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Fiduciary Relationships

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Abstract:

Although fiduciary relationships have a long tradition in Hammurabic, Jewish or Islamic codifications, they were especially conceived and instituted by Roman civil (private) law to normatively address asymmetrical interindividual relationships in which a settlor or beneficiary has an interest in the performance of a certain action, but does not have the experience, time or means to carry it out himself. Therefore, she needs a fiduciary to carry out that action, who does not necessarily have an interest in carrying it out to the satisfaction of the beneficiary. Since this is a problematic and potentially dangerous relationship for the beneficiary, both in private law and in democratic political relations, the fiduciary must be held accountable. That is why contemporary economics, law, bioethics and political philosophy have dealt with fiduciary relationships. In contrast, the fiduciary approach has been rare in the field of economics and society. A reflection on the interest of incorporating fiduciary analysis (in its empirical and normative dimensions) is proposed, illustrating it with the case of property. The necessary integration of the economic, social, legal and political dimensions in a fiduciary frame includes a reflection on the alleged fiduciary duty—and its correlative governance—to preserve the natural systems in which we live for the common good.

Keywords: fiduciary relationships, principal-agent, property, trusteeship

Introduction

A fiduciary relationship is usually understood as a legal and ethical relationship in which one party, known as the fiduciary, is entrusted with the responsibility to act in the best interests of the other party, known as the beneficiary or principal. In this relationship, the fiduciary owes a duty of loyalty, care and good faith to the beneficiary. Fiduciary relationships are characterized by a high level of trust, and the fiduciary is expected to prioritize the interests of the beneficiary above her own. Well known forms of fiduciary relationships include trustee-beneficiary, agent-principal, corporate director/officer-corporation, and partner-partnership, although even the courts have stressed that these categories are not exhaustive.[2]

Even though the social world is permeated by fiduciary relationships in multiple dimensions, sociological research is rarely based on this notion. Since fiduciary relationships are an integral part of the social and cultural factors that influence economic behaviour and organization, it seems reasonable to think that the concept of fiduciary relationships could be relevant to understanding how relationships—interpersonal and institutional, private and public, formal and informal—that have a fiduciary structure influence economic activities, institutions and transactions.

To show the substantive interest that a fiduciary understanding of economic and social reality can have, we first propose to show that the conceptualization of fiduciary relationships has a long history and that many of its principles have been examined and

developed by various disciplines such as law, bioethics, political philosophy and economics. Second, we will show that the field of economics and society has dealt with issues that have to do with fiduciary elements—most notably trust—but that they have rarely been carried out from a fiduciary framework and conceptual tools. Third, to illustrate the potential of analysis based on fiduciary relationships, we will examine the analytical interest of revisiting the old problem of property, which can be shed new light by combining an analysis from economic sociology that integrates the legal, social, economic, political and cultural dimensions. Finally, we will reflect about the interest and opportunity to articulate a proposal for a fiduciary institutional design for the preservation of global commons in favour of environmental sustainability.

Fiduciary Structures

Significant precedents for fiduciary relationships can be found in Hammurabic, Jewish and Islamic codifications, but especially in Roman law (Criddle et al., 2019; Frankel, 2011). Fiduciary relational structures were conceived and instituted by the Roman civil (private) law in order to deal normatively with what in contemporary conceptualization are characterised as asymmetrical relations between individuals in terms of information (Akerlof, 1970; Granado, 2011), where a trustor or principal has an interest in the realization of an action for the good of the beneficiary but does not possess the expertise or the necessary time to carry it out himself. Thus, she needs a trustee or fiduciary or

agent to carry out the action, one who has the required time or expertise, but not necessarily the self-interest to accomplish it out for the sake of the trustor. For the trustor/beneficiary, the bond with the trustee is both problematic and dangerous, for one reason: the trustee has broad discretion concerning the realization of the action. For this same reason, unlike what happens in the case of a normal contractual relationship—and for the benefit of the adversely affected part—, in a fiduciary relationship the trustor—sometimes the same person as the beneficiary—usually has the capacity of interrupting the relationship just by declaring loss of trust in the elected fiduciary (as it may happen with the lawyer-client, trustee-beneficiary, principal-agent, guardian-ward, and physician-patient relationships).[3]

Historically, in the classical Roman world, it is telling that Cicero (1928: I) resorts to the legal abstraction of guardianship (*tutela*) to describe adequately the relationship between public offices and the citizens within their jurisdiction.[4] Under Roman law, children who had not yet reached puberty (12 for girls and 14 for boys) and independent women (*sui iuris*) of any age required a guardian. In the event of premature death, the paterfamilias could appoint a guardian, who did not necessarily have to be a relative. Originally, guardianship was intended to preserve family property, but later included a public obligation to provide for the welfare of minors. In applying the notion of guardianship to the role of public office, Cicero may have had several aspects in mind. Thus, the creators of governmental guardianship—those who elect public officials—are themselves their

wards. The public officials have the obligation to serve them and to be accountable to them—as is also the case with iusprivate guardianship—for their good. Among the main responsibilities of public offices—analogous to those of guardianship—are those of looking after the safety and possessions of the ward. And, similar to what happens to the guardian who has been entrusted with this function by the paterfamilias, public officials are entrusted with the *res publica* or *res populi* (Mundó, 2024a).

This particular example helps to understand that fiduciary relationships can end up having very different materialisations, whether due to the specificity of the bond, the socio-historical context or the normative intentionality behind it. The case of the parent-child relationship is very illustrative. Parent-child relationship is often characterized by fiduciary duties, which require parents to act as trustees or guardians for their children's interests. This fiduciary duty encompasses a range of responsibilities, including managing the child's assets or inheritance, making decisions on their behalf, and protecting their rights and interests. Parents are expected to exercise prudence, care, and loyalty in fulfilling their fiduciary obligations towards their children. This type of fiduciary relationship has an inherently paternalistic component, insofar as the child does not have the necessary autonomy to look after his or her own welfare.

It is very fruitful to explore the problems associated with the projection of this model of the fiduciary relationship into the domain of bioethics or the realm of politics. In the traditional paternalistic model, the physician is assumed to have the capacity to decide

for the good of the patient (the bioethical principle of beneficence), based on trust. The latter is conceived more as a patient—in the sense of a passive recipient—than as an agent who looks after her own health. However, in contemporary healthcare, a conception of the patient-physician relationship that emphasises patient autonomy and promotes patient participation in therapeutic decision-making has been gaining ground. Alternatives to the paternalistic model may take different forms—Emanuel and Emanuel (1992) categorise them as informative, interpretive or deliberative models—, but all have in common a more democratised conception of the patient-physician fiduciary relationship. As such a fiduciary relationship is informationally asymmetric, which entails a set of clauses to protect the patient's good, such as the duty of loyalty (physicians' primary responsibility is to act in in the best interests of the patient's health and wellbeing), duty of care (providing competent and skilful medical care to their patients), duty of good faith (acting in good faith and with honesty and integrity in their interactions with patients), confidentiality, informed consent and, among others, accountability and transparency. In this sense, in a relationship conceived as fiduciary, trust is not a mere psychological expectation in the behaviour of third parties, but constitutes a web of obligations and responsibilities aimed at pursuing the good of the beneficiary and, at the same time, curbing as far as possible the undesired effects of the trustee's discretionary power (Bending, 2015; Gilson, 2003; Martin, 2020).

The same projection has been made to the political realm. As recently established by researcher Chiara Cordelli (2020), the fiduciary model can have very different applications in the constituency policy arena, depending on the nature of the fiduciary relationship and the normative intentionality that underpins it. Thus, if fiduciary malfeasance is deterred by appropriate accountability mechanisms and fiduciaries act in accordance with their own expert interpretation of their principals, then legitimacy is obtained. Cordelli argues that, just as parents exercise their parental authority legitimately, as fiduciaries of their children, to the extent that they act in accordance with their own reasonable interpretation of their children's interests without necessarily having to follow their own conception of their children's interests, public administrators, under the fiduciary model, act legitimately to the extent that they exercise their residual discretion through reasonable independent judgment and solely for public purposes.

Such concerns can be traced back to the explicitly fiduciary argumentation that flourished in the 17th and 18th centuries in England in the fight against absolutism—and which can also be found in authors from as different a historical context as the French Revolution, not to mention the plethora of fiduciary reasoning that can be found in the context of the American Revolution.[5] They have in common that they advocate a model of fiduciary relations that promotes a democratic or proto-democratic conception as opposed to either a paternalistic or authoritarian conception. Interestingly, in the last decades, researchers in disciplines more directly concerned with public law (constitutional law, administrative

law) have mainly focused their attention on the problems involved in the public (or plainly collective) projection of such fiduciary structures, which were originally conceived as a way of understanding and regulating relationships between private individual citizens (Barnett, 2009; Criddle, 2006; Criddle et al., 2018; Fox-Decent, 2011; Purdy, 2007). For example, when the popular sovereign ("We, the People", or the "volonté général") is regarded as the last-resort principal, only metaphorically can it be assumed for such a sovereign crowd to act as a sort of "unicum sui generis".

It is also well known that principal-agent relationship problems have been studied in economics (Blair and Lynn, 2001; Brooks, 2019; Cooper and Bradley, 1991; Pratt and Zeckhauser, 1985). Fundamentally, fiduciary or agency problems arise when the interests of the principal and the agent are not perfectly aligned, leading to potential conflicts of interest and inefficiencies, some of which have been extensively studied: moral hazard, adverse selection and informational asymmetry (Akerlof, 1970; Arrow, 1968; Hart, 1995; Holmstrom and Milgrom, 1991; Stiglitz, 1985; Stokey and Lucas, 1989; Tirole, 2006), as well as agency costs (Fama, 1980; Grossman and Hart, 1986; Hand and Lev, 2003; Jensen and Meckling, 1976), time inconsistency (Fudenberg and Tirole, 1991; Holmström and Milgrom, 1991: Kreps, 1990) and incomplete contracts (Bolton and Dewatripoint, 2005; Grossman and Hart, 1986; Hart and Moore, 1990), among others.

More generally, fiduciary relationships have several aspects in common: (1) they arise where someone (depending on the context, an agent, fiduciary or trustee) is entrusted with

the capacity—a certain kind of administrative power—to act on behalf of another (depending on the context, the principal, trustor or settlor, or the beneficiary), (2) for a particular purpose and (3) always for the good and best interests of the beneficiary, not the fiduciary itself. This asymmetric relationship usually means that the fiduciary (4) has a discretionary scope of authority to pursue the beneficiary's ends, establishing (5) an inherently trust relationship. (6) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion of power. (7) Accordingly, accountability mechanisms are usually articulated in a fiduciary relationship to limit, harness or dissipate the agent's incentives to act in his own interest rather than in the beneficiary's interest.[6] Thus, (8) in several types of fiduciary relationships the beneficiary can unilaterally sever the relationship simply by claiming a loss of trust (Miller, 2019; Mundó, 2020; Mundó et al, 2022).

Brokering fiduciary relationships into economy and society field: the case of property

The field of economy and society has explored some of the constitutive elements of fiduciary relationships, but these analyses are rarely conducted within an elaborate fiduciary conceptual framework. Good examples of this are the studies of the role of trust in economic exchange (Gambetta, 1988; Granovetter, 1973; Putnam, 2020; Williamson, 1979), the examination of the relationship between financial markets and institutional

trust (Dodd, 2014; Ertürk and Gabor, 2017), analyses of consumer confidence and economic transactions (Bostman, 2017; Sassatelli, 2007; Zelizer, 2017), the examination of the link between networks and social capital in economic activities (Sztompka, 2000; Tilly, 2005) and the evaluation of the importance of institutional trust in economic organizations (Kramer and Cook, 2004).

Other areas of economic sociology can benefit from an explicitly fiduciary reconceptualization. Regulatory agencies are responsible for overseeing compliance with fiduciary responsibilities, while legal systems provide remedies for fiduciary breaches. Fligstein (2002 [2001]) has conducted research on economic and political sociology, including the role of regulation and legal frameworks in shaping economic institutions and fiduciary relationships. Carruthers (1999) and Smelser and Swedberg (2005) addresses economic sociology and legal aspects of economic behaviour, including the legal structures governing fiduciary relationships. Their work contributes to our understanding of how formal institutions shape trust, responsibility and economic interactions in societies.

However, fiduciary relationships involve many more elements than trust, which can be enlightening for the understanding of the web of relationships in the social, economic and political world. For fiduciary relationships are subject to a huge variety of complications when applied, for example, to asset management. In these typical arrangements, a beneficiary confides control and management of an asset to a fiduciary. Ideally, the

beneficiary would want this relationship to adhere to specific guidelines dictating how the fiduciary should handle the asset in their best interests. However, the fiduciary's responsibilities are inherently open-ended. Because managing assets involves inherent risks and uncertainties, it's impractical to predetermine the exact conduct of the fiduciary. Additionally, constant oversight of the fiduciary's actions, though beneficial for the beneficiary, can be prohibitively expensive. Economists devise incentive structures utilizing self-interest to motivate one party to act in the best interests of another, employing the principal-agent model. The fiduciary relationship exposes a beneficiary/principal to two distinct forms of misconduct: firstly, the fiduciary may misuse the principal's asset or its value (an instance of malfeasance); secondly, the fiduciary may neglect the asset's management (an instance of nonfeasance). Each form of misconduct is regulated by imposing a legal obligation on the fiduciary. Misappropriation is governed by the duty of loyalty, while negligent mismanagement is governed by the duty of care (Cooter and Freedman, 1991). The presumptions surrounding misappropriation have been codified into prohibitive regulations of fiduciary behaviour. The two foundational rules of fiduciary conduct are the prohibition against conflicts of interest and duty, and the prohibition against undisclosed profits.

Carruthers and Ariovich (2004: 28) carry out a valuable reflection that allows condensing the multidimensionality of the issue. They argue that all regulations determine how owners use their property (intentionally or unintentionally), and government intervention

in markets may depend not on visible regulatory agencies, but on the details of property rights. But not all restrictions are imposed externally through formal government regulations. Informal and internal constraints on shareholders' use of corporate property are reflected in the business models of stakeholders (Donaldson, 1995). In the Anglo-Saxon corporate model, the owner-shareholders ultimately control the company, although they cede control to their agents, the managers. In contrast, stakeholder-based models recognize the importance of other components of the firm (employees, creditors, customers, suppliers, etc.), which also influence what the firm does (Freeland, 2001; Ziegler, 2000). What owners do with their property is conditioned by these other interest groups, whether or not they play a formal role in governance.

But we can see how the analysis is enriched when the fiduciary lens is applied to understand specific aspects of contemporary dynamics. Hawley and Williams (2000) argue that the growing role of institutional investors (what they call "fiduciary capitalism") may lead to a change in the nature of capitalism itself. As institutional investors increasingly become long-term, permanent holders of a broad cross-section of U.S. firms ("universal owners"), they are gradually becoming concerned not only with the long-term performance of individual firms, but also with the performance of the economy as a whole. In their view, institutional investors are also increasingly being asked by their constituents to vote proxies in favour of a wide range of social issues, such as diversity, the environment, human rights, factory closures and executive pay.

According to their analysis, the fiduciaries themselves are "owners", since they exercise almost all the rights and privileges of ownership:

"Since de U.S. Department of Labor's famous Avon letter in 1988, ERISA institutions also have had a positive obligation to vote proxies because issues put to a shareholder vote may have a significant impact on the value of assets in their portfolio. The duty of care requires fiduciary owners to exercise their proxy rights. The obligation can be discharged directly by the fund or by adopting a policy with regard to proxy issues and then delegating the responsibility for actually voting the proxies of their money managers. (…) What sets a fiduciary owner apart from individual owners is that the fiduciary does not have a claim on the stream of return generated by the investments", which accrue for the sole benefit of the beneficiaries. (Hawley and Williams, 2000:19).

These considerations raise two very representative issues. On the one hand, we are told that it is not possible to understand the complex web of relations between the different parts—and fundamental dynamics of contemporary capitalism—from their formal legal qualifications, without considering that we are dealing with a set of fiduciary relations. On the other hand, they show us that this type of relationship entails multilevel internal complications (who assigns the rights, who holds them and in what domains) and many external ones (how these rights are enforced, how informal structures and relationships affect formal fiduciary relationships) that require a multidisciplinary approach in which the field of economics and society has a lot to say.

This example attests that research in a fiduciary conceptual framework is by no means alien to the field of economy and society. But expressly fiduciary framing is rare. However, we believe that a fiduciary theoretical articulation both for the analysis of empirical phenomena and for the institutional design of social and economic life could

contribute to open complementary lines of research to those already explored and favour new approaches to pressing social problems.

Property is one of the particularly neglected issues in economic sociology (Swedberg, 2003: 203). As Carruthers and Ariovich (2004) state, "contemporary sociology has said far less about property than its centrality justifies, largely ceding the subject to economics and law" (p. 23). This does not mean that a sociological analysis of property that excludes its economic and legal dimensions should be proposed, but rather the opposite: a good understanding of the complex and multidimensional phenomenon of property should integrate all these disciplinary approaches. In contemporary societies, the legal system plays a crucial role in upholding property rights, thereby closely involving law and the state. Law, economy, state and culture are intertwined in shaping the practices and conceptions of property and, therefore, condition the type of institutional solutions that can be found to problems such as inequality, domination or social exclusion. And informal property rights often develop when behaviours become disconnected from formal institutional structures.

The enduring effect of the rhetoric of the absolutist conception of property, according to which property is a dyadic relationship between the owner and the thing, has often led to overlooking the fact that property also has a social and political dimension (Fligstein, 2001; Mundó, 2024b; Shipton, 1994;). The ideology of proprietary absolutism often carelessly intermingles the different historical sources to converge in a property modality

understood as absolute individual right, with a complete legal guarantee of private possession, disposition, and alienation, which would constitute the necessary condition for the individual happiness, self-government, political stability, and economic prosperity (Gordon, 1995: 95). Imbued with these heritages, perhaps two of the most influential sources of the spread of property understood as absolute have been the Anglo-Saxon conception of unlimited property expressed by William Blackstone (1765) and that embodied in the Napoleon's Civil Code (1804) (Congost, 2003).[7] But, even if it continues to persist, this dyadic conception of property does not pass the empirical test on the social diversity of current practices of property (Mundó, 2021).[8]

Property implies a bundle of rights, including the rights of access and extraction, management, exclusion and alienation (Schlager y Östrom, 1992: 252). The entire package may be held by one person or divided among several parties. Property rights are not a mere legal construction, as they confer power. That is why the relationship between property and political freedom has been present in classical sociological analysis (Marx and Engels, 1947: 79–81; Weber, 1981). The social practice of property rights varies over time and in social and political space. The objects of property are very diverse and have changed over time: contemporary democratic legal systems prohibit slavery—human beings as property—and intellectual property rights are ubiquitous—largely because of the international agreements of the World Trade Organisation. There may be holders of public and private property rights, as well as forms of common property ownership, but

the combinations of the specific rights that each holder has constitute non-homogeneous ownership realities. Likewise, property rights require the existence of other prior regulations that allow them to be exercised. Which means that a full understanding of property cannot be achieved outside the social and political world.

With all this in mind, our strong hypothesis as to why there is enormous potential for fiduciary exploration of the question of property in the contemporary world has to do with its political constitution, which should not be neglected. Morris Cohen (1927) explicitly defines property as a grant of "sovereignty" to the holder of a bundle of rights: it is a delegation of power by the state to private individuals of the ability to control the use of property and resources according to their preferences, and to exclude others from this use. Criticising legal positivist John Austin, who had cast doubt on the distinction between *dominium* and *imperium*, Morris Cohen considers that these are indeed discriminating concepts but that the important point is that, both comprising a form of sovereignty, the real distinction between the two lies in who holds the encapsulated power for each. In the case of property, *dominium* is the grant of power in the form of rights conferred by the state on an individual, of which three are more relevant than others: those that protect economic productivity, those that protect privacy and those that protect social utility. This, says Cohen, amounts to conferring a "limited but real" power to exclude third parties. The fundamental issue, therefore, is how far this "delegation" of state power to each individual goes, for—he argues—, if the scope of this delegated power is extended,

it must not be forgotten that "the actual fact that dominion over things is also *imperium* over our fellow human beings" (Cohen, 1927: 13). It is therefore necessary to understand property as an inherently politically constituted reality, to the extent that in it we have the core "of what historically has constituted political sovereignty" (Cohen, 1927: 13). If we accept Morris's historical-conceptual premises, then it is pertinent to understand that property can—and perhaps should—be treated as a reality of a fiduciary nature.

Then, our strong hypothesis is reinforced by the fact that in modern democratic constitutional order, not only political freedom has a trustee structure. Also, the regulation of ownership and appropriation of a society's resources and assets has a very precise trustee structure: ultimate ownership is always public, and what we commonly call "private property" rights, far from being an absolute, exclusive and excluding right of appropriation, is a right of private appropriation granted by the sovereign—through her political agents—in trust on the basis of public utility. Therefore. the private owner of a resource is thus ultimately—and usually very much in the middle—an agent of the principal (the sovereign) and is bound by this relationship of trust. Thus, we argue that this is a precise and cogent historical-institutional, philosophical and legal interpretation of the democratic constitutional idea of the "social function of property". Thus, we argue that this is a precise and cogent historical-institutional, philosophical and legal interpretation of the democratic constitutional idea of the social function of property. And

that is why it can be best understood in a fiduciary interpretative framework (Casassas and Mundó, 2022).

It should be made clear that this interpretation in no way prejudges the political direction that a society should take. But it does force us to orientate the research in a different way, in the terms in which it is actually proposed institutionally. Positions in favor, for example, of privatization processes either of public or commons, must argue that these privatizations: (1) are made on the basis of public ownership of the resource to be privatized; (2) that privatization, given the circumstances, means an improvement in terms of public utility, also in terms of the revenue that this privatization brings to the public treasury; (3) that whoever appropriates the resource to be privatized is the best possible trustee among all the available candidates (*in eligendo*), in the first instance deserving of more or less regularly imputable public trust (*in vigilando*). Between these two extremes of the range, a wide fiduciary regulatory space of resource appropriation opens up: from, at one extreme, large private companies (whose principal, in the internal organization of the company, are the shareholders, with the executives as their agents), to, at the other extreme, worker cooperatives (a modern, industrial example of traditional common land ownership). In all cases of this broad range of resource appropriation possibilities, the sovereign acts as the principal who ultimately regulates, on the basis of public utility criteria, the different ways in which agents manage (privately, in common, or as state administrators) the resource in question.

In sum, our hypothesis is that in order to fully understand both the empirical world of property and the institutional design mechanisms that allow it to be constituted and modified, it could be of great interest to the field of economics and society to integrate new (and, in a sense, not so new) conceptual tools to adequately capture the complications of fiduciary relationships.

Reframing new challenges: towards Earth trusteeship?

In recent years, we have seen all kinds of proposals to try and overcome the limitations faced by the states when it comes to confront global issues. Among such suggestions, there are ambitious proposals of systemic reorganization of the global institutions—even of creation of a world government—which come in different shapes, ranging from cosmopolitan perspectives on global resource redistribution based on visions of global justice; through general obligations of solidarity; global constitutional paradigms assigning limited authority to the states; spatial extension of general obligations concerning human rights; and up to more specific obligations of the states, such as their "duty of securing protection" against genocide or similar disasters caused by human beings (Benvenisti, 2013).

A growing area of concern in recent decades has been the overexploitation of the planet's natural resources, the loss of biological diversity, the risks to human health resulting from the breakdown of natural systems, and so on.[9] Given this reality, it seems pertinent to

reflect on the necessary governance of the global commons, which transcend state borders and the damage caused to them has an impact on life, health and welfare of humanity at large. Arguably, the current crises are not only social and ecological, but also of ideas. The fiduciary scheme offers an alternative that has a long history, but has been insufficiently explored as both a democratic and effective device in economy and society field. As we have tried to show, examination of the social, economic, and legal nature of fiduciary structures reveals that it is an enduring philosophical idea, but one that can be expressed in flexible, adaptable, and idiosyncratic legal arrangements. This idea can be transferred to thinking about how to ensure the sustainability of natural systems essential for life, proposing trusteeship—analogous to stewardship or guardianship or curatorship—as an existing and proven frame to be examined and reworked as a governance model for the sustainability of the global commons.[10]

Guy Standing (2022: 484-487) highlights the precedent of the fiduciarily conceived public trust doctrine, whose legal background requires common law institutions to actively safeguard the commons, prioritising common rights over private property rights and serving as custodians of the commons. He further notes that the public trust doctrine comprises some subsidiary elements. It mandates not only the preservation of the capital value of converted natural resources but also a commitment to conserve the broader natural inheritance, imposing duties against waste and to restore damaged resources. Consequently, the state bears the responsibility to preserve the environment impacted by

economic activities, precluding ecological "credit" or "offset" schemes and necessitating the free, prior, and informed consent of commoners for any intrusion into commons environments. In essence, the public trust doctrine obliges the legal system to protect community rights and their resilience against powerful commercial interests. Neglecting this duty can inflict severe consequences on local communities and the vitality of the commons. Without trying to be exhaustive, there was a wide variety of precedents, in addition to the public trust doctrine. Trusteeship would be analogous to stewardship or guardianship or curatorship, and would have such outstanding antecedents as the Magna Carta of 1215 or the *Carta da Foresta* (Charter of the Fortest) of 1217.[11] Aldo Leopold argued in 1948, in his *A Sand County Almanac*, that private landowners are responsible as stewards of their property for the common good of mankind and nature (Flader, 1999: 23). More recently, Judge Christopher Weeramantry (1997), former Vice Pricedent of the International Court of Justice, in his Separate Opinion on the ICJ's 1997 *Gabcikovo-Nagymaros* case he described "the principle of trusteeship of earth resources" as the "first principle of modern environmental law" (p. 108).

This raises the need for economy and society field to problematise the triad of anthropocentric property rights, economic growth that plunders non-renewable natural resources, and the consequent commodification of nature in all its relevant dimensions. In order to avoid ecological damage as much as possible and to promote natural systems conducive to life, international mechanisms need to be articulated that establish

responsibilities towards nature—and towards ourselves as a species. As has been shown, it can be fiduciarily argued that property rights (whether private, state or common) have a strong relationship to sovereignty. Benvenisti (2013) refers to a conception of sovereignty as the power to exclude portions of global resources. He points out that both ownership and sovereignty are claims to intervention in the state of nature through the delimitation of valuable space for exclusive use. This perception of states as power-wielding property owners provides a strong normative basis for the imposition of a positive obligation on states to take extraneous considerations into account when managing the resources allocated to them. A fiduciary conception of property can thus provide us with a framework in which to translate these moral foundations into legal obligations. Therefore, we can and should conceptualise the governance of global resources as the result of a collective normative decision at the global level, and not merely as a right of sovereign states (Criddle and Fox-Decent, 2019). Being vested in the people themselves, public sovereignty needs to protect the common good. It is in this sense that an exploration is proposed on how the presumed fiduciary duty—and its correlative governance—we humans have to preserve for the common good the natural systems in which we live.

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Résumé

Bien que les relations fiduciaires soient présentes depuis longtemps dans le code d'Hammurabi et les codifications juive ou islamique, elles ont été spécialement conçues et instituées par le droit civil (privé) romain pour traiter de manière normative les relations interindividuelles asymétriques dans lesquelles un commettant ou bénéficiaire a un intérêt dans l'exécution d'une certaine action, mais n'a pas l'expérience, le temps ou les moyens de l'exécuter lui-même. Il a donc besoin de faire appel à un mandataire pour réaliser cette action, qui n'a pas nécessairement intérêt à la réaliser à la satisfaction du bénéficiaire. Comme il s'agit d'une relation problématique et potentiellement dangereuse pour le bénéficiaire, tant en droit privé que dans les relations politiques démocratiques, le mandataire doit rendre des comptes. C'est pourquoi l'économie, la bioéthique, la

philosophie politique et le droit contemporains traitent des relations fiduciaires. En revanche, l'approche fiduciaire est très peu présente dans le domaine de l'économie et de la société. Une réflexion sur l'intérêt d'intégrer l'analyse fiduciaire (dans ses dimensions empirique et normative) est proposée dans cet article, étayée par le cas de la propriété. L'intégration nécessaire des dimensions économique, sociale, juridique et politique dans un cadre fiduciaire inclut une réflexion sur le devoir fiduciaire présumé – et sa gouvernance corrélative – de préserver pour le bien commun les systèmes naturels dans lesquels nous vivons.

Mots-clés : Principal-agent, propriété, relations fiduciaires, fidéicommission

Resumen

Aunque las relaciones fiduciarias tienen una larga tradición, que se remonta a las codificaciones hammurábica, judía o islámica, fueron particularmente concebidas e instituidas por el derecho civil (privado) romano para lidiar normativamente con relaciones interindividuales asimétricas en las que un fideicomitente o beneficiario tiene interés en la realización de una determinada acción, pero no tiene la experiencia, el tiempo o los medios necesarios para realizarlo por sí mismo. Por tanto, necesita de un fideicomisario para realizar esa acción, el cual no necesariamente tiene interés en realizarla a satisfacción del beneficiario. Dado que se trata de una relación problemática y potencialmente peligrosa para el beneficiario, tanto en el derecho privado como en las relaciones políticas democráticas, el fideicomisario debe rendir cuentas. Es por ello que la economía, el derecho, la bioética y la filosofía política contemporáneas se han ocupado de las relaciones fiduciarias. Sin embargo, el enfoque fiduciario ha sido poco común en el campo de la economía y sociedad. En este artículo se propone una reflexión sobre el interés de incorporar el análisis fiduciario (en sus dimensiones empírica y normativa), ilustrándolo con el caso de la propiedad. La necesaria integración de las dimensiones económica, social, jurídica y política en un marco fiduciario incluye una reflexión sobre el supuesto deber fiduciario (y su correlativa gobernanza) de preservar los sistemas naturales en los que vivimos en aras del bien común.

Palabras clave: Fideicomiso, principal-agente, propiedad, relaciones fiduciarias

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[2] As an illustrative example, a case in United States, *Mobil Oil Corp. v. Rubenfeld*, 72 Misc. 2d 392, 399-400, 339 N.Y.S.2d 623, 632 (1973) held that fiduciary relationships encompass both "technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another".

[3] According to Leib and Ponet (2012): "To be sure, in politics as well as in the private law context, the interests of constituents—regardless of whether they vote for their representative (or her opponent)—do not always converge with those of the fiduciary. Enforcing and protecting trust through obligations and duties therefore helps police fiduciaries from straying too far from their beneficiaries' interests. Trust is not a psychological state of the beneficiary, enabling her to believe that her interests or perspectives are somehow aligned with the fiduciary. Trust is rather the grease that allows the engine to function: lawyers, corporate directors, guardians of very minor children, and politicians (especially of our least preferred party) necessarily operate on the basis of some quantum of trust" (Leib and Ponet, 2012: 185).

[4] Cicero (1928). In his classical analysis, Sheldon Amos (1987 [1883]: 291) states that, under the Roman law, "[t]he office of guardian (…) was regarded as a service of public moment, and not of mere private convenience or arrangement," being imposed "as a public burden or duty to be rendered to the State".

[5] The following examples are highly representative. "As an estate in trust becomes a man's own, if he be not answerable for it, so the power of a magistracy not accountable to the People, from whom it was receiv'd, becoming of private use, the Common-wealth loses her liberty" (Harrington, 1656). It is also well known, of course, John Locke's description of legislative power as a "trust" which is commended to the Parliament for the benefit of the commonwealth (Locke, 1988 [1689], II, §§ 142–43), or John Milton's (1991 [1649]) portrayal of "the power of Kings and Magistrates" as "derivative, transferr'd, and committed to them in trust from the People, to the Common good of them all, in whom the power yet remaines fundamentally, and cannot be tak'n from them" (p. 10). The accumulation of fiduciary political expressions contributes to a better understanding of Maitland's thesis that "all political power is a trust" had become a commonplace in the English parliamentary sphere in the 18th century (cited in: Gough, 1950: 136).

[6] For this issue, it is essential to incorporate Aaron Pitluck's reflection on the concept of "conflict of interest" (see article in this volume).

[7] In the common law context, William Blackstone (1765-1769: Book 2) was forceful in his summary of the supposedly unlimited rights to property: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe". In Napoleon's Civil Code (1804) property was established as a subjective right that was absolute, exclusive and perpetual. According to its article 544: "Property is the right of enjoying and disposing of things in the most absolute manner […]".

[8] According to Schorr (2009): "The increase of citations of 'sole and despotic dominion' from the 1950s to the 1990s outstrips the increase in articles mentioning Blackstone in any context by a factor of ten. (...) It is only in recent years, and particularly in the United States, that something like a consensus has emerged that there was, in earlier times, a Blackstonian conception of property that made no room for community" (pp. 123, 126).

[9] Among the countless recent references to this, see, for example, Rockström et al. (2023).

[10] There is already a large body of literature proposing global commons trusteeship. See, for example, Lucy and Mitchel (1996), Wood (2013), Sand (2014), and Bosselmann (2015).

[11] The Charter of the Forest provided a—fiduciary—right of common access to (royal) private lands. Some of its clauses remained in force until the 1970s (Robinson, 2014).