COMPARATIVE LAW AND ANTIQUITY
WITHIN THE FRAMEWORK OF LEGAL HUMANISM AND NATURAL LAW

Gábor Hamza*

1. Legal humanism and ancient laws

1.1 The adherents of legal humanism took a particularly strong interest in Antiquity. This, of course, doesn’t mean that in the preceding centuries Graeco-Roman Antiquity had entirely been left out of consideration as far as a comparison between different legal systems was concerned. Suffice it to mention here the Collatio legum Mosaicarum et Romanarum, referred to as Lex Dei in the Middle Ages. This collection, which may have originated at the turn of the fifth century, is an often-cited example of legal comparison and was in particular used for practical purposes.¹ The real title and author of this collection, containing Hebrew as well as Roman legal material, are unknown.² This may explain why Boucaud described the aim of the Collatio legum Mosaicarum et Romanarum as mystical.³

Even in the works of the Glossators and Commentators we often find – primarily for practical purposes – certain rules of Justinianic Roman law, German law and Canon law being compared. Reference may be made to the fact that in the thirteenth century


* Chair, Professor of Law, Eötvös Loránd University, Budapest.
Ferretti of Ravenna compared Longobard and Roman law. In comparative studies based on Roman law, a number of outstanding representatives of medieval European jurisprudence also played a part. Due to the fact that no appropriate method existed, they investigated the laws of various peoples with no proper consideration of time and place. Their analyses consequently hardly complied with the basic criteria of comparative law as formulated centuries later. The lack of methodology was the reason why the Glossators and Commentators united “historical” and “comparative” studies on a basic level. Baratta’s interpretation appropriately refers to this in the following terms:

_E altrettanto ovvio che ... senza tener conto della vigenza a meno di tale ordinamento in determinati paesi ed epoche si può giungere ad affermare che glossatori e postglossatori attuarono une “felice” combinazione dello studio “storico” a “comparato”..._.

1.2 The first indication of a need to analyse the connection between Roman law and the law of other peoples of the ancient Mediterranean world may be found in the works of Humanist jurists. In the sixteenth and seventeenth centuries, the era of the Renaissance, the interest in Antiquity and in the works of classical authors grew all over Europe. It was first observed in Italy. Burckhardt called attention to this fact in a vivid descriptive form. Interest in Greek Antiquity had already been manifest in the age of Boccaccio and Petrarcha. Boccaccio was the first to translate the Homeric epics into the vernacular language of his country. The most famous university towns, such as Pavia, Bologna and Padova, ranked among the “poleis” of “cultic” importance where much attention was paid to Greek culture.

The interest in Greek culture soon became coupled with Oriental studies. The realisation of the importance of Arabic as well as Hebrew literature and science may be illustrated by the activities of the Florentine Gianozzo Mannetti and the neo-Platonist Pico della Mirandola, another Florentine scholar. The interest directed towards classical Antiquity (the most important figure in the domain of literature was Petrarca, who in his age may be considered as the “discoverer” of Cicero), was supported by the need to know the whole “orbis terrarum” of the time. This same need was also the starting point of the jurists’ interest along the same lines. It may further be attributed to Petrarca’s influence that the great _iurisconsulti_ of the sixteenth century, Alciatus, Cuiacius, Goveanus, Hotomanus, and perhaps also Dionysios Gothofredus, devoted much attention to analysing Cicero’s works.

4 Schnitzer (n. 1) p. 136.
7 Idem p. 196f.
Volterra argued that as early as the Renaissance, through the mediation of biblical scholarship and under the impact of Canon law, research not restricted to Roman law gained importance even in the field of civil-law studies. Attention was focused on the comparison of Roman law with other ancient legal systems. Hebraic law retained its personal effect. As early as the sixteenth and, particularly, during the seventeenth century, a considerable number of works on certain institutions of Hebraic law were published; some of them actually tried to determine the principal characteristics of that legal system.

1.3 During these centuries, a large number of Romanists did not restrict their research to the analysis of the *Corpus iuris civilis* and Canon law but extended their studies over an extraordinary range by investigating the sources of the law in both the Roman and the non-Roman world. As early as the sixteenth century, it was generally accepted that a philosophy and philology which was orientated towards Antiquity and in particular late Antiquity, should also include *iurisprudentia*. It was a sign of the age that in the fifteenth century philologists like Lorenzo Valla and Angelo Poliziano, having fully mastered the Greek language and employing philological methods, were the first to tackle the *Corpus Iuris*. This approach manifested itself in a particularly conspicuous form in the works of Alciatus. The proposal to connect jurisprudence to “*bonae litterae*” originated with him. Of course, the scholarly study of Roman law itself was part of the Renaissance, too, and jurisprudence became all the more an integral part of the Renaissance once the field of legal research had been extended considerably. The extension of the field of study had basically been caused by the appearance of the comparative approach. The preconditions of this extension, however, had been the availability of Bacon’s inductive method and also the fact that the Mediterranean world came to be considered by scholars – including the practitioners of jurisprudence – as a cultural and geographical unity. It is sufficient to refer here to Melanchton’s work entitled *Oratio de legibus* on the subject of “reception”. He supposed the Athenians to have taken over Egyptian law and the Romans in turn to have done the same with Greek law.

In all probability the broader outlook characterising legal humanism and jurisprudence may explain why it had occurred to François Hotman to criticise Justinianic Roman law as early as the second half of the sixteenth century. Hotman, as well as Leibniz who

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12 Their enumeration: see Volterra (n. 11) p. 4f. n. 1.
17 Schnitzer (n. 1) p. 9.
18 Schnitzer (n. 1) p. 9.
likewise stressed the need for codification,\(^{19}\) set a very high value on Roman law in its Justinianic form.\(^{20}\) But, in his work published under the title *Antitribonianus sive dissertatio de studio legum* in 1574, Hotman was a “nationalpolitisch engagierter Kritiker des justinianischen Rechts”.\(^{21}\) A legal scholar who had come to Paris from Bourges, Hotman wrote the above-mentioned work after having been inspired by his conversations with L’Hopital in his capacity as a court historian.\(^{22}\) The *Antitribonianus* was a major political monograph dealing with the reform of legal studies and prevailing statutes. Hotman’s proposal was essentially concerned with the fact that Roman law, modified by local customary law, should be the starting point of national codification. This furthermore suggested that, for him, Roman law retained its importance even after its reception in the codification taking place in the national States of Europe.\(^{23}\) As a “spontaneous” thinker and adversary of the *mos italicus*, Hotman’s\(^{24}\) principal aim was to explore classical Roman law, using Cicero’s works as well.\(^{25}\) For Hotman, there were actually two kinds of Roman law: the one was classical Roman law to be explored by detailed analysis; the other was Justinianic law as characterised by “*inconstantia et invarietas*”. Consequently, in his view, comparison was required *within* the field of Roman law itself. A devotee of the *mos Gallicus*, Hotman, whose works – especially the *Antitribonianus* – exerted a great influence on the scholars of *iurisprudentia* a few decades later, was encouraged by this “internal” comparison of the laws of peoples living in Antiquity to criticise the prevailing law.\(^{26}\)

Hotman supported his critique of Justinianic Roman law by referring to its archaic norms. Given that his critique concerned, basically, Roman law as it had found expression in the *Corpus Iuris*, Riccobono’s opinion – according to which Hotman “condamne toute la direction de l’enseignement et la substance même du droit romain (sic! G. H.) pour ce motif que ce droit, étant tout impregné de notions et de doctrines archaïques serait tout à fait étranger au monde contemporain”\(^{27}\) – seems to be exaggerated.

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22 Vogel (n. 20) p. 11 and p. 114.

23 As to Dumoulin emphasising the exclusive role of local traditions in terms of the codification, see Hug (n. 1) p. 116.

24 Hübner (n. 15) p. 48.

25 For the relationship between Hotman and Cicero see Vogel (n. 20) pp. 30ff. and pp. 70ff.

26 Besides the above-mentioned Leibniz Conring (De origine iuris Germanici) and Burchard (De hodiernae jurisprudentiae naevis et remedii) were the most important legal scholars who were given inspiration to the codification and the criticism of Roman Law (i.e. the law in force) by Hotman with his Antitribonianus. See: Vogel (n. 20) p. 110.

2. Natural law and research in relation to laws of antiquity

2.1 The fundamental concept of natural law which was increasingly gaining ground, namely that there is a “ius commune” independent of positive law, implied a need for comparative studies. Scholars studying natural law in the sixteenth and seventeenth centuries were thought to have discovered the traces of this “ius commune” in the Old and New Testaments.

Justinianic law and the Old and New Testaments were first compared by Raguellus on the basis of a study of natural law. Raguellus in his work *Leges politicae ex sacrae iuris prudentiae fontibus collectae ad formam Iustiniane codicis ex libris veteris et Novi Testamenti digestae* (published in Frankfurt in 1577) undertook an analysis of the material of a legal nature in the Old and New Testaments and a comparison between that and the *ius civile* which he regarded as equivalent to Justinianic law. In England, it was Selden who, in a number of works, dealt in detail with Hebraic law (*De successionibus in bona defunctorum ad leges Ebraeorum* (published in 1631), *De successione in Pontificatum Ebraeorum* (published in 1636), *De iure naturali et gentium juxta disciplinam Ebraeorum* (published in 1640), *Uxor Ebraica seu de nuptiis et divortiis veterum Ebraeorum libri tres* (published in 1646), and *De Synedriis veterum Ebraeorum* (published 1650 to 1653).28 English authors generally consider Selden as the founder of comparative studies in legal history. 29 It is also worth mentioning that in addition to Hebraic law in two of his studies (*De diis Syriis* (1617) and *Eutychii Aegyptii patriarchae orthodoxorum Alexandrini ecclesiae suae origines* (1642), Selden also examined other types of Oriental law.

The fact that comparative studies comprised ever wider spheres of the laws of the Mediterranean world, i.e. they drew a considerably greater geographical area of positive law into their field of interest, did not mean that the role of Roman law as *ius commune Europaeum* was in any way challenged.

It was not inconsistent with the above that Hermann Conring, in his work entitled *Commentarius historicus de origine iuris Germanici* (published in 1643) in which he had set out to prove the survival of certain institutions of Germanic law, raised the question of the legitimation of the reception of Roman law in Germany. 30 Very much like Beyer, Conring – basing his statement on the comparison drawn between Roman law and the *Landrecht* of regional implementation – called the supremacy of Roman law into question (just as Hotman had done before, with the difference, however, that he did not raise the question of codification).31

However, we should bear in mind that these critical remarks which necessarily existed on the academic level of that time, were not yet the rule but rather the exception. Arthur Duck, for instance, in his work *De usu et autoritate juris civilis Romanorum in dominiis*
**principum Christianorum libri duo** (published posthumously in 1652), presented a comprehensive history of the reception of Roman law (civil law), recognizing its dominant role in all European countries. Roman law, despite the basic idea of the *Corpus iuris reconcinnatum* i.e. a comprehensive code for Europe drafted by Leibniz, did not lose its importance for him, though he had become aware of its shortcomings in certain cases. In his opinion, on the one hand, the *Corpus iuris* contained certain norms not unconditionally advantageous to the states of his age, whilst, on the other hand, certain rules of Justinianic law were not in accordance with natural law. Leibniz was clearly aware of the importance of comparative studies.

For Leibniz, a comparative analysis was justified on two grounds. On the one hand, he realised the importance of the plurality of ancient law. One passage of the *Nova methodus discendae docendaeque iurisprudentiae* refers expressly to this:


On the other hand, the idea i.e., plan, of the “Theatrum legale” in itself presupposed the taking into consideration of a number of positive laws or, at least, a comparison between Roman law and the precepts and rules of the *ius naturae*. In Leibniz’s works, Roman law continued to preserve its character of *ratio scripta*. Leibniz is convinced that Roman law can be considered as “emanatio rationis”. To this important idea is reflected explicitly in the phrase “Jura Romanorum satis cognosci ex variis eorum monumentis possunt ...”.

### 2.2 In Grotius, in particularly in his *Florum sparsio ad ius Iustinianeum* and *De iure belli ac pacis*, Roman law and the law of foreigners are often found within a comparative context. This also appears, though to a lesser extent, in the works of Pufendorf. In his work entitled *De iure naturae et gentium*, Pufendorf referred to parallel legal phenomena. In the works of the most active exponents of the School of Natural Law we find traces of comparison, whether they carried out their investigations empirically (like Grotius) or used the deductive method. Grotius grasped the opportunity of referring to the law

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32 It is certain that Duck did not know about Conring’s work elaborating the same topic which was published some years before. See: Horn N.: Römisches Recht als gemeineuropäisches Recht bei Arthur Duck. In: Studien zur Europäischen Rechtsgeschichte. Hrsg. von W. Wilhelm. Frankfurt am Main, (1972) p. 171.

33 Sturm (n. 19) p. 13.


of a great variety of peoples. Investigations of this type, as Naber put it,\textsuperscript{37} did not only take place \textit{obiter}, but also collected a "\textit{verus thesaurus}" of the institutions of the different kinds of law which were so similar to and, at the same time, so dissimilar from one another. For Grotius, however, comparison was only an instrument. The comparison between the legal institutions of various peoples actually served only to legitimise the theory of natural law.\textsuperscript{38} Another characteristic of the School of Natural Law was that the historical factor had completely lost its importance. It may be mentioned in passing that for the exponents of the new School of Natural Law, the historical factor has regained some importance.\textsuperscript{39}

The "unhistorical" outlook of the exponents of natural law was well-illustrated by the opinions of Grotius and Pufendorf according to which the basis of statutory succession was the testator’s presumed will or (to put it more precisely) his will to be presumed (\textit{De iure belli ac pacis} II,7,3 and \textit{De iure naturae et gentium} IV,11,1). If one were to trace the claim to legal succession back to the will of the deceased, it follows logically that because of its origin testamentary succession should enjoy priority over statutory succession.

To the exponents of the School of Natural Law – as well as for the Humanists – the function of comparative analysis was not clarified. Due to this lack of clarification the only question they were interested in was the highly disputed problem of the origin of the legal institutions of Roman law when they compared them with legal institutions of other peoples, ethnicities, in Antiquity.

The typical, \textit{expressis verbis} representative of this approach was Heineccius in his work \textit{De utilitate litterarum orientalium in iurisprudentia}.\textsuperscript{40} It is worth mentioning that Heineccius paid considerable attention, even in his textbook published several times as \textit{Elementa iuris civilis secundum ordinem Pandectarum} (first published in Lipsiae in 1727), to, among others, Greek philosophy. This may be proved by the great number of citations from Aristotle’s \textit{Ethica Nicomacheia}.

In those investigations carried beyond the horizon of Roman law, the search for analogy was, in most cases, only of secondary importance and it was only in exceptional cases that it gained any significance. Generally, what mattered was to establish the similarity between various institutions without analysing the origin they had in detail. In some cases, the “assimilation”, attained indirectly, through mediation, was taken into consideration. Heineccius’ work, \textit{De utilitate litterarum orientalium in iurisprudentia}, where mention was made of the fact that Hebraic law had become an integral part of Roman law via Greek mediation, was an example of this approach.\textsuperscript{41}

\begin{footnotesize}
\begin{enumerate}
\item Hug (n. 1) p. 120.
\item See the works of Kaufmann: Naturrecht und Geschichtlichkeit, Göttingen, (1957); Die ontologische Bedeutung des Rechts, Darmstadt, (1965).
\item Volterra (n. 11) p. 10 n. 1.
\item Volterra (n. 11) p. 21 n. 1.
\end{enumerate}
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2.3 The trend of a comparative analysis of law in the late period of the School of Natural Law followed practical objectives in particular. Adherents to this trend were interested, above all, in carrying out such objectives and laid particular emphasis on the search for analogy (analogies). The best-known representatives of this School – which was actually no more than a kind of research trend – were Johann Stephan Pütter and August Friedrich Schott.

Information about the main phases of the life and professorial activities of Johann Stephan Pütter (1725-1807) may be found in his two-volume autobiography. Pütter had studied in Halle under Heineccius. Then, some years later, he became a professor and colleague of Gustav Hugo in Göttingen. From the autumn of 1747, initially as associate professor, Pütter held lectures in Göttingen. As Göttingen was at this time part of the Electorate of Hannover, in “personal union” (in German “Personalunion”) with England, the University of Göttingen was generally more open to new ideas than were the other universities in Germany.

Pütter, precursor, together with Gustav Hugo, of the Historical School – that is proved by the fact that the historical and methodological approach was kept separate in his work Entwurf einer juristischen Enzyklopädie und Methodologie (1757) – accepted the validity of the so-called historical and comparative approach as well as the arguments for customary law and for the so-called Natur der Sache. First and foremost a Germanist, Pütter dealt with the problems of the theory of the sources of law principally in volume II of his Beyträge zum Teutschen Staats- und Fürstenrecht, published in 1779. In this work the author formulated the requirement of applying the law in a “comparative” perspective. The theoretical foundation of the investigations into the comparisons made between several kinds of laws and legal systems was obviously provided by the fact that, following the example of his predecessors, he considered the ius commune of Germany, to which he attributed an autonomous existence, as of equal importance as post-reception Roman law.

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45 Stein (n. 36) p. 53.


47 Wieacker (n. 21) at p. 380 writes about the so-called “historische und vergleichende Betrachtung”.

48 For the foundations of the arguments in the “Natur der Sache”, Marx’s work mentioned in n. 44 is an excellent survey.
Already in his inaugural lecture, delivered early in his academic career in 1748, Pütter criticised the practice of mixing the rules of Roman and German law. The earlier approach, the so-called *Usus juris Romano-Germanicus*, characterised by indiscriminately mixing classical and Justinianic Roman law with the rules of Medieval law, was alien to Pütter. In his work entitled *Neuer Versuch einer Juristischen Encyklopädie und Methodologie* which was published in 1769, he reflected a change in outlook and demanded that *pure* Roman law should be taught at the University. This meant that Roman law should be taught “purified” of the elements of German and Canon law, and that archaic law (which was to be made into an independent system) should be distinguished from Justinianic law. This new approach included the requirement of comparison. For Pütter, Roman law meant the *ius peregrinum* which had to be opposed at all costs to the *ius patrium*. Pütter paid particular attention to the question whether besides Roman law, there existed another “common” German private law. In his opinion, there was originally a general customary (unwritten) law valid for the whole of Germany, which, had the reception of Roman law not taken place, might have been the *ius commune*. In this way – as Ebel put it – Pütter was the first to try to establish “deutsches Privatrecht”, the reconstruction of which was, incidentally, a mere *opus desperatum*, because of its particularism. Nevertheless, the problematic effort to reconstruct German private law, which did not include rules of Roman law, did not exclude the possibility of a comparison between the two systems.

The first formulation of the idea of distinguishing Roman law as received in Germany from the “autonomous” German *ius commune*, which was considered as being not inferior to the *ius Romanum*, was that of Johann Schilter. As early as the second half of the seventeenth century, Schilter (1632-1705), whose activities indicated the approaching end of *usus modernus*, was of the opinion that in Germany there existed two kinds of “common law” independently of each other.

From the point of view of distinguishing Roman law from German law, the *Praxis iuris Romani in foro Germanico* (published in Jena in 1675) and the textbook-like *Institutiones iuris ex principiis iuris naturae, gentium et civilis, tum Romani tum Germanici, ad usum fori hodierni accomodatae* (published in Leipzig in 1685) may be considered. Contrary to the trend of the *Usus modernus* that dealt with the institutions of Roman law and German law side by side and directly juxtaposed, Schilter was the first to treat the institutions of the German *ius commune* as if it were a coherent legal

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50 The work was first published in 1757. The 1769 edition is a considerably revised and enlarged version of the edition of 1757. See Ebel (n. 42) p. 61.
51 Cf. the several editions of “Elementa iuris Germanici private hodierni in usum auditorium” and the “Neuer Versuch einer juristischen Encyclopädie und Methodologie”.
53 Ebel (n. 42) p. 88.
54 Pütter (n. 51) 68, 7.
55 Landsberg-Stintzing (n. 44) p. 54; Wieacker (n. 21) p. 208; Ebel (n. 42) p. 86.
system, i.e. order. Further, he also sought to point to the antecedents and sources of German *ius commune*, for example, the *lex Salica*. In this way he was able to document the hypothesis according to which German private law had an independent existence. Schilter’s conception was soon to find followers, of whom Samuel Stryk and Christian Thomasius should be mentioned. His disciple, Christian Thomasius, was in all likelihood the first – prior to 1705 – to announce a lecture entitled “*Institutiones iuris Germanici*” on the German *ius commune* in Halle. Following him, Georg Beyer (1665-1714) gave lectures on the same subject in Wittenberg from 1707 onwards, the text of which was published after his death in 1718 by J. M Grieben under the title *Delineatio iuris Germanici ad fundamenta sua revocata*.57

Apart from the activity of Heineccius, it was Pütter who, following in Georg Beyer’s steps, undertook to elaborate, as far as possible, the details of the German *ius commune* which was considered to be autonomous. Pütter assumed that in Germany the reception of foreign law had been founded on an error and, for this reason, should be regarded as not inevitable at that time. However, he had to face the fact of reception and as a result gave up the idea of “banishing” Roman law from Germany. Yet, he firmly called the attention to the fact that “ancient” Germanic law had not ceased to exist after the reception of Roman law and, consequently, that its existence should be taken into consideration. The views of his contemporary, Friedrich Runde, were essentially similar.58 It was, of course, a different matter that, compared to Roman law, the “ancient” Germanic “*gemeines Recht*” was far from a systematised law; it was only a framework, a summary of the rules relating to individual legal institutions.

2.4 As he himself stressed in the preface to his work entitled *Entwurf einer juristischen Encyclopädie und Methodologie zum Gebrauch akademischer Vorlesungen*,59 August Friedrich Schott was Pütter’s follower.

The proper assessment of Schott’s scholarly achievement can be regarded, in our opinion, generally too brief and sometimes even prejudiced.60 A clear indication of the lack of appreciation for Schott was the fact that Wieacker failed to mention his name in his *Privatrechtsgeschichte der Neuzeit*: his name was absent from each edition, even from the Italian one.61 Schott’s importance should not be restricted to the publication of *Unparteiische Kritik*, issued in Leipzig between the years 1768 and 1790. In addition to having a thorough knowledge of Saxon law (*ius Saxonicum*)62, he also offered a

56  Landsberg-Stintzing (n. 44) pp. 90, 137 and 55.
57  Landsberg-Stintzing (n. 44) pp. 137ff.
58  Marx (n. 44) p. 17.
60  Landsberg-Stintzing (n. 44) pp. 481f.
61  Wieacker (n. 21) in general.
62  The proof of this is his work entitled “*Institutiones iuris Saxonici electoralis privati*”, published first in 1778 (3rd ed. Haubold, Chr. G. Lipsiae, 1795).
detailed discussion of methodological questions in his work *Entwurf einer juristischen Encyclopädie*.

Schott was further Pütter’s follower in emphasising that the German *ius commune* existed independently of Roman law. This is proved, among others, by the fact that when analysing the individual legal institutions, he referred *expressis verbis* to the German peculiarities, stating that the reception of Roman law had never taken place. Examining the *patris potestas* for instance, he referred to the fact that its form, so well-known in Roman law, never existed in the *ius Saxonicum*. When studying certain parts of private law, he saw two components: on the one hand, the *ius Germanicum privatum universale* and, on the other hand, Roman law. In the course of analysing the *ius Germanicum privatum universale*, he suggested that this should be distinguished clearly from the “foreign law introduced into the German courts of law”. In his discussions of Roman law, he stressed that it was effective law not only for the German courts but that it was equally current in most European countries. The fact that he stressed the differences between the two kinds of law in practice in Germany, anticipated the possibility of comparative research. This was taken a step further when he referred to “Mosaic law” contained in the Old Testament as part of the so-called *Göttliches Positivrecht*. The positive character of the “Mosaic law” was supported, on the one hand, by its effectiveness among the Jews themselves in their interrelationships, and, on the other hand, particularly with reference to the so-called Mosaic matrimonial law, by its prevalence among Christians.

In addition to referring to the Mosaic law as positive law and to distinguishing the German *ius commune* from Roman law, mention must be made of the fact that Schott was of the opinion that contemporary European law, or its survival from earlier ages in the collective memory, may have exercised an influence on the development of German *iurisprudentia*. He argued that this influence could not be thought of as universal; the influence of the “Italian, English, Dutch, Swedish and Danish” law manifested itself only in the individual legal institutions, that is, in a concrete form and way.

### 3. Conclusion

We can conclude that there is no generally shared view as regards the relationship between the comparative approach and the analysis of the various institutions of the classical Antiquity among the representatives of the trend of Humanist jurisprudence and the adherents of the School of Natural Law.

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63 Schott (n. 59) p. 151.
64 Schott (n. 59) p. 15.
65 Schott (n. 59) p. 79.
66 Schott (n. 59) p. 63.
69 Schott (n. 59) p. 204.
70 Schott (n. 59) p. 204.