-1114

Good intentions are usually the alibi for introducing these types of measures, whatever political tag identifies those measures (conservative, socialist, even liberal²). This is the way, societies with a strong Puritan identity such as the United States, violated individual rights even when times were ripe for consolidating the culture of Human Rights. For example, it was only in 2003 that the anti-sodomy³ laws, which had been ratified as recently as 1986,⁴ were declared unconstitutional. In another sense, today we are witnessing how egalitarian voluntarism —misunderstood as referring to material wealth equality 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 within which they developed.

While in the first case democracy is stingy by not recognizing negative freedoms such as the right to one's sexual identity, in the second, democracy brags when it promises a kind of welfare that is unsustainable. Both undermine and discredit the democratic system and the ideals that conceptually support it, as I will argue in the paper. And they do so because they betray the trust or confidence of citizens in their government (both as a political system as well as the authorities that lead it). I therefore suggest that the social contract is a trust-agreement 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 could be labeled "fiduciary democracy".

² Perhaps because of this Alasdair MacIntyre accuses liberalism (or the liberalisms) as "emotivist". MACINTYRE, Alasdair. *After Virtue*. Second Edition. Notre Dame: University of Notre Dame Press, 1984 (1981), p.23

³ LAWRENCE v. TEXAS (02-102)539 U.S. 558 (2003) 41 S. W. 3d 349

⁴ BOWERS V. HARDWICK, 478 U.S. 186 (1986)

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

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

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 redound in a social cohesion that benefits any governability, including the non democratic one. Thinkers like Alexis de Tocqueville⁵ and more recently Francis Fukuyama, have coincided in this affirmation. The latter has even insisted on the importance of confidence ties for a better functioning of markets, and not only on the political system⁶. For Tocqueville, who visited the United States during its first years as an independent federation, the high degrees of interpersonal confidence deriving from a strong associative culture between citizens explained the functionality of the American democracy. Fukuyama argues that even though it is apparently not obvious in the United States today, said culture is strongly rooted in the American being.⁷ This high interpersonal confidence cannot be easily associated to cultural homogeneity—there are multicultural countries such as the same United States with high confidence indexes—Instead, Fukuyama argues, interpersonal confidence can be associated with a good economic performance.⁸ There is also an important correlation between a greater degree of interpersonal confidence and the functionality of democracy.⁹

In the following tables it is possible to observe, with data from Latinobarómetro, 2010¹⁰

⁵ DE TOCQUEVILLE, Alexis *Democracy in America*. Vol. 5032. Fondo de Cultura Económica. 1978, p.165, 172-214

⁶ FUKUYAMA, Francis. *Trust: The social virtues and the creation of prosperity*. New York: Free Press, 1995, p.10-11

⁷ Ibid. P49-54

⁸ Ibid, p.325-347

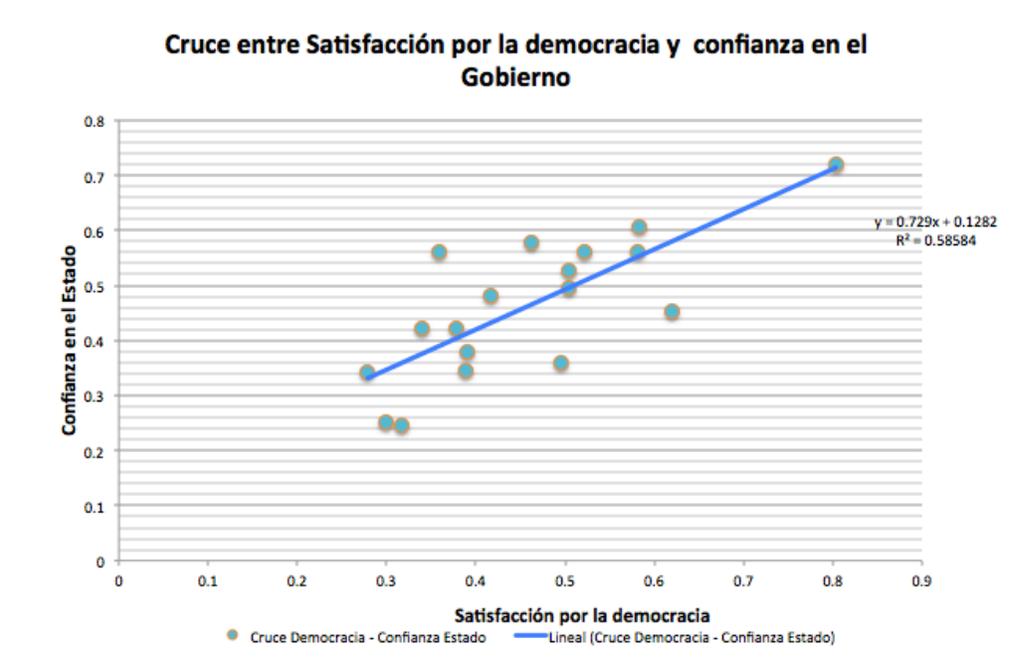
⁹ PUTNAM, Robert D. and Robert Leonardi. *Making democracy work: Civic traditions in modern Italy*. Princeton University Press, 1993. See also: Warren, Mark E., ed. *Democracy and trust*. Cambridge University Press, 1999, p.3-5

¹⁰ Latinobarómetro, Cooperación . *Latinobarómetro Informe 2010*. Santiago, Chile, 2010

that the countries where people have more confidence in their authorities are also those most satisfied with their democracies:

Country Identification	Satisfaction with democracy	Confidence in the State
Argentina	0.495	0.394
Bolivia	0.339	0.336
Brasil	0.521	0.491
Colombia	0.417	0.44
Costa Rica	0.62	0.453
Chile	0.582	0.596
Ecuador	0.504	0.392
El Salvador	0.462	0.262
Guatemala	0.316	0.197
Honduras	0.378	0.332
México	0.279	0.384
Nicaragua	0.391	0.284
Panamá	0.583	0.396
Paraguay	0.359	0.536
Perú	0.299	0.358
Uruguay	0.803	0.542
Venezuela	0.504	0.555
Rep. Dominicana	0.389	0.395

As can be observed, there is a clear correlation between confidence in the authorities and satisfaction with democracy.



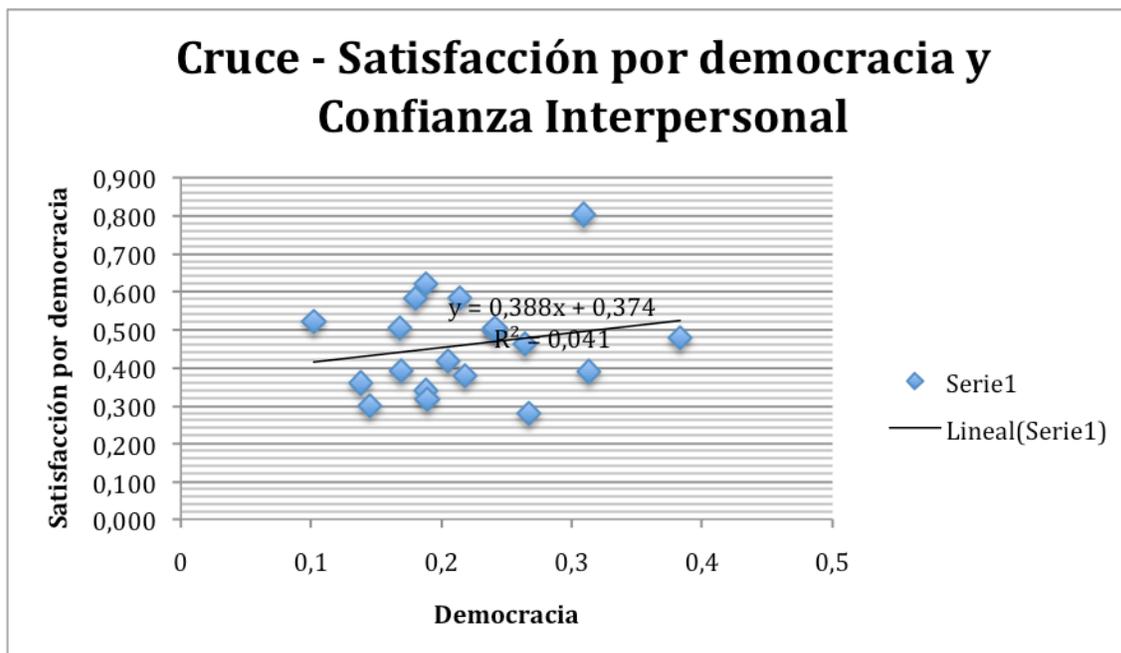
This confirmation should serve for us to find the scope and limits of the confidence that underpins democracy; its impact on the performance and legitimacy that makes possible the delegation of power¹¹. In the following table we can observe, according to data from Latinobarómetro (2011)¹², that in Latin America those countries where people affirm that co-citizens are trustworthy there is a larger perception of satisfaction with the way democracy is working. And it is among the citizens that authorities are elected.

¹¹ However, it doesn't seem possible to argue that interpersonal confidence generates, *per se*, democracy, that is to say, that it weakens authoritarianism or makes viable democracy when it doesn't exist, as the case of China would suggest. Democracy would apparently stabilize already existing democracies. See WEN FANG, Tang. "Interpersonal Trust and Democracy in China." University of Pittsburg, Pennsylvania, 2004

¹² Latinobarómetro, Cooperación. *Informe Latinobarómetro 2011. Santiago, Chile, 2011*

Country	Satisfaction with democracy	“One can confide on the majority of persons”
Argentina	0.495	0.241
Bolivia	0.339	0.188
Brasil	0.521	0.102
Colombia	0.417	0.205
Costa Rica	0.620	0.188
Chile	0.582	0.180
Ecuador	0.504	0.168
El Salvador	0.462	0.264
España	0.478	0.383
Guatemala	0.316	0.189
Honduras	0.378	0.218
México	0.279	0.267
Nicaragua	0.391	0.169
Panamá	0.583	0.214
Paraguay	0.359	0.138
Perú	0.299	0.145
Uruguay	0.803	0.309
Republica Dominicana	0.389	0.313
Venezuela	0.504	0.241

In the following table the same information is displayed in such a way that it is possible to



observe the inclination of the line that correlates both factors:

Once the aforesaid is confirmed, it is worthwhile to reflect on the implications this entails. On the one hand we have satisfaction with democracy, which is a system of aggregation of political preferences whose principal attribute, at least in the modern world, is to limit the power of government.¹³ In other words, when people can have confidence in others, they are also more satisfied with the mechanisms by which power is delegated as well as limited, since that is what constitutes modern constitutional democracies.

So now we face the fact that for political delegation to work, what and how much power is delegated is not an anecdotic result; rather, it is substantial. That comes as no surprise, since in one way or another, modern political thought has been facing this confirmation, ever

¹³ BOBBIO, Norberto. *Democracy and dictatorship: The nature and limits of state power*. U. of Minnesota Press, 1989

since Hobbes and Locke developed their divergent positions about the intensity of the power that should be legitimately entrusted to the State.¹⁴ Less obvious, perhaps, is the reasoning that links the aforesaid to citizen confidence. It seems clear that when the State is all-powerful, in the style of the great totalitarianisms of the 20th century, one of the first things that is lost is confidence. Novels like Ayn Rand's *We the Living*¹⁵ or movies like Florian Henckel von Donnersmarck's *Das Leben der Anderen*, show this with crystal clarity.

Even when those extremes are not achieved, when the promises of freedom and welfare become contradictory, defrauding also becomes irremediable and confidence collapses. Democracy's challenge, then, consists in finding the mechanisms that assure the degree of collaboration needed to preserve individual liberties without incurring in excesses. The functionality of the political system will depend on those mechanisms, since they will serve as the basis of their credibility (which means the confidence they deserve).

In my opinion, neither the existing purely libertarian approaches—that emphasize the merely contractual component derived from the decontextualized freest will— nor the “progressive” or socializing (*liberal* in the American sense) approaches —based on a sense or intuition of universal 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 election to obtain the benefits they obtain. I suggest that the

¹⁴ HOBBS, Thomas, *Leviathan*. Indianapolis: Bobbs-Merrill, 1958, p.86; LOCKE, John, *Two treatises od government*. Vol. 2, New York: New Anmerican Library, 1965, p.124-146

¹⁵ In this novel the lack of confidence that emerges between those who had cordial relations emerges. All of them fear the other. The immense network of prohibitions and restrictions grows and changes along the novel, which enlarges the discomfort. Rand, Ayn. *We the Living*. Signet, 2009

logic behind the political mandate —particularly when it is democratic—responds to causes not merely short term, pragmatic (convenient) nor cultural, but rather they respond to convictions profoundly rooted in human psychology.

The idea of confidence as a basis for political organization acquires in this proposal a different dimension relative to the typical justifications for state interventions that argue in favor of social cohesion. On the contrary, this paper proposes that the State should focus on its actual 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).

Following that line of thought, I propose, as I will develop later, that the social contract—infrequently typified in a specific way—resembles, or in any case is similar to, a social or a political trust-contract. In fact, rather than social contract, we should refer to a social or political trust (*fideicomiso politico o social*). This entails that the management of public goods—power—is entrusted by the citizens to politicians and public officials by way of a commission of trust (*encargo de confianza*). That delegation or mandate generates fiduciary ties (expectations and duties) between the citizens and their authorities.

Instead of answering to abstractions such as “the common good”—which in the last instance mean little or nothing—these relationships provide concrete objective loyalties, based on concrete ends, positions and interests. This generates a logic that can be described in a way compatible 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 align or make compatible those interests. In the case of the political mandate, as in any other case in which an agent acts on behalf a principal, it is evident that the misalignment of interests is not only a latent danger, but also a frequent one. Witness the corruption cases. It is a typical agency problem where the agent (government) who has to act in favor of its principal (citizens) doesn't necessarily have the incentives to do so.

In order to analyze the fiduciary relations of the government and how they 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 principally dedicated to the service of others and to the pursuit of the common good¹⁶—but also the theories that analyze the logic of the relation agent-principal, the use of which is more extended in the analysis of private organizations, in particular limited liability companies. Especially when they are widespread shareholding (public) companies, a misalignment occurs among the interests of the owner-shareholders (principal) and the managers of the company (agent).¹⁷

In fact, the bigger the delegation, that is to say, the more unattended the principal in the business he has entrusted the agent, the bigger the probability that a misalignment of interests is produced and, therefore, a deviation from the mandate. Such deviation may take the form—in the political trust— of corruption or abuse of power (authoritarianism, intrusion or overreaching faculties).

¹⁶ BUCHANAN, James M. and Gordon TULLOCK. *The calculus of consent: Logical foundations of constitutional democracy*. Vol.100. University of Michigan Press, 1965. P-.244-247

¹⁷ LA PORTA, Rafael et al. “Investor protection and corporate governance.” *Journal of financial economics* 58.1 (2000): 3-27

This dysfunctionality of democracy happens to be apparently so common that Guillermo O'Donnell suggested it constitutes a species within the genre of democratic regimes. This author called "delegative democracies" those where whoever wins an election can govern practically the way he wants during the whole period of his mandate with no limitation other than that derived from the relationships between really existent powers (factic powers) but without major institutional restrictions; and particularly without horizontal accountability mechanisms —without effective *checks and balances* from the other constituted powers in a scheme of effective separation of powers—. ¹⁸ These dysfunctional democracies are opposed to, but at the same time are a bad imitation of, representative democracies where accountability effectively occurs, especially horizontally, says O'Donnell. This paper, however, will also emphasize on the importance of vertical accountability. In this way, the fiduciary democracy would incorporate some exceptional direct participatory mechanisms of the principals (citizens) that better reflect the fiduciary nature of the delegation of confidence and will therefore lead to a more representative democracy. But this does not in any way mean that fiduciary democracy is a hybrid between representative democracy and direct democracy, as has been previously stated.

Thus, the problem of delegative democracies derive from the structural features of the act of delegation of power, which pose perverse incentives to those who receive the political mandate to betray the confidence of their principals. However, such structural elements are not invincible, as there are legitimate functional democracies in existence. What happens is that they have managed to channel more effectively the economic and philosophical

¹⁸ O'DONNELL, Guillermo A. "Delegative democracy." *Journal of democracy* 5.1 (1994): 55-69

requirements of the delegation of political confidence. This, as I suggest later, is due to a better understanding and channeling of the subjective and objective elements of the political mandate. The first have to do with the anthropological foundations that determine the conduct of the subjects involved—agent and principal—. The second involves the nature of the public goods that are assigned in a trust. Let us now analyze the anthropological-subjective element so as to explain, later, the nature of the public goods assigned in trust.

2. The “collaborative gene”: fiduciary anthropology

In this part of the paper, I will try to find out why human beings have a tendency to collaborate socially and delegate politically, in spite of the fact that they are also individualists in search for the satisfaction of their very own needs and preferences. So we have now that the subjective element which constitutes the fiduciary structure of public life and of coexistence is our tendency to delegate and to accept the delegation of public goods by means of political systems. Human beings have an intrinsic tendency to rely on other human beings for achieving certain objectives and to act egotistically for others. Usually, this describes *quid pro quo* 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 attributable to an interchange of goods and services. This suggests the existence of a “meta-contractual” scope that would explain the referred propensity.

Oversimplifying, it could be suggested that there exists a kind of “collaborative gene” that explains why it is proper to our species to recur to the use of collaborative formulas, even more complex and encompassing than contractual ones. If the human species is the only

rational one and because of that, 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 planet.¹⁹ 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 series of rational as well as emotional factors.

In fact, the intellectual and emotional complexity of *homo sapiens* have a common cause, which could refer to as “the biped curse”. The western myth of origins 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 the 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 become 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 functionalities²⁰.

Procurement of food via hunting and recollection initially, and then through agriculture, instead of having it at arm’s length in the trees, is what the Bible seems to refer to with the

¹⁹ NOVAK, Martin, *Why we help*, In Scientific American, July 2012. P. 22 and ff.

²⁰ CAMPBELL, Rolian, LLIEBERMAN, Daniel E. and HALGRIMSSON, Benedikt, “The coevolution of human hands and feet,” *Evolution* 64.6 (2010): 1558-1568

course 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 in their turn the comparatively premature birth of human beings, as the first psychologists observed in their time.²¹ Indeed, ours is one of the less developed and less apt for independent life species when born.²² Also due to the aforesaid, we are one of the species where a most intense dependence on 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*. So now we have clear, that the cause of our complex rationality is the same one as the cause of our complex emotionality. The cost of reason is physical and emotional dependence (a parental/filial externality).

This intensifies fiduciary duties of parents towards their children, since they cannot help themselves on their own, and require that their freedom be administered by their parents. This particular genesis of our species allows us to be more intelligent and skillful, but at the same time it makes us more dependent, initially and for a longer time. This allows us to reach farther, but depending first on others and assuming the duty of carrying with the children. Even though the aforesaid does not cancel the individualist nature of human beings, especially when adult, it does reveal clearly that we also have a consubstantial collaborative facet.

²¹ FREUD, Sigmund, and STRACHEY, James, *Civilization and its discontents*. WW Norton & Company, 2005, p.17-18

²² Ibid. Loc. Cit.

Nobody has the right to transfer to others the cost of his/her happiness; nor the obligation to assume the cost of other people's happiness, as a moral principle. But in actual fact, we seem to be programmed in some way to do both; at least in relation to some very near humans of our species such as the members of our family. The parent-child relationship is one in which, by definition, one depends on the other. It is, of course, a fiduciary relationship (one of confidence/trust). The survival of the child depends on the fiduciary expectation that the parents will take care of him/her. And the child starts to become aware of himself under the same scheme. Therefore, he/she acquires the notion of his/her individuality in a situation of fiduciary expectation in relation to his/her parents. That is, expecting from them certain support conducts. In that sense, the human brain is designed (hardware) or programmed (software) in some way to expect certain things in exchange for others, not necessarily reciprocally symmetrical. These duties and fiduciary expectations project themselves to other relationships different from the parent-child relationships of the individual with the others. For example, a certain collaboration is required, which we can brand as fiduciary, to obtain something apparently as selfish as physical pleasure. Hence, the generation of endorphins benefits from the relation with others, from sexual intercourse or eroticism, or simply from tenderness.

On another level, of course, the fiduciary logic extends also to political relations, to the political system in which we can also see duties and fiduciary expectations as we have seen before and as we shall see later on. But it is worthwhile to discard, as of now, that the former implies an absolute universal solidarity, with all the ethical consequences that this entails. The ideal of universal solidarity derives from the improvable Christian idea of universal love. But as Ortega y Gasset wisely pointed out, love is the architect of

hierarchies²³; in other words, the differentiation between those who deserve and those who do not deserve love is consubstantial to love. Yes one cannot love his neighbor as himself, much less all other neighbors equally. Neither is it possible to be universally solidary.

I refer to that constitutive predisposition to collaboration (which should not be overdimensioned) when I propose the (oversimplified) 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 a remediless determinism. That something has a genetic origin simply implies that there is, in the physical-chemical constitution of the species, a set of elements (not literally a gene) given the presence of which, it usually has the consequence of favoring a certain type of behavior. But this predisposal can be perfectly made to grow, be neutralized, diminished and in an extreme, annulled by exogenous elements during nurture.²⁴

So that when I refer to the collaborative gene in the human species I am only affirming that there could be a certain predisposition to collaboration—initially family, later on, socio-politically in a superior instance—but in no case am I 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 politically in a specific way (as happens 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

²³ ORTEGA Y GASSET. J. (1973) *Obras Completas* (Madrid, Rev. De Occidente) p.18

²⁴ DAWKINS, Richard. *The extended phenotype: the long reach of the gene*. Oxford University Press, USA, 1999 p. 12-13

enough to explain a genetic mutation that incorporates that type of organization.²⁵ 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 said gene, or as well, for the individual who carries it.²⁶ 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. Because of this, it is also impossible to conclude that there is a kind of biology of universal solidarity. That is why Dawkins elaborated the term “the selfish gene”²⁷.

Going back to our theme then, political systems, and within these, the different types of democracy, are contingent cultural solutions. But some of them can respond better than others to the anthropological needs that explain social collaboration. Within our species, however, the genetic endowment, including those features common to all individual of the species, are 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 has been said. Therefore, our species and its cultures generate a slew of individuals: some totally lacking in empathy (psychopaths literally) up to the contrary, beings dedicated in whole 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 Teresas: those persons that reflect in

²⁵ Ibid. p. 27-28

²⁶ Ibid. p.28-29

²⁷ DAWKINS, Richard. *The extended phenotype: The long reach of the gene*. Oxford University Press, Oxford, 2006

themselves altruistic excess and the sacrificial moral in favor of others. This is so much so, that several forms of political organizations—such as the Welfare States—have been structured around such a world view. (see further in part 6).

But let us assume that, apart from the cultural distortion in favor of exacerbated altruism as a moral value, the collaborative gene predisposes the majority of human beings to a medium degree of aptitude and preference for collaboration, which, in turn, are affected by cultural factors. As it happens, among the 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 has a more responsible attitude, including a sense of guilt, than the rest²⁸. This could imply that responsibility could be a typical characteristic of leaders. This responsibility could also be translated as fiduciary conscience of what people expect of one. Therefore, it is consubstantial to leadership to have a sense of fiduciary responsibility. The assumption that one should do something on behalf of others. But, as previously stated, that does not imply denying that all agents also act in their own benefit.²⁹ Therefore the aforesaid does not alter the political economy functions of government, as we shall analyze forthwith; it would only explain why some persons decide to take a proactive attitude in the relations of fiduciary collaboration (and become politicians or simply leaders) and others don't.

²⁸ Therefore, according to Business News Daily, 30/04/2012: "*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.*"

²⁹ There are several studies about the psychological mechanism that demonstrate the inclination to individualist behavior. See, for example, LATHAM, Simon. *The Joy of Sin*. Pp. 58 and ff.

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.”³⁰ In other words, if there were no public goods to manage, it would be very difficult to justify the existence of a State and the imposition of the monopoly of the use of legitimate force. As force is violence, and civilization consists in minimizing physical violence, a civilized society should tend to minimize the State, also. For that to happen it is imperative to have the scope of its action clearly and correctly delimited, which in the last instance depends on how public goods are defined. One has to understand that the temptation of understanding the public goods extensively so as to justify a greater government intervention exists. After all, as Alberto Benegas Lynch (s) says:”Public good is the central argument for state intervention.”³¹

Public goods were defined by Paul Samuelson as collectively consumable goods.³² These are goods produced for all or otherwise would not be 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 a rival in consumption. That is, that the generalized consumption of that good does not generate its exhaustion. These

³⁰ OLSON, Mancur, *The Logic of Collective Action* (1965), p.15.

³¹ BENEGAS LYNCH (h). *Public goods, externalities and the free riders: reconsidering the argument* (1998) p. 205

³² SAMUELSON, Paul A. “The pure theory of public expenditure.” *The revue of economics and statistics* 36.4 (1954): 387-389

two characteristics, however, are relative because they can change, and in fact they do change as time goes by in history, since technological advances have a way of modifying the human capacity for excluding third parties in the use of a good, as well as the rivalry in its consumption. Thus, for example, the moment a public good, let's say, the air, becomes susceptible of being "parceled out", immediately that good, would in its turn become perishable within the borders that allowed it to be excluded.

In any case, goods can evolve and pass from being public to being private. Highways could only be public a few years ago; today there are automatic systems that identify vehicles in transit on a highway which allow management to charge for using them and therefore, in effect, to be private. From what already has been said it can be inferred that a tendency should exist in the direction of constantly diminishing collectively owned property, and therefore also diminishing the delegation of power to manage those goods by reason of their nature. In other words, a public good is matter for state administration in as much as it cannot be turned into a private good, and until that happens. Whenever it becomes privatizable, it is returned to its true original owners, that is, the citizens³³. This is consistent with the idea that government is a trust-contract, as it is usual for a trust to have a limited period of validity. Something is given to be administered until the owner can administer it himself. In a private trust, however, the cause which makes it impossible for the owner to directly administer the goods at stake has often more to do with the subjective limitations of the owner (lack of age or ability) than with the nature of the goods under

³³ Thus, for example, in the privatization of a good that could only be perceived as public before, let's say, the highway, it's not that each citizen receives his aliquot share of the highway, but that the price the concessioner pays, rewards each contributor, through the State, for that good. This could, in reality should, redound patrimonially by way of a reduction in the tax burden, even though, unfortunately that doesn't always happen

trust. But in the logic of corporate governance, which also obeys to a fiduciary structure as has been mentioned above, the administration charged is linked much more directly to the nature of the goods that are entrusted to the management.

It can be deduced that a fiduciary democracy requires a diminishing State intervention, even though said intervention has to be increasingly effective. However, what can be seen in reality is precisely the contrary. That is, a growing intervention inasmuch as technology also favors renewed forms of intervention and control; even though elephantine States, including the always well intentioned welfare States, turn out to be, contrariwise, increasingly ineffective and inefficient. History and politics abound in examples in which generalized good intentions are confused with the public nature of goods. For example, it is erroneous to assume that there is such a thing as a public good constituted by the desire for generalized material welfare. Welfare is not a public good; it is a private aspiration. It depends, to begin with, on subjective preferences that are not objectively standard. It can only be achieved by producing wealth, a process that can be verified individually as well as collectively, but the collective attainment of which depends on individual titles, that is to say, through a merely contractual collaboration, not necessarily fiduciary. Wealth is generated, in general, starting 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 consent has been given voluntarily to such *quid pro quo*, as the rawlsean “*principle of fairness*” maintains based on ideals of Kantian-intuitive justice (*fairness*), what is really at

stake is not a universal collaboration but an expropriation of the patrimony 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 a supposed right to universal health absolutely free of charge. This does not constitute a public good. I don't 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 to face them effectively privately. 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, disease that spreads this 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 in a universally gratuitous way. To propose such a thing would imply a kind of universal obligation of every individual of minding the destiny of absolutely each and every human being. As in the Cesar Vallejo's³⁵ poem, human life

³⁴ NOZIK, Robert, *Anarchy, state and utopia*. Vol.5038. New York: Basic Books, 1974, p.95

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.”
VALLEJO, Cesar, *España, aparta de mi este cáliz*. Vol. 15. Ediciones de la Torre, 1992, p. 141*

could only be viable this way in as much as absolutely all co-humans of each individual involve themselves proactively in each others' lives. But poetry, even when it is good poetry (as Vallejo's is) is not a source of rights, of Law, nor of reality. Preserving life is, of course, a just 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 universal health. As can be seen in the following parts, I do not pretend to deny that it is consubstantial to the human species to have a scope of collaboration with others—I do affirm, precisely, that 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 pretended—but false—pseudo-public goods that I just used as examples, welfare and free health, have in common that they are well intentioned aspirations. Generalized sentiments (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 radioelectric spectrum. It is common to find in legal order, 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 assume 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, it is human ingenuity which is the absolute constituent of

the value of things. Its exploitation is the only source of wealth. Nothing linked to the original deposit of natural resources justifies the socialization of its entitlements. The underground is as privatizable as the ground; it has nothing public *per se*. The same thing can be said about the radioelectric 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 the 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 sustains, “owner” is not the concept that describes best the role of the State *vis a vis* those goods but “custodian”. That is to say, the agent that defines objectively the impartial rules through which the potential (private) owners can acquire them.³⁷ Note the fiduciary element present in the above assertion. 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—therefore—in all cases a mere fiduciary domain, and for this reason it is always subject to accountability, because the state always on behalf of its citizens.

4. The “social contract” is a trust

We have seen how the congenital (but vincible) propensity of human beings to achieve some of their objectives through collaboration, summed with the great difficulty (also

³⁶ RAND, Ayn. The property status of airwaves. In *Capitalism : The Unknown ideal*. New York:Signet, 1967. P.131-139

³⁷ Ibid p.133

vincible in the long run) of some goods with which he stumbles in his impetus to create wealth via the transformation of the world, justify a type of sociopolitical organization in which those goods have to be put in charge of a government; that is, a group of people who will be in charge, in the name of the plurality of the rest of their co-citizens, of deciding about them. But such decisions should always be in the benefit of the owners of those public goods. Or, that is to say, the government always acts, or should act, by a mandate and on behalf of the interests of third parties, under a structure of agent and principal.

This leads us to reasonably conclude that the nature of the so called “social contract” is the same as the one seen in Private Law between the parts who intervene in a trust-contract. I do not pretend to pass judgment on the temporal or conceptual anteriority of one or another figure (the private trust and the “constitutional trust” if you will) but simply to imply that both figures respond to the same philosophic, anthropologic and economic logic: the need to assign a confidential charge in relation to a number of determined goods (private in one case; public in another) whose owners cannot—usually only in a temporal way—administer them by themselves for whatever reason.

Within western legal thinking, and particularly under *common law*, fiduciary logic and contractual logic are not always easily compatible as Langbein admits.³⁸ Partly because of this, I find that fiduciary logic may be a more certain 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 in play to the effects

³⁸ LANGBEIN, John H. “The contractarian basis of the law of trusts.” *The Yale Law Journal* 105.3(1995):p.625. However, Langbein answers this idea, that attributes principally historical reasons and secondly economic ones, to revindicate finally the contractual nature of trusts.

of socio-political organization. It is not that contractarianism is radically wrong (at its roots), but that it happens to be, perhaps, insufficient. But what additional elements exist, besides those merely contractual, in fiduciary logic that can better explain social organization? Always in the scope of private law, fiduciary implies the existence of supra- or-meta-contractarian loyalties. Justice Benjamin Cardozo's famous decision practically "pulled out of his sleeve" a difference between duties merely obligational/contractarian and those of a fiduciary nature, to conclude that these last ones demand much higher levels of loyalty than the first ones, even when the fiduciary relationship is established by contract.³⁹ The *quid* of the matter perhaps has to do with the fact that contractual duties have to be explicitly accorded, or else have to be contemplated in the law,⁴⁰ and what apparently Cardozo pretended was to extend the obligations much farther than what was originally agreed on.

With similar logic it could be said, then, that fiduciary relations of the political type generate loyalty obligations—from the governments towards the citizens—that should go farther than what was explicitly affirmed 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. Hence, the increased loyalty that is required does not translate into a paternalist activism—as does not happen in law of trusts—but in high standards of diligence for the

³⁹ MEINHARD v. SALMON 164 N.E. 545 (N.Y.1928).

⁴⁰ But as is well known, positive or statutory law, in Anglosaxon law is very sparse in contractual norms of the suppletory type, typical of the civil codes of the German-roman tradition, which explains too the exaggerated extension of Anglosaxon contracts, which is becoming accepted too—with less justification precisely due to the existence of codes—in the practice of Private law in Latin America.

charges specifically committed (which do not have any reason to be deemed extensively) and above all in an effective accountability that procures a correct alignment of interests of agents and principals.

As Langbein refers, the central preoccupation of the modern (private) law of trusts is to safeguard the beneficiaries of the trust from the eventual perils of bad behavior by the *trustees* who, for example, could appropriate themselves, or administer badly the assets of the trust.⁴¹ As is evident, the same preoccupation results central to the legitimacy and efficacy of public affairs, meaning the functioning of the political trust-contract.

The structure of a trust, whichever one, consists in the fact that the owner of a certain good (settlor) delegates a third party (trustee) on the basis of confidence, so that he/she dedicates him/herself to administering said goods in a diligent manner—and usually makes them grow— in exchange for a retribution so as 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 posit things in two alternative perspectives: The first one, historical, where the settlers are the founders fathers of the State (let's say a Constitutional Assembly), 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 revolving, that is to say, one in which the citizens permanently entrust public goods to the trustees (authorities) in their own benefit. In this logic, citizens are constantly settlers as well as trustees

⁴¹ LANGBEIN, Op.cit. pag. 640

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 trust or the determination of who is the settler I will continue the analysis without assuming a final position about which of these two options is the more adequate one.⁴²

Democracy is not the only political trust possible, although it is probably the most successful and consistent with its causes and ends. A consented dictatorship and an absolute monarchy also imply that the State manages collective goods with the consent of its citizens. But the delegation mechanisms end up being much less legitimate and functional. They do not allow for a healthy accountability (they only allow, in the extreme, a voluntary abdication or a violent revocation).⁴³ And precisely when the trust is democratic, the mechanisms for rendering *accountability*—derived from the increased loyalty described before— become substantial. However, “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

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 more compatible with the “*living Constitution*” theories.

⁴³ “In a direct democracy or in an autarchic monarchy no accountability is sought. In that , because whoever acts and obtains results is, simultaneously, the original fount and final depositary of authority; in this, because account rendering is only due to the divinity; that is to say, not even to his earthly representatives.”

MILLAN, Henio and NATAL, Alejandro. “La rendición de cuentas a la luz de la Teoría-Agente principal: un análisis de la democracia en México”. Mexico DF: El Colegio Mexiquense, 2006.p.6

⁴⁴Ibid. p. 5

⁴⁵ Ibid. Loc. Cit.

Accountability, as has been established in previous paragraphs, is destined to realign incentives that naturally tend to misalign due to the vicarious structure of the trust and, in general, of all the relations that have an agent and a principal. It is, besides, consubstantial to this type of relations, that the agent has a more or less 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-making.⁴⁶

Starting from the logic of methodological individualism that informs the *Public Choice* theory, the center of the organizational problems that occupy us can be defined, under 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... that is, 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 given in political trust. Those goods are non-exclusive in their use, and non-rival in their consumption, and therefore tend to possess diffuse features also in the information available about them.

The structure of agent and principal, thus, establishes a game of collaboration that, by its same characteristics, carries a high risk of being badly resolved. Applied to 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

⁴⁶ “Accountability can only exist when margin for discretionary acting exists”. Ibid. p. 6

⁴⁷ Ibid. p.7

prisoner dilemma⁴⁸. Applied to the scope of collective action, this reveals that “if the number of persons necessary to propel and obtain that an end 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 persons is superior to that required for collective action to render fruit... the rational individual will chose not to participate, precisely because he can obtain the benefits without incurring in the costs, since by its characteristics of public goods, once the objective is produced, no one can be excluded from its benefits.”⁴⁹

The aforementioned describes, or better yet, predicts the famous “tragedy of the commons” by virtue of which, 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 few.⁵⁰ However, Elinor Ostrom—Nobel Economics prize 2009—found several specific cases of concrete communities in which the collective title 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 a 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 ties.⁵¹ The aforesaid suggests that a political trust usually works better the nearer the agent is to the principal. Therefore, the

⁴⁸ This dilemma consists of a theoretical model according to which 2 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 medium severe sentence (3 years), if none of the two confess, they will have lesser sentence (2 years), and if one confesses (betrays his accomplice) but the other on doesn't, the one who confesses will have the least sentence possible (1 year) and the other the most sentence 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 Ibid. p.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 (rentists at State costs).

democratic trust works better if the authorities nearer to the trust are empowered preferably; that is, local governments, provided, of course, that there are mechanisms for rendering accounts sufficiently enforceable and functional in said 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 adhered to, and confidence is not systematically defrauded. In fact, one of the main advantages of a fiduciary democracy consists in that the systematic confidence in its institutions generates a great stability, not only political but also economic and social, in the long term.

5. Fiduciary democracy and its main elements

We have just seen that political organization is structurally fiduciary. This implies that someone does something for others, in the name of others, entrusted by the rest. This gives us sufficient basis to suggest a distinctive form of political organization, fiduciary democracy. This is an improved form of representative democracy—which we can also identify as liberal in the classic sense of the word—.⁵²

The elements of direct democratic participation that this model would incorporate, would be practically limited to account rendering, and do not extend to the majority of other ways of participation, as will be seen later on. If Athenian democracy meant the direct participation of the citizens in the affairs of the State⁵³, all the arguments developed along

⁵² HELD, David, *Models of democracy. Polity Pr. 2006, p. 56 and ff.*

⁵³ *Ibid.* p.14

this paper point to material and logical impossibility of said participation, given the nature of the public goods in question. That is why emphasis has been put on the need for delegation mechanisms in the form of commissions of trust that found the democratic-fiduciary relation. Richard Posner, for example, 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 policies⁵⁴ (because they delegate that function).

But it is consubstantial to fiduciary democracy that those commissions of trust be specific, not ample. That is why the separation of powers exist. In fact, in a fiduciary democracy we should talk about several commissions of trust or even several trusts; one per each function of the State (which is to say a lot more than one per each power of the state, especially in modern States that are increasingly technocratic and regulatory). What defines democracy is the limitation of power. What defines fiduciary is the delegation of confidence. I retake the idea expressed at the introduction, according to which, the clue to a good democracy, legitimate and functional, would be to find mechanisms that would allow us to approach as nearly as possible to the point of equilibrium in which powers are sufficiently delegated, and yet, adequately limited.

Fiduciary democracy or constitutionalism respond—like the theory of poliarchy, which proposes that in modern democratic systems converge features of Greek democracy, republicanism and liberalism⁵⁵-- to the conceptual tradition according to which modern

⁵⁴ POSNER, Richard A. *Law, pragmatism, and democracy*. Harvard University Press, 2003 p. 140-149

⁵⁵ DAHL.ROBERT A. *A preface to democratic theory*. University of Chicago Press, 2006 p. 131

western democracy does not consist only in popular vote, but also in the delegation of power and in the inalienability of fundamental rights.

For this reason, governments are forbidden to affect those private goods of their citizens that have not been made part of the commission of trust. Therefore, fundamental rights cannot be violated, much less abolished by the majority via the pseudo democratic popular consultation or plebiscite. This follows the line of whichever classic definition of modern democracy, which consists in trying to limit the power of all minorities (including the majority which is made up of a set of minorities) so that no group can trample another, alienating their rights. If the essential point in democracy is de-concentrating the political power of minorities and distributing it among as many hands as 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 fiduciary democracy states that the way to de-concentrate power is through rules appropriate to a commission of trust or trust-contract, duly established in the Constitution, which is the founding document that constitutes the social contract. 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 of itself break the confidence of citizens in their governments and turn the political trust contract into an usurpation of power.

On the other hand, as Millan and Natal affirm, there would be no need or basis for accountability mechanisms, if there were no ample discretionary mandate.⁵⁷ As Langbein

⁵⁶ Vid. Note 13 Supra

⁵⁷ Vid. Nota 43 Supra

holds on his part, modern law of trusts has revoked ancient laws that restricted the attributions of trustees, whose attributions now typically consist in conducting investment programs and the administration of financial assets which require extensive discretionary powers so as to respond to changing market forces.⁵⁸ In primitive fiduciary schemes, trusts were thought of, only to preserve and transmit tracts of land, whereas now they have a financial function which is much more sophisticated.

Does the same happen with political trust-contracts? 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 complexity and the efficacy of the commission of trust—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 much greater discretionary power. One who decides to leave a train has a lot more freedom to revoke the transportation commission of trust than the passenger of a plane (who can't leave in the next station). But at the same time the train passenger has to submit himself to a transport process much less effective (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 the complex surgery nor the flight can last forever; even when it is possible to imagine flights and surgeries that last several hours. In their turn, because of their dedication and complexity requirements, they 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.

⁵⁸LANGBEIN, *Op. Cit.* p. 641

Fiduciary democracy, like any other trust-contract, implies that power—or a determined public good—is given in administration precisely because of the impossibility or difficulty of the title holder—the citizens in this case—to micromanage it. The trustee—government—requires a discretion margin to do so effectively. In exchange for that, it has to render account of the mandate implacably; but in order to exercise the mandate it cannot be consulting the beneficiaries of the trust every moment, because that puts his efficacy at risk. That is why the equation “direct popular consultations equal more democracy” (as plebiscitary regimes hold) is false. I will sustain that consultations are democratic in as much as they fulfill functions of accountability rendering that reinforce confidence in the fiduciary system.

However, more discretion increases, in a directly proportional way, the risk of opportunistic behavior by the trustees. This danger, at the same time is a peril to the viability and sustainability of the political organization. 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. This dilemma has to 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 precision as to the public goods that are entrusted to him/her. Provided that, a greater degree of discretion can be allowed if also mechanisms for corresponding accountability do exist. Once the public good is defined, it requires also to precise, with greatest degree of detail, who the titleholder of the good is; that is, the beneficiary of such good. The question then is, in each specific case, to whom does the authority who exercises the trust owe loyalty in

each specific precise public trust case. Whom does he/she have to benefit with his/her actions. Not always is the beneficiary the whole political community, understood as the whole country. At the level of local governments, for example, the fiduciary loyalty corresponds to the interest of smaller communities. In an increasingly complex State with a diversity of offices, the holders of public goods entrusted are also correspondingly diverse.

It is important to precise this point, because usually, the state organs and organisms mix up their mandate by way of increasing them. Thus for example, to cite a real case, not long ago the Transportation and Communications Ministry of Peru had the duty of deciding about the renovation of a telephone concession to a company very controversial to the public opinion. The way the ministry had 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 the function said company has to comply with, but also the fiduciary duties of the ministry. The scope of the mandate was limited: extend the coverage of the service; instead, it dedicated itself to negotiating a series of gratuitous services for interest groups (retirees, beaurocrats). It could be argued that the State legitimately should try to facilitate life for these groups; but if that would be the case, that 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. It is a distortion that takes away the focus on its functions to introduce those elements into the equation. Similarly, there are equivalent examples in other scopes. 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 solidity of the currency, not to propitiate the reduction of unemployment. Thus, the examples are interminable.

Other consequences that derive from the application of the theory of fiduciary democracy have to do with questions transcendent to political exercise and public administration, as for example:

5.1 The space for direct participation mechanisms is limited to 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 from what has recently been proclaimed in Peru with a certain lightness, it is not true that revocation is a mechanism for sanctioning corruption or crime. There are other figures, such as vacancy and/or criminal lawsuits therefor. 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 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. Revocations are the sanction against misleading or false political advertising. When voters feel systematically mocked by some politician who promised exactly the contrary of what he/she does once in office, the beneficiaries of the trust should have the option of revoking their mandate when confidence is over. 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 mandate, and in political life this is equivalent to modifying the Constitution, it is reasonable that it should occur through a referendum or popular consultation. These two figures (revocation and popular consultation to modify the Constitution) are included, for example, in the Peruvian Constitution of 1993. However, its regulation via constitutional development laws is not at all blissful and requires to be improved. For example, in the case of revocation, there is no consistency in regards to how local revocable authorities are elected (in closed lists) and how they are revoked (individually); neither is there any consistency in 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 elected), among other inconsistencies. In any case, it is worthwhile to precise here that the mechanisms for direct participation that a fiduciary democracy should favor, are those which are exerted spontaneously by citizen initiative, not those the legal system imposes mandatorily every so often or when a certain supposal has been verified. As David Altman says, the first have proven to be a lot more efficacious and legitimate than the second, which when put into effect have resulted in undesirable consequences⁵⁹.

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

⁵⁹ ALTMAN, David. *Direct Democracy Worldwide*. New York: Cambridge University Press, 2011. P. 60 and ff.

fiduciary loyalty specifically guaranteed in the confidence charge which originated the fiduciary title that justifies the public property of said good.

5.3 Derived from the above described item, any act of corruption is at the same time an expropriation—of a fiduciary domain entrusted in a commission of trust—and an aggravated theft, because it not only implies disposing of 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 de-intermediation of authorities and citizens (agents and principals) needs the adoption of electoral mechanisms that guarantee this, such as the implantation of uninominal districts in parliamentary elections.

5.5 Governance problems or the efficacy of public administration derive from the same misalignment of incentives that is observed in private relations between owners and managers of a public company; that is, they are agency problems (between the “agent” and his/her “principal”) as has also been described in

detail. These problems may usually be rationalized through (mathematical) formulas of incentive realignment⁶⁰.

5.6 The State can only do for citizens what they cannot do directly for themselves, which taken to the entrepreneurial scope, implies that entrepreneurial activities by the State are only allowed when the citizens cannot do them. Thus, the theory of fiduciary democracy justifies, not only economically, but philosophically and politically the subsidiarity principle of State Entrepreneurial Activities consecrated, for example, by 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.

6. Main failures of political trust

Of course, democracy fails. The so called failures of the social contract could be labeled as frauds in a system that emphasizes the fiduciary elements of said contract. In this part, instead of making a list of those historical failures or frauds, I will concentrate on the more recent actual problems in force in modern democracies, particularly in Latin America. Broadly speaking I will identify 3 recurrent types of democratic failure, each one of them

⁶⁰ HENIO, Millan & NATAL, Alejandro, m. Op. Cit. P. 11

related to different type of failure or misalignment in relation to the scheme of political commission of trust that typifies democracy.

The first type of failure is the one traditionally found in Latin American democracies until a few decades ago: the verification that when there was democracy, it was merely formal; in reality 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). These so called democracies perpetuated a class social organization, sometimes an exploitative one; and, in many cases, forms of servile labor. Politics was placed at the service of group interests. I write in the past, because I believe that this type of democracy is slowly going backwards. The most eloquent examples that come to my mind are recent, from a historical point of view, put not descriptively in force. I am thinking of Peru previous to the state coup of Gen. Juan Velazco Alvarado in 1968, of Ecuador before Rafael Correa assumed power; or in pre-chavist Venezuela. It is not casually that those regimes were deposed or substituted by populist authoritarianisms. The wear and tear of the mercantilist economic system—which generated perks and privileges—brings about the discredit and de-legitimacy of the political system that backs it as a corollary. 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 rationale of the populist twist.⁶¹ According to them, for a rational agent who lives in the lower and less favored levels of socioeconomic scale, 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 including a welfare manner, rather than to perpetuate social and economic organization schemes that close the door to access opportunities and success. And that is what occurs in mercantilist economies, which is the way we can label them “mercantilist democracies”. 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”⁶². Even though the country they describe historically is Peru of the period 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 kept. With a recklessness 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 compels me to propose my hypothesis in a purely preliminary manner, and absolutely open to a refutation on the part of those nearer to those realities.

The failure in this type of regime is sufficiently obvious, and answers graphically to the logic described all along this paper: a misalignment of interests between leaders and constituents, trustees and beneficiaries, agents and principals. Take note that mercantilist

⁶¹ ACEMOGLU, Daron, adn ROINSON, James. *Why nations fail: the origins of power, prosperity and poverty*. Crown Business, 2012

⁶²DE SOTO, Hernando, GHERSI, Enrique and GHIBELLINI, Mario. *El Otro Sendero (1987)*: 1986.

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 they should represent towards the service of small groups of influence. These defects could be corrected by establishing more direct and precise ways of account rendering, which would include, for example, geographical circumscriptions more bounded for parliamentary representation—which generate dis-intermediation between representatives and their voters—as has been shown before.

Another determining factor, no doubt, is the amplexness and imprecision of political mandates. As has already been described, one of the central elements of fiduciary representative democracy (but not the traditional kind) is that all mandates should be very specific in relation to the administration of the public good entrusted, as well as to who the titleholder of the good and principal to whom accounts should be rendered is.

Instead of correcting those deficits of traditional representative democracy rationally, with bigger and better mechanisms of accountability that respond adequately to fiduciary logic (converting traditional representative democracies into fiduciary ones), we observe—in part of our continent at least—a certain tendency to replace mercantilist democracies with populist authoritarianisms, as has already been pointed out. That seems to be the case today in several countries of the region, such as, Venezuela, Ecuador, Bolivia, Nicaragua, and with less intensity but with more complexity, Argentina. As is very predictable, that

model constitutes the second—and, of course, graver—type of failure of the democratic trust. The reason is that the remedy is worse than the disease. Hence, a misalignment problem ends up being surrogated with a much more intense delegation of power.

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

Authoritarian populisms usually try to perpetuate themselves in power through destructive rhetoric attacking democratic institutions and its agents. They frontally attack the political classes, (sometimes deservedly), that preceded them in power. They usually found an eminently anti-political stage, in which the limitations to power through the separation of powers of the State are banished, as are the control mechanisms or checks and balances and almost any form of political deliberation through the effective neutralization of the majority of independent media, or, at least, the more powerful.⁶³ This anti political interregnum could be read as a reaction of the Latin American population to the inefficacy of traditional, institutional party politics. In this reaction a super-politization of themes is produced that should not be matter for fiduciary delegation and that hiper-bureaucratize politics and/or economics, as we have seen when we touched mercantilist democracy. This way,

⁶³Although 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.

disenchantment with bureaucratic politics makes people confide in efficient and wasteful *caudillos* (dictators) who, of course, do not resolve the dilemmas of the imperfect delegation of power.⁶⁴ The typical way in which they legitimize themselves is through plebiscitary mechanisms, generally established beforehand in the political system itself (that is to say, legally and constitutionally provided), but not spontaneously sought for by the population.

Under this perverse logic, what is more frequently verified is that plebiscites, so typical of populist authoritarianisms, are used to exceed the reasonable terms of the political trust, so as to extend it to fields which in no way justify a delegation of power, because usually there is no public good in play. Plebiscites in direct democracies usually serve as pretexts for the authorities to achieve and hoard a greater amount of power for themselves, 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 popular consultations that took place in Ecuador a couple of years ago. They were related to such topics as freedom of expression, up to the right of attending bullfights. They ended up imposing limits by virtue of which, the government ends up having decisive power in relation to such scopes, which is unreasonable for the government to have. In

⁶⁴ “ At the other extreme, we find the indifference of the citizens and the weakening of the account rendering mechanisms, which cede complete control of public affairs to the authority—the agent—and accepts all his results, provided the legal framework and the processes they favor are respected. These types of situations are identified with governments led by charismatic leaders, upon whom all confidence is deposited, and accountability is unnecessary and unthinkable as a citizen claim, because the agency problem does not exist. Even when the property and control of power are separated, confidence that the agent will act in all circumstances in favor of those he represents will lead to affirm that adverse or uncertain results of his administration are due exclusively to reasons out of his control. This scenario is usual in regimes with varying degrees of authoritarianism, in the measure in which confidence may constitute an asset that allows, initially, exceptions to expected legal conduct and, later, a more systematic justification of unlawful procedures.” MILLAN, Henio and NATAL, Alejandro. OP. Cit. P22

other words, a fiction is generated through which the idea that these are goods or rights that originally belonged to the State, when in reality they not only do not respond to that nature, but in reality cannot be delegated, because there is no problem with the administration of said powers that justifies that private owners have to delegate to anybody (much less the State) their administration. They are not, by any length of the word, public goods; they are private rights. No matter how much the population may want to undermine them, 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 via their votes. That is to say, it establishes the terms of the trust.

In authoritarian populisms, then, the mechanisms of direct democracy—instead of assuring that the actions of the agent respond to the will and the interests of its principal—usually become plebiscitary means that jump away from other representative institutions, or to rid itself of the responsibility of adopting hard politics, or simply constitute tools to mobilize and legitimate populism, as Altman⁶⁵ holds, when referring to popular consultations typically instrumented from constituted power and not by the spontaneous initiative of citizens, as usually happens in populist authoritarianisms.

Many are the ways in which populist authoritarianisms betray the democratic trust. We have just seen, to begin with, that they violate the idea of the limitation of power, the foundation of 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

⁶⁵ ALTMAN, David. Op. Cit. P86

“delegative democracy”⁶⁶ In that line, it emphasizes the fiduciary element in a perverse way, when it situates it only at the genesis of the establishment of a government but at the same time, disappears it in successive stages. In other words, make it impossible to verify effectively the more sane mechanisms of account rendering. At the same time, populist authoritarianism discredits democracy because it makes it implausible since it incorporates the populist element in its value-promise. As Uruguayan ex president Julio Maria Sanguinetti says: “Populism is promising what cannot be accomplished”. Populism is, therefore, a congenital failure and liar. On the contrary, fiduciary democracy has as one of its pillars the effective accomplishment of the promise, implicit or explicit in the trust awarded to the trustee or government. Populism implies an intrinsic defect in the type of promise the government makes. It promises something that should not be promised, because it is not necessary—there is no public good to justify it—nor is it feasible in the last instance. 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 of the other are, of course, different. However, the logic of excessive promises is similar in both cases, so the explanation I will develop around this specific point for the welfare State is also true for populism.

The third model of fiduciary failure is, of course, the welfare State. The welfare State was originally conceived 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 non-viable as the recent European crisis has shown. It has been clearly seen that

⁶⁶ Vid. Nota 18 supra

financing the maximalist benefits promised by the continental European democracies was a fiction based on an indebtedness impossible to repay. The fiction of that welfare—no matter how many times it was identified as a “right”—was built at the cost of governmental leverage that presents a double problem: moral and functional. The moral cost 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 it. That each newborn citizen has to fulfill the increasingly hedonistic needs of his predecessors is a reality that has little or nothing to do with the founding promise of equal opportunities. But as if this moral problem were not enough to reconsider the model, a second problem certainly linked to the first, has to do with the practical viability of welfare States; the demographic problem. Europe, and in general the developed world (excepting the United States) have population structures in the form of an inverted pyramid; in other words, where the adult population exceeds the young or new population. The intrinsic logic in 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 by way of a pretentious social security, to all the economically inactive population, be that children, adolescents, university age young people (which extends almost limitlessly through doctorates and post-doctorates) and retirees (who retire at younger ages). If you sum 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 (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 rethinking. What I have exposed a few lines up is a summary of what has failed in their mission by way of excesses and the lightness with which promises have been made. The promise of an absolute and general material welfare achieved in violation of the principle of causality in the generation of wealth—wealth in the world 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.⁶⁷

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 won't even mention economically) of the world is made up of the productive citizens.

In the welfare state, a very few, the harder and more skillful workers, have to finance the material well being of a majority who consider that it is immoral that the productive class appropriates itself legitimately the wealth that it has produced. This is because in opposition 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 in anything else than in 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. A mountain full of gold, or an underground

⁶⁷ NOZICK, Op. Cit. P. 297 and ff.

full of oil are worth exactly zero, if there is no technology that enables man to conquer the geological whims that maintain those resources encapsulated and unreachable, as has been explained before. Therefore, no welfare “cake” exists that should be distributed (or redistributed) among all.

This extended conception of wealth is based on a mystical fallacy: the idea that those 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 process.⁶⁸ But in the absence of such a theological basis (and I am assuming that a democracy is a non-confessional lay form of government), there is no motive to conclude that the goods that do not qualify as public should be excluded and have a rival consumption—and here is included everything, from the land to the electromagnetic waves—would have to belong originally to all citizens. Moreover, in the absence of the mystical argument, the maximalist redistribution constitutes a systematic confiscation incompatible with elementary freedoms.⁶⁹

⁶⁸ “...all these efforts would have been vain and useless, better yet, would not have been able to begin, if the kindness of the Creator of all things, God, had not delivered before the wealth and the natural instruments, the power and the forces of nature “. Pius XI, QUADRAGESIMO ANNO, Encyclical. The restoration of social order.

⁶⁹ “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 then to provide them? If some men are entitled by right to 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 right. No man can have the 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”. RAND, Ayn. Appendix: Man’s Rights. In *Capitalism, the Unknown Ideal*. New York: Signet, 1967. P. 372-373.

The fallacy that the State should provide people with welfare directly (surrogating their responsibility of doing that by themselves) achieves grotesque extremes in practice. As Nicholas Eberstadt points out, in the United States it has become a way of life to collect disability payments. 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 country.⁷⁰

If we revisit the anthropological logic of fiduciary relations, as described in part 3 of this paper, we shall remember that the original confidence trust (filiation), the same as all other ulterior trusts, have an intrinsic expiration date. They are structured so that the ward be protected initially but also so that he/she learn later on to fend for him/her self. Exceptionally, due to physical, mental or grave emotional damage, the incapacity is permanent, and the trust is indefinite, lifetime for the beneficiary. But that is the pathology of the trust, not its rule. In political economy the same rule is true. No one has to assume the permanent incapacity of citizens to preserve their own interests. The delegation of public goods to be administered by the State is only until they can be privately administered, and, as has been seen, technological advances make this possible in a greater number of suppositions. A political organization that transfers to the State the responsibility for the welfare of its citizens, something that in principle each one is in the situation and obligation to provide for himself directly, turns a pathology into a rule. It should not surprise, then, that in the long run, this is an unsustainable model.

⁷⁰ “Uncle Sam as Santa”, in National Review Online: www.nationalreview.com/blogs/print/335866

Nobody can have a legitimate expectation, much less a right, to be permanently kept by others. Much less even, if those others have no specific fiduciary duties to that person. One can think, like Rawls⁷¹, that it would just that the creation of wealth were governed by a different principle than causality by which it governs itself. But upholding mechanisms destined to make physical laws be different than they are because we consider them unjust, and presenting these as a political program, or worst yet, as a constitutional end, is again in Nozick's words, pure utopia⁷² 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 Christ.⁷³

Physical reality can be transformed, but not refounded by man. He does so in search of his own welfare, and that of his more beloved proximate beings. But he does not do it for a universal idea of equal justice than 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

⁷¹ RAWLS, John. *A Theory of Justice*. Bellknap Press, 1999, p.372-387

⁷² NOZIK, Op Cit. Loc. Cit.

⁷³ 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 for the human being such as natural disasters or geological or ecological disasters etc. That is also why the term "Theodicy" was elaborated to refer to divine justice intuited in the earthy activities of nature. Vid. NEIMAN, Susan. *Evil in Modern Thought* Melbourne: Scribe Publications, 2003.

democracy that promises and cannot fulfill what it promises suicides itself. A democracy is more effective when it is more efficacious than its declarations of good intent. It is strengthened.

As can be seen clearly, the theory of fiduciary duties and expectations that underpin the democratic trust outlined in this paper contrasts with a universalist, Kantian vision (based on an abstract sense of duty) of solidarity among all men. The only universal fiduciary duty conceivable that applies to all human beings is respect for their equal freedom. This derives from a very obvious and collaborative game, and from a more individualist than gregarious logic. If it were not true that everyone has the right to respect for his freedom, just because he/she belongs to the species, then nobody can justify *ex ante* his right to freedom. But this is a negative freedom, in the usage of Isaiah Berlin's terminology,⁷⁴ even if, as Holmes and Sustain affirm, all negative freedom requires in the extreme an act (of defense, for example,) on the part of the State, and so of money to finance itself or otherwise it would not be enforceable⁷⁵. That equal liberty is the only guarantee that we have to achieve our individual survival and start looking for our happiness (in all its subjective variations possible). But the aforesaid should not be taken as an occasion to confuse this framework for coexistence, as it frequently occurs even within the liberal tradition, in the supposed (and inexistent) appearance of more demanding fiduciary duties that translate to others the burden of others' welfare in comparable terms to those which exist in particular fiduciary relations, with very specific trusts and trustees (agents and

⁷⁴BERLIN, Isaiah, *Two Concepts of Liberty*. 1958

⁷⁵ From which Sustain derives that all freedoms are positive. HOLMS, Stephen and Cass R. Sustain. *The cost of rights: why liberty depends on taxes*. WW Norton & Company, 2000.

principals), with concrete objectives and aligned loyalties. Such diverse and exacting duties and expectations exist for several casuistic reasons, but are not the rule in social coexistence. They do not encompass all citizens in a commitment to the happiness of absolutely all their equals. If there is something like universal fraternity, it is very tenuous and limits itself to the aforesaid respect for equal freedom as I held before.

In conclusion, there is no mandate that socializes economic productivity and transform it into a common good. Such a thing has no objective basis (in the nature of the generation of wealth) nor subjective (in the necessity of the human being to delegate a defuse common good) underpinning. Therefore, the implicit promise of the welfare State is false. It is an excess of representative democracy. To convert in public, not only via property, but also through regulations that bureaucratize private economic activity, always with the pretext of safeguarding some defuse interest is a breach confidence, is an excess in the mandate. There is no public good to justify. It implies that the State assumes more prerogatives and attributes than are reasonable and expectable.

As can easily be concluded, the trust-contract democracy theory and its paradigm fiduciary democracy proposed in this paper not only does not try to become a hybrid, nor a happy medium between representative democracy and the direct one (although there are elements of the two). It also does not pose a third way between capitalism and socialism, nor a hybrid vision between an individualistic and a collectivist philosophy. As this theory starts from representative democracy to attempt to improve it (with direct participation mechanisms), it also starts from an economic freedom vision to complement it with an explanation of the indisputable phenomenon of collaboration in the human species, usually

ignored and ever so slightly and insufficiently addressed in the libertarian tradition of contractarian shape. It can be said that this is a *laissez faire* theory that deals with certain questions, -or better yet, findings— uncomfortable for the libertarian tradition. The expressed explanation attempts may be seen as simplistic in some cases, or too complex, in others. It could well be that all this reflection opens more questions than the answers it tries to close. But that is, precisely, what intellectual activity is all about.