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Employee as a Legal Person of Roman Law

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5.1.1. Theoretical and Historical Legal Sciences

GENERAL OVERVIEW OF THE DISSERTATION

The relevance of the research. Labour law is a relatively new legal area in comparison with others. Its appearance is assigned not earlier than to XIX century, to the period of rapid industrial developing in the main European cities accompanied with rising of the labor rights issue. Yet it does not mean that employement phenomenon is observed only at this time. From the outset the history of Ancient Rome demonstrates an efficient way of work organization with using of alien productive forces. However, the idea that slavery was the main productive force of ancient economy dominated for the long time[1]. Actually slaves were exploited in different economic sectors doing not only physical but also intellectual work. Accordingly many scholars was believed that the original object of hiring was the same slaves[2].

This view was obliged to Marxist theory of social formations and later was refused as deficient[3]. The ancient economy research made in the middle of XX century shows that slavery was not the single way of work organization. The main arguments of this theory were contested by many scholars. Basing on the number of sources they illustrated that the expansion of Roman Empire did not mean in any case the enslavement of conquered nations. The average number of slaves gained in the result of military campaigns till the maximal extension of Roman Empire territory did not go beyond 5000 people per year. The half of them was directed to public works mainly to mines where the average lifetime was quite short and natural reproduction was complicated. Moreover, villa as a typical figure of the ancient household could not have a sufficient amount of slaves for cultivating lands related to it meanwhile large farms were pretty rare since the most of big landowners preferred to hold the bunch of small domains. Finally the top of epigrafical and other materials demonstrates active participating of freedman and

[1] About treating this question in literature see more: *Finley M.I.* Ancient Slavery and Modern Ideology. New York: The Viking Press, 1980. P. 11 – 67.

[2] See e.g.: *Burckhardt Chr.* Zur Geschichte der locatio conductio. Öffentliche Habilitationsvorlesung. Basel, 1889. S. 27.

[3] This point of view was developed in Max Weber's theory arguing for abundance of cheap slaves work due to successful conquering of alien lands (See: *Weber M.* Agrarian History of the Ancient World. M.: «KANONpress-C», «Kuchkovo pole», 2001. C. 122). See *Finley M.I.* Op. cit. P. 41 – 44 where the critical reflection on this opinion is presented in the context of incautious adoptations of modern economic theory to ancient commercial activity.

freeborn citiziens[4].

Nevertheless, the old view was adopted by many jurists who explained immaturity of some legal institutes with prevalence of slavery. For instance, V. Ryasentsev supposed in the middle of XX century as yet that the presence of slaves in roman household made superfluous the institute of agency[5]. The same view is applied to employement. Even if it was necessary, - say those who share this view, - it was satisfied by using slaves of other housholders in the form of leasing[6].

To contradict this opinion one can list some institutes derived from the Ancient Roman Law. One of them is observed in XII tables that is the loosing of *patria potestas* on a son who was sold by his father three consecutive times[7]. This rule is interpreted as striving to limit the father's right to sell his son to use him in an alien household[8]. The fact of his later reverting under father's control proves that the son was exploited temporally[9].

No less ancient is giving a freedom for a slave so as the later would present himself in legal relations independently. This practice became current at the end of Republic and to the beginning of Empire. However as early as XII tables containted some rules concerning relations between freedman and his ex-dominus pretending on the part of the freedman inheritance (Gai. 3.40). It seems that both examples do not let to say that roman economy was completely slave-owning.

Thus, the modern view on the process of work organization in Ancient Rome is about combination of dependent and independent work forces. Nevertheless, scholars have the smallest information about legal status of a free employee. Probably, we should

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[4] See more: *Staerman E.M.*. The Heyday of the Slave Relations in the Roman Republic. M.: «Nauka», 1964. P. 5 – 35.
[5] *Ryasentsev V.A.* Agency in the Soviet Civil Law. T. I.: Thesis. … Doctor of Philosophy in Law. Москва, 1948. P. 15.
[6] See e.g.: *Jörs P., Kunkel W., Wenger L*. Römisches Privatrecht auf Grund des Werkes von Paul Jörs. 2. neu bearb. Aufl. Berlin: Springer, 1949. S. 238.
[7] Gai. 1.132: …lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his verbis: "si pater ter filium venum duit, a patre filius liber esto"…
[8] See: *Gulyaev A.M.*. Hiring of services. Yriev: Print. of K. Matisen, 1893. P. 20 – 22.
[9] Reuven Yaron comes to the same conclusion contradicting to Levy-Bruhl who argued for the triple sale that happened in one moment by one act (see: *Yaron R.* Si pater filium ter venum duit // Tijdschrift voor Rechtsgeschiedenis. Vol. 36 (1968). P. 70 – 71). Yet the author insists it is incorrect in that case to talk about hiring whereas mancipation implied a transmission under potestas of mancipating person (Ibid. P. 71). I am not sure that the hypothesis of implementing into the sale agreement a clause about following manumission is absolutely unplausible for the archaic period of Roman Law. In republic nonlegal treatsises one may see such expression like "buy works" (Cic. De off. I.42.150). It is conceivable that such word usage came into common use thanks to ancient legal practice.

agree with those who argue that in the most cases hired workers, poor and uneducated persons, did not have any chance to appeal to roman jurists and for this reason no significant practice to solve their problems was elaborated[10].

This fact obstructs to deeper understanding of private law foundations of modern labour law. It leads to some problems one of which is the difference between a hired worker and a person doing work or services based on a civil-law agreement. In fact, both of them can do the same activity but the first has legal guarantees which the second is deprived. This problem is caused with combinaton of public and private law regulation of labour law which seems artificial due to the legal autonomy and independency of private law person in contrast with the person of labour law.

For this reason the criteria of subordination is used in labour law doctrine in order to divide all workers on subordinated and independent. However this criteria comes under attack by those who regards it as economical rather than legal subordination since the later is produced by certain contractual terms[11]. Such terms regulates work procedure. If this procedure is determined mainly by an employer there is a subordination to his commands (*Weisungsunterworfenheit*)[12]. Yet this kind of subordination is observed even in civil-law agreements when a person performs a work in strict accordance with a client brief. From the other hand it could be absent from relations with those employees whose job is exactly to supervise work activities of other workers. Hence there is a suggestion to stop seeking for subordination between contract partners and to appraise in any singly case each economic and legal element of a labour relation[13].

It is remarkable that this criteria is universal and does not depend from the type of contract putting into effect labour relation. It could be special labour contract like in French or Italy or common service agreement like in Germany. It leads to question in comparative-historical perspective: could an employee be recognized as a special person of private law due to his subordinated status? Or whether this question is raised with later ideas as a result of reflection on the position of the working class in XIX century? This

[10] See in more details: *Brunt P.A.* Free Labour and Public Works at Rome // The Journal of Roman Studies. Vol. 70 (1980). P. 84
[11] See e.g.: *Barthélémy J., Cette G.* Réformer le droit travail. Paris: Odile Jacob, 2017. P. 8 – 9
[12] See: *Salkowski K.* Arbeitsrecht. 2. Aufl. Berlin-Heidelberg: Springer Verlag, 2020. S. 37 – 38.
[13] See: *Perulli A.* Il diritto del lavoro e il "problema" della subordinazione // Labour & Law Issues. vol. 6 n. 2 (2020). P. 129

statement of the question actualizes research of Roman Law in which we may observe original attempts of regulating labour relations based on civil-law constructions.

The statement of the topic research. The legal status of employee was not the subject of romanistic research during long period of time. Probably, the reason of that is the bench mark. To understand the legal status of an employee one should perceive his relations with employer. The contract *locatio-conductio* as the form for leasing (*locatio rei*) as well as hiring (*locatio operis, locatio operarum*) is the most informative agreement for that purpose[14].

However, we face there a problem of dividing that species while roman jurists did not do that[15]. It was not obstruction for legal historians of XIX century who strived to discover origins of hiring works applying that division. According to Theodor Mommsen's view, works providing comes from public relations between the state and an official. In archaic period there was an agreement attributed to relations between lictores and kings. After bureaucracy development *operas locare* were performed by special officials[16]. The scholar exemplifies it with relations between magistratores who hired assistants called apparitores. In that case it depended from a public official whether to give a job. Hence in that relation a conductor was the community itself[17].

Another view on *locatio operarum* origins was presented by Burckardt. He did not deny that a community was one of the contract partners. Yet he supposed that a place where this agreement was concluded was a forum where slaves as well as free persons

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[14] See: *Dozhdev D.V.*. Roman Private Law. Textbook fur universities. M: «Norma», 1997. P. 528.

[15] See e.g.: *Torrent A.* The Controversy on the Trichotomy "Res, Operae, Opus" and the Origin of the "Locatio-Conductio" // Revista Internacional de Derecho Romano. № 9 (2012). P. 379 – 380. Ср.: *Schulz F.* Classical Roman Law. Oxoford, 1951. P. 542 – 543, 544: «the trichotomy is not found in the Roman sources and was not even implicitly recognised by the classical lawyers <…> It is a product of continental legal scholasticism and leads to unnecessary difficulties». Deriving from the unic contract different species was realized only in New Era while the most systematical view on three completely different agreements was presented in Heinrich Dernburg's treatises (see: *Dernburg H*. System des römischen Rechts: Pandekten. Bd. II. 4. Aufl. Berlin, 1894. S. 298.)

[16] *Mommsen T.* Die römischen Anfänge von Kauf und Miethe // Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung. Bd. 6 (1885). S. 260 – 262.

[17] *Ibid.* S. 264, 266. Public-law roots of *locatio operis* was even earlier supposed by Degenkolb. He supposed *locatio* operis was derived from *locatio operarum* and explained different positions of a public official (in one case he is a client-locator while in another – employer-conductor) with mixing of different terms by ancient jurists appealing to Guius (D.19.1.19-20: veteres in emptione venditioneque appellationibus promiscue utebantur. Idem est et in locatione et conductione). Meanwhile he did not insist that locator was a leading partner in each type of locatio (see: *Degenkolb H.* Platzrecht und Miethe. Beiträge zu ihrer Geschichte. 1865. S. 24 – 25, 132). The same opinion was shared by Cujacius (see: *Cujacius J.* Tolosatis Opera ad Parisiensem Fabrotianam Editionem Diligentissime Exacta. In Tomos XIII Distributa Auctiora Atque Emendatiora. Continuatio Partis Tertia. Tomus Quintus. 1838. P. 842: «locator est qui init, inchoat contractum <...> conductor autem est qui subsequitur et locatoris condicionem accipit gratamve et ratam habet).

offered their services. Burckhardt maintained his view with etymological analyse of the word *conducere* that referred to a moment of capting and taking away with one self (*con-ducere*). According to him, the ancient *locatio operarum* was rather a product of private affairs while there was circulation of chattel in contrast with leasing of lands being in public property[18].

Meanwhile Italian romanists were inclined to discover a common element in each type of *locatio-conductio*. For instance, Arangio-Ruiz thought that demands of contract partners were satisfied based on universal lawsuits *actio locati* and *actio conducti* in any case of contract breach. Moreover he insisted on *res* as universal object for any type of *locatio-conductio* even in *locatio operarum* where a salve delivered services being an object of legal relations[19].

The next generation of Italian scholars based on *locatio-conductio* as a single contract saw its object in similarity not of *res* rather of actiones performed on it. For instance, Pinna Parpaglia supposed there was no *res* as the object of the contract. According to him, it was about giving the opportunity to exploite. That means when one was hired to cultivate a land the object was not the land but the opportunity to cultivate it. In a similar way Roger Vigneron regarded as the object certain actions performed by *pater familias* who managed not only family assets lended to others but also family members hired by them[20].

This view puts into doubt the very existing of special labour agreement in Roman Law but does not exlude the question of the legal status of an employee. Among all opinions mentioned above we could mark the weakest element of unilateral theory of *locatio-conductio*: how work performing regarded by modern jurists as obligation to do something (*facere*) could be identified with obligation to give something (*dare*)? It feels like a later convention characterizing the development of roman legal theory. Such expressions like *locare* and *conducere* point at physical link with the contract object at the moment of placing it (*locare*) and taking away with oneself (*conducere*). Is it possible

[18] *Burckhardt Chr.* Op. cit. S. 28.
[19] *Arangio-Ruiz V.* Istituzioni di diritto romano, 14 ed. Napoli 1960. P. 345 ss.
[20] Unfortunately, I have not that treatises at my disposal and hence they are cited by *Fiori R.* La definizione della locatio conductio. Giurisprudenza romana e tradizione romanistica. Napoli, 1999. P. 4 – 5.

to find this physical link in work performing perceived as efforts of a worker?

Francesco de Martino was the first who formulated this question more precisely. The scholar put forward a theory of the gradual development of the oject of *locatio operarum* stemmed from the practice of leasing a slave. In his view, this type of agreement was fully align with leasing of movable things and that is why it stood in legal practice of roman jurists using an expression *se locare* even in the later Classical Roman Law. It obstructed to penetration in a system of labor relations an idea that a work is an obligation to do something (*facere*). Work performing in classical period of Roman Law was equal to giving oneself (*dare*) and only later *opera* as the integral object was derived from a worker[21]. At the same time Francesco De Robertis saw the main reason of subordination of a worker to an emoployer in a fact that the former came into the householding of the later. Hence he became a family member taking a place similar to the slave position (*loco servorum*). The scholar explained it with a hypothese that a hired person performed his work all day and often remained at the employer's house since he did not measure time during and scope of the work by his own[22].

However this opinion begs two questions. Firstly, how could a free worker being the object of the contract be regarded as the contract partner simultaneously? Secondly, is it possible to talk about subordination in case when a worker did not stay at the employer's household but did his work at another place or even performed public works? Going from those questions Remo Martini developed his own hypothese. In his view, the hired worker was the object as well as the contract partner. The scholar sake confirmation of that theory in relations between freedman and his patron whom the lex Aelia Sentia prohibited to draw income from freedman's works. According to Martini, this prohibition was tied with an intention to restrict excession use of freedmans forces like slaves by their ex-owners. The prohibition to lease own freedmans confirmes that they and not works were the object of the contract between a patron and third parties[23].

But how could a worker be the object and the contract partner at the same moment?

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[21] See: *De Robertis F.M.* I rapporti del lavoro nel diritto romano. Milano: Giuffré, 1946. P. 128 – 130.
[22] See: Ibid. P. 130 – 133.
[23] See in details: *Martini R.* «Mercennarius»: contributo allo studio dei rapporti di lavoro in diritto romano. Milano: Giuffrè, 1958. P. 30 – 35.

Martini affirms there were two agreements that took place on practice: besides *locatio-conductio* it was a special stipulation (*stipulation operarum*) by which a worker ought to provide not himself but his work[24]. Meanwhile, the scholar disagrees with the De Robertis opinion and rejects subordinating authority of an employer-housholder in relation with his worker. He comes to conclusion that the texts analyzed by De Robertis are silent on this issue[25].

Remo Martini's position was widely admitted in literature. Its shifts away from previous view on work performing as the obligation *dare*. The scholars discerned in a worker not only the contract object but also his personality. Yet his point of view faced strong objections. It does not answer how the structure of *locatio operarum* could exist without a person as the key element. Moreover, it is quite problematic to prove with sources that *stipulatio operarum* was in common use. Jean Macqueron even doubts in existing of that stipulation since the more identified was a work the less it seemed on relation with an unqualified person. More likely, it was about relations with a specialist coping with certain tasks (*locatio operis*). But in that case it was not necessary to make the stipulation[26]

The following discussion on that topic precises the ideas presented by Francesco De Robertis and Remo Martini. It has to admit that legal status of a hired person was analyzed by the scholars mainly on legal texts of classical period of Roman Law. Meanwhile, the later scholars are used to put the legal status of a worker in historical context. For example, Hornst Kaufmann based on comedies by Plautus and Caecilius Statius proves that leasing agreement was derived from hiring workers and not the reverse. Their semantical affinity is nothing than a consequence of the primitive perception of the world relying on «unreflected tangible and visible forms of appearing»[27]. In his view, those who argued for the rental origin of labor agreement thought that terminology used for slaves was enlarged upont relations with freeborn

[24] See: Ibid. P. 43 – 45.
[25] See: Ibid. P. 46 – 47, P. 63 ssq
[26] See: *Macqueron J.* Réflexions sur la locatio operarum et le mercennarius // Revue historique de droit français et étranger. Vol. 36 (1959). P. 614.
[27] *Kaufmann H.* Die altrömische Miete, ihre Zusammenhänge mit Gesellschaft, Wirtschaft und staatlicher Vermögensverwaltung. Köln-Graz: Böhlau-Verlag, 1964. S. 181.

workers through the freedmans what is completely wrong. In fact, even in the archaic period of Roman Law on may discern free person as the object of hiring agreement[28].

Yet Kaufmann does not explain how could a worker be the object and the party in the legal relationship simultaneously. He only marks that Latin language adapting to modifications in householding have distinguished a work (*opera*) from a person doing it. However he admitted that it is quite difficult to determine the certain time period when it has happened[29]. Nevertheless, the scholar clearly illustrates that this term *opera* divided from a worker appears as early as in ancient sources. This remark is highly important since it shows that analysing of using latin terms describing work performing is not enough to demonstrate quality changes in labor relations[30].

The following authors who dealt with employement in Ancient Rome founded on sources researched earlier demonstrating place of an employee in economical life and social structure of ancient romans[31]. At the same time a distinct research of the legal status of a roman worker was not still conducted. Hence as I may suggest on treatises being at my disposal the final step to investigation of a roman worker as a special person of Roman Law and the party of the labor agreement is not still made.

The aim and tasks of the research. Thus, the aim of the research is to completely reconstruct of legal status of a worker as a person of Roman Private Law. To pursue that it is going to solve the **following tasks**:

1. To discover the interconnection between a roman worker and Roman Law of Persons. This task implies defining of basic terms used to descrive legal statement conditions of a person and settling out ascertaining their generic relation with the notion meaning a hired person.

2. To determine social standing of an employee taking into account his economic

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[28] Ibid.

[29] Ibid. S. 182 – 183.

[30] For this reason the opinion presented by Okko Behrends seems oversimplified. He supposed that separation a work from a worker was a result of systematization of legal jurisprudence happened in classical period of Roman Law (see: *Behrends O.* Die Arbeit im römischen Recht. Zur Frage ihner rechtlichen Einordnung und moralischen Bewertung // Le travail: recherches historiques. Table ronde de Besançon, 14 et 15 novembre 1997. Besançon : Institut des Sciences et Techniques de l'Antiquité, 1999. S. 118 ff.).

[31] See e.g.: *Möller C.* Freiheit und Schutz im Arbeitsrecht. Das Fortwirken des römischen Rechts in der Rechtssprechung des Reichsgerichts. Göttingen, 1990. S. 3 – 25; *Du Plessis P.* Letting and Hiring in Roman Legal Thought: 27 BCE - 284 CE. Leyde: Brill, 2012. P. 114 – 115.

characteristic and ethical evaluation of a paid work. It demands to figure out economic and social factors that could impact on view of legal jurists on workers.

3. To characterize legal standing of an employee taking into account his socio-economic role in historical perspective. This task is combined with defining rights and duties that designate relations of an employer with an employee and third parties.

According to that **the object of the research** is a legal standing of a roman worker as a person of Roman Private Law. But **the subject of the research** is connection of a worker with Roman Law of Persons, socio-economic factors that predetermining features and the content of his legal standing.

Methodology and research methods. Methodology of legal history answers on the question «how?» in two ways. From the one hand, it deals with certain perception tools used to achieve a goal to be sought. From the other hand, we might reflect upon definitions applied to describe historical context. They are borrowed from categories modern to a scholar. It risks to make historical research too anachronic. Indeed, is it possible to affirm that such category like «person at law» could be applied for authentic reconstruction of legal standing of an employee? Would we bring to it a semantic element inherent in later historical period?

It was probably the way of german legal thought in XIX century. In that period there was an idea that all history of Ancient Rome represents the gradual shift from tribal collectivity to patriarchal individualism. In that view Roman Law sustained interests of *pater familias* and assured his autonomy and independency in relation with others and whole society. Hence there is a presumption that original Roman Law was the law of private persons[32].

Nevertheless, this view was strictly criticized at the end of XIX century. Among the first who pointed out the limits of roman individualism was Rudolf von Jhering. He challenged a view that social intercourses in Roman society could be adequately described with the category of legal relation[33]. To confirm his opinion the romanist

[32] See: *Arnold W.* Cultur und Recht der Römer. Berlin: F. Dümmler, 1868. S. 48 – 49

[33] See: *Von Jhering R.* Geist des römischen Recht auf verschiedenen Stufen seiner Entwicklung. T. II. Erste Abt. Dritte verbess. Aufl. Leipzig: Druck und Verlag von Breitkopf & Härtel, 1874. S. 139 – 141.

illustrated the bounds of legal rights of *pater familias* observed as early as in archaic period of Roman Law. It was emancipation of a son from the paternal authority in case of his triple selling or appointment of a guardian for mentally defective persons and wasters of family assets. As Jhering said it was a way to ensure interests of family members as well as the whole society interested in respecting for interests of everyone[34].

The discussion about the place of individual and his legal standing in Roman law was sparked again in the middle of XX century. In that dispute Fritz Schultz saw a guarantee that a government would not intervent in private affaires in independency of magistrates and members of *comitia* [35] whereas Francesco De Martino illustrated the limits of private autonomy constituted by roman society appealing to the institute of public land (*ager publicus*)[36].

Thus, the research of individualism of Roman Law in XIX-XX centuries was complicated by external circumstances accompanying with scholars. They were influenced with economic, political and other features of a society modern to them. As a result each event in the history of roman jurisprudence could be explained by them in different manner[37].

This fact prompts to use carefully modern categories and withdraw from making a comparison with moder law of persons. This approach called applicative was widely accepted in German Pandectism but has the limit area of its effect and and are not able to take into account features of certain historical legal order[38]. It could be reasonably used in such studies whose subject is a common event for all legal orders easily adapted to

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[34] *Von Jhering R.* Der Zweck im Recht. Erster Band. Lepzig: Druck und Verlag von Breitkopf & Härtel, 1877. S. 504 – 505.

[35] See in more details: *Schulz F.* Principles of Roman Law. Oxford, 1936. P. 173 – 178. It is used to think that the scholar's opinion was formed with violations of human rights in Nazist Germany. See e.g.: *Tuori K.* Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe. Cambridge: Cambridge University Press, 2020. P. 46 – 49. However there is another view supported by biographical details and presented by *Giaro T.* Victims and Supporters of Nazism vis-à-vis Europe's Legal Tradition. A New Episode in the History of the Third Reich? // Forum Prawnicze. Issue 6 (62). 2020. P. 70 – 72.

[36] See: *De Martino F.* Diritto e società nell'antica Roma. Roma: Editori Riuniti, 1979. P. XVII ss.

[37] For example, Fritz Schulz explained the raise of divorces in the end of Roman Republic with admitting and developing of liberal view on familial structure that could not more restrict their member in intention of self-realization. However Paul Delarov following to Jhering saw the reason of this phenomenon in the controversial reason namely that it was an intention of Roman society to enlarge rights of distinct members. In his view, it was a single way to conservate the social integrity at the expense of limiting of paternal individualism (see: *Delarov P.V.* The study of the history of a person in Ancient Roman Law. The essay of legal history. S.-Petersburg: The printing of the bookseller P. Martynov, 1895. P. 68, 108).

[38] Critical review on this approach see in: *Wieacker F.* A History of Private Law in Europe / Translated by Tony Weir. Clarendon Press, 1996. P. 14 – 15.

modern theoretical constructions and legal norms[39]. In contrast to it there is another approach put forward in literature on Roman Law called contemplative method. It tends to reconstruct ancient law as an indigenous historical phenomenon. One might say it is more suitable to legal standing of an employee in the system of Roman Law of Persons.

However it has to note that such division is based on false presupposition of research specialization and has not so much in common with real methods used by legal historians[40]. It is unlikely to completely adhere to the contemplative method since it is unpossible to withdraw from modern categories in describing historical context.

For this reason analogy in sources examination is not applied in current research. But in the rest it is based on methods of linguistical, systematical and historical interpretation well-establisched in romanistic studies. Where it was possible interpretation of texts was made in such sequence of methods. It allowed to combine historical context of a source with tradition of its understanding.

Chronological framework of the research. Based on results of ancient economy studies one may suggest that exploiting of alien work forces in own household is rooted in the deep past and naturally conserved for centuries. Nevertheless, the current research is limited with Pre-classical and Classical periods of Roman Law (II B.C. – III A.D.). The choise of the chronological framework is determined with several reasons. Firstly, everyone who studies Roman Law has to be reckoned with the predominance of sources come from Classical and Postclassical periods of Roman Law. The second period is not of interest to us since in that time an employee is integrated into college unions with compulsory participation[41]. His rights and duties related to work performance are regulated with imperial enactments. This state of affairs does not allow to deeply analyze private-law aspect of labor relations in that period.

As for Archaic period of Roman Law it is to say that his content is reconstructed based on fragmented sententions of roman historians, grammars and antiquarians lived in

[39] See: *Новицкая А.А*. The formation of contract theory in roman jurispudence. Thesis. ... Doctor of Philosophy in Law: 12.00.03 Moscow, 2014. P. 51 – 52.
[40] See e.g.: *Haferkamp H.-P.* „Wie sollte man als Rechtsdogmatiker in der Geschichte zurückgehen?“ // Zeitschrift für neue Rechtsgeschichte. Bd. 30 (2008). S. 273.
[41] See in more details: De Robertis F.M. Storia delle corporazioni e del regime associativo nel mondo romano. Volume II. Bari: Adriatica editrice, 1973 P. 129 – 136.

different times. This fact suggests skills of working with archeological and epigraphical materials based on linguistic analysis[42]. Without required skills the current research is confined to references to modern scholars studying employement in that period.

Secondly, the legal standing of a worker began to be shaped in Pre-classical period and finally formed in Classical period of Roman Law because of economic and social circumstances being at the end of Roman Republic and the beginning of Principate. Furthermore, it was the period of complete systematization of Roman Law reflected in the Institutes of Gaius where the legal standing of different persons is particularly regarded.

The sources of the research could be divided on legal and non-legal. The first group includes fragments of juridical treatises composing the main content of the Digest of Justinian. The more releveant information about an employee is provided by Ulpianus and Paulus. In addition to them there are used sources beyond Corpus iuris civilis. One part of them is attributed to the jurists mentioned before (*Pauli Sententiae, Collatio legum Mosaicorum et Romanorum*), while the other is presented with Vatican Fragments and the Institutes of Gaius. Furthermore, there are cited some epigraphical sources such as tablets found on mines of Ancient Dacia and Vipasca (*tabellae certae Daciae, lex metallic Vipascensis*) which inform us about employement of workers in that regions.

The frame of non-legal materials is composed with agricultural treatises of Marcus Porcius Cato (*De agri cultura*), Marcus Terentius Varro (*De re rustica*) and also the works, letters and the orations of Cicero (*De legibus*, *De oratore*, *De officiis* etc.) which give us the worth information about hired work in Roman Republic. Besides, there are fragments from the Vocabulary of Festus, comedies of Plautus, the Epigrams of Martial and fables of Phaedrus permitting to illustrate the movement from non-juridical to juridical meaning of the notion of *persona* and establish the origin of other terms.

The scientific novelty of the research lies in the fact that it is the first time when an employee has been regarded as the person of Roman Law in Russian studies of legal history. Furthermore, the feature of his legal standing is explained with determing his

[42] On working with archaical sources see in details: *Kofanov L.L.*. Lex and ius: the origin and developing of Roman Law in VIII – III centuries B.C. M.: «Statut», 2006. P. 45 – 46.

place in the system of Roman Law and discerning the intercourse with social and legal standing of an employee.

Conslusions submitted to defense:

1. The tradition of ancient drama and rhetoric caused the shift from material understanding of the term *persona* as a scenic mask (Phaedr., fab. 1.7.1-2, Mart., Epigr. 3.43) to abstract notion meaning an object and then a subject of discourse. At the end of Roman Republic we see using of this word in the sense of public function and also legal standing of a distinct person (Cic. De officiis, 1.34; De legibus 2.48-49). This shift from material to ideal and abstract image of person gives this notion so general meaning that it includes in treatises of roman jurists all types of persons, even slaves and freeborns (Gai. 1.8-9). The features of legal standing is shaped with ceratin circumstances identifying each person. Their variety let to say that one subject at law may have several persons such as one slave has a person of the slave of each co-owners of him (D.45.3.1.4).

2. Among the words used to describe a hired person in Roman Republic, the term *mercennarius* is the most frequently word to mean each person doing something for consideration. Meanwhile, it is quite complicated to determine his legal standing based on the most sources. The large meaning of this word caused its applying not only to working man (Cato. De agri cultura, 5.1.19 etc.) but also to corrumpted officials (Cic. Verr. 6.54 etc.) and even to gods. Despite of the common view, the term *mercennarius* meant slaves as well as free workers what makes it closer to the term *persona* in their capacity to encompass persons with different legal standing.

3. This feature is tied with the fact that ancient economy for the all time period we research was based on cooperation of servile and free labor. It is proved with sources demonstrating different areas where the efforts of *mercennarius* were used. In some of them the job is unspecialized (Cato, De agri cultura. 4.2; Varro, De re rustica, 1.17), while the other contain some notes on certain tasks (Cornelius Nepos, Eumenes, 1.5; CIL II, n. 5181 etc.). Meanwhile, the majority of sources discussed do not refer to legal standing of a worker.

4. The negative attitude to paid work presented by some republic writers (Cic. De officiis 1.150) was of small impact on the content of the worker’s legal standing. This

attitude was not common for precedent and following epochs. In Greek (Thykid. II 40 etc.) and latin literature (Virg. Georg. 1.145-146 etc.) it is highlighted the social meaning of labor activity while the studies of epigraphic materials let us to suggest positive attitude to the own labour from the workers theirself.

5. Roman juritst strived to fix the borderline standing of an employee in Pre-classical Roman Law through his ideal and not real entering into the employer's family (D.43.16.1.18,20). It caused some traits of labor relations going beyond work performing. From the one hand, it is jurisdiction of pater familias on his worker in case of theft (D.47.2.90.pr.) and an ability to hold servitude through him (D.8.6.20.pr.). From the other hand, an employer was responsible for actions done by his worker (D.43.16.1.pr.). The limits of worker responsibility are also caused with subordination in his relations with an employer since the later organized working process and hence took the risk of impossibility of work performance (D.19.2.38.pr.).

6. In Classical Roman Law there were significant social and economic transformations that changed the image of roman society and remarkably weakened previous social hierarchy. For this reason it is formed the image of independent worker whose relations with their clients do not have any domestic and subordinating elements. This circumstance was preparated with the view on work as the object of the contract which has certain time limits (D.7.7.1). Hence a worker is separated from his work. He became a full member of the society. It increased the standard of his legal responsibility elaborated with his professional competency and a special liability for damage of things trusted him for work performing (D.19.2.13.5).

Theoretical implications of the research consist in stimulating scientific discussion in the area of private law history and giving input into understanding of civil law foundations of labor law. **Practical implications of the research** lie in the possibility to use the research results in teaching of roman law, history of law and labor law.

The validation of the research results was made with presenting three papers scientific conferences and other events. The first paper was presented on the Round table «The genesis and developing of Russian contract law» held 29.11.2021 at the Private Law Research Centre under the President of the Russian Federation named after S.S. Alexeev.

The second paper was presented at the same place on the Joint meeting of the Chair of the law of obligations and Contract law department with the topic «Service providing: the disntinct type of contract?» held 11.11.2022. The third paper was presented on the IX All-Russian Legal Summit held 11.11.2023 in Ufa. Furthermore, there are three articles published in journals recommended by the Higher Attestation Commission[43] and one article in a journal recommended by the HSE (list D)[44].

THE MAIN CONTENT OF THE DISSERTATION

The introduction reflects the relevance of the research, related works, there is determined the aim and tasks of research, its subject, object and methods. Finally, it is argued the scientific novelty and the main conclusions submitted to defense are presented.

In **the first chapter** it is elucidated the intercourse between latin term *mercennarius* meaning a worker with Roman law of Persons.

In **the paragraph 1.1** it is illustrated the formation of the notion *persona* in roman jurisprudence. This term is rooted in ancient drama and rhetoric. Whilst in roman fables and comedies it means directly a scenic mask it gains more abstractive character getting closer to the modern meaning of each actor. The similar meaning of the term *persona* was borrowed by roman jurists in II century A.D. what coincided with developing of systematization. Hence, the term *persona* in the Institutes of Gaius is the general category combining freeborns and slaves. It could not be regarded as humanistic believes of the jurist rather the feature of legal thought comprehending a subject at law beyond individual circumstances. This feature corresponds to the ideal image of a scene whose characters are perceived based on the marks of their masks rather their individuality. Perceiving of *persona* without an actor wearing it enlarges the capacity of roman jurists to understand the external world based on their intuition. Thereby it is admitted that one subject at law can wear a bunch of personae attributed to other subjects at law. It is dinimacity of persona moving from one state to another that stimulates to developing new terms. Therefore,

[43] *Pestov M.M.* The premises of appearing and the meaning of the notion of a person in roman jurisprudence of classical period // Civil Law Review. № 3. 2023. P. 258 – 286*; Pestov M.M.* The development of the legal relation of service providing in Pre-classical Roman Law // Civil Law Review. № 1. 2023. P. 215 – 256.
[44] *Pestov M.M.* The liability of a worker in Classical Roman Law // Theoretical and parctial jurisprudence. № 2. 2023. P. 39 – 47.

there are introduced the eminent notion of «capitis deminutio» and such terms like «condicio» and «status» meaning the static state of persona beyond certain circumstances.

In **the paragraph 1.2.** it is explained the significance of the general notion *persona* for understanding a hired worker as the person of Roman Law. Ancient sources contain some mentions about many professionals whose job is specialized. But there are only some terms pretending to signify an unspecialized worker. Roman jurists denoted a hired worker more often with the term *mercennarius*. This term was originally used as an adjective and later as a noun that literally meant a person whose state as a subject at law is determed with gaining a profit (*merces*). Thereby, in literature there was a long discussion who was *mercennarius*: a free person or a slave leased for a work? Alfons Bürge supposed this term usually designated an alien slave leased to another peson. Yet the scholar did not refuse that sometimes the term *mercennarius* was applied to a freeborn worker but much less often in comparison with a slave. In contrast to his view, Cosima Möller thought that sources analyzed by her opponent demonstrates the term *mercennarius* was applied to freeborns as well as to slaves. It underlines the generic interconnetion with the more general term *persona*. Their common function was to designate each actor beyond a framework of certain case. Yet it could be suggested that as in the case of every *persona*, the legal standing of a worker is determed with its position in the ancient roman community. It demands to invoke to non-legal sources to point out the social standing of a worker.

In **the second chapter** of the research it is described the social standing of a worker taking into account his economic function and ethical debates on paid labour.

In **the paragraph 2.1** there are cited sources demonstrating the place of an employee in the roman household. One of the most archaic source «*De agri cultura*» of Marcus Porcius Cato contains some mentions about an unspecialized worker executing orders of an employer together with slaves of the later (De agri cultura 1.3, 4.2, 144-145). The text does not allow to verify the legal standing of this worker and it let us to suppose that he could be a slave and a freeborn. The same conclusion could be done in relate to the text of Varro in which he enumerates those who cultivate lands (De re rustica 1.17). But other texts in which the legal standing of a worker is more obvious brings us to

conclusion that for different epochs freeman worked side by side with a slave performing different and occasional as well as specific and professional work. For instance, they both could be managers of a farm (Col., De re rustica 1.12), scriptors of a private person or an official (Corn. Nep., Eumenes, 1.5), stone quarriers (CIL II, n. 5181) or muleteers (Fest., De verborum siginificatu 258.63-65; CIL IV, n. 97; CIL IV, n. 113). It brings to conclusion that the features of ancient householding could cause converging between a free worker and a slave in the eyes of roman jurists.

In **the paragraph 2.2** it is made the controversial conclusion in regard to ethical views on employement. The remark of Cornelius Nepotus on the modern to him disrecpect for employement is confirmed by Cicero in his estimate of handcraft industry as dirty and unfree (De officiis, 1.150). Nevertheless, the analysis of texts of Cicero and other authors shows that the opinion of the orator was not commonly held in different times and regions. For instance, Ancient Greek literature demonstrated that as early as times of Homer (Od. XVIII 366-372) and Hesiod industriousness was a honor and crucial qualification since the very human existing depended on it. This situation is going to be changed at the V century B.C. when arising income inequality consisted with democratic policy in some Ancient Greek poleis. It provoked indignation of wealthier citiziens. We see some reports on negative attitude to sellers and workers made by Herodotus (Hdt. II 167). But the policies of Pericles (Thykid. II 40) and Solon (Plut. Sol. 23) was turned on popularization of work ethic among Athenians and their glorification in account of that qualification contrasted with other Greeks. There is observed the regularity with which the attitude to hired work depends on political regime in certain polis. The more oligarchic it is the less valuable are people living for their work efforts. This regularity is observed in writings of Ancient Greek philosophers. While Plato and Aristotel posted handcrafters on the very low place in social hierarchy Antisthenes affirmed that labour is a good. Furthermore, some epigraphical materials show that many handcrafters of Athens were pride of the results of their job impressing their names on the things they made.

As for the Cicero he also fluctuated in his estimation of paid work. Based on analysis of texts written by him one may conclude that employees stood no lower than those whose craft was called by him as *artes illiberales*. The condemnation of their work

had nothing to do with gaining profit. The same was made by big maritime traders applauded rather than blamed by Cicero (De officiis 1.151). More likely, it was caused with subordinative character of the relationship between an employer and an employee compared by Cicero with agreement of enslavement (*auctoramentum servitutis*). By this he meant that private interests became more important for a worker than common welfare. At the same time, Cicero admitted public importance of each activity arguing that gratuitious as well as non-gratuitious goods exchange is submitted to the idea of common welfare (*communis utilitas*) the whole community of people is founded on (De officiis 1.7.22).

Christianity gaining ground in the following centuries approved positive attitude to hired work and judged idleness and laziness. Gaining profit was not blamed as itself but only with using profit for purposes contradicting with Christian dogma. This is also connected with judging of some sort of activities such as military and state service. It is accompanied with the economic raise of the first centuries of Roman Empire. The brightest illustration of this trend is conserved with epigraphical materials in which roman handcrafters in the same manner as their Athenians predecessors did not shame to designate their occupation. This allows to suggest that even if Cicero's views might impact on legal standing of a worker it was in much less degree than objective factors of combining work efforts of slaves and free persons.

In **the third chapter** it is described the features of the legal standing of an employee in Pre-classical and Classical Roman Law based on the previous conclusions.

In **the paragraph 3.1** the legal standing of a worker is reconstructed with legal opinions elaborated in Roman Republic. The difference with the views of classical jurists is indirectly confirmed by Ulpian reflecting upon services of an agrimensor. According to him, the republic jurists did not believe there could be the contract of *locatio-conductio*. Answering on why an agrimensor could not be hired as a worker one may designate the features of the worker's legal standing in Roman Republic. One of them lied in the fact that a worker in contrast with an agrimensor became temporally a member of an employer's family taking the place of a slave. As a result, an employer was responsible fot his actions by the interdictum recuperandae possessionis (D.43.16.1.20). It marks on

diminishing of his rights happened at his will (Pauli sententiae 2.18.1). The second feature was the compensatory nature of work in contrast with other services provided gratuitously based on the contract of *mandatum* due to specific views on friendship became legal meaning (Cic., Lael. De amicitial, 51). Being incorporated into *familia* of an employer caused specific regulation of worker's liability. From the one hand, an employer had jurisdiction over his worker in case of theft. From the other hand, an employer took the risk of impossibility of work performance.

In **the paragraph 3.2** it is described the features of the legal standing of a worker in Classical Roman Law. That features is linked with changes happened in the roman society of Principate when the social hierarchy legally formed was removed with system of formal bounds between independent subjects at law. Thereby the relations of work performing were also changed. A worker has gained large independence from his employer and opportunity to control work performing by himself. At the same time, his liability for the quality of work has also increased. It is appeared a special criteria of liability dealing with a breach of an obligation due to inexperience of a worker (*imperitia*). The later became to be regarded as professional what caused the increase of his liability. Meanwhile, it was about not only performing the work required but also conserving things trusted to a worker for doing his job (*custodia*). This cause for liability had objective character and the fact of damaging or destruction of the hing was enough to fix the breach of obligation despite of efforts made by the worker.

PUBLICATOINS ON THE RESEARCH TOPIC

Publication in journals included into the HSE University list (list B and D):

1. Pestov M.M. The Responsibility of a Service Provider in Classical Roman Law // Theoretical and Applied Law. № 2. 2023. P. 39-47.
2. Pestov M.M. The Preconditions and Meaning of Legal Person in Classical Roman Law // Civil Law Review. № 3. 2023. P. 258-286.
3. Pestov M.M. Formation of Legal Relations for Service Provision in Pre-Classical Roman Law // Civil Law Review. № 1. 2023. P. 215-256.