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Ole Lando, Djingis Kahn and Memetics

1. Introduction

It is said that an overwhelming majority of the European population has genes from Djingis Kahn. He was a successful gene transmitter. Although Ole Lando has a big family with many children and grand children, he will most likely not become a gene transmitter comparable to Djingis Kahn. However, as a *mem*e transmitter, Ole Lando will perhaps become comparable to Djingis Kahn's gene transmissions. In the following, I will analyse Ole Lando in a memetic perspective.

2. Memetics – a short introduction

Memetics is a metaphor to describe a phenomenon of development. It is a theory of mental content based on an analogy with Darwinian evolution.¹ It applies evolutionary models to cultural information transfer.

A meme is essentially a *unit of culture* — an idea, belief, pattern of behaviour, etc. The meme is hosted in one or more individual minds and can reproduce itself from mind to mind. Thus what would otherwise be regarded as one individual influencing another to adopt a belief is memetically described as a meme reproducing itself.

Memes are copied by imitation, teaching and other methods. The copies are not perfect: memes are copied with variation (mutations). Mutation is possible within every interaction of the imitation process. Only some of the

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1. Originating from Richard Dawkins, *The Selfish Gene* (1976). See also Aaron Lynch, *Thought Contagion: How Belief Spreads Through Society* (1996); Susan Blackmore, *The Meme Machine* (2002).

mutations can survive since the memes compete for space in our memories and for the chance to be copied again. The mutation rate in memetic evolution is extremely high.

A meme's success is to a large extent dependent on the effectiveness of its host.

3. Memetics and the law

Memetics illustrates how the law is in constant development and enables understanding of the mechanisms for changes in law.² It offers a theory of law-making, by its attention to the process of creation, selection and stabilization of a new legal concept.³

Jurisprudence was evolutionary long before Darwin.⁴ Already Oliver Wendell Holmes and Arthur Corbin used Darwinian ideas to explain the development of legal concepts and the selective survival of legal precedents.⁵ Holmes describes how a rule can adapt itself to new reasons and thereby enter upon a new career, and how the old form of the rule can modify itself and receive a new meaning.⁶ The options available to the judge or legislator are both informed and constrained by the existing "meme pool" of legal forms.⁷

Legal development occurs by members in a society convincing others about what is fair and right, unfair and wrong. There can be no legal system without the conscious participation of human actors in its establishment and functioning.⁸ Law is information about how to behave and can only func-

tion in the long run if a greater part of the addressees accept the rules.⁹ The evolutionary theory of law offers a way of thinking about law as emerging from the interactions of individual agents. In this context, legal literature and professors explaining the law fulfils an important role.

Variation in legal memes is often the result of experimentation by legal actors when faced with the need to adapt an existing rule to new circumstances. An example of successful meme transmission is the influence on the structure of Anglo-American law private law by German Jewish professors. There was a need to create a comprehensive order in the increasing, unstructured case law. The German professors successfully experimented by organizing the case law in a German structure. Ole Lando has described this interesting development.¹⁰

Some legal memes do not gain success. It frequently happens that a particular legal concept does not survive in the competition for space in lawyers' conceptual spectrum (their brains) and consequently does not get copied. As an example, Ole Lando has described how Henri Batiffol's international private law theory about the contracting parties not having power to choose the governing law of the contract, today is almost forgotten.¹¹

4. Ole Lando's facilitation of meme mutations and means of transmission of memes

4.1. Teaching

Ole Lando is an esteemed lecturer. He enjoys the interaction with young students and does not simply read up boring notes. Already as a young student he found pedagogic role models – and some discouraging examples. Ole Lando had the famous Danish professor Alf Ross as a role model and copied Ross's ability to deliver a clear message and how he made the memes (ideas) relevant for the students. Ole Lando was also inspired by American professors and their teaching methods.

For a meme to be successful it is essential to acquire new hosts, i.e. to bring the memes to potential hosts' attention and make the memes sufficiently attractive to be selected by these hosts. Ole Lando has been very success-

2. It has been considered controversial to apply memetics or evolutionary theory to law, see an in-depth analysis of this issue, Mauro Zamboni, "From 'Evolutionary Theory and Law' to a 'Legal Evolutionary Theory'", *German Law Journal*, issue 9/4 (2008), 515.
3. Mauro Zamboni, "From 'Evolutionary Theory and Law' to a 'Legal Evolutionary Theory'", *German Law Journal*, issue 9/4, 515 (2008), at p. 527.
4. Hovenkamp, "Evolutionary Models in Jurisprudence", 64 *Texas Law Review* (1985), 645.
5. Simon Deakin, "Evolution for Our Time: A Theory of Legal Memetics," Working Paper No. 242 for the CBR Research Programme on Corporate Governance, Contracts and Incentives, University of Cambridge.
6. Oliver Wendell Holmes, *The Common Law*, (first published in 1881), p. 8.
7. Simon Deakin, "Evolution for Our Time: A Theory of Legal Memetics", Working Paper No. 242 for the CBR Research Programme on Corporate Governance, Contracts and Incentives, University of Cambridge, 23.
8. Simon Deakin, "Evolution for Our Time: A Theory of Legal Memetics, Working", Paper No. 242 for the CBR Research Programme on Corporate Governance, Contracts and Incentives, University of Cambridge, 24.

9. The question of who is the addressee (public officials or the general public) is debated.

10. Ole Lando, "Hitler og de tyske retslærere", *Ugeskrift for Retsvæsen* (2007), 155.

11. Ole Lando, "Erinner og metode for retssammenligning på privatrechts område", *Tidsskrift for Retsvitenskap*, Vol. 3 (1998), 389. Lando, however, points out that Batiffol's analytical method was well respected.

ful in this respect. He is a convincing lecturer and takes every opportunity to lecture young potential meme hosts at his home university and abroad.

Teaching is not only a means for transmission of memes. Interactive teaching methods also allow meme mutation. By the interaction with students and their ideas, the existing memes can take new and more suitable forms. Ole Lando is always ready to listen to arguments from the young generation and to mould (mutate) his own ideas accordingly in order to increase their attractiveness.

A lesson to be learned for aspiring meme transmitters is to teach often, with pleasure and a true belief in the importance of the students as future meme hosts and mutation enablers.

4.2. Conferencing

Ole Lando frequently participates in conferences. Still, at the age of almost 90 years, he often travels abroad. He is the opposite of the lonely genius who figures out perfect ideas in splendid isolation. The conferencing activities are beneficial in two respects. First, Ole Lando interacts with other persons who may become meme hosts. Second, Ole Lando can select new memes from other persons and mutate them with his own memes.

Ole Lando does not only attend conferences narrowly focussed on contract law. He is often a guest at conferences on legal theory, comparative law, international private law etc. and thereby increasing the number of meme hosts and mutation possibilities.

The PECL project was organized by Ole Lando as a kind of conference going on for a decade. There was no permanent chairman and the participants had equal standing. Thereby everybody was listening carefully to *what* the others were saying, instead of focusing on *who* said it, which is beneficial for meme mutations. Furthermore, the participants in a non-hierarchical process are more likely to perceive that the memes are their own, which probably makes them efficient meme hosts and meme transmitters.

A lesson to be learned for aspiring meme transmitters is to network actively at conferences and also to focus more on content in argumentation than on the formal authority of the speaker.

4.3. Persistence

The memetic perspective shows the powerful slow impact of gradual mutations. Ole Lando has a patient attitude towards legal development. He often refers to differences in Germany some two hundred years ago between "the Thibauts" who were eager to create a rapid change by legislation (the quick fix attitude) and "the Savignys" who believed in a slow and solid process

producing sustainable solutions.¹² Ole Lando does not clearly belong to any of these two categories. However, he is in no hurry and slowly, slowly "contaminates" other meme hosts with his memes and invites them to participate in meme mutation.

In the PECL project Ole Lando allowed the meetings to take time and issues to be re-opened many times. The aim was to receive consensus among the participants. That takes time. The many different memes must be confronted and slowly mutate into one common meme.

The process of mutation never ends. Ole Lando participated in the work for Unidroit Principles of International Commercial Contracts, continued by initiating and publishing the Principles of European Contract Law, then immediately contributed to the Study Group for a European Civil Code and the publication of the Draft Common Frame of Reference. Now he is the father of an on going project regarding Scandinavian Contract Law.

Literature on memetics often points to the QWERTY phenomenon. It refers to the keyboard design of alphabetical letters, which was made to avoid that the letter arms of old fashioned manual typewriters collided. This is not an efficient design for modern computer keyboards (for instance the frequently used letter "a" is designated to the little finger of the left hand). Despite the inefficiency, the QWERTY design survives due to the problems of switching to a new system being too large for the individual user. The QWERTY design is good enough to survive.

The QWERTY phenomenon illustrates that the existing legal institutions are not necessarily the best available. Through the amplifying effects of feedback between institutions and their environment, certain other paths, some of them beneficial, have been closed off.¹³ Ole Lando has always acknowledged the importance of tradition and never immaturely struggled for a certain "best" solution. Sometimes it is better to accept that a meme is not likely to change and instead circumvent it.

A lesson to be learned for aspiring meme transmitters is to be patient and have faith in the snowball effect of efficient meme transmission. Ole Lando's attitude not to make "the perfect instrument" and then retire, but instead to always strive towards improvement is also a key factor in efficient meme transmission. Ole Lando has been an active lawyer for almost 70 years. To

12. Ole Lando, "Some Features of the Law of Contract in the Third Millennium", *Scandinavian Studies in Law*, Vol. 50 (2007), 157, at p. 360 ff. Lando has been inspired by Klaus Peter Berger in using these terms.

13. Simon Deakin, "Evolution for Our Time: A Theory of Legal Memetics", Working Paper No. 242 for the CBR Research Programme on Corporate Governance, Contracts and Incentives, University of Cambridge, p. 25.

work full time far beyond retirement is probably also of importance for an aspiring meme transmitter.

4.4. Open-mindedness

Ole Lando is not limited to the narrow legal sources of law. He is always interested in sociological aspects, ethics, history and in law and economics. Thereby he is aware of the potential constraints in the law as it stands now and to the developments that inevitably lay ahead. An example is his early interest in consumer law.

Ole Lando's wide interest in society enables efficient meme mutations and to find ways of expressing the memes in a language which convinces not only lawyers, but also other important hosts.¹⁴

A lesson to be learned for aspiring meme transmitters is to enable mutation by meme hosts from different environments.

4.5. Attractive presentation of the memes

For a meme to survive it must be selected before it is copied. The chance of somebody selecting a particular meme is greatly enhanced by an attractive package. By presenting the results of the active mutation-process instigated by Ole Lando in the PECL, the memes have become easily accessible to legal counsels and judges throughout the world. The PECL design is a much more efficient package than the old fashioned thick book written by a professor.

Another effect of the presentation in the format of legislative look-a-like articles, is that the chance of a meme being copied without alterations is much higher than an idea presented as a chapter in a traditional book or paper.

It is easy for a legal counsel to refer to an article in PECL, which may inspire the judges to take a look at the article and maybe apply it – or at least be influenced by it. When several court decisions have referred to the

14. Mauro Zamboni, From "Evolutionary Theory and Law" to a "Legal Evolutionary Theory", *German Law Journal* (2008), issue 9/4, 515, at p. 532: As many legal scholars have pointed out, legal reasoning most of the time is a type of common sense reasoning, i.e. it often incorporates and uses moral, political, economic, or other kinds of values as criteria for regulating human behaviours. However, legal reasoning has special requirements, due specifically to its normative and conflict resolution roles. The regulation of human behaviours then is not based for instance on statements directed at convincing or persuading the addressees (as in politics). Legal reasoning is instead based on the use of specific language which, once it has transformed certain religious, cultural, moral, or economic values into legal concepts, indicates to the addressees (legal actors and/or the community at large) not models of behaviours they will "probably" embrace, but model of behaviours that the addressees "ought" to embrace.

article, it is likely that a legislator modernizing the law with a main purpose to codify the existing law will copy the PECL article.

When it comes to packaging, Ole Lando was inspired by the US Restatements of the Law. We see how he copied the concept of restatement and mutated it to suit the modern European needs. PECL is not a restatement of the existing law, but a combination of the common core of European contract law and "the better rule".

A lesson to be learned for aspiring meme transmitters is to dress the memes in an attractive package which is easily accessible to potential meme hosts. Furthermore, an ideal meme package should be designed so that the risk of variation (mutation) of the content is minimized.

4.6. Happiness and curiosity

Ole Lando is a happy and charming lawyer. He is not a suffering martyr. He truly enjoys discussing law and is anxious to always learn more about law and society. Thereby he himself is an attractive meme host. By increasing the chances that he himself is selected, he enhances the chances that his memes become selected. The members of PECL also had academic curiosity and were eager to learn about the law in other states.¹⁵ An environment full of curiosity is a good ground for meme mutation.

A lesson to be learned for aspiring meme transmitters is to be as happy and charming as Ole Lando.

5. The future

Ole Lando is influential in many respects. His active participation in the international meme mutation processes within the law has been extremely important. Furthermore, he is a living personal example of efficient meme transmission.

Europeans are rather oblivious of the genes Djingis Kahn transmitted to most of us almost a millennium ago. Likewise, in a thousand years many may be unaware of Ole Lando's memes still lingering in their meme pool.

15. Ole Lando, "How the Principles of European Contract Law (PECL) Were Prepared", *European Journal of Law Reform* (2006), Vol. 8, No. 4, 477.