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Leaving Town for the Market: The Emergence and Expansion of Social Trust in the Works of Elinor Ostrom and Henry Sumner Maine

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Abstract: This paper uses the evolutionary frame provided by the Victorian jurist Henry Sumner Maine to describe the process by which trust can be seen as the product of a gradual development that starts with small-scale communities and later allows market exchanges to develop themselves. I also argue, using the work of Elinor Ostrom (1990), that trust emerges first within small-scale communities, where first- and second-degree collective action problems need to be resolved. The development of a social disposition to trust is closely linked with an institutional context that encourages individuals to take the externalities of their actions into account. This is made possible by customary mechanisms, as the development of social trust at this stage cannot rely on a mighty "Leviathan". Therefore, this paper questions the claim that social trust is the product of market exchanges.

Market exchanges might favor the further growth of social trust, hands in hands with the right institutional frame. However, this growth is not just the transposition of a previously acquired disposition to trust. The work of Henry Sumner Maine interestingly underlines the importance of the co-development of institutions and trust, from its origin in small communities to its expansion to market exchanges. Both Ostrom's and Maine's perspectives underline the fact that trust and trustworthiness are complementary and question a-rational perspectives on trust. This paper also elaborates on the claim, coming from the literature on contract law, that focusing on sanctioning mechanisms can be highly counterproductive.

Keywords: Trust; Markets; Henry Sumner Maine; Contract Law; Customary Law; Ostrom

Introduction

This paper is a contribution to the question of the emergence of social trust and its relation to market exchanges, using insights from Henry Sumner Maine

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(1822-1888) and Elinor Ostrom (1933-2012). Economists have sometimes given contradictory functions to trust: it might be considered as the basis for market exchanges, but it might also be described either as a supplement or, even further, as a product of market relations. Indeed, if trust is a basis for market relations, then it means that it might come from external and pre-existing conditions, which could conflict with the idea that market societies produce trust between individuals, allowing strangers to exchange with each other. Also, the idea that trust could be a supplement to market relations (Arrow, 1972) is ambiguous: is trust a natural by-product of markets relations alone, made to stabilize exchanges? Is it a "patch" put in place by societies against the normative disruption caused by markets?

It has been noted that individuals that are more exposed to markets have a stronger sense of fairness and reciprocity than those who live in closed and small-scale communities (Zak and Knack 2001). Reactivating a classical *doux commerce* argument, compelling critiques of the anti-commodification literature (Brennan and Jaworski 2015) have argued that while some norms might be dissolved by markets, they can also promote tolerance and openness to foreigners, especially beyond the boundaries of one's communities. In this frame, small-scale communities tend to be opposed to large-scale communities that are more complex and integrated to markets, and of which members are ready to trust non-members of their network of personal relationships. Therefore, trust would be a strong feature of complex societies, as opposed to more traditional societies. While in closed-communities, individuals' moral behavior would be based on direct peer-pressure, and where one's reputation of being an unreliable person would be very damaging to one's social life, large-scale societies, integrated to markets, do seem to rely on people's willingness to behave fairly with strangers, even when they could take advantage of them with little to no repercussions.

The point of this paper is to question this dichotomy. Following Bowles (2016), one can argue that markets are not self-sustaining and that they rely on norms and institutions that lie *beyond* them and cannot be reduced to them. In this frame, social trust is part of a "civic culture" that includes institutions, both being essential to markets. Markets therefore prosper on a fertile institutional ground, and their development confirms that pre-disposition by expanding individuals' ability to trust strangers. Not surprisingly, law as an institution plays a significant role in this institutional framing. Meanwhile, this does not solve two problems: first, the one of the emergence of social trust and second, the one of how social trust can be enlarged to market relationships, if it originates in a previous context.

I thereby base my reflection on the following hypotheses: trust is a preexisting condition that is transferred from small-scale communities to large ones, that are more integrated to markets. Markets prosper on social trust and might only foster it. Following this, markets might appear as a "parasite on tradition" (Bowles 2011), as they rely on a preexisting social capital to thrive. A second though essential idea is that trust is accumulated as a "social capital" (Ostrom, 1990) at the level of small-scale communities and thanks to their institutions. This paper clarifies and exemplifies this set of hypotheses by exploring and connecting the works of two authors, the Victorian jurist Henry Sumner Maine (1822-1888) and Elinor Ostrom (1933-2012).

The work of the 19th century jurist Henry Sumner Maine provides a frame where the development of markets is made possible by the expansion of social trust from networks of personal relations to impersonal interactions. In this process, contract law is essential. As will be explained, Maine's involvement in the drafting of the *Indian Contract Law* of 1872 is a result of that belief. Moreover, Maine's description of "village-communities" and their evolution, that one can compare to the Ostromian commons, provides conceptual tools to analyze the following problems:

If trust is not produced by markets and modern institutions themselves and comes from an earlier stage of social relationships, then,

1/ how does this transition from small-scale communities to large-scale cooperation on markets take place?

2/ how can an infinite regress problem be avoided, since trust needs to emerge at some point?

Meanwhile, Elinor Ostrom's research on the commons shows that trust emerges first within small-scale communities. It is on this level that first and second-degree collective action problems are resolved, laying the foundations for the accumulation of trust as social capital. The commons provide us with a paradigmatic example of how individuals can start finding each other trustworthy, even when a social disposition to trust has not yet been developed.

The argument of this paper is developed as follows. In a first section, the work of Brennan and Jaworski (2015) will be analyzed as a recent example of the argument that markets promote trust (1.1). This view is then discussed to highlight how markets rely on pre-existing social dispositions and especially on trust, as illustrated in the literature on contractual relations (1.2). Then, a discussion of Luhmann's concept of "systemic" trust aims at showing that such an institutional perspective must not neglect the fact that personal and systemic trust cannot be strictly distinguished, as well as the role of trustworthiness cannot be forgotten, in order to explain the emergence and expansion of trust as a social disposition (1.3). In a second section, it will be argued that the Ostromian literature emphasizes the fact that trust is an institutional product at any level of human cooperation (2.1), that the commons are a paradigmatic example of this process (2.2). As a specific context, thanks to customary mechanisms, the commons illustrate how individuals can get a direct and empirical confirmation of the belief that others are trustworthy, allowing for the development of a widespread social disposition to trust (2.3). A third and last section dwells on Henry Sumner Maine's interesting insights about the extension of social trust to markets, starting from small communities or "village communities" (3.1). Interestingly, this extension is presented by Maine as a two-fold process: the gradual transformation of property rules allows for the development of both contractual relationships and a social disposition to trust (3.2). Maine's involvement in the *Indian Contract Act* of 1872 illustrates this dynamic quite clearly (3.3).

1. Markets and layers of trust

1.1 Trust as a product of market exchanges?

While Arrow (1972) only assumed that some values and social behaviors like trust and trustworthiness *might* be essential for market relationships to happen, recent criticisms of anti-commodification arguments have emphasized or reactivated the opposite claim that markets do, in fact, foster pro-social tendencies, with a focus on trust and fairness.

Brennan and Jaworski (2015) are particularly representative of that trend. Their main goal is to defend the neutrality of markets regarding morals. Indeed, their main argument is that, when it comes to markets, "it's the how, not the what" (2015: 29). In their view, markets themselves are just a *process* where prices are attributed to goods, they do not promote or foster negative values, or corrode good ones. "Wrongness" in possession must exist prior to markets to consider that something might not be bought or sold. Therefore, if it is allowed to possess or do something for free, it must be allowed to put it on a market (2015: 10-11). The point is therefore to shift the focus from the "what", which kinds of goods could markets sell or not, to the how: how can markets in goods, when they are not forbidden already, be regulated (2015: 25)?

Nevertheless, Brennan and Jaworski's point goes further: it upholds the classical idea (as a matter of fact, they quote Voltaire on the London Stock Exchange, see Brennan and Jaworski 2015: 25) that markets promote "tolerance and openness", even though they might lead to the decrease of traditional forms of solidarity (2015: 93). Their point focuses in fact on trust, as they propose a short literature review of the empirical studies that established a link between market exposure and the ability to *trust*. Neuroeconomist Paul Zak (2008) argues that studies on the topic show a strong correlation between exposure to markets and the tendency, among individuals, to make fair offers to strangers. In one of these studies, Herbert Gintis argues that market exposure is strongly correlated with higher levels and fairness (2012). Zak and Stephen Knack (2001) purport to show that market societies are *high-trust* societies, while non-market societies are *low-trust* societies. Al Ubayli et al. (2013) noted that using cues that are usually connected with the frame of market relationships make people more "trusting", "trustworthy" and "fair" (these are Brennan and Jaworski's words).

Nonetheless, these studies do not quite support the sweeping point that market societies make individuals trustworthy, trusting and behave fairly. They merely show that markets might *reinforce* such dispositions, only if it is required by the nature of the interactions in question. Also, one cannot so easily conclude that since higher degrees of trust and willingness to be fair are necessary to market relationships, individuals have higher or stronger moral values. As Gintis noted, "fairness motivations" are simply "more pronounced" for individuals who are exposed to market economies. Meanwhile, in "simple societies" that are less exposed to markets, all types of games (ultimatum, public good and trust games) still provided strong results. Therefore, contradicting the point that markets make people immoral by showing that they do foster pro-social tendencies does not prove at all that these abilities were not present already.

Even more so, concluding to the higher morality of individuals in such societies appears to be a leap of logic, that Brennan and Jaworski fortunately do not seem to make, as they only argue that "market systems require a high degree of generalized trust and trustworthiness to function" (2015: 98). In fact, the detail of their argument points to a certain sensitivity to context: they underline that studies showed that introducing money into large groups made people more cooperative (Camera, Casari, and Bigoni 2013), while introducing it in small-scale interactions makes them *less* trusting of each other. More precisely, activating the *frame* of markets in personal relationships signals "a lack of trust" (Brennan and Jaworski 2015: 98). Brennan and Jaworski thus seem open to the idea that the kind of trust one finds in markets and large-scale societies is another kind of social trust than the one might find in small-scale communities. Their argument, as we understand it, is not that the latter simply do not rely on social trust, but rather that there is one particular kind of trust, essential to market exchanges, that is a social disposition to interact with foreigners, predisposing individuals to find them trustworthy.

1.2. Trust as a "civic culture"

From a different perspective, an institutional approach to the problem highlights the fact that markets rely on pre-existing *institutions* and *social dispositions*, including trust, to function. In Bowles's words, this makes markets "a parasite on tradition" (2011). In simplistic terms, trade requires two main kinds of institutions to thrive on a large scale, beyond small communities and personal relationships: stable property rights and efficient contract law. As a consequence, the rule of law is likely to be a crucial element for the development of markets, as it provides stability to individual expectations. The guarantee that an external authority is able to use sanctions to enforce property rights and contractual rules therefore plays an important part in the development of markets.

The security of expectations might depend on a third-party that will be able to enforce sanctions. In the words of Hobbes, this makes the Leviathan a necessary condition for the emergence of markets (Hobbes 1651: VI, I, XV), as it is for social cooperation in general. Nevertheless, this Hobbesian paradigm does seem to rely on the assumption that individuals cannot trust each other without the threat of external sanctions, as Gunning (1972) argues in the case of contracts[1]. Also, relying on the sanctions of an external enforcer for expectations to be guaranteed appears more as the opposite of social trust than a way to achieve it. Indeed, the

1 One of the reviewers pointed to the fact that Hobbes's work in itself is rather an endeavor to give authority some legitimacy rather than defending sanctions as the way to establish trust between individuals. This is indeed Hobbes's main purpose. Nonetheless, one could argue that the anthropological assumptions underlying his *Leviathan* make sanctions the only guarantee of contracts and therefore, of market exchanges. These assumptions lie at the heart of many reflections from economists like Gunning, who are the target of the critique we are putting forth here.

idea that trust can only be established thanks to the certainty that free-riders and non-cooperators will be sanctioned sounds both idealistic and contradictory. On the one hand, one can hardly believe that in any complex society, all free-riders can be caught and sanctioned. Individuals must therefore trade and interact even though some might escape sanctions if they want.

Moreover, studies tend to show that the possibility of sanctions does not necessarily lead individuals to be more cooperative or fair in their exchanges (Barr and Wallace, 2009, Henrich et al. 2010), especially when it comes to contracts. On the contrary, the threat of sanctions can undermine cooperative tendencies. More generally, the idea that market exchanges and cooperation mostly rely on the existence of an authority that can punish non-cooperators comes from a disproportionate focus on the protection of rights and, as explained by Malhotra et al. (2011) on *control*, disregarding the important role of *coordination*, especially in contract law. Malhotra and Murnighan (2002) also highlight the importance of the structure of contracts to foster interpersonal trust.

Voluntary exchanges are in fact based on a large set of shared conventions, where trust plays an essential role. If one pictures the diversity of exchanges and interactions that take place on markets, one will realize that enforcement is usually distant, and rights simply assumed to be respected. When one buys something on the spot on a market, the seller seldom has the obligation to prove that what he is selling belongs to him. Conversely, one is not necessarily considered as a thief if one buys stolen goods in good faith.

Also, the threat of sanctions from an external authority seems little relevant when one entrusts primary products to a manufacturer in exchange of the later deliverance of refined goods. Similarly, it was shown that trust is more effective between contractual partners than specifying all the terms of the contracts (Lorenz 1999). Therefore, not only contracts *cannot* be complete, but the completeness of contracts is counterproductive (Brown, Falk and Fehr 2004). As asserted by Bowles in *The Moral Economy* (2016), the emphasis must rather be put on the virtuous circle that is created when contractual relationships are left to operate on their own: when they remain simple and flexible formalities, contracts foster the development of trust as much as they rely on it. This is part of Bowles's argument that markets thrive on a pre-existing "civic culture" instead of being its promoters, and that institutions can foster social trust as much as they rely on it. This nonetheless does not solve the infinite regress problem that comes from asserting that markets both thrive on social trust and produce it.

1.3. Beyond "systemic" trust

Brennan and Jaworski and the literature they base their claims on rightly stress the distinction between different kinds of trust. In the meantime, the institutional perspective, while drawing our attention on pre-existing social dispositions, does not provide a clear answer to the question of the emergence of a trust and how personal and systemic trusts are both distinct and related.

Luhmann's functionalist understanding of trust can be of a great support here, for the sake of conceptual clarification. Luhmann proposes to distinguish between trust as it emerges between individuals who interact frequently (*familiarity*) and another kind of trust, of a more "systemic" nature (1979: chap. 3). Trust has a central role in Luhmann's first works on social systems, in the way that it is instrumental in dealing with the radical "contingency" that produces "complexity" and which characterizes the world before humans start interacting. First interactions soon decrease such contingency, by building expectations and patterns that individuals can refer to in their later interactions. A social system filters the events that occur in its surrounding environment, a factor of complexity that needs to be reduced.

Trust, at any level, reduces complexity in a specific way: it both reduces some complexity and allows individuals to take the risk of *more numerous and complex interactions*. In a similar fashion, feelings individuals have for each other allow one individual to build a general frame in which the complexity of the other person's behavior will be made manageable. They will not, nonetheless, allow for the flexible development of new interactions in the specific way trust does: trust ensures the ability to interact and more precisely to cooperate, by forfeiting present gains for the perspective of future ones. This is why trust is a favorable condition to the development of more complex forms of rationality, including secondary social systems like markets and any cooperative endeavor in general. In this light, trust appears like an essential social "organ", and trade is only one function that this organ allows to perform.

Personal and systemic trust share the same function: reducing complexity by producing a *sense* of certainty in the absence of *actual* certainty. But what is the specificity of systemic trust, that appears essential for markets and complex societies to function? According to Luhmann, systemic trust is not built thanks to the personal accumulation of positive experiences with trustworthy people: it comes from the system that surrounds the individual. Money is a good illustration of this: general information on the social system that is currently working is supposedly enough to trust complete strangers that also belong to this system. One can trust a person who hands them money in a shop. Theoretically, one deceiving individual will not shake our belief in the system itself. This is meant to show that systemic trust is not dependent on separate personal experiences. It allows us to navigate complex societies where we have to interact with strangers and no time or means to test their trustworthiness.

Nonetheless, the social nature of personal trust cannot be discarded. Taking the example of a small community, it would difficult to argue that, for a farmer to trust another, all it takes is familiarity. There is no doubt that past actions and demonstrations of trustworthiness are essential in such a context. Moreover, the kind of trust that one shows to a neighbor appears different as the way we trust a shopkeeper we had never encountered before. Nonetheless, the scale of interactions in a farming community does not erase all cooperation problems and the risks of seeing conflicts emerging. Trust is a matter of rules, institutions and conflict-resolution mechanisms at this level as well, as our reading of Ostrom's work will show below.

In general, Luhmann's distinction between systemic trust and familiarity must not be exaggerated. He acknowledges that both are social products, but at different levels. Indeed, personal trust is not simply a feeling that individuals might have for each other, as it is already produced socially, through interactions, for instance in the context of the family. It becomes a natural disposition to trust a certain circle of individuals, based on familiarity. Luhmann's account therefore points to a complementarity of the different kinds of trust but his theory allows to take a step further and argue that systemic trust can serve as a background for personal trust, instead of the latter being a pre-requisite to the former.

The example of money shows that trust is a pre-established disposition. The slow emergence of non-metallic currencies is proof that interactions that require high levels of trusts need both individual and collective dispositions to develop gradually. Trade between strangers, as an interaction that necessitates such high levels of trust, must therefore rely on *pre-existing collective dispositions that individuals acquire*.

Meanwhile, market exchanges can also lead to the development of personal relationships and of the kind of trust they entail: a company can appear more or less *trustworthy* to clients, two regular business partners can form a long-lasting relationship of trust. At that level as well, it is difficult to separate the institutional elements (an effective contract law, for instance) from the accumulation of positive experiences. Trustworthiness does matter, as well as rules and coordinating devices, at all stages of social cooperation.

It is therefore possible to elaborate on Luhmann's typology of the different kinds of trust, to sketch an evolutionary frame which would allow us to argue that:

1/ Trust as it is manifested in market exchanges, despite its specific features and institutions, is the product of the gradual development and expansion of a social capital, accumulated in small-scale societies, that enables individuals to cooperate with each other. It thereby harnesses the potential of that social capital as it was developed in small-scale communities.

2/ Trust and cooperation are *learnt* at the most basic social level, as illustrated by research on the commons. A strict distinction between personal and systemic trust is therefore not valid, as trust is always a social product.

3/ As such, trust is systemic, even at the simplest levels of social cooperation, in the way that it does not strictly depend on individual interactions. Meanwhile, relations of personal trust are still developed in complex societies, and they thrive on favorable institutional contexts. Institutions can also be essential in allowing the development of personal trust. Trust can either be understood as a "social capital", using Ostrom's words (1990) or as a social disposition that emerges from the positive interactions between these elements. It therefore does not explain cooperation by itself.

2. Trust as an institutional product for cooperation

2.1. The commons: externalities, trust and cooperation

Institutions that allow for efficient cooperation and the solving of social dilemmas on a large scale could not emerge spontaneously and neither could the kind of systemic trust that, once accumulated, is necessary for large-scale cooperative endeavors. As argued above, in order to avoid an infinite regress problem, it seems necessary to assume that trust emerges at some point, within small communities, where individuals cannot rely on a previously accumulated social capital to establish trusting relationships.

The commons, as studied by Ostrom and her collaborators, are a paradigmatic example of the problem of the emergence of trust[2]. Indeed, in the commons, establishing cooperation seems to be a particularly challenging task. In most cases, communities can only rely on internal mechanisms to manage to do it. In a context where no external authority can enforce sanctions, it seems necessary that individuals trust each other to cooperate. It could be argued that individuals manage to trust each other because they are neighbors and/or because they have regular proofs of the trustworthiness of the other members of their community, as they interact with them constantly.

Instead, the literature on the commons does include many examples of failures to establish cooperation at the most local level (Berkes, 1986). Also, the story behind successful examples underlines the complexity of that process. Ostrom did not provide a list of defined institutions, which would be contrary to her commitment to highlight that there is no given solution to cooperation, everything being context dependent. Yet, several criteria are considered by her as instrumental in ensuring the success of cooperation in these situations. Trust is not itself one of these criteria but developing trust or failing to do so is thus presented as one of the main causes of success (or failure) of the commons (Ostrom 1990: 21). For instance, Ostrom describes the challenges met by irrigation projects in Sri Lanka and identifies the "endemic" nature of "lack of trust" among farmers and between them and officials as a major obstacle in the efficient management of infrastructures (Ostrom 1990: 167 and Perera 1986: 89-91). In this specific case, it was necessary to develop "mutual trust and reciprocity" among members of the farming community themselves and officials on a small scale, before reorganizing the maintenance of irrigation infrastructure on a large scale. It was essential, to do so, to "nourish" trust on a "face-to-face basis", within small groups, using intermediaries.

Several lessons can be drawn from this paradigmatic example. First, trust appears to be a necessary foundation for cooperation to appear at all its stages. Second, trust does not emerge naturally between "neighbors", who can instead live in deep distrust. On the contrary, the emergence of trust seems to require two elements: the rights rules and mechanisms on the one hand, and a feeling that others are trustworthy. A mixture of institutions and enforcement mechanisms and personal trust therefore appear as necessary for social trust to emerge.

2.2. The terms of the problem

The question that structures Ostrom's inquiry in *Governing the Commons* can be stated as follows: how can individuals solve fundamental cooperation problems and start trusting each other when they do not have any *empirical* reason to find

2 For a fairly complete review of works on the commons, see Ostrom and Hess 2007.

each other trustworthy? Interestingly, Ostrom rules out any "non-rational" explanation for cooperation: trust and cooperation must be the reasonable thing to do for self-interested utility maximisers, and one cannot rely on explanations such as mere familiarity or an "instinct" for cooperation. Fortunately, Ostrom shows that the context of the problem is also where its solution is found, which is in a very localized context, where individuals are able to design rules that are self-enforcing, ensuring the very basis needed to find each other trustworthy.

What is exactly the problem in the case of the commons? As described in the literature on the "commons", cooperation problems emerge when communities need to balance, on the one hand, the appropriation of resources by individuals and, on the other hand, the sustainability of such uses, so that resources remain available in the future. In *Governing the Commons*, Ostrom argues that it is by finding solutions to such primary cooperation problems that communities gradually learn to solve cooperation problems, from the simplest to the most complex ones. This incremental process, as described by Ostrom, locates a potential origin of cooperation in the commons and makes it the start of a learning process where the social disposition to trust, a form of "social capital", expands its scope as cooperation reaches new levels of complexity (Ostrom 1990: 187).

What is the exact nature of this disposition to cooperate, in which trust plays a large part? It is more specifically a disposition, by individuals, to take into account the *externalities or external effects* of their actions. The famous "tragedy of the commons" is essentially a problem of negative externalities: individuals who send their cattle to graze disregard the negative externalities they are imposing on others. It is therefore not surprising that the Ostromian literature on the commons focuses, explicitly or not, on proving that the commons can provide mechanisms that deal with externalities. Nonetheless, a close analysis of this literature shows that any cooperation problem is, in the end, a problem of externalities, whether they are positive or negative. Avoiding overexploitation is the most common problem of negative externalities but, for instance, having people benefiting from irrigation infrastructures without contributing to their maintenance is a positive externalities problem.

We draw the following conclusion from Ostrom's work: if social trust is essential to cooperation, then it must play an important part in the solution of externality problems. Ostrom presents the problem of cooperation in the commons as follows: one individual will cooperate *if one believes* that the other will also cooperate (1990: 186). We can rephrase this condition: one will cooperate *if one believes that the others will take the externalities of their actions into account* or, in other words, *if one trusts others to integrate issues of externalities* in their actions and interactions. This belief, to be a called a social disposition to trust, must not be limited to a one-time situation. It must be a belief that others, within one's community, are *generally disposed to integrate issues of externalities* in their actions and interactions.

According to Ostrom, models that claim that the commons are bound to a "tragedy" fail to understand how the structure of the commons can foster this kind of disposition to trust (Ostrom 1990: chap. 1). Such models underline how cooperation is difficult to achieve and describe accurately the consequences of situations when individuals act independently, without communicating, have little interest in long term benefits and "little mutual trust". Meanwhile, in the "localized physical setting" of the commons, it is possible but of course not necessary that individuals "can learn whom to trust, what effects their actions will have on each other and on the CPR, and how to organize themselves to gain benefits and avoid harm" (1990: 183). Avoiding harm here must mean avoiding *reciprocal* harm, since in the context of the commons, the simple nature of cooperation emerges: avoiding *indirect* harm to others, in the shape of externalities, is the only way to avoid harm to oneself.

2.3. The crucible of trust as a social disposition

One could conclude, from Ostrom's mere hints about the role of trust in the commons, that the specific nature of interactions in such settings fosters the appearance of trust. However, why would trust and cooperation find their origin in such an environment? Ostrom's view of cooperation as a long and incremental learning process is a response to what she sees, along with collective action theorists (Olson 1975), as the main defect of a Hobbesian paradigm: how could one expect individuals to take a sudden leap from the complete absence of cooperation to full subjection to the Leviathan? It seems necessary that individuals have a prior ability to trust each other's ability to cooperate. Indeed, cooperation is strictly conditional. This implies that one cooperates only if others commit themselves to show cooperative behaviors (Ostrom 1990: 99-100). Restricting oneself and not overexploiting the commons without some guarantee than others will do the same would not be a rational decision. Where can guarantees be found where the Leviathan is by definition absent? Ostrom's demonstration on the functioning of the commons are meant to show that these guarantees are provided by the context and the mechanisms that we see as typical of customary institutions (1990 chap. 1-2).

Nevertheless, trust remains a leap of faith: such mechanisms can only provide a frame that allows for it to grow. Are we lost in an infinite regress where trust is always necessary for trust to emerge? The commons demonstrate that there is an environment where individuals can commit to cooperation, without much priori information on others' trustworthiness, because they are physically close and share similar issues on a similar territory. For instance, one has strong incentives to watch if one's neighbor is not pumping too much water from a common irrigation structure, since he or she will be the first person impacted. In such contexts, everybody is watching everybody, and everybody has a personal interest in watching others and reporting frauds. Committing oneself to conditional cooperation ("I will if you will") is therefore still a leap of faith, but one that will directly push co-contractors to enforce the rules. This is where the virtuous circle of trust begins: the conditional commitment to cooperation drives individuals to monitor each other and this monitoring, if it confirms that others are indeed cooperating, validates that trust is empirically founded and therefore a rational decision (Ostrom 1990: 187).

This can be rephrased as follows: trust, to emerge, requires the ability to believe that others will reciprocate cooperative behaviors. For one individual to cooperate, it is necessary that he or she *believes that it is expected* of everyone, in a specific context, to follow specific *rules of cooperation*. This belief is therefore strictly about the *normative aspect* of this context. One pays its taxes believing that others will do too and believing that those who do not will be sanctioned. Nonetheless, compliance to tax laws in our societies can be described as "quasi-voluntary" (Levi 1988: 23), since this belief is not necessarily confirmed empirically and because there are no real guarantees of the other's obedience to the rule. Indeed, those two correlative beliefs come with no confirmation or immediate guarantee and the entire system relies on the preexisting trust in the cooperative behavior of others. On the contrary, in the commons, individuals can get empirical confirmation of their normative beliefs: the possibility for individuals to monitor each other in the localized context of the commons ensures that there is no disconnection between normative expectations and their empirical confirmation. Trust can therefore start from that point.

The commons are characterized by the general diffusion of the individuals' ability to *monitor* and *sanction* each other. Ostrom, taking the example of Turkish fisheries, observes that "cheating on the system will be observed by the very fishers who have rights to be in the best spots and will be willing to defend their rights using physical means if necessary (…)", meaning, in this case, cutting the nets of non-cooperators (1990: 20). When talking about the *huertas* of the region of Valencia in Spain, and of their irrigation infrastructures, Ostrom provides the following illustration of what she describes as the *reciprocity* of mutual monitoring and sanctioning (1990: 74):

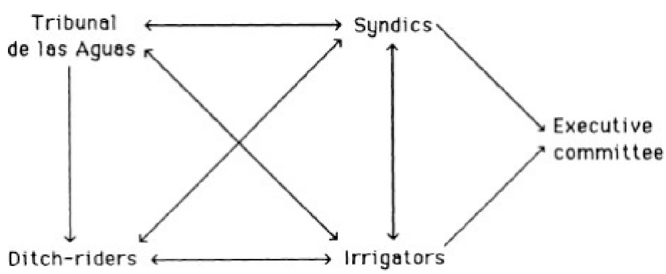

Figure 3.2. Patterns of monitoring and accountability among key actors in the Valencia *huerta*.

Instead of reciprocity, one could see this as a *circular* system, that matches the need to produce a virtuous circle of trust, one where expectations are directly confirmed by empirical assessments (Ostrom 1990: 187). Empirical confirmations come in two sorts: confirmation that actual non-cooperators are spotted and sanctioned, which is not necessarily the case for an external authority that might miss some of them and incriminate the wrong people, but also confirmation that others *do indeed* cooperate, as individuals get first-hand information on compliance rates (Ostrom 1990: 74-75). Every member of the community has thus access to *empirical confirmations of the normative efficiency of the system*.

This direct relationship between facts and norms thus appears to be foundational in the institutionalization of cooperation, thanks to the way it fosters the development of a disposition to trust others. This is even more related to trust that this structure allows for both a high rate of compliance to rules on the one hand, and a low level of actual sanctions on the other hand. Sanctioning appears little relevant in a context where one's trust in others cooperative behavior get validated and reinforced by empirical data. Conversely, following an evolutionary frame, one could assume that this is the very reason why individuals can learn to trust without the need for sanctions and with no direct proof of others' trustworthiness.

One could believe that once the ability to trust and cooperate is learnt in a context like the commons, then it can be extended to a wide range of situations, including market exchanges. The work of Henry Sumner Maine provides a frame that allows us to conceptualize this transition, by highlighting how it relies on a gradual institutional evolution that involves contracts. Also, Maine and his contemporaries were also interested in how communities managed resources in common and how it affected the structure of their property-relations. In Maine's work, the "commons" are called "village-communities". There is therefore a parallel to establish between Maine and Ostrom, a connection that is acknowledged by Ostrom herself (Ostrom and Hess 2007).

3. Trust, markets and contract law in Henry Sumner Maine's work

3.1. From "village-communities" to markets

Henry Sumner Maine's work, especially *Ancient Law*, published in 1861, is famous for the idea that societies evolved from a state where individual rights were primarily defined by status, to a state where individuals get rights with little regard to their status within the family or the clan, and can build legal relationships with each other on a contractual mode. The gradual *contractualization* of societies is therefore at the core of Maine's theory, and this already makes it an interesting frame for our discussion.

More specifically, it meets the required criteria to provide insights on the way markets develop thanks to the growth of a pre-established social capital that allows individuals to trust each other to cooperate. Maine portrays the emergence of markets between small communities as a "moral" progress that involves the gradual expansion of contractual capacities. More interestingly, he describes how the evolution of the institution itself meets the requirement of large-scale trade. Also, in an anti-Hobbesian gesture, Maine takes the focus out of sanctions and enforcement (which we previously referred to as *control*) to point at what makes the institution of contracts an efficient coordination tool which can allow and enhance large-scale trade, provided it is based on social dispositions like trust. As we will later see, Maine applied this frame by playing a significant role in the drafting of the 1872 *Indian Contract Act*. More explanation on its conceptual background is necessary to understand how.

From *Ancient Law* and beyond, Maine is interested, just as many of his contemporaries, in the "village-communities" that he believes are found in great numbers in India in his days. The historians of his time provided him with similar examples in the past of all European societies, where one could allegedly find such self-sufficient communities, with individuals connected fictionally or not by their blood, who cultivated land collectively (Maine 1861: 245).

In Maine's opinion, markets emerge in the unregulated space between self-sufficient communities (Maine 1871: 192). No community has the authority over others in this neutral *space*. Moreover, none of the specific sets of customs regulating one of these communities has any legitimacy to regulate the relationships between the different communities. The solution to this normative void therefore knows the following constraints: no superior authority will be the source of the rules of trade and enforcement will therefore prove challenging. In other words, communities will have to rely on each other's good faith to be able to trade with each other. It is safe to assume that Maine has a similar process to that of the constitution of the *Jus Gentium* in mind. He describes the process as follows: before being considered a kind of "natural law" by roman lawyers, the *jus gentium* was nothing but a set of common rules, built thanks to comparisons between the different sets of customs of the neighboring communities with which Rome had to trade. For Maine it is "in part originally a Market law", the "parent" of International law (Maine 1871: 193).

The rules that allow markets to function must therefore be distinct from the customs and practices of each separated community, but also be compatible with them. They must be fair to all parties but, most importantly, they need to function without a third-party to *enforce* them through sanctions. Also, for Maine, the clarity and the consistency of rules are, rather than the guarantee of sanctions by an external authority, instrumental in the development of a trusting relationship between partners. A clear normative frame is the priority so that individuals who come from different communities engage in market exchanges.

The virtuous circle described by Bowles is thus in place. Parties to an exchange have a first incentive to cooperate: their mutual gains. Under the right conditions, individuals will thus be able to trust each other to be able to trade goods and services. Trust is the correct word for a leap of faith with little or no guarantee of sanctions against non-cooperators. Those who do not will gradually learn to trust each other more and will graduate cooperate on a larger scale, trusting each other more and more.

Nevertheless, the gradual development of trust in market exchanges is neither the mere product of a favorable institutional context, nor the sole result of an accumulation of positive experiences of trustworthiness. Maine does not defend the idea that the social capital that was accumulated in "village-communities" is simply *transferred* to market exchanges when it meets with the right institutions. Instead, he describes how institutions like contract and property law gradually evolve, altogether with social dispositions. This allows to bridge the gap between the emerge of social trust in small-scale societies and the development of markets.

3.2. The development of trust as a moral disposition and the evolution of contracts

Maine describes the development of trust in moral terms, equating it with an increase of the "morality" in society. This increase is directly connected to the expansion of market exchanges and their separation from the rules of closed communities. In Maine's thought, this movement is tightly linked to the history of contractual law, exemplified according to him by the history of roman contracts.

According to Maine, "Contracts" depend on "virtues", or on the development of specific "moral obligations". Unsurprisingly, these virtues are none other than "good faith and trust", that happen to be more "diffused" than before at any point of the evolution of societies (Maine 1861: 306). He conceives his opinion as being contrary on his contemporaries, who would tend to believe the opposite, that virtues are in decline. The reason for this incorrect impression would lie in the fact that they witness shocking frauds. Nonetheless, according to Maine, shocking breaches of contract can only take place in a world where individuals rely, for their daily interactions, on mere confidence in each other, including towards strangers. To illustrate his thought, Maine points at the fact that in criminal Roman Law, the most ancient form of dishonesty that was punished was only theft. Meanwhile, English criminal law, in his time, recently started to "prescribe punishment for the frauds of Trustees". Obviously, for trustees to be punished in case of fraud, the possibility of entrusting someone with large responsibilities over one's property needed to be possible *a priori* (1861: 3067).

Maine proposes an explanation for the underlying cause of this evolution:

> (…) in the interval between their days and ours, morality has advanced from a very rude to a highly refined conception – from viewing the rights of property as exclusively sacred, to looking about the rights growing out of the mere unilateral reposal of confidence as entitled to the protection of the penal law. (1861: 307)

Morality here is to be understood in its larger sense: that of social dispositions. Such dispositions evolved, following a change in the perception of property: from viewing it as "exclusively sacred" to considering that a trust, the act of transferring one's rights to some goods to another person ("the mere reposal of confidence"), deserves the protection of the law. One could notice here that the "protection of the penal law", or the threat of sanctions, merely offers a backing to trusting actions.

In any case, Maine connects two parallel movements to each other: a transformation of property rights and the gradual evolution of contractual law. The transformation of property rights starts at one extreme, where no individual is a true owner: property belongs to a social group, the community or the extended family. As resources are essential to the sustainability of the group, no member can freely dispose of them, with the exception of some marginal acquisitions. Property is therefore considered as a *patrimony*, of which management is entrusted to a patriarchal leader in the societies Maine studies, the equivalent of the Roman *paterfamilias*. The *paterfamilias* is considered himself as nothing but the manager of a fund (Maine 1861: 233-235). Originally, property is therefore, as Maine puts it specifically, a “bundle of rights”, expression which he appears to use to designate the Roman *universitas juris*, a set of rights and duties connected to a person (Maine 1861: 177-178).

The idea that property is a “bundle of rights” aims at describing two essential features of this context, where the village-community exploits its resources: first, the fact that property is a set of rights as well as of duties, granted by the collective itself, even when it regards individual rights to appropriation; second, that individuals are in the position of “owners” only to the extent that they manage a common fund they have the duty to preserve and transfer to future generations (Maine 1861: 178). In this context, property relations are defined by the imperative of preserving a common fund (1861: 262).

Maine believes that the history of property can be described as the general movement from this patrimonial conception of property to the idea of property as a dominion on things, where one individual can dispose of goods at will. This movement is necessarily connected to the development of trade: as communities get more interconnected, and as their survival depends less and less on a specific stock of resources, located on a specific territory, individuals are increasingly allowed to dispose freely of more goods. This explains why the process can and must be incremental: commercial relationships develop gradually, from the exchange of secondary or surplus goods in a context where stability is guaranteed by the existence of the community and its “sacred” property. Relations of solidarity and constraint within the community provide a stable frame from which individuals can start exchanging with strangers, but only at the margins, where risks are controlled.

The later evolutionary process relies on the development of “moral” dispositions, in Maine’s words, and these moral dispositions are in return gradually reinforced in the process. Instead of describing this as a vague circular relationship between the development of market relationships and of the disposition to trust, Maine highlights the instrumental role of contracts. This evolution is directly correlated to the evolution of property rights. Goods are first exchanged and transferred through heavily constraining ceremonies. As community-based constraints are loosened, property can be exchanged more and more freely. Even though Maine provides great details of this process, one can sum it up in the following way. Ceremonial requirements are first meant to frame exchanges in a context where trust in contractual relationships is not fully established because goods are still controlled by distinct communities. These requirements are gradually less constraining, until forms of contract that only rely on an exchange of promises by parties is enough to be binding. The community loses its grip upon contractual relationships, while individuals can gradually contract with other regardless of their community of origin (Maine 1861: 313).

Maine goes into many details about the types of contracts that emerged in Roman contractual law (1861: 338-9). The important point to remember is that the technical changes in contracts are responsible for the gradual development of moral dispositions, mainly *trust*, that sacralizes, through a sense of obligation, the mere exchange of wills by individuals regardless of their community of origin. Enforcement therefore comes only after further "moral" developments. Even more than just catching up, the law leaves more and more room for individuals to determine the terms of their contracts. The true institutional basis for the development of trust is therefore not a mighty Leviathan, that would suddenly allow individuals to contract with each other at the very moment it allows them to build a social contract. Dispositions to respect contracts are the product of an evolutionary process which institutional basis lies in the simplification, unification and formalization of contractual proceedings, rather than on the threat of sanctions by an external authority. This discussion resonates with Bowles's conclusions that, while using the threat of sanctions and demanding more complete terms would be counterproductive, the formalization of contractual terms remains essential (Bowles 2016). The systematic recognition of contractual arrangements, even when they are of customary nature, is also a central point among Hernando De Soto's recommendations to foster harmonious economic development in context of legal pluralism (De Soto 2000).

Maine's interest in the role of "possession" as a legal tool, inspired by Savigny's work on Roman law (Savigny 1856: 7-8), is also connected to this process: possession allowed to consider that individuals, despite the lack of formal property titles, could see some rights similar to those of owners respected, and acquire formal property rights thanks to prescription. According to Maine, possession was just a transitional way to legitimize claims that lacked formal proof (1861: 254). Possession also plays an essential role in economic transactions. For them to happen, it is essential that the mere possession of goods and their simple transfer are enough and that no more formalities are required. This can explain why the acquiring stolen goods on a market in good faith is not always reprehensible in all legal systems.

Relying on that fact, Mikhail Xifaras, in his analysis of 19th century doctrinal debates about property in the French Civil Code, interestingly points to the fact that *trust*, and not law, is the guarantee for the property of goods that circulate in economic exchanges (Xifaras 2004: 171). These reflections on possession are also for Maine meant to support a critique of contractualism and more specifically of Hobbes (Maine 1861: 257). This brings more support to the argument that trust between individuals is not created by the Leviathan's ability to enforce rules backed by sanctions but comes from a larger background of cooperative behaviors. While contractualists like Hobbes describe how the "discipline of force" is necessary to bring separated individuals together and allow them to trust each other, Maine argues that trust between strangers emerges from preexisting institutional arrangements and their transformation.

3.3. Henry Sumner Maine and the Indian Contract Act of 1872

One excellent example of Maine's thought on the role of trust and contract law in the development of markets is illustrated by his influence on the *Indian Contract Act* of 1872[3]. In British India, legal courts were faced with the impos-

3 The *Indian Contract Act* of 1872 can be found at this address: http://www.dezshira.

sible task of taking elements of British law as a reference while accommodating their decisions to local customs, mostly out of fear of disrupting the balance of traditional communities. This balancing act was not the only issue, since local customary law was far from being a systematic body of laws, especially in matters that interested the British the most: land law and contract law. Without the creation of a set of general and formal contract laws, resorting to local customs was nearly impossible: as local customs were primarily focused on the task of settling feuds between individuals within their shared community, dealing with conflicts opposing individuals from different communities proved quite a challenge (Roy and Swamy 2016: 128).

Naturally, foreign investors who wished to bring their business to India had to resort to multiple intermediaries to interact with local producers (Roy and Swamy 2016: 129). This was particularly the case for the indigo trade. As unresolved and sometimes violent disputes multiplied themselves, the absence of a general customary law of contracts became a larger problem. Despite some attempts at finding unifying principles of contractual law in the 18th century, trade was therefore widely impacted. *Distrust* was the main characteristic of the relationships between investors and cultivators, especially in the indigo trade (Roy and Swamy 2016: 123). Tacit conventions, frequent and efficient among members of the same communities, were not possible between investors and cultivators who had not established prior relationships. Beyond the local networks of reciprocity, the absence of a formal contract law was therefore catastrophic, leading to the Indigo Mutiny of 1859, one of the largest and most violent rebellions against the British rule.

The Mutiny started with cultivators refusing to sell their indigo to the European investors who owned the factories where indigo was transformed, violating their contracts with them. Contracts were indeed the crux of the problem: from the 1820s to the Mutiny, judges had only two options to settle contractual disputes: either they used their judgment to rule according to equity and depart from existing rules, or they used penal law, a domain that was much clearer, to enforce contractual obligations. Nevertheless, jurists felt that building a proper set of contractual laws was necessary. Most of the disputes emerged from the fact that investors complained that cultivators were exploiting the vagueness of their contracts, most of the times non-written ones. An inevitable vicious circle was in place: the more investors sought to establish clearer and more constraining terms, the less cultivators respected their obligations willingly. As a consequence, more distrust led investors to demand more clarity regarding the terms of the contract and to put more pressure on them, sometimes threatening them with violence, which was naturally increasing the amount of distrust, and so on and so forth.

The first recommendations of the legal committee that was given the task to find solutions to this problem were to emphasize institutional solutions to this issue of

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trust: an efficient and speedy justice system, the official record of clearer and more explicit contracts, the writing of an independent contract law (Roy and Swamy 2016: 123). These recommendations remained as such until 1862, when Henry Sumner Maine became a member of the Legal Council in India. Maine had to battle against fears of new riots by the locals. He supported the idea of uniform contractual code, mixing local customs with Western elements, believing that simple and efficient procedures, as long with clarified contractual terms, would solve the vicious circle of distrust that was opposing investors and cultivators. The political discussion ended up with a victory on Maine's side, despite some concessions to the opposing view.

Some conclusions

Both Elinor Ostrom and Henry Sumner Maine would agree that there is nothing *natural* in trusting others in a social context, no matter the scale. Trusting commercial partners who come from different communities that one's own is not natural, but neither is trusting one's neighbor no to let his sheep overgraze. Therefore, one can neither argue that markets produce trust *ex nihilo*, nor that it just comes from a further institutional development, as if the social disposition to trust could be transferred from one context to the other.

For both Ostrom and Maine, trust emerges at the simplest level of social cooperation. At that stage, it is not solely based on mere familiarity and positive personal experiences. A specific context and specific (customary) mechanisms are necessary for individuals to find each other trustworthy, before they can develop a disposition to trust. Ostrom thereby underlines the gradual nature of the development of trust, considered as a learning process. To this, Maine provides a way to bridge the gap between interactions within small-scale communities and market exchanges. He does not argue that markets simply harness social trust then foster it. The "moral" dispositions required for individuals to trade on a large-scale, in a complex society, are developed alongside gradual institutional changes, property and contract law being instrumental.

Such perspectives on social trust highlight its rational nature and the complementarity between trust and trustworthiness. At no point of social development can trust, as a social disposition, completely be disconnected from the support of an institutional frame that allows individuals to find each other trustworthy. In Luhmann's words, trust is "systemic" from the smallest communities to the largest. Meanwhile, trust can be a social capital, a way for individuals to interact with strangers they do not know by granting them a certain level of trustworthiness by default. Nonetheless, trustworthiness must be established at the most basic level of cooperation so that trust can develop. Moreover, trusting relationships between trading partners are also built on a mixture of institutions and trustworthiness. It is maybe in that way that markets might be said to foster trust, but it therefore does not seem to be an intrinsic property of market exchanges.

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