



Universidad de
Oviedo

RIDROM

Revista Internacional de Derecho Romano

ISSN 1989-1970

Octubre-2026

Full text article

<https://reunido.uniovi.es/index.php/ridrom>

Fecha de recepción: 04/05/2026	Fecha de aceptación: 26/09/2026
Palabras clave: <i>Mutuum; Derecho romano; contratos reales; obligatio; fuentes clásicas; conductio.</i>	Keywords: <i>Mutuum; Roman Law; real contracts; obligatio; classical sources; conductio.</i>



THE HISTORICAL EVOLUTION OF THE MUTUUM CONTRACT: AN ANALYSIS OF THE CLASSICAL SOURCES □

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(FERREIRA OLIVEIRA, Miguel. *The historical evolution of the mutuum contract: an analysis of the classical sources*. RIDROM [on line]. 37-2026.ISSN 1989-1970. Pp. 424-469. <https://reunido.uniovi.es/index.php/ridrom>)

Resumen:

Este artículo examina el desarrollo histórico del contrato de *mutuum* en el Derecho Romano mediante fuentes clásicas y su reconstrucción dogmática. Se analiza la formación de la *obligatio* y la clasificación del mutuo como contrato real, destacando el papel de la *datio rei* en la constitución del vínculo obligatorio. El estudio rastrea la evolución de la institución desde sus raíces en la solidaridad social hasta su consolidación como instrumento vital para la circulación de riqueza y el crédito. Se presta especial atención a sus elementos constitutivos, características y remedios procesales. Finalmente, se argumenta que el mutuo fue fundamental para organizar el sistema crediticio romano y el desarrollo del Derecho de Obligaciones.

Abstract:

This article examines the historical development of the *mutuum* contract in Roman Law through classical sources and dogmatic reconstruction. It analyzes the formation of the *obligatio* and the classification of mutuum as a real contract, emphasizing the role of *datio rei* in establishing the obligatory bond. The study traces the institution's evolution from its roots in social solidarity to its role as a vital instrument for wealth circulation and credit. Key focus is placed on its constitutive elements, essential characteristics, and legal remedies. Ultimately, the article argues that mutuum was fundamental to organizing the Roman credit system and shaping the broader Law of Obligations.

Contents: 1. Introduction. 2. The Roman Legal Context and the Formation of Contracts. 3. The Development of the *Mutuum* contract. 3.1. The Origin of the *Obligatio* and the Emergence of the Contract. 3.2. Formalism and Contractual Categories in Ancient Rome. 3.3. The Evolution of the Contract over Time. 4. The Development of Real Contracts. 4.1. Constitutive Elements of the *Mutuum* contract. 4.2. Characteristics of the *Mutuum* contract. 4.3. Legal Protection of the *Mutuum* contract. 5. Conclusions. Bibliography.

1. Introduction

The *mutuum* contract occupies a position of particular significance in the history of obligations law. This relevance derives not only from its practical utility within the everyday economic life of Roman society, but also from its role in the dogmatic consolidation of contractual categories that would later shape the Western legal tradition. Among the various contractual forms recognised in Roman law, *mutuum* stands out as the paradigmatic example of a real contract, insofar as its formation depended upon the delivery of the thing (*datio rei*), from which arose the obligation to return an equivalent quantity of the same kind and quality.

The centrality of this institution may be explained on several levels. First, the *mutuum* contract responded, from an early stage, to a fundamental need within the organisation of social and economic life, allowing individuals to address immediate requirements of subsistence and, later, facilitating the circulation of wealth, financing, and credit. Second, its legal regulation illustrates, with particular

clarity, the structural logic of the Roman legal system, grounded in formalism, the typification of obligatory relationships, and the distinction between the different modes through which obligations could arise. Third, the historical development of *mutuum* reflects, in an exemplary manner, the broader transformation of Roman legal thought, from an approach centred on the objective element of the *datio rei* and the rigidity of *ius strictum*, towards a gradual recognition of agreement and the will of the parties.

The present study aims to examine the historical development of the *mutuum* contract in Roman law, drawing on the classical sources, in order to understand its origin, structure, and evolution. More specifically, it seeks to show that this institution should not be regarded merely as a technical mechanism for the loan of fungible goods, but rather as a legal institution reflecting significant economic, social, and doctrinal transformations.

To that end, the analysis begins by situating *mutuum* within the broader framework of contract formation in Roman law, examining the relationship between *obligatio*, contract, formalism, and the various contractual categories. It then turns to the specific development of *mutuum*, considering its function within Roman economic life and the manner in which its legal contours were progressively shaped by jurisprudence and practice. Finally, attention is given to its constitutive elements, its defining characteristics, and the legal remedies available to the lender.

An examination of the sources supports the view that *mutuum*, although originally rooted in a primitive framework of trust and solidarity, gradually acquired greater technical and legal refinement

as Roman society became increasingly complex. This transformation did not, however, eliminate the institution's original structure, which remained anchored in the requirement of the delivery of the thing and in the obligation to return the *tantundem eiusdem generis et qualitatis*. It is precisely this balance between formal tradition and practical adaptation that underlies the dogmatic interest of the Roman *mutuum* and explains why its study remains essential for understanding the historical foundations of key institutions in contemporary private law.

2. The Roman Legal Context and the Formation of Contracts

As is widely acknowledged, modern Western law has its roots in the Roman legal system. Over time, this system extended far beyond the boundaries of the ancient Roman Empire and came to exert a profound influence on the development of Western legal orders, particularly in the field of civil law.

In fact, since Roman law constitutes the origin of most of the legal institutions that form part of the Western legal tradition, an understanding of Roman legal culture becomes essential for a clearer comprehension of the structure and historical development of contracts.

In this context, it becomes necessary to examine the origins of the *mutuum* contract through an analysis of its historical development, with the purpose of identifying its distinctive features and the transformations it has undergone since its earliest forms to the present day. Such an approach makes it possible to better

understand the sources of current law and the foundations of contemporary legal institutions, particularly in relation to legal relationships that were already central in antiquity, such as the *mutuum* contract.¹

The *mutuum* contract can in fact be traced back to very early times, emerging as a practice grounded in reciprocity and, above all, in solidarity. In situations of surplus food production, individuals would provide others with goods exceeding their own needs, later receiving, once circumstances had changed, products of equivalent quantity and quality in return.

This early model can be identified in several ancient civilizations, such as Egypt and ancient Greece, where this type of arrangement was commonly used for the loan of grain. Only at a later stage did loan agreements begin to involve money as their object, a development that can be observed, for example, in Egypt.²

¹ On the *mutuum* contract, see: CUNHA GONÇALVES, *Contratos*, pp. 247, ss.; PIRES DE LIMA/ANTUNES VARELA, *Código Civil anotado*, vol. I, pp. 761, ss., sub arts. 1142 e ss.; MENEZES CORDEIRO, A. *Manual de Direito Bancário*, 4.^a ed., Coimbra, Almedina, 2010, pp. 623, ss.; REDINHA, J. *Contrato de mútuo*, in MENEZES CORDEIRO A. (org.), *Direito das Obrigações*, III, 2.^a ed., Lisboa, AAFDL, 1991, pp. 185-262; DE ALMEIDA, F. *Contratos*, II, cit., pp. 141, ss.; ABRANTES, J. J. *Algumas notas sobre o contrato de mútuo*, in *Nos 20 anos do Código das Sociedades Comerciais. Homenagem aos Profs. Doutores A. FERRER CORREIA, ORLANDO DE CARVALHO e Vasco LOBO XAVIER*, II – Vária, Coimbra, Coimbra Editora, 2007, pp. 1057-1068; MENEZES CORDEIRO, A. *Tratado de direito civil*, XII, cit., pp. 181, ss.; MENDES CORREIA, F. *Contrato de mútuo: questões antigas e desenvolvimentos recentes*, in MENEZES CORDEIRO A. (org.), *Código Civil. Livro do Cinquentenário*, I – Homenagem ao Professor Doutor Fernando PESSOA JORGE, Coimbra, Almedina, 2019, pp. 527-563.

² MENEZES CORDEIRO, A. (2021). *Tratado de Direito Civil XII - Contratos em Especial* (Segunda parte, p. 185). Coimbra: Almedina.

A particularly significant presence of *mutuum*-type arrangements can be observed in maritime transactions, later referred to as maritime loans, in which the lender's profit was directly linked to the success of the venture. Under this arrangement, if the enterprise proved successful, the lender would obtain the expected return, if it failed, the lender bore the risk of loss.³

In Roman society, particularly during the monarchical period and the early Republic, the *mutuum* contract developed more gradually. Given the predominantly agrarian character of Roman society at that time, no clear distinction initially existed between different forms of loans.

Such agreements were initially concluded within the family circle and only later extended to neighbours. These contractual relationships were founded primarily on the trust established between the parties, as they typically concerned loans of consumable goods and were concluded without remuneration. In other words, the lender did not derive any profit from the transaction, which allows these arrangements, in many cases, to be understood essentially as acts of giving.^{4,5}

For a considerable part of Roman history, loans for use, safekeeping, and consumption, generally concerning basic goods,

³ This form of *mutuum* would go on to play a fundamental role in the commercial economy of Mediterranean civilizations. MENEZES, M. (2023). *Dos perigos aos riscos: génese e evolução das práticas e discursos dos seguros marítimos (séculos XIII-XVII)*. *História. Revista da FLUP*, IV Série, 13(1), 75-95.

⁴ MENEZES CORDEIRO, A. (2021). *Tratado de Direito Civil XII - Contratos em Especial (Segunda parte)* (p. 186). Coimbra: Almedina.

⁵ FERREIRA, B. (2011). *Contratos de créditos bancários e exigibilidade antecipada* (p. 27). Coimbra: Almedina.

were not clearly distinguished from one another. Only toward the end of the Republic, or at the beginning of the Principate, did *mutuum* emerge as a distinct legal institution within the praetorian notion of *credere*. At that stage, the praetor introduced *actiones in factum* in order to provide legal protection for arrangements such as *commodatum* and *pignus*.⁶

Despite the slow process through which *mutuum* was consolidated as a legal institution in ancient Rome, it ultimately came to assume a structure largely consistent with that which would later be adopted, over time, in various legal systems.

In this respect, the Portuguese legal system is no exception. In its current formulation, the *mutuum* contract is legally defined in Article 1142 of the Portuguese Civil Code (CC) as: “o contrato pelo qual uma das partes empresta à outra dinheiro ou outra coisa fungível, ficando a segunda obrigada a restituir outro tanto do mesmo género e qualidade.”^{7,8,9}

If one considers the wording of the law, it becomes clear that the essential structure of the *mutuum* contract remains, to a large

⁶ MORAES MOTA, M. (2019). *As raízes romanas do contrato*. Revista Jurídica Luso-Brasileira, 5(1). Coimbra: Centro de Investigação de Direito Privado.

⁷ Our translation: “the contract by which one party lends to another money or another fungible thing, the latter being obliged to return an equivalent amount of the same kind and quality.”

⁸ As noted by PIRES DE LIMA, J., & ANTUNES VARELA, M. (1997). *Código Civil anotado* (4^a ed., Vol. II, p. 761). Coimbra: Coimbra Editora: the concept set out in this provision corresponds, in essence, to the definition of *mutuum* contained in Article 1813 of the Italian Civil Code.

⁹ As noted by VASCONCELOS RAPOSO, J. (2016). *Crédito hipotecário, incumprimento e execução no contexto da crise financeira – A “dação potestativa” como solução?* (p. 14). Coimbra: Almedina: this definition introduced by the civil legislator in 1966, at first glance, appeared to move away from the contractual type of loan as established in the Seabra Code, which, in social terms, continues to persist, even in everyday language.

extent, faithful to the model outlined in Roman law. In that context, *mutuum* consisted in the transfer of ownership of fungible goods from the lender to the borrower, who thereby assumed the obligation to return the *tantundem eiusdem generis et qualitatis*, that is, an equivalent amount of the same kind and quality. It was precisely around this model of *datio* that Roman jurisprudence consolidated the notion of the real contract, giving rise to sustained doctrinal interest over the centuries.¹⁰

In these terms, and from an etymological perspective, it remains appropriate, following the words of *Gaius*, to describe this contract as it is called, *mutuum* because what is thus given to you by me becomes, from mine (*meum*), yours (*tuum*). In turn, *mutuum* is related to the root *mov*, from which *movere* and *mutare* derive, conveying the idea of exchange or change of place. In *mutuum*, accordingly, one observes the exchange of fungible things for others that are likewise fungible.¹¹

2. *The Development of the Mutuum contract*

3.1. *The Origin of the Obligatio and the Emergence of the Contract*

In light of the foregoing, it becomes necessary to examine the historical development of the contractual figure over time. Particular attention must be given to the fact that, although the *mutuum* contract forms part of obligations law, this does not mean that its existence

¹⁰ SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 5 e ss.). G. Giappichelli Editore.

¹¹ SANTOS JUSTO, A. (2011). *O mútuo no Direito Romano - Algumas notas romanas no Direito Português* (p. 74). Coimbra: Almedina.

coincided with, or preceded, the emergence of the concept of obligation. In fact, the notion of *obligatio*, predates the abstract elaboration of the concept of contract.¹²

In the *Institutes* of the Justinianic period, *obligatio* was defined as a legal bond by which we are necessarily bound to render something in accordance with the law of our city.^{13,14}

By contrast, the concept of *contractus* appears in Roman law through the writings of the jurists already in the classical period, as a way of expressing what had been concluded through formulations such as *res contracta* (a contracted matter or the object of a contract), *contrahenda* (that which is to be contracted), and *negotium actum* or *contractum* (a transaction concluded or a contract entered into), used to describe legal transactions that gave rise to obligations.¹⁵

¹² MORAES MOTA, M. (2019). *As raízes romanas do contrato*. Revista Jurídica Luso-Brasileira, 5(1). Coimbra: Centro de Investigação de Direito Privado. From the original: “a noção de *obligatio*, ou obrigação, é anterior à elaboração abstrata da figura contratual”.

¹³ From, PANERO GUTIÉRREZ, R. (2004). *Derecho Romano* (3^a ed., p. 456). Valencia: Tirant Lo Blanch: Where it states that *obligatio* was defined as “*el vínculo jurídico – iuris vinculum – por el que, necesariamente, somos constreñidos – quo necessitate adstringimur – a pagar alguna cosa – alicuius solvendae rei – según los derechos de nuestra ciudad – secundum nostrae civitate iur-*”. Our translation: the legal bond (*iuris vinculum*) by which we are necessarily bound (*quo necessitate adstringimur*) to pay or perform something (*alicuius solvendae rei*), according to the law of our city (*secundum nostrae civitatis iura*).

¹⁴ The parallelism and similarity between this definition and that found in Article 397 of the Portuguese Civil Code are evident, where it is stated that: “*obrigação é o vínculo jurídico por virtude do qual uma pessoa fica adstrita para com outra à realização de uma prestação*”. Our translation: an obligation is a legal bond by virtue of which one person is bound towards another to render a prestation.

¹⁵ MENEZES CORDEIRO, A. (2021). *Tratado de Direito Civil – VII Direito das Obrigações* (p. 62). Coimbra: Almedina.

This understanding is also confirmed by the way in which *mutuum* was treated in the classical sources. As can be seen in the work of *Gaius*, *mutuum* was regarded as a paradigmatic instance of an obligation arising from the delivery of a determinate thing, forming part of the system of restitutionary actions based on typical grounds for recovery. It does not, therefore, appear as a contract endowed with an autonomous legal regime, but rather as the cause justifying restitution. The absence of a separate title devoted specifically to *mutuum* in the *Digest*, unlike what occurs with other contractual figures, reinforces this interpretation, since issues relating to *mutuum* were addressed mainly within the framework of the *condictio certae rei* (the action for the recovery of a specific thing). This approach suggests that the practice of *mutuum* preceded the systematic formulation of the contract as a technical legal category, and that its relevance lay primarily in its concrete function as a transfer of ownership accompanied by an obligation of restitution.¹⁶

In this sense, in Roman law the contract was not merely an agreement of wills, but rather a legally recognised instrument that, in accordance with the schemes characteristic of classical law, gave rise to an obligatory relationship.¹⁷

This interpretation is particularly evident in the case of *mutuum*, whose central place within the legal system is reflected in its prominent treatment in the *Institutiones* of *Gaius* and of *Justinian*. In

¹⁶ LÓPEZ-RENDO RODRÍGUEZ, C. (2018). *Intereses de préstamos de dinero. Limitaciones legales y efectos civiles de su abusividad en el Derecho romano*. *Revista Internacional de Derecho Romano*, 426-464.

¹⁷ TORRENT RUÍZ, A. (2021). *La noción de contrato en Derecho Romano*. *Revista Internacional de Derecho Romano*, RIDROM, 26, 550-574.

these didactic works, *mutuum* appears as a distinct legal figure, even though, as noted above, classical legal doctrine did not grant it a fully autonomous systematic treatment in the *Digest*.¹⁸

3.2. Formalism and Contractual Categories in Ancient Rome

In the archaic period, a mere agreement of wills was insufficient for the formation of a contract. Roman law adopted a far more restrictive conception of contracts than that found in modern legal systems, recognising as contracts only those agreements intended to create obligations and which also satisfied an objective requirement. This requirement consisted in compliance with the ritual formalities necessary for the contractual act, since only through the observance of such formalities could obligations effectively arise.

The jurists of the classical period, rather than conceiving contracts as a general and unified category, instead recognised certain specific contractual types endowed with autonomous legal regimes, in which the corresponding obligation arose not from the subjective element (*pactum, conventio*), but as a consequence of an objective element, expressed in the observance of formalities or in the delivery of the thing (*forma, datio rei*).¹⁹

¹⁸ Also, SACCOCCIO, A. argues that this absence reveals the antiquity and ancestral character of the *mutuum*, whose origin goes back to a phase of Roman law prior to the strict delimitation between legal categories, when it was understood as a typical cause of the obligation of restitution rather than as an autonomous contract. Cfr. SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 23 e ss.). G. Giappichelli Editore.

¹⁹ ALMEIDA COSTA, M. J. (2022). *Direito das Obrigações* (12^a ed., p. 215). Coimbra: Almedina.

Roman law was profoundly formalistic, requiring the observance of rituals and rigid procedural schemes for the validity of contracts. As a result, contracts acquired legal effectiveness only if they complied with specific forms, such as those concluded *verbis*, *litteris*, or *re*. Formalism thus constituted an essential feature of the system, ensuring legal protection for creditors.²⁰

Thus, given the objective character of Roman law, little inclined toward abstraction and largely focused on concrete situations, formal requirements, and ritualised acts, contracts could not be recognised unless they were expressed through a form, falling within one of the following three categories:

a) *verbis*, which had both a religious and a practical function, and required the formulation of strict oral declarations, according to a predetermined wording;

b) *litteris*, which consisted in obligations created through a written entry in the creditor's accounts, such as the *transcriptio*, whereby the debt was recorded in the creditor's ledger; and

c) *re*, in which the essential element for the formation of the contract was the delivery (*traditio*) of the thing.²¹

This requirement of the effective delivery of the thing, as a constitutive element of the obligation reflects a deeply objective conception of the contractual bond. In this framework, *traditio*, or *datio rei*, was not merely a moment of performance, but rather the

²⁰ SILVA, A. F., & ROCHA, M. V. (2017). *O contrato no Direito Romano à contemporaneidade: uma análise evolutiva do sistema contratual moderno*. *Revista Brasileira de Direito Civil em Perspectiva*, 3(2), 1-22.

²¹ MORAES MOTA, M. (2019). *As raízes romanas do contrato*. *Revista Jurídica Luso-Brasileira*, 5(1). Coimbra: Centro de Investigação de Direito Privado.

fundamental legal act from which the *obligatio* arose. The delivery of the thing functioned as a clear and observable criterion for the existence of the legal bond, reflecting a concern for legal certainty and evidentiary reliability in judicial proceedings, within a system in which the will, abstractedly considered, had not yet acquired sufficient autonomous value to produce binding legal effects.²²

The contract was not confined to mere consensus, since an obligation arose only when the legal order recognised the relationship as a valid juridical source, requiring the observance of formalities in order to ensure the effectiveness of obligatory bonds.²³

Accordingly, contracts did not arise from the mere expression of the parties' will, but from compliance with solemn forms and strict requirements, the observance of which was essential for the creation of legally recognised obligations.²⁴

The contract was, therefore, a formally recognised legal act that produced obligatory effects, only when concluded in accordance with the forms prescribed by the legal order.²⁵

For the *obligatio* to arise, an additional element beyond the mere agreement of wills was required. This element emerged when the

²² BRAMANTE, M. V. (2008). *Il mutuum nell'esperienza giuridica romana*. Università degli Studi di Napoli Federico II.

²³ TORRENT RUÍZ, A. (2021). *La noción de contrato en Derecho Romano*. *Revista Internacional de Derecho Romano*, 26, 550-574.

²⁴ SILVA, A. F., & ROCHA, M. V. (2017). *O contrato no Direito Romano à contemporaneidade: uma análise evolutiva do sistema contratual moderno*. *Revista Brasileira de Direito Civil em Perspectiva*, 3(2), 1-22.

²⁵ ZIMMERMANN, R. (2016). *Direito romano e cultura europeia*. *Revista de Direito Civil Contemporâneo*, 7, 1-30.

agreement (*consensus*) became associated with solemn acts such as the *stipulatio* and the *nexum*.²⁶

The *stipulatio* was a formal verbal contract consisting in the pronouncement of solemn words, formulated according to a predetermined sequence of question and answer, the completion of which brought the contract into existence. The formalism required for its conclusion was regarded as essential, as it made clear to the parties that the creditor's expectations were legally protected, through the explicit articulation of a serious consequence for the debtor in the event of non-performance of the agreement.²⁷

It constituted one of the principal contractual models of ancient Rome, distinguished by its formal and verbal character. This type of contract required a specific exchange of solemn words between the parties and functioned as a flexible legal instrument capable of serving various purposes, including guarantees, sales, and promises of payment.²⁸

For its part, the *nexum* was a contract concluded *per aes et libram*, that is, a formal act performed before witnesses with the use of copper and scales. Under this arrangement, the debtor, or a member of the debtor's family, became subject to the creditor's power in the event of non-performance. The *nexum* may be understood as a form of loan

²⁶ NOVAES HIRONAKA, G. M. F. (1990). *Contratos reais e o princípio do consensualismo*. Revista Da Faculdade De Direito, Universidade De São Paulo, 84(84-85), 79-91.

²⁷ SILVA, A. F., & ROCHA, M. V. (2017). *O contrato no Direito Romano à contemporaneidade: uma análise evolutiva do sistema contratual moderno*. Revista Brasileira de Direito Civil em Perspectiva, 3(2), 1-22.

²⁸ TORRENT RUÍZ, A. (2021). *La noción de contrato en Derecho Romano*. Revista Internacional de Derecho Romano, RIDROM, 26, 550-574.

endowed with executory force, since it allowed the creditor, in case of default, to reduce the debtor or the debtor's relative to a condition of servitude.²⁹

This contract operated as a form of security for a loan, and until the debt was discharged, or until the *solutio per aes et libram*, corresponding to the formal act of releasing the debt, took place, the debtor remained in a condition comparable to that of a slave. During this period, the creditor could keep the debtor in chains or compel him to work, benefiting from his labour until the obligation was satisfied.³⁰

Another relevant example of a formal legal act concluded *per aes et libram* was the *mancipatio*, an early form of the contract of sale. Although it shared with the *nexum* the same ceremonial formalism and the solemn words pronounced before witnesses, its purpose was the transfer of ownership. It was a transaction that required the purchaser to recite specific solemn formulas, and to make a symbolic payment with a piece of bronze, which, when struck against one of the scales, represented the weighing corresponding to the price to be paid.³¹

²⁹ MORAES MOTA, M. (2019). *As raízes romanas do contrato*. Revista Jurídica Luso-Brasileira, 5(1). Coimbra: Centro de Investigação de Direito Privado.

³⁰ DA CUNHA LOPES, T. M. G., & Chavira Villagómez, R. (2018). *De las obligaciones del contrato en derecho romano*. Revista Internacional de Ciencias Jurídicas.

³¹ SANTO JUSTO, A. (2017). *Manual de Contratos Cívicos – Vertentes Romana e Portuguesa* (pp. 353-354). Lisboa: Petrony.

3.3. *The Evolution of the Contract over Time*

Subsequently, during the time of *Gaius*, a further contractual category was added to those previously identified, *verbis*, *litteris*, and *re*, that was based on *consensus*. As a result, four types of contracts came to be recognised, each requiring compliance with specific formalities that were legally defined and typified. These formalities were to be interpreted strictly, since the obligation arose from the objective element of the contract, while the will of the parties was still not regarded, at that stage, as an independent source of the obligation.³²

*“Et prius videamus de his, quae ex contractu nascuntur. Harum autem quattuor genera sunt: aut enim re contrahitur obligatio aut verbis aut litteris aut consensu.”*³³

Thus, up to that period, the prevailing view was that the obligation was constituted on the basis of the objective element of the transaction. Only in the Justinianic era did a conceptual shift occur that allowed, at least partially, the unification of the notions of

³² According to MENEZES CORDEIRO, A. (2021). *Tratado de Direito Civil – VII Direito das Obrigações* (p. 64). Coimbra: Almedina: obligations contracted *re* (through the thing) arose from the delivery or transfer of the object, as in the case of *mutuum*. Obligations contracted *verbis* (through words) derived from the *stipulatio*, structured as a question and answer. Obligations contracted *litteris* (in writing) were typically financial in nature, sometimes involving arrangements such as instalment payments. Finally, obligations contracted *consensu* (by mere agreement) gave rise to various *bonae fidei* contracts, such as sale, lease, partnership, and mandate.

³³ GAI. 3.90. Our translation: “Let us first consider those [obligations] that arise from contract. These, in fact, are divided into four kinds: either the obligation is contracted by thing (*re*), or by words (*verbis*), or by writing (*litteris*), or by consent (*consensu*).”

contract and agreement. In this context, the Justinianic compilation brought about a reformulation of the concept of contract, and *conventio* came to be regarded as the essence of the obligatory relationship, allowing consensus to assume a central role as the criterion for contractual validity.^{34,35}

Byzantine jurists departed from the earlier classical view that obligations arose from an objective element, and moved away from the traditional contractual categories, *re, verbis, litteris*, and *consensu*, placing primary importance on the will of the parties. The prevailing understanding became that an obligation no longer resulted from the objective element itself, but from the agreement of wills between the parties, which constituted the common basis of the various obligations. These would then be completed through a specific material act, whether by the delivery or transfer of the thing, or by the observance of the formalities required for their validity.³⁶

In fact, this transition from the objective element to the primacy of consensus did not occur abruptly, but rather resulted from a gradual doctrinal and practical evolution. As legal scholarship has emphasised, the shift from the formal rigidity of the classical categories to a more flexible system grounded in the agreement of the

³⁴ TORRENT RUÍZ, A. (2021). *La noción de contrato en Derecho Romano*. *Revista Internacional de Derecho Romano*, 26, 550-574.

³⁵ Thus, the essence of contracts came to lie in *consensus*, that is, in agreement or convention. However, consensus was sufficient for contractual formation only in certain cases; in others, the law still required the completion of a final material act. ALMEIDA COSTA, M. J. (2022). *Direito das Obrigações* (12^a ed., p. 216). Coimbra: Almedina.

³⁶ MOREIRA ALVES, J. C. (1998). *A formação do contrato obrigatório - suas raízes romanas*. *Revista da Faculdade de Direito, Universidade de São Paulo*, 93, 3-24.

parties must be understood in light of the social, economic, and cultural transformations that marked the end of the Republic and, above all, the post-classical period. The original formalism of *mutuum* as a *re* contract, founded upon the delivery of the thing, was progressively reconfigured, not only with regard to its economic function but also in its legal framework. This development reflects a broader transformation in the Roman law of contracts.³⁷

This development, particularly evident in the post-classical and Byzantine periods, reflects a departure from the earlier objectivist structure, as consensus gradually came to assume primacy in the formation of obligatory bonds. The agreement of wills thus became, even when still subject to certain formal requirements, the true generating element of the *obligatio*, including in contracts that had traditionally been classified as real contracts.

Although, in the case of *mutuum*, even after consensus had been reached, the obligation arose only upon the effective delivery of the thing, the so-called *datio mutui*, which transferred ownership of a fungible good and generated the obligation to return an equivalent in kind and quality. The figure of *mutuum* thereby emerged as the archetype of the real contracts, requiring for its completion both consensus and a material act of performance, without which no obligatory bond came into existence.

The criterion of full consensuality only emerged at a later stage, and even then, reservations remained regarding its application to real contracts. The legal regime governing loans reflected this initial

³⁷ BRAMANTE, M. V. (2008). *Il mutuum nell'esperienza giuridica romana*. Università degli Studi di Napoli Federico II.

rigidity, in which the mere agreement of wills was insufficient to create an autonomous obligatory bond. As illustrated by the rules concerning the stipulation of interest (*foenus*), the validity of the agreement often depended on compliance with prescribed forms, revealing the persistence of contractual formalism. Moreover, the regulation of interest rates and the sanctions associated with non-performance, demonstrates a growing concern for balance within obligatory relationships, thereby reinforcing the social function of *mutuum* within the Roman legal order.^{38,39}

In practice, the Roman contractual system underwent a gradual process of opening, in which *conventio* increasingly gained prominence as an expression of private autonomy, even where the contract still required a material element for its completion. This development led to a growing recognition of the obligatory bond as a projection of the common will of the parties, allowing contractual

³⁸ MARTÍN, P. (2017). *Intereses de préstamos de dinero: Limitaciones legales y efectos jurídicos en la experiencia romana*. Revista de Estudios Histórico-Jurídicos, (39), 387–414.

³⁹ The granting of *mutuum* with an interest stipulation (*stipulatio usurarum*) was subject to various limitations throughout the Roman legal experience, reflecting concerns with the protection of debtors and with the moral regulation of lending practices. Legislation alternated between the complete prohibition of interest and the establishment of maximum percentage limits, as occurred with the *Lex Genucia* (342 BC), which sought to curb abuses in the charging of excessive *foenus*.

Later, Emperor Justinian introduced a more uniform regulation of permissible interest rates, establishing different limits according to the category of lender, ranging from 6% per year for ordinary citizens to 12% for bankers (*mensarii*), thereby reflecting an emerging functional and professional differentiation within the credit market. For further discussion on this matter, see LÓPEZ-RENDÓ RODRÍGUEZ, C. (2018). *Intereses de préstamos de dinero. Limitaciones legales y efectos civiles de su abusividad en el Derecho romano*. Revista Internacional de Derecho Romano, 426–464.

relations to expand beyond the rigid frameworks of the classical tradition.

4. The Development of Real Contracts

Among the contracts that were not considered perfected on the basis of *consensus* alone, requiring instead an additional material act for their constitution, were the so-called real contracts. In Roman law, this category included the *mutuum* contract, the contract of *commodatum*, the contract of *pignus*, and the contract of *depositum*.

However, these contracts did not share the same legal nature. In fact, the contracts of *commodatum*, *pignus*, and *depositum* were regarded as *bonae fidei* contracts, meaning that, in the event of litigation, the judge was entitled to assess the transaction between the parties in accordance with equity and good faith in the performance of the obligations. By contrast, *mutuum* was classified as a contract of *ius strictum*.⁴⁰

In fact, among the real contracts, *mutuum* early distinguished itself by its practical relevance and its close connection with Roman economic and social life, which justifies a more detailed examination of its historical development. Although the precise historical moment of the emergence of the *mutuum* contract is unknown, it is generally accepted that it is a legal institution of very remote origin. Its presence was already essential and deeply rooted in archaic Rome, responding, as noted earlier, to a basic need for subsistence and being frequently

⁴⁰ TORRENT RUÍZ, A. (2021). *La noción de contrato en Derecho Romano*. *Revista Internacional de Derecho Romano*, RIDROM, 26, 550-574.

used to address temporary shortages within agricultural and pastoral contexts.

In a society lacking a structured financial system, marked by scarcity of resources and dependence on natural cycles, *mutuum* functioned as an instrument of solidarity, grounded in values such as *fides* (good faith), trust, and friendship. The loan for consumption, informal and devoid of formal guarantees, rested on the moral expectation that what had been received would be returned in an equivalent quantity and quality.⁴¹

In reality, although the *mutuum* contract originally emerged as an act of solidarity between individuals bound by close and trust-based relationships, intended to address temporary needs without any expectation of remuneration, it gradually evolved as these relationships expanded.⁴²

With Rome's expansion across the Mediterranean, particularly from the third century BC onward, together with its gradual opening to international trade and the influx of wealth, *mutuum* underwent a process of functional transformation and began to play a role in the financing of economic activities. Urban growth, the expansion of commercial exchange, and the emergence of a new mercantile and

⁴¹ The central element of the contract was the *datio*, that is, the delivery of a fungible thing, usually seeds, foodstuffs or small sums of Money, which transferred ownership of the good to the borrower and gave rise to the obligation of restitution. The very etymology attributed to the term *mutuum*, although today rejected by linguistic scholarship, reflected this idea of transfer: "*ex meo tuum fiat*". SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 23 e ss.). G. Giappichelli Editore.

⁴² FERREIRA, B. (2011). *Contratos de créditos bancários e exigibilidade antecipada* (p. 27). Coimbra: Almedina.

financial class, made the use of *mutuum* increasingly common as a means of access to credit for entrepreneurs and traders. The figure of the simple lender gave way to that of the professional banker, who not only lent his own capital, but also received deposits and carried out more complex financial operations.⁴³

This new economic context, grounded in the growing importance of banking activity and monetary circulation, led to the increasingly frequent use of *mutuum* with interest. This development required the legislator to impose normative limits on interest rates and to establish consequences for cases of usury. Although interest-bearing loans were not prohibited, the perception of disproportion between the amount lent and the repayment demanded in certain situations prompted regulatory restrictions in the name of the public interest and the protection of debtors, anticipating concerns that would later assume a central place in modern legislation on credit.⁴⁴

In fact, the *mutuum* contract did not remain confined to its original function. From this initial informal model based on trust, it gradually underwent transformations until it became a typified contract, protected by the legal order and consolidated as a unilateral contract of *ius strictum*, subject to legal mechanisms ensuring its enforcement.⁴⁵

⁴³ SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 23 e ss.). G. Giappichelli Editore.

⁴⁴ LÓPEZ-RENDÓ RODRÍGUEZ, C. (2018). *Intereses de préstamos de dinero. Limitaciones legales y efectos civiles de su abusividad en el Derecho romano*. Revista Internacional de Derecho Romano, RIDROM, 426–464.

⁴⁵ SILVA, A. F., & Rocha, M. V. (2017). *O contrato no Direito Romano à contemporaneidade: uma análise evolutiva do sistema contratual moderno*. Revista Brasileira de Direito Civil em Perspectiva, 3(2), 1-22.

The increasing sophistication of the Roman economy gave rise to a functional duality in the use of *mutuum*, which came to operate both as an instrument of consumption and as a means of investment. Alongside the traditional *mutuum pauperum*, typical of the economically weaker strata and intended to meet immediate needs, a new form of *mutuum* emerged, directed toward the financing of commercial and entrepreneurial activities. This development was closely connected with the growth of banking activities, marked by the appearance of *argentarii* and *coactores argentarii*, professionals who intermediated credit operations and advanced sums for acquisitions at public and private auctions. These agents, comparable in some respects to modern banks, operated with instruments such as bills of exchange, systems of guarantee, and increasingly sophisticated accounting techniques. This evolution shows that, even while retaining its structure as a real contract based on the *datio rei*, *mutuum* became compatible with a wide range of financial transactions, responding to the expanding demands of Roman economic life.⁴⁶

Its regulation ultimately led to the creation of specific actions by the praetor to ensure the restitution of the thing lent, among which the *condictio* was particularly significant. This procedural remedy allowed the lender to demand from the borrower the return of the loaned property, on the basis that the defendant held a thing which, under the law, he was bound to restore to the claimant. Accordingly, the *condictio* must be understood within the framework of contracts of *ius strictum*, where the judicial decision was confined to the

⁴⁶ SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 23 e ss.). G. Giappichelli Editore.

application of the formally established rule, without recourse, unlike in other real contracts, to considerations of equity.^{47,48}

As *mutuum* became increasingly frequent in commercial and financial transactions, a growing tension emerged between the rigidity of its structure as a real contract, dependent on the *datio rei*, and the new practical demands of commerce, which required more rapid and effective solutions. Roman law never formally recognised a consensual *mutuum*, yet the sources reveal a gradual enhancement of the role of the parties' will, particularly through the use of legal devices such as the *stipulatio*, which made it possible to reinforce the obligatory bond even before the delivery of the thing. Thus, although the traditional model based on the *datio mutui* continued to prevail, a clear doctrinal tendency developed toward overcoming the limitations imposed by *realitas*, paving the way for more flexible legal formulations, better suited to the expanding financial practice. This tension between formal structure and the autonomy of the parties' will, therefore, characterises the final stage in the development of *mutuum* within the Roman legal system, while, at the same time,

⁴⁷ ZIMMERMANN, R. (2016). *Direito romano e cultura europeia. Revista de Direito Civil Contemporâneo*, 7, 1-30.

⁴⁸ According to WATSON, A. (1971). *Roman Private Law around 200 B.C.* (pp. 126-127). Edinburgh, it is also important to highlight the introduction of the *legis actio per condictioem*, which established a specific mechanism for the restitution of sums of money through the *lex Silia*; subsequently, the *lex Calpurnia* extended the application of the *condictio* to cover the return of other defined objects. This implies that the *lex Silia* must have been prior, as the need for a specific law regarding money would otherwise have been redundant.

foreshadowing later doctrinal debates concerning the concept of contract.⁴⁹

At this final stage in the development of the Roman *mutuum*, one can observe a tension between the traditional formalism centred on the requirement of *datio rei* and the gradual acceptance of more flexible contractual mechanisms grounded in the autonomy of the parties' will. In this context, *stipulatio* came to play a significant role as a means of reinforcing obligations arising from prior agreements, making it possible to anticipate obligatory effects even before the delivery of the thing.

As can be observed in the later legal experience of the Roman Empire, *mutuum* remained a central institution in the granting of credit, but gradually became more permeable to flexible practices and interpretations, particularly in a context of increasing commercial complexity. This coexistence between formal structure and the will of the parties reveals the hybrid character of Roman *mutuum*, as an institution situated between the model of *ius strictum* and the principles of modern contractual consensualism, thereby anticipating foundations that would later be consolidated within the Western legal tradition.⁵⁰

4.1. Constitutive Elements of the Mutuum Contract

As noted above, the *mutuum* contract was a unilateral contract through which one party received ownership of a certain *pecunia* or

⁴⁹ SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 23 e ss.). G. Giappichelli Editore.

⁵⁰ Cfr. BRAMANTE, M. V. (2008). *Il mutuum nell'esperienza giuridica romana*. Università degli Studi di Napoli Federico II.

of another fungible thing, thereby assuming the obligation to return an equal quantity of the same kind and quality. It may therefore be considered that the contract was constituted by three fundamental elements: the *conventio*, the *datio rei*, and the object.⁵¹

The *conventio* consisted in the agreement by which the borrower undertook the obligation to return an equivalent amount of *pecunia* received or goods of the same nature and quality as the *res* that had been lent. Accordingly, it was essential that the agreement established the borrower's duty to restore an equal quantity of money or goods of the same kind and quality as those that had been the object of the loan.

Legal scholarship has recognised that, although *mutuum* was originally based on the delivery of the thing, the agreement of wills soon came to assume a decisive role, influencing the very scope of the obligation arising from the *datio* and allowing the parties to determine elements such as the place and time of restitution.⁵²

In fact, the increasing relevance of *conventio* as an autonomous normative element within *mutuum* is also attested by the Roman sources, which show how the mere agreement between the parties

⁵¹ SANTO JUSTO, A. (2017). *Manual de Contratos Civis – Vertentes Romana e Portuguesa* (pp. 353-354). Lisboa: Petrony.

⁵² This recognition of the autonomy and relevance of the *conventio* was further reinforced by Roman banking practice, particularly in transactions involving the *argentarii*, where the place of restitution, and even clauses concerning the possible charging of interest, were often stipulated from the outset. Although *mutuum* remained a contract of *ius strictum*, the praetor allowed ancillary agreements which, without altering the legal structure of the contract, could modulate the terms of restitution, thereby illustrating the growing influence of the parties' contractual will within the framework of the obligations law. BRAMANTE, M. V. (2008). *Il mutuum nell'esperienza giuridica romana*. Università degli Studi di Napoli Federico II.

could determine not only ancillary aspects but also decisive elements of the obligatory bond, such as the *locus solutionis*, even where this did not result from a formal stipulation.⁵³

For its part, an understanding of *datio rei* requires a prior analysis of the general structure of *mutuum* as a real contract, whose completion depended upon the delivery of the thing lent. In the Roman legal context, *mutuum* was regarded as a real contract whose perfection required the delivery (*datio*) of the object. From that moment, ownership of the fungible goods was transferred to the borrower, giving rise to the obligation to return an equivalent in kind and quality.

This structure implied that the lender had to be the owner of the thing lent and possess the legal capacity to transfer it. Roman jurisprudence addressed this reality under the designation *datio mutui*, an expression that emphasised the material character of delivery as the constitutive condition of the obligatory relationship. The borrower became the owner of the thing lent, assumed the risk of its loss (*periculum*), and was free to dispose of it, provided that restitution was ensured, generally within the agreed period. Restitution could be claimed through the action *condictio*, which was based on the equivalence between the thing delivered and that which had to be returned, reflecting the logic characteristic of unilateral contracts and of *ius strictum*.

This essential requirement of the transfer of ownership through delivery distinguished *mutuum* from *depositum*. Although both were

⁵³ SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 40 e ss.). G. Giappichelli Editore.

real and gratuitous contracts, *mutuum* differed from *depositum* not only because it was a unilateral contract, but above all because its fundamental legal effect consisted in the transfer of ownership between the parties.⁵⁴

This distinction could, however, become blurred when the deposit concerned fungible goods, since, if the depositary was permitted to use the thing, the relationship would in fact correspond to a *mutuum* rather than to a true deposit:

*“Deposui apud te decem, postea permisi tibi uti: Nerva Proculus etiam antequam moveantur, condicere quasi mutua tibi haec posse aiunt, et est verum, ut et Marcello videtur: animo enim coepit possidere. Ergo transit periculum ad eum, qui mutuam rogavit et poterit ei condici.”*⁵⁵

In fact, this fragment shows that, once the depositary was authorised to use the fungible goods delivered, even if they had not been physically moved, the jurists Nerva, Proculus, and Marcellus considered that the situation should be treated as a *mutuum*. This was because the depositary came to possess the goods *animo domini*, that is, with the intention of acting as their owner. Such a change in the

⁵⁴ SANTO JUSTO, A. (2009). *O Depósito no Direito Romano – Algumas marcas romanas no Direito Português* (p. 28). *Fundamentos Romanísticos del Derecho Contemporáneo*.

⁵⁵ D.12.1.9.9, PAUL. 2 ad Ed. Our translation: “I deposited ten [coins] with you; afterwards, I allowed you to use them. Nerva and Proculus maintain that, even before they are moved, they may be claimed as though it were a loan for consumption (*mutuum*), and this is correct, as it also appears to Marcellus, since he began to possess them with the intention [of using them as his own]. Thus, the risk passes to the one who requested the loan, and against him the action *condictio* may be brought.”

nature of possession therefore entailed the transfer of the risk (*periculum*) and made it possible to demand restitution through the action *condictio*, thereby confirming the transformation of the deposit into a *mutuum* from a legal standpoint.

Thus, for example, the figure known as *depositum irregularis* was, in reality, a disguised *mutuum*, since the delivery accompanied by *animus transferendi dominii* and the fungible nature of the thing entailed the transfer of ownership and the replacement of the duty of custody with an obligation to restore an equivalent.⁵⁶

In Roman banking practice, the *depositum irregularis* was common in dealings with the *argentarii*, where the depositary was allowed to dispose of the deposited property, undertaking only to return an equivalent amount. This practice effectively produced an assimilation between deposit and *mutuum*, revealing the permeability between juridical categories that were formally distinct but functionally convergent.

This distinction between *mutuum* and *depositum*, centred on the transfer of ownership effected through the *datio rei*, prepares the ground for the analysis of the third essential element of *mutuum*: the *res*.

In fact, the nature of the object lent played a decisive role in the legal configuration of the contract. Historiography has shown that, in the early Roman conception, it was precisely the *res*, as the object of delivery, that possessed sufficient obligatory value to justify, in itself, the emergence of the obligation. This understanding was consistent

⁵⁶ SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 71 e ss.). G. Giappichelli Editore.

with the logic underlying other obligatory situations arising from the delivery of a thing, such as the payment of what was not owed (*solutio indebiti*) or the *datio ob causam*.⁵⁷

Finally, the object of the loan, the thing lent, had to be fungible in nature, since the essence of the transaction laid in the borrower's obligation to return to the lender a thing identical in kind to that which had been lent. Consequently, if the object delivered were non-fungible, restitution in those terms would be impossible, and the relationship could not be classified as a *mutuum* contract.⁵⁸

The requirement of fungibility did not, however, prevent certain goods, though not traditionally fungible, from being treated as such by the parties where there was an intention to restore an equivalent rather than the very same thing. This conceptual flexibility allowed *mutuum* to be adapted to a wider range of practical

⁵⁷ However, the same historiography also shows that the delivery itself could be carried out by a third party, without affecting the attribution of the obligation to the designated lender, provided that the intention manifested at the moment of *traditio* pointed in that direction. Such a situation, far from undermining the real structure of *mutuum*, rather revealed a certain functionalisation of *traditio*, allowing it to be performed *sub nomine* of another, so that the action could be acquired for the benefit of the person in whose name the thing was delivered. This interpretation, grounded in texts attributed to Paulus and Scaevola, confirms that the will of the lender could, in certain circumstances, prevail over the purely material aspect of delivery, giving it a guiding function that made it possible to determine the active subject of the obligatory relationship, even when that person had not physically carried out the *datio*. SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 40 e ss.). G. Giappichelli Editore.

⁵⁸ The fungibility of the thing lent constituted one of the structural elements of *mutuum*, since the borrower's obligation consisted exclusively in the restitution of an equivalent good, rather than of the very same thing considered individually. TORRENT, A. (2021). *La noción de contrato en Derecho Romano*. *Revista Internacional de Derecho Romano*, RIDROM, 26, 550-574.

situations, bringing it closer to other legal figures such as *datio ob causam* and *condictio*, with which it shared the logic of restitution by equivalence. Roman jurisprudence, in addressing these related institutions, confirmed that the transfer of ownership accompanied by an obligation of equivalent restitution could also occur outside the strict framework of *mutuum*, demonstrating how the model of *mutuum* broadly influenced the development of obligations arising from the delivery of a thing.⁵⁹

4.2. *Characteristics of the Mutuum Contract*

Although, in its origins, the *mutuum* contract was essentially gratuitous, the charging of interest was gradually admitted, albeit always subject to an additional degree of formalism. In classical Roman law, interest (*usura*) did not arise automatically from the nature of the loan; rather, it required an express supplementary agreement, generally concluded through an autonomous *stipulatio*, distinct from the mere *datio rei*. *Usura* was thus understood either as the price for the use of money (*usus aeris*) or as compensation for the risk borne by the lender (*sortis periculum*), as reflected in fragments attributed to Paulus and Papinian. Only with the development of the Justinianic system did the charging of interest come to be recognised more broadly in law, even in the absence of a prior written agreement.

⁵⁹ LÓPEZ-RENDÓ RODRÍGUEZ, C. (2018). *Intereses de préstamos de dinero. Limitaciones legales y efectos civiles de su abusividad en el Derecho romano*. Revista Internacional de Derecho Romano, RIDROM, 426-464.

In its primitive form, *mutuum* was essentially gratuitous, a characteristic that resulted not only from technical or procedural considerations but also from ethical foundations deeply rooted in Roman legal thought. This gratuitous nature reflected a clear moral stance, as profit derived from lending was viewed with suspicion by jurists and legislators. This attitude is evidenced by the severe penalties established in the Twelve Tables against the *feneratores*, whose activity was equated with that of manifest thieves and punished with particularly harsh sanctions. The early system of remedies for non-performance, relied on strict actions, such as the *actio sacramenti* and, later, the *condictio*, both aimed at securing the simple restitution of what had been delivered.⁶⁰

This aversion to unjustified profit was also reflected in strict measures such as the *senatusconsultum Macedonianum*, which prohibited the judicial enforcement of debts contracted by *fili familias*, precisely in order to prevent abuses by creditors. Roman legislation thus sought to distinguish between legitimate loans and usurious practices, tolerating *foenus* only when previously stipulated, at defined rates and within certain legal limits.⁶¹

Moreover, the *mutuum* contract displayed a clearly unilateral structure, as it originated from a legal relationship that was itself strictly unilateral, in which the only obligation rested with the

⁶⁰ SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 23 e ss.). G. Giappichelli Editore.

⁶¹ LÓPEZ-RENDÓ RODRÍGUEZ, C. (2018). *Intereses de préstamos de dinero. Limitaciones legales y efectos civiles de su abusividad en el Derecho romano*. Revista Internacional de Derecho Romano, RIDROM, 426-464.

borrower, consisting in the duty to return to the lender a thing of the same kind and quantity.

This configuration reinforced the gratuitous character of the contract, implying that the value of the thing delivered by the lender determined the maximum amount to be restored, although nothing prevented the restitution of a lesser amount. Only the upper limit of the prestation was fixed by the value of the thing lent, since the absence of an agreement on interest excluded any increase in the amount to be returned.⁶²

The distinction between the various ways in which obligations could arise in Roman law was already the subject of reflection in the classical period, as evidenced by Ulpian when citing Labeo in the context of the *edictum praetoris urbani*. According to this doctrine, certain situations are regarded as “done” (*agantur*), others as “carried out” (*gerantur*), and others as “contracted” (*contrahantur*). The term *actum* thus designates, in a general sense, any act capable of producing legal effects, whether verbal or real, as occurs in the *stipulatio* or in the *numeratio*. By contrast, *contractum* refers to a bilateral obligation arising from an agreement of wills, as in sale, lease, or partnership. The term *gestum*, in turn, denotes an act performed without verbal formalisation, as occurs in certain real contracts. This tripartite distinction helps to clarify the unilateral structure of *mutuum*, which, not being a bilateral *contractum* but

⁶² However, according to SANTO JUSTO, A. (2017). *Manual de Contratos Civis – Vertentes Romana e Portuguesa* (p. 354). Petrony, the borrower’s obligation to pay interest may derive from another legal relationship initially created through a formal contract (ordinarily a *stipulatio usurarum* and, later, probably through a literal contract).

rather a contract of *ius strictum*, was closer in nature to *gestum*, even though it was formalised through the *datio rei* and could be reinforced by verbal mechanisms such as the *stipulatio*.⁶³

Despite this, the principle of gratuitousness admitted several exceptions. Notable among these were loans of goods, loans granted by cities, loans provided by banks, and maritime loans to shipowners or merchants (*foenus nauticum*). In fact, within the Roman society, the activity of granting loans with interest developed considerably and came to be clearly regulated by law.⁶⁴

This activity, however, was not free from controversy. The excessive charging of interest, the so-called *foenus excessivum*, was subject to significant legal restrictions, particularly concerning the maximum permissible rate (*usurae legitimae*), the requirement of written stipulation, and the possible nullity of the loan where such limits were exceeded. The repression of excessive profit was grounded in an ethical conception of *mutuum* as an instrument of assistance rather than exploitation. This approach was also reflected in the regulation of *foenus nauticum*, which was permitted only in specific contexts, such as the financing of maritime ventures, where the high level of risk justified the additional premium.

⁶³ D. 50.16.19 (Ulp. 11 ad edictum).

⁶⁴ According to SANTO JUSTO, A. (2017). *Manual de Contratos Cívicos – Vertentes Romana e Portuguesa*. Petrony, at the time of the Law of the Twelve Tables, interest amounted to 8.33% per month. Subsequently, several laws reduced and even prohibited this practice: by the end of the Republic, the maximum limit had been fixed at 12% per year, and Justinian later reduced it to 6%, with certain exceptions. For example, interest on loans granted to owners of workshops could not exceed 8%, and where the debtor was a person of high rank the limit was set at one third of 1% per month. From the third century onwards, imperial legislation also established the principle that the total amount of accrued interest could not exceed the capital.

Roman jurisprudence expressly recognised the validity of *mutuum* with interest, provided that the interest was properly stipulated and did not exceed the authorised rates. Such stipulations could take the form of ancillary clauses attached to the principal contract or be formalised through a *stipulatio usurarum*, a separate verbal contract that fixed the amount and duration of the interest. This solution made it possible to reconcile the unilateral and originally gratuitous structure of the traditional *mutuum* with the practical need to remunerate credit in economic activities, particularly through the *foenus nauticum*, in which the creditor assumed the risk associated with the maritime voyage.⁶⁵

Moreover, Roman *mutuum* was, above all, a real contract, whose completion depended on the effective delivery of the thing, without which no obligation of restitution arose. This structural characteristic was reflected, for example, in the requirement of *numeratio*, that is, the actual delivery of the sum lent to the debtor, in the absence of which no enforceable legal bond came into existence.⁶⁶

⁶⁵ LÓPEZ-RENDÓ RODRÍGUEZ, C. (2018). *Intereses de préstamos de dinero. Limitaciones legales y efectos civiles de su abusividad en el Derecho romano*. Revista Internacional de Derecho Romano, RIDROM, 426-464.

⁶⁶ The informality of the *mutuum* and the trust between the parties thus proved incompatible with the figure of a promise to lend, the admission of which would run counter to the very nature of the transaction. The later practice of preceding the delivery of the money with a verbal stipulation, giving rise to the figure of the *non numerata pecunia*, called into question the validity and enforceability of such promises when the borrower had not yet received the sum. Although the *stipulatio* could, in the abstract, generate a formally enforceable obligation, Roman jurists recognised that it would be unjust to require the restitution of sums that had never been delivered, and therefore admitted the possibility for the debtor to defend himself through specific remedies such as the *exceptio doli* and, later, the *exceptio non numeratae pecuniae*. SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 107 e ss.). G. Giappichelli Editore.

The requirement of *numeratio* was so central that, in the absence of proof of delivery, the existence of a *mutuum* was not admitted, even where a prior agreement between the parties could be established. This rigidity shows that, within the Roman model, the material completion of the contract preceded any legal effect, thereby excluding the possibility of a purely consensual *mutuum*.⁶⁷

Nevertheless, the conditions required for the validity of *mutuum* were the following: a) The object of the loan had to consist of things capable of being weighed, counted, or measured, such as wine, grain, oil, among others; b) The things delivered to the borrower had to be transferred with the title of ownership (*mutui datio*). The transfer of ownership was effected through *traditio*; c) There had to be an agreement of wills between the parties concerning the loan, an agreement between creditor and debtor whereby the debtor undertook to repay what had been received within the agreed period, in the same quantity and quality. This agreement did not allow the borrower to return more than had been received, since the obligation arose from the delivery of the thing itself.

4.3. Legal Protection of the Mutuum Contract

In the event of non-performance by the borrower, the lender, although not protected by a specific action created exclusively for

⁶⁷ BRAMANTE, M. V. (2008). *Il mutuum nell'esperienza giuridica romana*. Università degli Studi di Napoli Federico II.

mutuum, could rely on one of two actions to assert his right: the *actio certae creditae pecuniae* or the *condictio triticaria* (or *condictio certae rei*).⁶⁸

Where the object of the *mutuum* consisted of a sum of money, the lender could bring the *actio certae creditae pecuniae*, an action aimed at recovering a specific amount of money owed to the creditor. By contrast, the *condictio triticaria* (or *condictio certae rei*) was the action used to recover an equivalent quantity and quality of fungible goods previously delivered by the lender to the borrower, where the object of the loan consisted of fungible things other than money.^{69,70}

The *actio certae creditae pecuniae* and the *condictio triticaria* were both typical actions of the formalistic Roman system of justice, structured according to rigid procedural models and suited to the protection of purely patrimonial interests. These actions, grounded in the restitution of fungible goods, were limited to the proof of the *datio* and of the precise amount of the obligation to restore, leaving no room for equitable or discretionary assessment by the judge.

They followed the logic of contracts of *ius strictum*, being confined to the application of formally established rules, without regard to considerations of equity, unlike what occurred in contracts of *bonae fidei*. This procedural rigidity in the treatment of *mutuum*

⁶⁸ SILVA, A. F., & ROCHA, M. V. (2017). *O contrato no Direito Romano à contemporaneidade: uma análise evolutiva do sistema contratual moderno*. *Revista Brasileira de Direito Civil em Perspectiva*, 3(2), 1-22.

⁶⁹ SANTO JUSTO, A. (2017). *Manual de Contratos Civis – Vertentes Romana e Portuguesa*. Petrony

⁷⁰ ZIMMERMANN, R. (2016). *Direito romano e cultura europeia*. *Revista de Direito Civil Contemporâneo*, 7, 1-30, clarifies that the *actio certae creditae pecuniae* and the *condictio triticaria* were the actions used to ensure the restitution of borrowed values, functioning as procedural mechanisms through which lenders were protected in Roman law.

within Roman law was consistent with its character as a unilateral and formal contract, whose legal protection rested exclusively on the verification of the delivery (*datio rei*) and of the corresponding obligation.^{71,72}

This same rigidity is confirmed by the legal sources themselves, particularly in D.12.1.11, §1, where Ulpian, citing Proculus, states that if ten coins are delivered to the borrower under an agreement that only nine are owed, the borrower cannot be compelled, as a matter of strict law, to pay more than nine. Conversely, if it is stipulated that, for ten received, eleven are to be repaid, the lender may not claim more than the amount actually delivered:

*“Si tibi dederō decem sic, ut novem debeas, Proculus ait, et recte, non amplius te ipso iure debere quam novem. Sed si dederō, ut undecim debeas, putat Proculus amplius quam decem condici non posse”.*⁷³

In other hand, in D.45.1.68, the view is reinforced that, even where a prior agreement exists, the effects of the promise are strictly

⁷¹ LÓPEZ-RENDÓ RODRÍGUEZ, C. (2018). *Intereses de préstamos de dinero. Limitaciones legales y efectos civiles de su abusividad en el Derecho romano*. Revista Internacional de Derecho Romano, RIDROM, 426–464.

⁷² In fact, *mutuum* occupied a singular position in Roman law, since the borrower's obligation was determined exclusively by the contract itself, leaving no room for judicial consideration of possible difficulties or personal circumstances affecting the debtor. The judge could not modify the terms of the contract, but was required to decide solely on the basis of the strict observance of the obligation undertaken by the borrower. TORRENT, A. (2021). *La noción de contrato en Derecho Romano*. Revista Internacional de Derecho Romano, RIDROM, 26, 550-574.

⁷³ D.12.1.11.1, ULPIANUS. 26 ad Ed. Our translation: “If I give you ten [coins] so that you must owe nine, Proculus says, rightly, that you do not owe, as a matter of strict law, more than nine. But if I give them to you in such a way that you must owe eleven, Proculus maintains that it is not possible to claim from you more than ten.”

delimited, and protection may extend only to obligations that are certain and precisely determined:

*"Si poenam stipulatus fuero, si mihi pecuniam non credidisses, certa est et utilis stipulatio. Quod si ita stipulatus fuero: "pecuniam te mihi crediturum spondes?", incerta est stipulatio, quia id venit in stipulationem, quod mea interest."*⁷⁴

These texts illustrate the rigorous application of *ius strictum* to the *mutuum* contract, focusing the protection of the lender on the effective delivery of the thing and on the exact identity of the obligation undertaken.⁷⁵

However, despite the rigidity of the protection afforded by the actions available to the lender, namely the *actio certae creditae pecuniae* and the *condictio triticaria*, Roman commercial practice occasionally sought to circumvent the strict requirements of the real contract through the use of the *stipulatio*. The formal promise to grant a *mutuum*, although initially viewed with reservation by the legal tradition, was known and admitted in classical Roman law, particularly when accompanied by a penal clause.

As the jurist Paulus observed in D.45.1.68, where a penalty was stipulated for the non-performance of a promise to grant a *mutuum*, such a stipulation could give rise to a definite and enforceable

⁷⁴ D.45.1.68, PAUL. 2 ad Ed. Our translation: "If I have stipulated a penalty in the event that you do not grant me the *mutuum*, the *stipulatio* is certain and valid. But if I have stipulated in this way: "Do you promise that you will grant me the loan?", the *stipulatio* is uncertain, because what enters into the *stipulatio* is that which is of interest to me (*id quod mea interest*)."

⁷⁵ SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 136 e ss. e 149 e ss.). G. Giappichelli Editore.

obligation, otherwise, only the actual loss suffered by the promisee, *id quod interest*, could be recovered.⁷⁶

The *stipulatio* thus emerged as a useful instrument for anticipating the obligatory effects of *mutuum*, enabling the creditor to secure the performance of the agreement even before the effective delivery of the thing. Although characterised by its verbal formalism, this device helped to mitigate the rigidity of *mutuum* as a real contract, bringing it closer to more flexible forms of contractual arrangement.

This flexibility introduced through the *stipulatio*, although exceptional, reveals an attempt by the Roman system to adapt to the demands of commercial practice, particularly in situations where the delivery of the thing had not yet taken place. In the context of *mutuum*, this development reflects a certain openness of the Roman legal system to forms less dependent on the materiality of the *datio* and more oriented toward consensuality.

5. Conclusion

The analysis undertaken allows the conclusion that the *mutuum* contract represents one of the most significant institutions of Roman law within the field of obligations, not only because of the frequency of its practical use, but above all, due to the doctrinal importance it

⁷⁶ This legal solution reaffirms the distinction between the real contract of *mutuum* and its mere promise, the protection of which did not allow the promisor to be compelled to deliver the sum, but only to compensate for the loss caused by the breach. Roman jurisprudence thus recognised limits to the possibility of coercive protection of the lender when the *numeratio* had not yet been carried out, thereby reinforcing the centrality of tradition and delivery of the thing as a requirement for the obligation of restitution. SACCOCCIO, A. (2020). *Il mutuo nel sistema giuridico romanistico: Profili di consensualità nel mutuo reale* (pp. 145 e ss.). G. Giappichelli Editore.

assumed in the historical formation of Western contractual thought. *Mutuum* illustrates particularly clearly the logic of the Roman legal system, characterised by a typified structure of the sources of obligations, by strong formalism, and by the central role of the *datio rei* as the constitutive element of the obligatory bond.

It was observed that the origin of *mutuum* precedes its conceptual autonomy as a contract. Before emerging as a technically defined legal institution, *mutuum* existed as a social practice of assistance, grounded in trust and reciprocity, particularly within agricultural contexts and situations of scarcity. Only gradually, and in connection with the economic and commercial development of Rome, was this practice absorbed into the legal order, becoming integrated within the category of real contracts and benefiting from its own procedural protection.

From a structural perspective, *mutuum* established itself as a unilateral, real contract of *ius strictum*. Its completion depended on the delivery of a fungible thing and the transfer of the corresponding ownership to the borrower, from which arose the obligation to return an equivalent in kind and quality. This configuration shows that, in the classical Roman model, the mere agreement of wills was insufficient to generate the obligatory bond, clearly distinguishing *mutuum* from modern conceptions based on the predominance of consensus. Nevertheless, the evolution of the sources reveals a growing recognition of the importance of *conventio*, as well as the use of complementary instruments, such as *stipulatio*, capable of reinforcing or anticipating obligatory effects.

The functional transformation of *mutuum* constitutes another central aspect of its development. From a primitive instrument of solidarity and subsistence, *mutuum* came to play a significant role in financing economic activity, accompanying the commercial, urban, and banking expansion of Rome. This change contributed to its increasing legal sophistication and to the emergence of new tensions between the rigidity of the contract's formal structure and the practical demands of an expanding economy. The regulation of interest, the limitations imposed on *foenus*, and the normative intervention against usury further demonstrate that *mutuum* also lay at the centre of ethical, social, and political concerns.

From a procedural standpoint, the legal protection afforded to *mutuum* confirms its classification within the framework of *ius strictum*. The *actio certae creditae pecuniae* and the *condictio triticaria* reflected a form of protection based on proof of delivery and on the precise determination of the prestation owed, leaving little room for considerations of equity. This regime reveals an internal coherence between the nature of the contract and the legal mechanisms available for its enforcement, reinforcing the idea that *mutuum* was conceived in Roman law as a strictly defined institution, albeit one capable of functional adaptation.

In summary, the study of Roman *mutuum* shows that this institution played a decisive role in the formation of the dogmatics of obligations, constituting a fundamental link between archaic economic practices and the construction of legal categories that continue to structure private law today. Its development reveals not only the capacity of Roman law to respond to the concrete needs of

social and economic life, but also the depth of its influence on the European legal tradition. The *mutuum* contract should therefore be understood as a historically dynamic, legally sophisticated institution that is doctrinally central to the understanding of obligations law.

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