Municipium as a subject of private law

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Resumen

El objeto de este estudio es el análisis de las fuentes del Derecho romano, especialmente del Derecho municipal, a fin de indagar acerca de la capacidad jurídica de los municipios o colonias en el ámbito del Derecho privado. En particular, se han identificado las autoridades municipales encargadas de ejercer las acciones judiciales. El objetivo de esta investigación es analizar las fuentes del Derecho romano para comprobar la veracidad de la afirmación según la cual las autoridades municipales actuaban tanto en el ámbito del imperium como del dominium. En las conclusiones finales se afirma que los municipios romanos son un arquetipo para la organización y el funcionamiento de los autogobiernos locales contemporáneos, incluido el ejercicio de acciones judiciales.

Palabras clave: Derecho Romano, Municipio, Sujeto De Derecho, Persona jurídica, autoridades municipales.

Abstract

The subject of this study is the analysis of sources of Roman law, especially municipal laws, in terms of capturing the concept of the legal capacity of municipia or colonies in the field of private law. In particular, the municipal authorities responsible for performing legal actions in private law have been identified. This study aims to analyse the sources of Roman law to demonstrate the truthfulness of the initial claim that municipal authorities carried out actions within the scope of imperium *and* dominium. *In the conclusions, it is stated that Roman municipia are an archetype for the organisation and functioning of contemporary local self-governments, especially municipalities, including the performance of legal actions.*

Keywords: Roman law, municipality, subject of law, legal person, municipal authorities.

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1. INTRODUCTION

In the modern reorganisation culture of almost every state, it is evident that local governments, regardless of the nomenclature, have legal personality. This is what the Polish[1], Spanish[2] or Italian[3] legislator states. In addition, the Council of Europe strongly emphasises local government autonomy in the European Charter of Local Self-Government of 15th October 1985. Thus, local government bodies may also perform activities in the area of private law.

It is worth remembering, however, that the concept of a legal person was not known in ancient Rome. This one was conceived only in Roman-canon law in the Middle Ages[4]. It would seem, therefore, that the concept of the legal personality of a municipality was not known to the ancient Romans. In fact, the concept of a legal person was alien to the Romans, but it functioned in practice - the best example was fiscus and municipalities or colonies[5].

[1] The article 2, paragraph 2 of the Act of 8th March 1990 on municipal government (i.e., Journal of Laws of 2023, item 40). In the Polish Constitution in the article 165, section 1, the principle of the legal personality of a commune was not expressly formulated, yet the constitution-maker decided that a local government unit is entitled to ownership and other property rights. Thus, the legal personality of communes was indirectly recognized as a constitutional principle. L. RAJCA, *Konstrukcja osobowości prawnej samorządu terytorialnego*, in *Samorząd Terytorialny* 3 (2004) pp. 5-23.

[2] The article 11, paragraph 1 Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local (BOE núm. 80, de 03 de abril de 1985). E.C. PIAZUELO, *Influencia de la configuración de la personalidad jurídica del Municipio en la determinación de la titularidad del Patrimonio local*, in *Revista de Administración Pública* 137 (1995) pp. 93-146; C. ESTEVAN DE QUESADA-J.J. SZCZERBOWSKI (Eds.), *Wprowadzenie do prawa hiszpańskiego* (Olsztyn 2012) p. 51.

[3] In the article 11 of *Codice civile*, the legislator expressly states that municipalities have legal personality. Hence, in the law of 8th June 1990, no 142 *Ordinamento delle autonomie locali* (GU n. 135 del 12.-6-1990 - Suppl. Ord. N. 2) only the autonomy of municipalities is mentioned. F. STADERNI, *Diritto degli enti local* (Padova 2009) pp. 31-37.

[4] J.A.M. MUÑOZ, *Persona jurídica y personaje literario*, in *Anuario de Derechos Humanos* 1 (2000) pp. 155-190. The development of the concept of a legal person in Anglo-Saxon law, see: P. MAITLAND, *Moral personality and legal personality*, in *Journal of the Society of Comparative Legislation* 6.2 (1905) pp. 192-200.

[5] B. SITEK, *Autonomia społeczności lokalnych z perspektywy prawa rzymskiego i współczesnych rozwiązań normatywnych*, in *Journal of Modern Science* 1/36 (2018) pp. 33-50.

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The subject of this study is the analysis of the sources of law, especially municipal statutes, in terms of capturing the concept of the legal capacity of municipalities or colonies in the field of private law. For the fluency of the conducted research, it is necessary to unify the terminology; namely, in the further part of this study, I will use the term municipality in various lexical companies without distinguishing between a municipality and a colony. Anyway, this division of the cities of the Roman Empire was blurred already in the second century after Christ. This study aims to show how autonomous the system of municipalities was in the field of performing legal acts in the area of private law. The consequence of the subject and purpose of the work defined in this way is the research hypothesis, namely - Roman municipalities are undoubtedly the archetype of the organisation and functioning of modern local governments, especially communes, in the area of private law.

2. Characteristics of the municipal system of ancient Rome

However, the municipal system of ancient Rome cannot be perceived through the prism of modern political solutions, especially regarding the relationship between the state and local governments. The current organisation of the institutional structure of the local government is the prerogative of the central political authorities of the state. By means of the constitution and laws, the country is divided territorially, and the territorial units created in this way are assigned with the specific tasks. It is the state authorities who, to a large extent, decide on the amount of financial resources at the disposal of local governments through the system of subsidies[6]. From this point of view, we can only talk about the limited autonomy of local government units.

The organisation of the municipal system in ancient Rome looked completely different from contemporary normative and political solutions. After the Punic Wars, especially after the Second Punic War (218-201 BC), the previously small city of Rome became not only the political but also the cultural and economic centre of the world. In this perspective, the existing city-state (*polis*) concept began to undergo slow transformations. Cicero already identified the state with the nation

[6] H. Wollmann, *La reciente reforma del gobierno local en España: reflexiones desde una perspectiva comparada*, in *Revista Cuadernos Manuel Giménez Abad* 8 (2014) pp. 59-71; E. Feret, *Teorie samorządu terytorialnego i ich wpływ na kształtowanie strony dochodowej budżetu jednostki samorządu terytorialnego,* in W.M. Miemiec (Ed.), *Finanse samorządowe po 25 latach samorządności. Diagnoza i perspektywy* (Warszawa 2015) pp. 238-248.

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and not the city[7]. Deeper integration of the population living under the rule of Rome, especially in Italy, took place during the Civil War, which happened at the end of the republican system. It was then that the process of Romanization began – it means the process of creation of a unified political culture, including a common language, which was Latin, came into use. The administrative procedures in the provinces were standardised, and Roman law became a model for the practice of performing legal acts also between non-citizens[8]. Further changes in the constitution of the Roman state took place with the change of the republican system to the principate. On 13th January 27 BC, Octavian August divided power between the Roman Senate and the emperor. This legitimised his power[9].

With the development of Roman rule over the conquered areas, other previously independent cities were absorbed under Roman rule. Most often, the system of these cities remained unchanged. However, the city was becoming politically, especially militarily, dependent on Rome. However, it retained its far-reaching autonomy, especially regarding finances and the implementation of local development[10]. Hence, the municipalities had their own financial policy[11]. In return, the Roman state provided peace, security, and order. Roman legions, Roman law and central administration were to serve this purpose.

The situation with the colonies was somewhat different. Already in the second century BC, Rome began colonising the conquered areas by founding new

[7] Cic., *De rep.* 1.25.39: *res publica res populi*.... B. Sitek, *O państwie i politykach według Cycerona*, in *Journal of Modern Science* 1/2 (2006) pp. 11-19; H. Kupiszewski, *La nozione di stato nel* De republica *di Cicerone*, in Scritti *Minori* (Napoli 2000) pp. 511-517; G. Lobrano, Res publica res populi. *La lege e la limitazione del potere* (Torino 1996) p. 111.

[8] As for the practice of applying the Roman law, it was already in 242, before Christ, when a special *magistratus praetor peregrinus* was set up, who had the power to settle disputes between peregrines J. Harries, *Cicero and the Jurists. From Citizens' law to the lawful State* (Duckworth 2006) pp. 146-7; L. Girdvainyte, *Roman Law, Roman Citizenship, Roman Identity? Interrelation between the Three in the Late Republic and Early Empire* (Leiden 2014) pp. 46 ss.

[9] E. Meyer, *Einführung in dir Antike Staatskunde* (Darmstadt 1968) pp. 228 s. From Diocletian, the complete centralization of the central administration began, modelled on the Eastern despotism, especially the Persian one. See A. Chastagnol, *L'accentrarsi del sistema: la tetrarchia e Costantino*, in *Storia dei Greci e dei Romani, La Roma tardoantica. Per una preistoria dell'idea di Europa* (Milano 2008) pp. 196 ss.; P.A. Brunt, *The Fall of the Roman Republic* (Oxford 1988) pp. 3 ss.

[10] E. Gabba, *La opportunità del decentramento. Municipalizzazione dell'Italia e continuità dei ceti dirigenti locali*, in L. Capogrossi Colognesi-E. Gabba (Eds.),*Gli Statuti Municipali* (Pavia 2006) pp. 575-578.

[11] F. Vallocchia, *Città e risorse tra attività economiche e pubblica utilità*, in *Koinōnia* 44.2 (2020) pp. 1559-1578; G. Chantal, Pecuniae publicae... ne otiosae iaceant *(Plin. Epist. 10.54). Strategie finanziarie nell'amministrazione provinciale*, in *Gli Statuti Municipali* cit. pp. 384-386.

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cities, in which the poorer inhabitants of Rome were usually settled, or later, the legions, which, after a fairly long period of service, went to the reserve[12]. Colonies were founded according to a specific model, which was reflected in the *lex Iulia municipalis*[13] or later in the *lex Flavia municipalis*[14]. These were the so-called model acts. Each municipality received its own law and a unified organisational structure. Over time, the old municipalities adapted to this pattern. And as has already been said, the difference between these two organisational forms of cities was slowly blurred as soon as at the beginning of the second century.

However, the important thing at this point is the need to clarify the relationship between Rome and the municipalities. In general, Rome did not intervene in the internal affairs of the municipia, although some matters were reserved for the competence of provincial governors – for example, the settlement of court disputes in civil cases above a certain amount of the value of the subject of the dispute[15]. Criminal matters were also, in principle, the competence of the governors of the provinces[16]. Numerous cases of central government interference in the organisation and functioning of municipalities have been described in the literature[17].

3. The scope of possible legal actions belonging to municipal authorities

Contemporary public administration activities are located either in the imperium or dominion spheres. The first of these areas concerns the issuance of legal acts of an authoritative nature. Such a legal relationship is characterised by the inequality of the parties. The stronger party is always the public authority. On

[12] M. Farinelli, *Città nuove, colonizzazione e impero: il caso di Fertilia,* in *Passato e Prezente* 88 (2013) pp. 57-82.

[13] L. Mitteis, *Über die sogenannte* lex (Julia) municipalis, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 33.1 (1912) pp. 159-180.

[14] Á. d'Ors, *La nueva copia Irnitana de la* Lex Flavia municipales, in *AHDE.* 53 (1983) pp. 6-17.

[15] W. Bojarski, *Stosunki cesarskiego Rzymu lokalnymi autonomiami w zakresie sądownictwa*, in T. Maciejewski (Ed.), *wymiaru sprawiedliwości* (Koszalin 1999) pp. 14 ss.

[16] W. Litewski, *Rzymski proces karny* (Kraków 2003) pp. 67-68; T. Mommsen, *Römisches Strafrecht* (Göttingen 1999) pp. 226-228.

[17] C. Brélaz, *Motifs et circonstances de l'ingérence des autorités romains dans les cites grecques sous le Principat*, in A. Baroni (Ed.), *Aministrare un impero Roma e le sue province* (Trento 2007) pp. 109-143; V. Marotta, *Ulpiano e l'impero*, II, *Studi sui 'libri* de officio proconsulis' *e la loro fortuna tardoantica* (Napoli 2004) pp. 15 ss.; W. Eck, *Provincial administration and finance*, in *The Cambridge Ancient History* 11 (2000) pp. 266-292.

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the other hand, the activities of public administration in the sphere of *dominium* include performing legal acts typical of private law. This division of public administration activities, also concerning municipalities, was already known in Roman law[18]. From the point of view of contemporary categories of private law entities, a municipality was treated as a private law entity.

Some activities in the implementation of public tasks were conducted by the officials themselves in Rome or in the municipalities. In Rome, but also in the municipalities, many specialists were employed, including highly qualified public slaves who performed public tasks. However, most public works, especially in constructing new facilities, were outsourced to private entrepreneurs associated in companies called *societas publicanorum* or *redemptores*. As A. Trisciuoglio shows, the company was always represented by one of the partners called *manceps-redemptor* when concluding contracts[19].

One of the essential tasks of the authorities of each municipality was to provide the residents with food supplies, *cura annonae*. The city's provisioning primarily included the grain supply, which was mostly coming from North Africa at that time[20]. The grain deliveries were handled by entrepreneurs operating in the form of today's company. The municipal authorities were interested in the purchase of grain mainly for free distribution to the poorer part of the local community. This practice was already used during the civil war in Rome and then in the municipalities[21]. There were numerous abuses during grain purchase, for example: suppliers manipulated grain prices by colluding or monopolising the supply market. To put an end to these practices, in 18 BC, the *lex Iulia de annona*

[18] J. Gaudemet, «Dominium-imperium». *Les deux pouvoirs dans la Rome ancienne*, in *Droits* 22 (1995) pp. 3-17; J. Jagielski - M. Wierzbowski, *Prawo administracyjne* (Warszawa 2019) pp. 163 ss.

[19] Societas publicanorum *e aspetti della responsabilità esterna*, in: http://www.dirittoestoria.it/11/memorie/Trisciuoglio-Societas-publicanorum-responsabilita-esterna.htm [2014-12-26]. See L. Maganzani, *Pubblicani e debitori d'imposta. Ricerche sul titolo editale de publicanis* (Torino 2002) pp. 155 ss.; R. Mentxaka, *Algunas consideraciones en torno a las concesiones administrativas y sus garantías: capítulos 63-65 de la lex Malacitana,* in *Mainake* 23 (2001) pp. 71-96. A. Mateo, Manceps redemptor publicanus. *Contribución al estudio de los contratistas públicos en Roma* (Santander 1999) pp.154 ss.

[20] E. Höbenreich, Annona. *Juristische Aspekte der stadrömischen Lebensmittelversorgung im Prinzipat* (Graz 1997); B. Sirks, Qui annonae urbis serviunt (Amsterdam 1984) pp. 45 ss.

[21] B. Sitek, Tabula Heracleensis (lex Iula municpalis). *Tekst, tłumaczenie, komentarz* (Olsztyn 2006) pp. 28-29; C. Virlouveta, Tessera frumentaria. *Les procédures de la distribution du blé public à Rome* (Rome 1995) pp. 172 ss.; On the practice of free grain distribution in Egypt, see: G. Wesch-Klein, Liberalitas in rem publicam*: private Aufwendungen zugunsten von Gemeinden im römischen Afrika bis 284 n. Chr.* (Waldenburger 1990) p. 32.

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was issued, on the basis of which the accumulation of excessive food stocks or the intentional raising of grain prices was penalised[22]. As part of the provisioning of the city, the municipal authorities´ duties also included supplying water to the city. The fundamental way of implementing this sentence was the construction of aqueducts (*lex Ursonensis,* 99). The construction of aqueducts was one of the activities referred to as *opus publicum faciendum*, which will be discussed below.

Another area in which municipal authorities performed civil law activities was cult. *Lex Ursonensis,* 69 mentions the payment of remuneration to tenants of religious rites (*redemptori redemptoribusque*) carried out in each municipality. The conclusion of an agreement with them, *lex locationis,* was the basis for the payment of these remunerations.

An essential area of concluding civil law contracts was carrying out works involving the construction of new or repairing existing public facilities, including constructing or repairing roads, moats surrounding the city, sewers, or other public facilities[23]. In this case, this was an area of *opus publicum faciendum, reficiendum, restituendum*[24].

4. Procedures and authorities authorised to enter into legal transactions

Concluding civil law transactions by municipal authorities in the period after the Punic Wars cannot be surprising. Although the concept of a legal person was not known at that time, it was used in practice. The development of the concept of the tax office under Octavian Augustus was of particular importance for the development of this concept from the perspective of performing civil law transactions. The tax office, understood as the state treasury, was treated as a subject of civil law. Later, in court proceedings, the treasury was represented by an *advocatus fisci*[25]. Municipalities were treated in an analogous way to the tax office.

[22] D. 48,12,2 pr. (*Ulp.* 9 *de off. procon.*). W. Litewski, *Słownik encyklopedyczny prawa rzymskiego* (Kraków 1998) pp. 155 ss.

[23] *Lex Urs. cap.* 77; 78; 98.

[24] Activities undertaken in constructing new elements of public infrastructure were primarily regulated by private law regulations. The provisions on *locatio conductio* contained in D. 19,2 is an example of such situation. One can also point to provisions concerning only public works (*opere public*), e.g., C. 8,12. C.Th. 15,1 or D. 50,10.

[25] For more on the development of the *advocatus fisci* institution in ancient Rome, see: B. Sitek, *Wybrane systemy prawnej i instytucjonalnej ochrony praw i interesów państwa* (Warszawa 2020) pp. 36-46;

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First, the municipal authorities responsible for performing civil law transactions on behalf of the municipality and the subject matter of such agreements (*lex locationis*) should be indicated. Contracts for the performance of work or public tasks were classified as *locatio condutio operis*, which is similar to today's contracts for specific work. In the event of the need to employ additional lawyers to perform the contract, which was most often the task of the contractor (*redemptor*), a contract of the mandate was concluded, *locatio conductio operarum*. As part of the contract concluded with the public entity, the *redemptor* should transport funds to pay for such contracts (*mercedes*)[26].

Public bodies authorised to enter into civil law transactions with *redemptores* have undergone an evolution in terms of changing names or the scope of competence. During the Roman Republic, such authorities were censors and consuls. The censors could only spend funds approved by the Roman Senate. However, to obtain such funds, the censors were directed to the quaestors who were in charge of the treasury of the city of Rome (*aerarium*)[27]. But already at the beginning of the principate, these powers came to new imperial officials, *curatores*.

In turn, a more stable situation in this respect was in the municipalities. As a rule, the *potestas locandi* belonged to *IIviri* (*lex Irnitana cap.* 69). The funds for the implementation of public tasks came from the city *aerarium*, and their spending was controlled by the city council (*ordo decurionum*)[28].

Therefore, it is worth asking the question about the scope of the subject of legal actions. The answer to this question is not simple. In the case of smaller investments, such as road repair, the lessees of public works, *redemptores*, did not only carry out the work entrusted to them. According to A. Trisciuoglio, they simultaneously dealt with the design of this task. The analysis of legal or literary

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A. Agudo Ruiz, *El* advocatus fisci *en derecho Romano* (Madrid 2006); G. Boulvert, Advocatus fisci, in *Index* 3 (1972) pp. 49-60.

[26] Cic., *In. Verr.* 2,1,56. A. Trisciuoglio, «Sarta tecta, ultratrinuta, opus publicum faciendum locare» *Sugli appalti relativi alle opere pubbliche nell'eta republicana e Augustea* (Napoli 1998) pp. 94 ss.

[27] B. Sitek, Ultro tributa. *Controversie e lacrime d'imprenditori in materia di appalti pubblici (Liv. 39.44). Esperienze antiche e moderne,* in A. Fernández de Buján et. al. (Eds.), *Hacia un derecho administrativo, fiscal y medioambiental Romano* (Madrid 2016) pp. 697-709; J. Soulahti, *The Roman Censors. A Study on Social Structure* (Helsinki 1963) pp. 64 ss; G. Hahn, De censorum locationibus (Leipzig 1879) pp. 9 ss.

[28] Cic., *ad fam.* 13,11. A. Trisciuoglio, Sarta tecta, ultratrinuta, opus publicum faciendum locare cit. p. 108; B. Sitek, Lex coloniae Genetivae Iuliae seu Urosnensis i lex Irnitana. *Ustawy municypalne antycznego Rzymu. Tekst, tłumaczenie i komentarz* (Poznań 2008) pp. 34 s.

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sources does not indicate that public *architecti* were employed in Rome or in the municipalities for the implementation of a specific public investment[29]. Thus, hiring an architect for smaller investments was on the side of the one who won the tender to execute specific public works[30]. The situation was similar in the case of employment of other subcontractors, such as *mensores*, which were experts in making distinct types of measurements. They were the ancestors of modern surveyors[31]. Architects or surveyors were often highly qualified slaves.

Work was organised slightly differently on the occasion of sizable urban investments in Rome or in the municipalities. In this case, the city employed professionals, including architects. Therefore, the planning of the investment was the responsibility of the contracting authority, not the contractor. This possibility is confirmed by numerous inscriptions – for example, the inscription commemorating the construction of the central archive in Rome (*Tabularium*)[32]. At the same time, architects had the right to control the work done by *redmtores*. Similar solutions were also used in municipalities.

The next element was the issue of providing the contractor with the resources, which means the building material, *materies*. The analysis of sources carried out by A. Trisciuoglio indicates that there was no uniform practice in this regard. Thus, Cicero points out that the ordering party's job was to provide the material[33]. In turn, Pliny the Elder describes the conclusion of one of the contracts for the execution of public work, which stipulated that it was the contractor's responsibility to provide the material for construction[34]. It follows from these two cited texts that the circumstances of the investment implementation and its size were decisive as to which party to the civil law contract was to provide the appropriate building material.

[29] A. Trisciuoglio, Sarta tecta, ultratrinuta, opus publicum faciendum locare cit. pp. 82 s.; E. de Ruggiero, s.v. '*Architectus*', *Dizionario Epigrafico* (Roma 1895) p. 645.

[30] The scope of knowledge that an architect should have been described *Vitruvius*, Vitr. *De arch.* 1,1,10.

[31] B. Sitek, Professio mensoria. *Rzymskie korzenie zawodu geodety*, in W. Brzęk et. al. (Eds.) *Funkcjonowanie administracji publicznej – historia i stan obecny* (ed. by W. Brzęk, S. Ćmiel, K. Novikova), (Józefów 2013) pp. 173-185; S. del Lungo, *La pratica agrimensoria nella tarda antichità e nell'alto Medioevo* (Spoleto 2004) pp. 72-74.

[32] CIL I[1],808.

[33] Cic., *In Verr.* 2,1,56,146. A. Trisciuoglio, Sarta tecta, ultratrinuta, opus publicum faciendum locare cit. pp. 87-89.

[34] Plin. Mai., *Nat. Hist.* 36,55,176.

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After specifying the type of contracts concluded for the performance of public works and the subject matter of the contract, *lex locatio*, it is worth mentioning the procedure for selecting contractors for public works. Already in ancient Rome, a procedure similar to the modern public procurement procedure was developed. It was also used in the municipalities. This procedure was preceded by a public announcement of information about the planned public investment[35]. However, there are sources according to which the *magistratus* organising the public procurement selected the contractor without a tender based on their own will[36].

5. Conclusion

The modern concept of local government undoubtedly originates in normative and political solutions developed in ancient Rome. Already at that time, the municipal authorities, whose system was to some extent modelled on the solutions used in Rome, conducted their activities in two forms. The first one was a form of imperious action (*imperium*), while the second form of activity of municipal authorities concerned activities in the field of private law (*dominium*).

The municipalities, acting within their autonomy, conducted a fairly extensive investment activity, for example, in constructing new public facilities or repairing existing ones, *opus publicum faciendum, reficiendum, restituendum*. Only small investments were carried out with the use of professionals employed by the municipality. In other cases, implementing these tasks was entrusted to external entities, most often referred to as *redemptores*. To carry out these works, it was necessary to select contractors. For this purpose, a procedure which is an archetype of the modern public procurement system has already been developed in Roman law.

With the selected entrepreneur, an authorised official with *potestas locandi* concluded a contract for performing a specific work, *locationes operarum*. The contract's content contained various types of clauses according to the needs of the work being carried out. The standard provisions of such an agreement included: the subject of the work, the price, the cost of the material or the method of

[35] Liv. 39,44.

[36] Vitr., *De arch.* 6,5. A. Daguet-Gagey, *Les opera publica à Rome (180-305 op. J.-C.)* (Paris 1997) pp. 223-225.

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obtaining the building material. Hiring subcontractors, especially architects or *mensores*, was left to the contractor's discretion, but not always.

The issues discussed in this article indicate a certain genius of the Romans, who, a long time ago, developed legal and procedural solutions for the implementation of public goals, which are a model for modern legal solutions.

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