ANDERS SANDØE ØRSTED AND THE INFLUENCE FROM CIVIL LAW UPON DANISH PRIVATE LAW AT THE BEGINNING OF THE 19TH CENTURY

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On December 21, 1978, two hundred years will have passed since the birth of the Danish lawyer and statesman Anders Sandøe Ørsted. Few lawyers have been of such importance for the evolution of the positive law of their country as Ørsted. It is therefore appropriate, in this bicentennial year, to consider what significance we should today attach to Ørsted's writings and his other activity for legal evolution in Denmark and to investigate the reasons for that significance. Numerous works have been written on Ørsted in Danish, but unfortunately translations are sparse.[1] These works agree not only in assigning to Ørsted a major role in Danish legal evolution but also in assessing his contribution to European legal thought as among the most outstanding of the period. By no one has this view been more strongly expressed than by Frantz Dahl, who in a series of papers has characterized Ørsted's contribution as bearing the hallmark of genius and worthy to be ranked with the work of the greatest lawyers in history.

In this paper an attempt will be made to assess Ørsted's contribution from a European perspective in the light of recent research on the history of European private law.[2] Taking as a starting point his writings in the field of private law, which constitute only a part of his total output, it will be shown to what extent Ørsted made direct use of foreign law in his application of specific legal principles.

Anders Sandøe Ørsted performed his work at a time when European legal thinking was breaking up. In what follows an assessment of his output will be made within a limited field, that of private law, in the light of this breaking up, which for Ørsted raised the question of the desirability of undertaking an independent formulation of the more important advances made in foreign law.

In order to appreciate the special significance which Ørsted had for Danish legal evolution it is necessary to make some observations on his life

[1] See Frantz Dahl, *Anders Sandøe Ørsted as a Jurist,* 1932, *l'Œuvre juridique de Anders Sandøe Ørsted,* 1934, and *Geschichte der dänischen Rechtswissenschaft,* 1937, pp. 34–46.

[2] In this connection the author bases himself upon the results reached in his doctoral dissertation, *Fra "Lovkyndighed" til "Retsvidenskab". Studier over betydningen af fremmed ret for Anders Sandøe Ørsteds privatretlige forfatterskab,* 1976—with a summary in German. The reader is referred to that work for a more detailed bibliography on the subjects dealt with in this paper. A few additional references to subsequent literature are made in the footnotes below.

and on the background to his activity in older Danish law. He was born in 1778, the son of a pharmacist in a minor Danish town, but already at the age of 16 he went to Copenhagen where he studied philosophy and law at the university. In 1799 he became a bachelor of law. The year before, he had received a university prize for a thesis on legal philosophy, which he defended on Kantian lines, and in the following year he participated in a competition for a position at the University of Copenhagen. As he was not successful, he immediately embarked upon a judicial career which took him through the Municipal Court in Copenhagen to the Supreme Court, which he left in 1813 in order to take up an administrative post in the central organ of government in Denmark, the Chancellery, which supervised the administration of the judicial system. Ørsted was engaged as a deputy of the King and from 1825 until the revolution of 1848 he had the main responsibility for the framing of legislation. During the period 1835–46, when Denmark was still an absolute monarchy, he was furthermore the representative of the Government in the Consultative Assemblies of the Estates of the Realm which had been introduced in 1834. This was likewise a key position, since it fell to Ørsted to submit the Government's proposals to the Assemblies, which actually had a considerable influence even though their authority was only consultative. Ørsted lost his governmental positions in the peaceful revolution of 1848, which resulted in the establishment of a constitutional monarchy. For a short time during the years 1853–54 he was the head of a constitutional government. Besides this spectacular public career Ørsted found time, particularly in the first decades of the century, to write widely on legal topics, producing treatises, monographs and a few major codifying works on parts of Danish law. His output was not limited to a few specific fields, but included all the major areas of law such as private law, penal law and procedural law, as well as salient parts of public law.[3] Although his work appeared in somewhat scattered form its impact on Danish legal evolution was tremendous. As early as the 1830s there were others who, on the basis of Ørsted's work, produced a comprehensive review of Danish procedural law. He was himself able to give legislative form to his ideas on penal law in a number of important enactments in the field of penal law in the 1830s and 40s, and his writings in the field of private law were likewise highly important for the subsequent treatment of the issues by legal science.

Since Ørsted's writings had such a great influence on Danish legal evolution, it is but natural to ask whether and to what extent the views expressed in them are original or are based upon influences from abroad,

[3] See Krarup in 15 *Sc.St.L.*, p. 153 (1971).

e.g. from foreign codifications. This question can be answered only on the basis of an investigation of the extent to which Ørsted was familiar with foreign law. Accordingly, an attempt will now be made to give a comprehensive review of Ørsted's position within current European thinking in the field of private law.

As will be shown, there can hardly be any doubt that to a considerable extent Ørsted's *oeuvre* belongs to the European tradition in the field of private law. Foreign law was one of the most important of Ørsted's sources of inspiration in evolving Danish law, and in this respect Ørsted occupies a unique position among contemporary lawyers of high standing. On many points he received impulses from foreign law which frequently spurred him on to elaborate theories of his own. In doing so, he normally stayed within the limits of local legal tradition but occasionally he went further and introduced principles which had no immediate support, whether in legislation or in judicial practice, in that tradition.

In the period in which Ørsted was at work the basis of Danish law was the Code of 1683. This aimed at being all-embracing and comprised law of procedure, ecclesiastical, private, maritime and penal law; but in fact there were certain lacunae and this had led to the issuing of a considerable number of supplementary orders during the 18th century. Above all the judicial practice of the Supreme Court,[4] which was established in 1661, had evolved a number of legal principles, particularly within private law. In this process, foreign law—not least Roman law—had played a role, although the fact that it was not until the 18th century that a profession of trained lawyers actually began to appear meant that the influence from foreign law frequently manifested itself in terminology and issues rather than in the specific solution of detailed legal problems. Particularly at the end of the 18th century there is an increase in the number of cases with distinct legal aspects coming before the Supreme Court and one can observe how in taking position on issues the judges to a constantly increasing extent exhibit a sound legal conception of judicial doubtful points.[5] However, knowledge of the practice of the Supreme Court was limited outside the court itself. It was not until around 1800 that judgments were at all regularly reported. This, however, was of importance primarily in relation to the reporting of judgments by the Municipal Court of Copenhagen, which had acquired a normative status, since it was not until

[4] See Iuul in 6 *Sc.St.L.*, pp. 163 ff. (1962).

[5] The most extensive research on the 18th-century practice of the Supreme Court is to be found in Thøger Nielsen, *Studier over ældre dansk formueretspraksis*, 1951. The information given on judicial practice in what follows is based on that work.

1857 that the Supreme Court began substantiating its judgments. In assessing Ørsted's contribution it is thus relevant that it can be established that only to a limited extent was he aware of the legal evolution which had taken place on the basis of the practice of the Supreme Court during the 18th century. However, he did apparently have a very good knowledge of contemporary practice, particularly during the years when he himself was acting as a judge and as an editor of legal journals. The basis for his considerations was, apart from legislation, current judicial practice, which frequently was a source of inspiration to him and prompted him to publish minor or major dissertations, as well as other legal writings.

The guidance that Ørsted could find in older or contemporary Danish legal writing on the solution of dogmatic issues was, however, very limited. Although a national legal literature had been developing during the 18th century the results were as yet sparse. In that century natural law had played a major role in legal evolution and also in judicial practice. But an independent Danish literature on national law existed only to a very limited extent. During the 18th century several works on natural law appeared in Denmark but, in all essentials, they were merely adaptations of one or other of the numerous foreign systems. As for Danish law, several comprehensive systematic presentations appeared in the second half of the 18th century. The most outstanding of these was a series of lectures by L. Nørregaard, who to some extent adopted foreign precedents in his institutional system[6] as well as in his handling of dogmatic problems.

Against this background it was natural for Ørsted to seek inspiration from abroad in his further development of Danish legal science. Precisely around 1800 European legal science acquired a new orientation. This new orientation took on different forms in different countries. It is characteristic of Ørsted that, unlike such authors as Bentham or Savigny, it was only to a limited extent that he based himself upon a particular theory of law or tried to frame general theories of law. He was, therefore, able to benefit from the results achieved by authors belonging to a number of different schools.[7]

Earlier Danish research regarding Ørsted has traditionally pointed to similarities and differences between Ørsted, on the one hand, and his great

[6] See Klaus Luig, "Institutionenlehrbücher des nationalen Rechts im 17. und 18. Jahrhundert", *Ius commune* III, 1970, pp. 64 ff. On the significance of Roman law for Scandinavian legal science, see also Jacob Sundberg, "Civil Law, Common Law and the Scandinavians", 13 *Sc.St.L.* (1969), in particular pp. 198 ff., and Gomard, "Civil Law, Common Law and Scandinavian Law", 5 *Sc.St.L.*, pp. 27 ff. (1961).

[7] A review of the new orientation of European legal thinking around 1800 associated with Bentham, Savigny and Ørsted has recently been given by J. Dalberg-Larsen, *Retsvidenskaben som samfundsvidenskab*, 1977.

contemporaries, Savigny and Feuerbach,[8] on the other, and outlined to what extent Ørsted deviated from contemporary Danish legal science. In so doing the fact has been overlooked that Ørsted has a distinct position within the European tradition of private law. On the basis of more recent research in the history of European private law one can establish three main trends which particularly influenced both Ørsted's writing and his legislative activity in the field of private law.

In the first place, it was of importance that Montesquieu's pioneer work *De l'Esprit des Lois* (1748) influenced the direction which studies were to take for a great number of lawyers and others who no longer felt traditional teories of natural law to be satisfactory, but acquired an interest in what appeared appropriate in "the nature of things", i.e. the interrelation between legislation and certain concrete circumstances. This trend was extended to theology by the Göttingen theologist Michaelis, whose views helped to weaken the conception of mosaic law as a universally binding expression of "the Law of God" (Ørsted discussed these views in his writings on matrimonial law which, however, are not reviewed here).[9] Around 1800 the trend left its mark on, among others, the famous German lawyers A. D. Weber, Martens and Gustav Hugo as well as on Thibaut and Feuerbach—names which have no common denominator but which all symptomize a legal science which, in one way or another, dissociated itself from the traditional natural law. These were the men who, above all, influenced Ørsted during the first years of his career as a legal writer.

Another element of decisive importance was the great codifications of private law which appeared in the years around 1800 in Prussia (1794), France (1804), and Austria (1811). A profound knowledge of these three codes combined with a solid grounding of Roman law endowed Ørsted with precise information on the mechanisms of a number of major legal institutions in three important nations. Ørsted applied his knowledge as a legislator, and he likewise applied it in any situation where it was relevant, in submitting thoughts on legal policy, to urge in support of an argument the consideration that by adopting it conformity with the rules of foreign law would be achieved. Ørsted always attached great importance to this consideration, above all because of his conception of a European *jus gentium* common to all people at the same level of civilization. Prussian,

[8] See, in the same direction, Frantz Dahl in 37 *ZRGGerm* (1917) and the German works based thereupon in Erik Wolf, *Grosse deutsche Rechtsdenker*, Tübingen 1963, pp. 526 ff., and Thieme in *Acta facultatis juridicae Universitatis Comenianae*, Bratislava 1968, pp. 259 ff. (*Die deutsche historische Rechtsschule Savignys and ihre ausländischen Jünger*).

[9] See *Fra "Lovkyndighed" til "Retsvidenskab"*, pp. 60 ff.

French, and Austrian law were studied by Ørsted mainly on the basis of the legal texts and the supplementary normative commentaries, his knowledge of the legal writing of these countries otherwise being limited. As regards the *Code civil* it is remarkable that Ørsted's knowledge of this code seems to have been acquired above all through the literature which was produced in the Rhine countries as a consequence of the reception of French law.[1] Ørsted read and quoted the *Code civil* in French, but he primarily applied German literature on that work, e.g. Zachariae's famous manual.[2] He also used the commentary by Maleville, one of the drafters of the code, in a German translation.

Finally, from around 1815 the German historical school began to preach respect for law as part of a heritage and for popular legal convictions—a conservative doctrine which further reinforced Ørsted's caution when it came to fundamental reforms. Ørsted always tried to demonstrate that new rules were related to Danish legal principles. In the field of legislation respect for the people as the foundation of law led to caution regarding reforms which, though otherwise commendable, were not in conformity with popular legal convictions. In a more independent manner, too, the German historical school and its theories left their mark on Ørsted's conception of law and not least on his attitude to codification. But first and foremost this was based upon a respect for laws as part of a heritage. However, these ideas were not unfamiliar to Ørsted even before the emergence of the historical school. Many of Ørsted's most important contributions to legal science had been made already prior to the establishment of the historical school, but under the influence of that movement Ørsted apparently strengthened his efforts to adapt new legislation to hereditary law. This attitude, however, did not prevent him from introducing a number of reforms.

All these trends had one characteristic feature in common, namely that they were founded upon Roman law. It was precisely Ørsted's deep understanding of Roman law and his belief in its great significance for European legal evolution that were determinative in his application of foreign law. In comparison with the constant influence of these factors upon Ørsted, other impulses were but of small importance. This applies, e.g., to his relation to the philosophy of Kant, which had a decisive influence upon his personal development, but was only of passing significance for his position on legal philosophy.

[1] The latest works on this are Elisabeth Fehrenbach, *Traditionale Gesellschaft und Revolutionäres Recht*, Göttingen 1974, and Werner Schubert, *Französisches Recht in Deutschland zu Beginn des 19. Jahrhunderts*, Cologne-Vienna 1977.

[2] C. S. Zachariae, *Handbuch des französischen Civilrechts* (1st and 3rd eds. 1808 and 1827–28).

Besides these three main trends around 1800 the immediately preceding trend of legal science, that of natural law, also had an influence upon Ørsted. This has been underlined by, among others, Alf Ross in his book *Virkelighed og Gyldighed i Retslæren* (1933), where Ross states:[3] "Ørsted grew out of natural law, and he had his struggles with natural law, and without a knowledge of the problems of natural law one cannot acquire an understanding of the evolution of Ørsted's legal philosophy."

In the light of the foregoing introductory remarks, an attempt will now be made primarily to establish, on the basis of Ørsted's own statements on foreign law, the extent to which Ørsted himself admitted foreign law to have been of significance for his writing and his legislative activity.

A limited amount of information on this may be found in the first volume of Ørsted's memoirs, *Af mit Livs og min Tids Historie* ("Of the History of my Life and Times") (1851), in a manuscript published posthumously by N. Cohn in *Juridisk Tidsskrift* 1918, p. 399, and in the first volume of *Haandbog over den Danske og Norske Lovkyndighed* ("A Manual of Danish and Norwegian Jurisprudence").

Ørsted's autobiography, however, provides little by way of a basis for analysing his legal education and his relation to foreign law. The only foreign lawyers referred to are A. D. Weber, Gustav Hugo and Thibaut as well as the Kiel lawyer Falck, who however is mentioned only in a political context. Ørsted also makes some comments on his study of Roman law. Although the names listed are by no means without significance in the present connection, there is thus little guidance on the subject at issue to be found in the autobiography. It is through an analysis of Ørsted's monographies and treatises on private law that it can be established to what extent his writing was influenced by foreign law. The first-mentioned three German lawyers all stem from the time immediately prior to or after 1800. A. D. Weber is an outstanding representative of the late school of natural law. Although continuing under the assumption of *a priori* legal principles, he was none the less an exponent of what has at times been conceived of as a practical empirical science of natural law—a school, research on which was founded by Hans Thieme.[4] Gustav Hugo is regarded as one of the predecessors of the German historical school, and at the same time he was of major importance for the evolution of a positive trend within legal science through his work *Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts* (1799), which can hardly have been without relevance for Ørsted's dissociating himself from natural law and occupying

[3] See p. 25.

[4] See "Die Zeit des späten Naturrechts" in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Germanistische Abt.* 56 (1936), pp. 202 ff.

himself exclusively with positive law. Thibaut, despite his orientation towards Roman law and history, remained outside the historical school by reason of his philosophical treatment of law, but through his extensive writings within a number of fields of positive law and his activity as a lecturer he acquired a considerable contemporary reputation and is often quoted by Ørsted.

The best guide to an understanding of Ørsted's views on foreign law and its significance is to be found in his statement in the first volume of his main work on private law, *Haandbog over den Danske og Norske Lovkyndighed* ("A Manual of Danish and Norwegian Jurisprudence") I (1822), at pp. 466 ff. By way of introduction Ørsted underlines in the following words the importance of foreign law as a source of inspiration in framing legal problems not hitherto dealt with in Danish law:

> In all fields a study of foreign law may in many respects be useful to anyone wishing to acquire a complete insight into our current law. In this way his attention will be drawn to legal problems which have not previously been presented in our society and which he will be urged to solve; furthermore, he will often be brought to reconsider hitherto accepted principles which will be found to be so clearly at variance with the rulings of foreign law that he will be prompted to undertake a more detailed analysis.

Having thus stressed the importance of foreign law as a basis for a more detailed consideration of national law in areas where it deviates from foreign law, Ørsted proceeds to refer to foreign law as a general authority in solving legal problems in situations where national law has no explicit provisions:

> It [foreign law] provides an authority where issues arise which are not regulated by explicit legislation but where equity and reasonableness must be taken into account. Particularly where a discernible identity is to be found, and where rules have been in force from time immemorial and have thus been tested by experience, foreign law is of the greatest importance.

This last point of view is elaborated by Ørsted through a series of examples, among them the rules on the venue of arrest of aliens, the application of rules on minors to contracts entered into abroad, and maritime and commercial rules—all fields in which international intercourse required similarity in legislation. Thereafter Ørsted underlines the following more general view on foreign law:

> Above all it seems appropriate to justify what is the natural meaning of the law against a different interpretation, presumably based upon inherent rationality, when one finds that such a meaning has been clearly adopted in law

> elsewhere. It would, i should say, be very presumptuous to maintain that the legislator has not intended what is covered by his wording when it is taken into account that other informed legislators have none the less intended precisely the same.

As examples of this *Code civil* art. 2180 is cited as evidence of the prescription even of registered mortgages and—in support of a rule to the effect that payment made by a minor out of his own income cannot be vindicated—mention is made of a number of provisions of foreign law, including a Swedish enactment of 1734 explictly granting minors the right to dispose of their own income but not of an inheritance.

It is very difficult to analyse the phenomenon of legal influence. There is no cut-and-dried solution to the problem how to define a reception of foreign law.[5] Even when dealing with such a limited field as the application of foreign law made by one individual legal scientist, it is—to mention only a few aspects of the problem—by no means always easy to establish whether the correspondence with foreign law stems from an explicit incorporation or is the result of a parallel development, or whether a reference to foreign law expresses the fact that confirmation has been found of an interpretation already adopted.

In assessing Ørsted's application of foreign law one must realize that in conformity with the approach of the historical school—whose head, von Savigny, he recognized as a great authority—Ørsted's basic position was to regard the fact that a rule originated from foreign law as a negative element which could be neutralized only by demonstrating the rule's conformity with Danish legal principles.

Thus Ørsted writes as follows on the application of foreign law:

> Although I have frequently tried to clarify and extend my concepts by means of foreign, and particularly German, law and legal writing, it is none the less difficult to mention any example where I have adopted foreign law which was not firmly rooted in, and appropriate to, our own law. Frequently when I have developed some significant legal theme and have compared our system with the system of foreign law and have objectively assessed the advantages and disadvantages of the different systems, I have reached the conclusion that the Danish system has major advantages, and I tend to believe that this comparative analysis has led to a deeper insight into the nature of such legal themes and a heightened awareness how fortunate we are, on the whole, in our national legislation and legal development. Otherwise I gladly admit that in undertaking such comparisons I have not set out to find something superior in our own system; my aim has been to ascertain what was just

[5] An analysis of the phenomenon of influence has been given by Thøger Nielsen, *op. cit.* (p. 247, note 5), pp. 13 f.

> and true and I have been prepared to recognize the advantages of foreign systems where these actually were better; it has then been all the more satisfying to me when an objective assessment has confirmed a predilection for our own particular legal development.[6]

In a manuscript published much later Ørsted writes:

> Incidentally, I venture to assert that in applying foreign law I have always exercised the greatest care and I have never, whether as an author or when assisting in legislation, proposed the introduction into our national law of any principle of foreign law which was not appropriate to our law and our conditions.[7]

The application of foreign law was conditional upon that law's being in accordance with Danish legal principles in the light of a critical assessment. Ørsted therefore had to dissociate himself[8] from the *Philosophie des positiven Rechts* which had been formulated by Hugo, who wanted to take all existing of former legal institutions—even, e.g., polygamy or slavery—into consideration provided they had been recognized in an existing or older legal order, although it must be assumed that Hugo's comparative method was at the time it was presented of importance for Ørsted's attitude to the relevance of foreign law. In relation to this concept of the philosophy of positive law Ørsted established an "*ordre public* principle". In this way conformity was obtained with another contemporary comparative analyst of law, Feuerbach, who likewise stressed the necessity of foreign law's being in conformity with the existing national legal order.[9] One may also refer to the fact that one of the earliest analysts of comparative law,[1] Montesquieu, stressed the interdependence of laws with the nation for which the laws are meant, since "c'est un gran hazard si celles d'une nation peuvent convenir à une autre". Actually, the latter fundamental principle of all comparative legal research, namely that a knowledge of the text of the law does not suffice but that it is necessary also to know the reasons behind it and its place in the foreign legal system, appears to be precisely what Ørsted meant by the above-quoted statement to the effect that foreign law must conform to "our law and out conditions". Ørsted's application of foreign law places him among the first scholars to engage in comparative legal research.

[6] A. S. Ørsted, *Af mit Livs og min Tids Historie,* 1851, p. 8.

[7] See Cohn (ed.), *Juridisk Tidsskrift* 1918, p. 399.

[8] See *Af mit Livs og min Tids Historie* I, p. 148.

[9] See, e.g., Dölemayer, "Die bayerischen Kodifikationsbestrebungen", *Ius commune* V, 1975, pp. 138 ff., and on the conditions framed by Feuerbach for the reception of the *Code civil* in Bavaria particularly p. 141, and on establishing a jury system Ørsted in *Nyt juridisk Arkiv* 10, pp. 1 ff. Furthermore Ditlev Tamm, *Fra "Lovkyndighed" til "Retsvidenskab"*, p. 358.

[1] See Constantinesco, *Rechtsvergleichung,* Cologne 1971, pp. 78 ff., and Kahn-Freund in *Modern Law Review* 1974, pp. 6 ff.

The justification for applying foreign law is found by Ørsted in the existence of general legal principles common to several nations which were in force besides national law. This is expressed with particular clarity in the views regarding the philosophy of law-making which Ørsted outlined in the first volume of his autobiography (pp. 146 ff.).

According to Ørsted the object of this philosophy of law-making was to "treat all major legal relations in such a manner as would correspond to the rational order". One should "not only review directives given by legislation regarding the interrelation between individuals but also outline the proper order of institutions by means of which society should ensure for each and every citizen a proper legal order". Consequently the philosophy of law-making should include not only private law but also a great number of public institutions. As for the manner of presentation, Ørsted stressed that "matters of general applicability should be underlined in such a way as to take precedence over various situations and circumstances which could be decisive in various ways. But matters of general applicability comprise not only the minor area which could be said to be precisely defined through mere rationality but also everything which is universally applicable having regard to the degree of civilization reached in all reasonably developed states (*jus, quod naturalis ratio inter omnes homines constituit*)".

The application of foreign law, on the one hand, and the consideration to be given to popular legal convictions and the particular law of the country, on the other, were expressive of a dualism which it was necessary for Ørsted to overcome. One could not deny that foreign law was a major element in developing Danish law, just as one had to recognize that Danish law belonged to the progressive and civilized legal orders. At the same time there was inherent in the contemporary attitude to history, with its preoccupation with features which were characteristic of each nation, a tendency to lay emphasis on the national elements in the legal order.

The dualism between the application of foreign law and the consideration to be given the national legal order was not overcome, but an attempt was made to legitimize the use of foreign law. One could not deny that Denmark belonged to the "reasonably developed states" marked by legal institutions of general validity. It should be possible in legal development to take foreign law into account, but there was no denying that in so doing the legal order was penetrated by an element without any relation to the traditional conception of law as found in the people which, according to Ørsted, was the basis for legal development. By maintaining that foreign law applied was not contrary to the national conception of law, Ørsted tried to make his method legitimate. That he did not more openly recognize the extent to which he applied principles of foreign law is probably explained

by an inability to free himself from the influence of the dominating historical school.

Actually Ørsted's justifications for applying foreign law are, to a remarkable degree, akin to the natural-law doctrine that a legal principle is in accordance with natural law if it is also in accordance with current law in all civilized nations.[2] The new aspect introduced by Ørsted was his proviso that the foreign law should be appropriate to the particular circumstances of the nation.

Since the first half of the 19th century, it has been traditional to regard private law as comprising such fundamental legal fields as the law of persons, family law, inheritance law, the law of things, contracts and torts, as opposed to penal law and procedural law as well as to public law on the whole. Ørsted applied a broader concept of private law in which penal law and procedural law were included. Ørsted had taken over this systematization from the textbooks of 18th-century institutions, and he did not attempt to bring it up to date. However, his applying this broader concept of private law had no bearing upon the dogmatic treatment of the various subjects, since Ørsted treated the law of persons and the law of things as well as the fields of penal and procedural law separately.

To elucidate Ørsted's method, some examples, drawn from his writings and his legislative activity, will now be given of instances where foreign law constituted a part of the matters that he took into consideration in the framing of the legal rules or principles. From this it will appear how Ørsted in Denmark, to a considerable extent, promoted the entire European debate around 1800 on a number of traditional legal institutions. However, there could be no question of adopting extensive reforms in Denmark. In spite of the unfortunate outcome of the 1807–14 war with England Danish absolutism, by and large, remained unshaken. But in the wake of the French revolution of July 1830 some changes in the direction of reform were made in Denmark through the establishing of consultative estates patterned on the precedent of Prussia. Consequently, in this closing phase of Danish absolutism we find more reforms than in the years immediately after 1800. Therefore, Ørsted's application of foreign law consisted, to a considerable extent, of adapting details and of paying regard to legal policy with a view to subsequent legislation. Nor, probably, was Ørsted—apart from his very early years—a revolutionary type. For him a gradual adjustment to new ideas seemed preferable to revolutionary change. This is shown by his rejection of the Constitution adopted in 1849,

[2] See Thøger Nielsen, *Studier*, p. 21, where Nielsen gives a quotation from Grotius. See Stig Jägerskiöld, *Studier rörande receptionen av främmande rätt i Sverige*, Lund 1963, pp. 84 ff.

introducing a new system of government, and probably also to a certain extent by his attitude to codification. In the 1830s the question of producing a codification of Danish private law came up, but Ørsted rejected this idea in particular in the light of the considerations which von Savigny had invoked against codification.

The range of legal problems in which Ørsted engaged himself, and which had not previously been dealt with in Danish legal writing, was enormous. In many areas the value of his practical solutions was so obvious that he must be held a pioneer in the continued dogmatic treatment of fundamental fields of law. In this connection his susceptibility to what was of value in foreign legal writing and legislation was a decisive element. However, as already indicated, Ørsted was no builder of systems. He did not construct a system of private law of his own but followed the system which had been used in the textbooks since the days of Heineccius. Whether this was due to lack of time or to a disinclination for the task, it contributed to an openness towards such solutions as were compatible with Danish law. In this connection a key concept was that of "*the nature of things*", to which Ørsted gave a wide application, just as German legal writers had done around 1800. As was also the case with most of the German authors, the phrase has no fixed meaning in Ørsted's writing but covers a number of different considerations. As a result the way was also opened to the acceptance of ideas from foreign law in the solution of concrete legal issues. The wide range of specific legal questions left unsolved by the legislator made the importance of this legal source evident.

Inheritance law was one of the fields in which amendments in European legislation was made to a considerable extent in the years around 1800. The provisions on inheritance law in the *Code civil* and, to an even greater extent, arts. 732–49 of the Austrian Civil Code had demonstrated how complex rules could be superseded by systems based upon a few simple principles. There was a lively debate in Germany on the comparative advantages of these systems. Among others, Gönner was an advocate of the *Code civil* system of inheritance, while some scholars preferred the parental system of the Austrian Code. Ørsted enthusiastically adhered to the parental system, which he outlined with a view to a law reform in his scientific works,[3] just as later on he contributed to its implementation through an Inheritance Ordinance of 1845. This ordinance also meant an extension of the right to dispose of assets by will which under the Danish Code had been severely limited, and in considering this point Ørsted drew upon foreign law and pointed out that the most important codes contained

[3] See in particular *Haandbog over den Danske og Norske Lovkyndighed* IV, 1831, pp. 430 ff.

rules of a wider scope. Although he did not succeed in overcoming the more conservative objections to such a wide right to dispose of the estate by will, Ørsted adopted the solution of the Austrian Civil Code under which a person could dispose of one half of his assets by will, as opposed to the *Code civil* and the Code of Prussia, under which the right to dispose by will was dependent upon the number of descendants. However, the Rules on Inheritance from Missing Persons of 1839 were based upon the principles of the *Code civil,* in accordance with a proposal by Ørsted. Consequently, no share of the estate was set aside for a person unless it could be proven that he was alive (see *Code civil* art. 135).

A novel concept in Danish family law around 1800 was the introduction of the institute of *adoption.* Recognition of this institute had taken place already prior to Ørsted, but during the latter's activity in the Danish administration he apparently favoured a development based on the French pattern. Thus, among other things in accordance with the rules of arts. 348 and 350 of the *Code civil,* it became an established practice to incorporate in decrees concerning adoption a provision to the effect that the adopted child should neither acquire any right of inheritance from the adopter's family nor lose his right of inheritance from his own biological family.

In the field of the law of persons the *legislation on minors* gave Ørsted particular reason to incorporate conceptions emanating from foreign law. Under the practice of the Supreme Court in the 18th century it had been established that a minor was obliged to pay debts entered into to satisfy his needs. This practice was overruled in 1804 through an ordinance which, in general, freed minors from the obligation to fulfil contracts entered into. This ordinance was modified in 1839. During the discussions on this point Ørsted referred to foreign law, especially to art. 1307 of the *Code civil* and art. 248 of the Austrian Civil Code, to demonstrate that Danish legislation continued to grant minors a very considerable degree of protection. Foreign law, however, was not the pattern on the basis of which the reform itself was adopted.

An area in which Ørsted made a particularly outstanding contribution is that of the fundamentals of the law of things and contracts. As early as around 1800 Ørsted had developed his basic position regarding the *law of ownership* independently of foreign law. He appears, however, to have been distinctly influenced by the so-called "legal theories" of the 18th century on the right of ownership proclaimed by, among others, Montesquieu and Rousseau.[4] According to these theories ownership was a right created by

[4] See Hedemann, *Die Fortschritte des Zivilrechts im 19. Jahrhundert* II.1. (1930), p. 110. Ørsted likewise submitted his considerations independently of the so-called "German concept of

society with corresponding inherent limitations motivated by the interests of society. This theoretical construction, and the corresponding theory of ownership as based upon a hypothetical agreement between people on the extent of ownership, were also applied by Ørsted. On this basis Ørsted justified a number of limitations upon the right of ownership. However, he distinctly dissociated himself from the absolute ownership expressed in art. 17 of the Declaration of Human Rights of 1789, which was partly incorporated in art. 544 of the *Code civil.*

As for the question of *transfer of ownership*, the influence from foreign law is quite clear. In deciding this issue, earlier Danish legal science had applied the Roman *traditio* criterion—physical delivery of the thing. Ørsted adhered to this view but, contrary to his predecessors, he framed the *traditio* criterion in such a way as also to include a number of cases where no physical delivery took place. In evolving this theory, by means of which Ørsted introduced into Danish law the doctrine of *constitutio possessorium* and *traditio brevi manu* as well as the doctrine of the significance of a "symbolic" delivery by handing over a key to the place where the goods sold are stored, or presenting a bill of lading, Ørsted demonstrated a clear correspondence with similar ideas in Savigny's famous work *Das Recht des Besitzes* (1803). As an argument in favour of the doctrine of *traditio* Ørsted furthermore pointed to a number of foreign legal orders. Thus he found support for his position in the Code of Prussia I, 9, para. 3, and the Austrian Civil Code art. 425. On the other hand, art. 1138 of the *Code civil* and a Swedish draft act of 1826 influenced by the *Code civil* were contrary to Ørsted's proposition in that, in accordance with the theory of natural law, they allowed mere agreement to suffice for constituting a transfer of ownership. Ørsted consequently subjected the system of rules concerning transfer of ownership in the latter two texts to drastic processing, attempting to reconcile them partly with the doctrine of *traditio,* before finally concluding that foreign law confirmed the conception that in solving conflicts regarding transfer of ownership the natural starting point was not the mere agreement but *traditio.* However, he severely criticized the lack of rules in the *Code civil* on security in acquiring real estate.

In deciding whether the owner of a thing who has been unlawfully deprived of it has a right of *vindication* from a *bona fide* acquirer, the Danish Code of 1683 as well as the subsequent doctrine of natural law took the position that the owner had an unconditional right of vindication, regard-

ownership" (see on this K. Kroeschell, "Zur Lehre vom germanischen Eigentumsbegriff" in *Rechtshistorische Studien. Hans Thieme zum 70. Geburtstag zugeeignet,* Cologne-Vienna 1977, pp. 34–71), but he was familiar with the criticism of the concept of divided ownership by the German scholar Thibaut.

less of whether the acquirer was in good or in bad faith. Ørsted was the first Danish legal scholar to disagree with such a right to unconditional vindication. Older legal doctrine had substantiated the right of vindication on the basis of the character of the right of ownership as a *jus in re*, but Ørsted disagreed with this conception. He pointed out the importance for society of the security of trading, which was an argument for recognizing an extinction of rights in certain cases—a point of view which was in conformity with the concept he had developed regarding the right of ownership. In rejecting conclusions to be drawn from the right of ownership as a *jus in re* Ørsted apparently found some support in the writings of the contemporary German lawyer Thibaut as well as in those of another German lawyer Gönner, who criticized the unconditional right of vindication in support of the view that greater consideration should be given to trading. In framing in detail the limitations upon the right of vindication which should be acknowledged, Ørsted also pointed to the great codifications, citing, e.g., the right of redemption under the Code of Prussia and the *Code civil*. Further, he referred to the rules of the Austrian Civil Code art. 367, which provide for extinction in a number of cases corresponding to Ørsted's enumeration of situations in which there is a demand for extinction.[5] Ørsted's views regarding the demand for limitations upon the right of vindication were not immediately accepted, either in judicial practice, which had to base itself upon the provisions of the Danish Code, or in the consideration of possible legislative reforms. Not until the beginning of this century is it possible to observe, in practice as well as in legislation, tendencies in the direction of limitations of the right of vindication, though these are by no means of the extent advocated by Ørsted.

A dogmatic problem to which Ørsted devoted several treatises was the issue of the conditions under which a person could acquire an *easement* through prescription. In the 18th century Danish judicial practice had exclusively taken into consideration whether the exercise of the easement had been obvious, but Ørsted claimed that two additional conditions must also be fulfilled in order to acquire a right by prescription, namely that there was a continued exercise of the easement, and that this was manifest from some visible arrangement. Faced with criticism to the effect that this theory introduced a foreign element into Danish law, Ørsted had to admit that in framing these conditions for prescription he had been inspired by arts. 690 and 691 of the *Code civil*. However, he took care to underline that

[5] See Ørsted in *Arkiv for Retsvidenskaben* 1, 1824, pp. 508 ff. Reprinted in *Privatretlige Skrifter* II, 1930, p. 235.

this did not involve an arbitrary framing of legal rules on the basis of foreign legislation, but that the rules of the *Code civil* were rooted in older French law—though not in older Danish law.

In a number of fields Ørsted, by virtue of his position in the Danish administration, participated in legislative reforms. This was, among other things, the case in relation to *mortgage in real estate,* in which area Denmark, as well as several other European countries, introduced important amendments at the beginning of the 19th century with a view to promoting trade and securing the creditors' rights by introducing the principles of publicity and speciality. These principles had, in all essentials, been introduced into Danish law through the Danish Code and subsequent Royal Ordinances; consequently, in undertaking a comparative analysis of Danish mortgage legislation and foreign law[6] Ørsted came to the conclusion that Danish law was fully as advanced as the fairly detailed mortgage laws which had been adopted around 1800 in Prussia, France, and Bavaria, among other countries. However, in certain areas a need for reform existed. This was particularly so in relation to the land registry, which appeared somewhat primitive by comparison with the detailed systems which on Gönner's proposal had been introduced in Bavaria.[7] Admittedly, Ørsted concluded—rightly—that at times Gönner had gone rather far in the direction of pedantry in establishing the mortgage registers. However, the Bavarian system of 1822 was useful to Ørsted as a precedent when he was engaged in establishing the Danish mortgage system, which came into being in 1845 through a Royal Ordinance.

The law of contracts was another field where the influence from foreign law was quite evident.

As regards the right to cancel a contract in case of breach of contract, judicial practice in the 18th century showed some confusion between a principle of natural law which, to a considerable extent, granted a right to cancel a contract in case of breach, and the principle of Roman law which admitted a possibility of cancelling the contract only where an agreement to that effect had been entered into in a special *lex commissoria.* Late in the 18th century there was a certain turning in the direction of Roman law in that a general right of cancellation was no longer recognized. Contrary to his predecessors Ørsted adhered more closely to the Roman point of view and held that a major breach of contract must be involved. In support of

[6] In *Juridisk Tidsskrift* 16.2 (1830), pp. 92 ff., and *Privatretlige Skrifter* II, pp. 306 ff.

[7] On this point reference is now also made to a series of dissertations in "Die rechtliche und wirtschaftliche Entwicklung des Grundeigentums und des Grundkredits", *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* III, 1976. See particularly Stolleis's study, "Das bayerische Hypothekengesetz von 1822", *loc. cit.*, pp. 240 ff.

this position he also invoked foreign law, viz., the Code of Prussia I, 5, para. 393, and the *Code civil* art. 1184, in conjunction with arts. 1610 and 1655, although it is not clear whether it was his knowledge of foreign law or the older practice that decided his position. However, that he was quite aware that his position was confirmed by foreign law appears, among other things, from a note on a judgment of 1807 where Ørsted refers to foreign law.

The obligation of a seller to guarantee that items sold do not suffer from defects was likewise a field in which foreign law played a role. In this connection one can distinctly trace an influence from the concept of *Gewährleistung* or *garantie* developed in the great codifications, see the Code of Prussia I, 5, paras. 318 ff., the *Code civil,* arts. 1625 ff., and the Austrian Civil Code, arts. 922–33.

Another area where Ørsted was clearly in line with a tendency common in Europe was that of recognition of the rule of negligence (*culpa*) as the foundation for the law of torts. In this respect Ørsted was able to build upon the great codifications, which all established the principle of *culpa.* At the same time, however, he was well acquainted with the extensive German writing from the beginning of the 19th century on the Roman concept of *culpa.* Ørsted's reference to the law of torts clearly shows his knowledge of foreign law. In particular the analysis of the concept of *culpa* in his later works demonstrates an influence from one of the crucial works in German legal writing, Johan Christian Hasse's *Die Culpa des römischen Rechts* (1815), but already previously Ørsted had, on the basis of his study of Roman law, reached similar results, among other things in assessing the position of the rule of *culpa.*

Earlier Danish legal theory had merely recognized that obligations could be created on the basis of a contract or on the basis of a tort. On the other hand, it did not recognize so-called quasi-contracts, of which the most important are unsolicited management of a person's business, *negotiorum gestio*, and *condictio indebiti,* i.e. the right to vindicate what has been performed on the basis of a wrongful assumption of liability. The recognition of quasi-contracts showed a distinct influence from contemporary Roman-law theory, particularly from two German works at that time, namely A. D. Weber, *Systematische Entwickelung der Lehre von der natürlichen Verbindlichkeit* (2nd ed. 1795) and the first volume of C. F. Glück, *Ausführliche Erläuterung der Pandekten nach Hellfeld* (1790). In the more detailed framing of the theory on *negotiorum gestio* Ørsted based himself upon Roman law and, to some extent, also on the Code of Prussia, particularly with regard to the limitation that the rules on *negotiorum gestio* should apply only to *necessary* management on somebody else's behalf.

In framing the rules on *condictio indebiti*[8] Ørsted took a more independent position in relation to foreign precedents. His fundamental view was that Danish law particularly emphasized the binding effect of agreements, and that consequently *condictio indebiti* could be recognized only in quite exceptional circumstances. He thus treated the impulses he had received from foreign law, not least the German doctrine of Pandects, in an independent manner when framing this legal institute, where the actual starting point was apparently the opposite. Earlier Danish judicial practice on this matter, in so far as it existed, seems to have followed the Roman-law theory. This appears from a number of judgments reported by Ørsted and also from a Supreme Court judgment of 1826 which, oddly enough, is not quoted by him. That judgment seems to be based upon the traditional distinction between *error juris* and *error facti.* Vindication was refused in a case of *error juris,* though the judgment does not appear to be based upon a general theory of vindication—this rule has also been underlined by Ørsted. The theory evolved by Ørsted thus took its starting point in foreign law and, particularly in its richness of detail, bore definite marks of influence by foreign legal writing; but at the same time it expressed an individual position, in that Ørsted also limited the right of vindication in case of an error of fact, on which point there was no judicial practice.

Commercial law constitutes an area in which a knowledge of foreign law plays a special role already as a consequence of the importance of international commercial customs. Within the legislative field the adoption of a new Bill of Exchange Ordinance in 1825 in particular was a manifestation of an adaptation of Danish law to more recent European law on bills of exchange. In particular the relation to the market in Hamburg, so important to Danish trade and credit, was apparently decisive in this area, but the provisions of the French *Code de commerce* were also influential in framing the rules on bills of exchange.[9] On the whole it appears that the school of commercial law which had developed in Hamburg and was associated with such names as Martens and Büsch and, later on, Benecke and Pöhl played a major role for Ørsted. Thus, in his review of the law of maritime insurance Ørsted frequently referred to the normative work of Benecke in this field.

In his reference to the *law of companies* Ørsted appears to have been influenced to a considerable extent by French law. A more detailed scrutiny reveals, however, that in all essentials this influence was limited to

[8] *Juridisk Tidsskrift* 14.2 (1828), pp. 225 ff., and *Privatretlige Skrifter* II, pp. 264 ff.

[9] See a review of the Bill of Exchange Ordinance by Bender in *Tübinger Kritische Zeitschrift* 4 (1828), pp. 94 ff.

terminology. In art. 19 of the *Code de commerce* Ørsted found a convenient distinction between various types of companies, and the terms used by the *Code civil* in its Danish translation are later on used by Ørsted. On the other hand, it is doubtful whether Ørsted was also influenced by substantive French company law. At any rate this was not the case in relation to the establishing of limited liability companies, in which respect Ørsted explicitly rejected the idea that Danish law at that time was the system of concession. The question of influence from French law may, however, be discussed in relation to the problem within the theory of partnerships as to whether the creditors of a company have a right prior to that of the creditors of the individual partners. On this question Ørsted quotes a French judgment from 1834 as an argument for answering the question in the affirmative.[1] However, Ørsted also substantiated his result in other ways and the judgment seems rather to have been an argument and not a decisive element in Ørsted's discussion.

The significance of foreign law for Ørsted's legal writing may also be discussed in relation to fields other than those referred to above. As an example may be mentioned private international law, in which field it has been discussed[2] whether Ørsted, who in his pioneer works framed an extensive number of detailed rules on the solution of international conflicts of private law, was familiar with the writings of the Dutchman Ulrich Huber (17th century), whose conception was based upon principles other than the traditional theory of statute. Ørsted may have known Huber through the older works of the German Hertius and Johannes Voet, to whom he makes a reference (although he hardly read the latter). None the less it appears doubtful whether Ørsted paid particular attention to Huber. He does not refer to him and, furthermore, the points where Huber's and Ørsted's concepts coincide, such as, e.g., the principle that in assessing the effects of a contract one should take into account the home country of the parties if the contract is intended to be fulfilled there and disregard the place of contracting, may equally well have been founded in influences from elsewhere—in this particular instance from the Austrian Civil Code, art. 37.

On the basis of Ørsted's knowledge of foreign law and his application of

[1] *Haandbog over den Danske og Norske Lovkyndighed* V (1832), p. 677. The influence of French company law on Ørsted seems to have been somewhat exaggerated by Ranieri, "Rezeption und Assimilation ausländischer Rechtssprechung, dargestellt am Beispiel des europäischen Einflusses der französischen Judikatur im 19. Jahrhundert", *Ius commune* VI, 1977, p. 228.

[2] See Ole Lando, *Kontraktsstatuttet,* 1963, p. 10, Ernst Andersen in *U.f.R.* 1963, pp. 69–70, and 1977, pp. 93 ff., and O. A. Borum, "Lidt om Ørsted og om Ulric Huber" in *T.f.R.* 1967, pp. 413 ff.

it in his writings on private law, of which a far from exhaustive number of examples have been given above, it does appear reasonable to regard Ørsted not only as the founder of an independent Danish legal science but also as the author who gave Danish private law a place in traditional European private law. Ørsted frequently applied precedents from foreign law, ordinarily as something to prompt additional thinking rather than to be used as a pattern. The schooling which Ørsted had received through Kant's philosophy had, however, quite naturally turned his attention towards Germany, which in this period also appeared as a model in a great many other areas of Danish intellectual life, above all in literature. Even when, like other Kantians such as Hugo and Feuerbach, he turned to positive law, he remained orientated towards Germany. He appears to have familiarized himself with the *Code civil* in the first instance through German translations which were made upon the reception of French law in the Rhineland. At times he went further than his contemporaries could immediately accept, e.g. with regard to the extinction of rights to personal property or the creation of easements through prescription. But in by far the majority of cases Ørsted's considerations on the basis of principles of foreign law were favourably received. In a decisive way they contributed to strengthening the science of private law in Denmark in the 19th century.