THE NEW CHINESE CIVIL CODE AND THE REALITY OF THE LOAN

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1. *The category of the real contract in the face of the attacks from a false modernity*

The dogmatic framework of the contract of loan is still a problematic issue within the Roman legal system, especially considering the development of this institution from the age of the 'foundation' of the system in Justinian's Roman law to its outcomes within the European, Latin American and Chinese juridical 'subsystems'. [1]

The reality of the Roman loan been has for years an unassailable cornerstone of Romanist doctrine. The most obvious legacy of this approach is to find the same systematic placement of our contract in all European civil codes of the past two centuries, with the exception of the Swiss *OR,* which had even abolished the category of real contracts. [2] The Swiss choice to qualify the loan as a consensual contract has been followed by

[1] I have recently dwelt on this point several times: for a summary of my thought, see A. SACCOCCIO, *Il mutuo nel sistema giuridico romanistico. Profili di consensualità nel mutuo reale*, Turin, 2020, *passim*.

[2] For the exclusion of manual donation, see Art. 2421: «la donazione manuale si compie mediante la consegna della cosa dal donante al donatario» ('manual donation is accomplished by the handing over of the thing by the donor to the donee'). About this specific point, see J. MENABRITO PAZ, *Die Entwicklung des Darlehens im mexikanischen Recht – vom römischen Recht zum schweizerischen Obligationenrecht*, in *Roma e America. Diritto romano comune*, 41, 2020, 365 ff. (= in A. SACCOCCIO-I. FARGNOLI [eds.], *Römisches Recht und lateinamerikanisches Rechtssystem. Kolloquium in memoriam Eugen Bucher an der Universität Bern am 13. September 2019,* Modena, 2021, 73 ss.).

several other European and Latin American legislators: it is sufficient to recall here the Federal Civil Code of Mexico of 1927, or those of Peru of 1984, or Cuba of 1987, or the very recent Argentine Civil and Commercial Code of 2015,[3] while in Europe the reform of the law of obligations in Germany in 2002 (see below) has moved in this direction. On the other hand, other contemporary codifiers have chosen to maintain the category of real contracts, and to place the loan within it: the clearest examples of this tendency are the Civil Code of Paraguay of 1987 and that of Brazil of 2003[4] and, precisely, the Chinese Contract Law of 1999 and the new Chinese Civil Code, which we shall examine below.

I find it interesting to note two factors, peculiar to the contemporary period: on the one hand, the resistance of the reality of the loan in some modern juridical legal orders, notwithstanding the strong doctrinal and/or jurisprudential (and, in some cases, legislative) pressure to the contrary; on the other hand, the systematic model adopted in the Chinese Contract Law of 1999 and now in the very recent Chinese Civil Code, which admit (also) a real structure for the loan. Both of these choices appear to be homologous to the construction derived directly from Roman law. In particular, the recent choice of the Chinese legislator to sanction the existence of the category of real contracts and to place within it the loan, albeit with

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[3] On this point, let me refer to what I say in A. SACCOCCIO, *Mutuo reale e mutuo consensuale nel sistema giuridico latinoamericano*, in *Roma e America. Diritto romano comune*, 27, 2009, 101 ff. (spanish transl. in AA.VV., *Tra Italia e Argentina tradizione romanistica e culture dei giuristi*, edited by C. CASCIONE-C. MASI DORIA, Naples, 2007, 261 ff.; chinese transl. *Lun Lameifa zhong de yaowu jiedai he nuocheng jiedai*, in *Xueshuo Huizuan – Digesta*, Beijing, 2011, 21 ff.; port. transl. in AA.VV., *Sistema jurídico romanistico e subsistema jurídico latinoamericano*, edited by S. SCHIPANI-D.B. SANTOS-G. DE ARAUJO, São Paulo, 2015, 455 ff.); IDEM, *La difusión del principio del consensualismo en América Latina: las categorias real y consensual en el derecho de los contratos*, in *Autonomía privada. Perspectivas del derecho contemporaneo,* edited by M.L. NEME VILLAREAL, Bogotá, 2018, 47 ff.; IDEM, *Realità e consensualità nel diritto dei contratti alla luce del Nuovo Cc. argentino,* in *Nuovo Codice civile argentino e sistema giuridico latinoamericano*, edited by R. CARDILLI-D.F. ESBORRAZ, Padua, 2017, 475 ff.; IDEM, *Dal 're contrahere' al contratto reale. Brevi note sulla categoria di 'contratto reale' nel Codice civile di Cuba del 1987*, in *Costituzione e diritto privato. Una riforma per Cuba*, edited by A. BARENGHI-L.B. PÉREZ GALLARDO-M. PROTO, Naples, 2019, 429 ff.

[4] For Paraguay cfr. art. 1292 Cc.; in doctrine, cfr.: J.R. TORRES KIMSER-B. RÍOS AVALOS-J.A. MORENO RODRÍGUEZ, *Derecho bancario*, Asunción, 19992, 226 ss.; M.A. PANGRAZIO, *Código civil paraguayo comentado. Libro tercero*, Asunción, 1998, 530 s. For Brazil, see art. 586 Cc.; in doctrine, cfr. O. GOMES, *Contratos*, Rio de Janeiro, 2002[25] (1st ed. 1959), 319; S. RODRIGUES, *Direito civil. Dos contratos e das declarações unilateral da vontade*, III, São Paulo, 2002[28], 35 e 262; M.H. DINIZ, *Curso de Direito Civil Brasileiro*, III, *Teoria das Obrigações Contratuais e Extracontratuais*, São Paulo, 2002[17], 93 e 298; L. ROLDÃO DE FREITAS GOMES, *Contrato*, Rio de Janeiro-São Paulo, 2002[2], 65 e 270; IDEM, *Tratado teórico e prática dos contratos*, III, São Paulo, 2002, 169; Á. VILLAÇA AZEVEDO, *Teoria geral dos contratos típicos e atípicos. Curso de direito civil*, São Paulo, 2002, 71 s.; A. RIZZARDO, *Contratos*, Rio de Janeiro, 2005, 79 and 599; P. NADER, *Curso de Direito Civil*, III, *Contracts*, Rio de Janeiro, 2005, § 15, 48 f. (with doubts) and § 104, 351.

the cautions we shall see, seems to me to justify the considerations I intend to develop on this issue.

Moreover, the same fluctuations between the maintenance and deletion of the category of real contracts can be seen by observing the more or less recent Projects for the unification of contract law circulating in Europe, in which the model of the consensuality of the loan appears to be by far the dominant one, although the idea of its reality is not ignored.

In fact, the 1994 Unidroit Principles seem to be inspired by the former alternative:[5] the point n. 3 of the 'official' commentary, significantly entitled '*All contracts consensual*', states that although some national legal orders provide for delivery as one of the requirements for the completion of a contract, «these rules are not easily compatible with modern business perceptions and practice and are therefore excluded by this Article».[6] With respect to par. 3.2 of the *UNIDROIT* Principles it has been expressly stated in the literature that the rule is specifically intended to «escludere che il completamento del procedimento di formazione [del contratto] possa … dipendere dalla consegna di una cosa».[7]

In the same vein, the *PECL* (*Principles of European Contract Law* 1996/2000) provides in Art. 2:101, in what has been called a «definizione nascosta di contratto» (hidden definition of contract), that «a contract is concluded if: a) the parties intend to be legally bound and b) they reached a sufficient agreement, without any further requirement».[8] It is evident that the *PECL* «do not recognise the legal category of 'real contracts'».[9] More nuanced is the position of the *DCFR* (*Draft Common Frame of Reference*) of 2008, which, in offering a definition of contract, which – let it be said in passing – is lacking in the other two Drafts, identifies it as an «agreement»:[10] however, at the level of defining technique, it does not es-

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[5] See the *Unidroit Principles of International Commercial Contracts* (latest version I have seen is dated 2016), Art. 3.1.2 headed '*Validity of mere agreement*': «A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement»: the reference to the absence of «any further requirements» seems to me to be sufficiently clear in the sense indicated in the text.

[6] The principles and their commentary are easily accessible: see https://www.unidroit.org/contracts. On the scientific value of the commentary in the *UNIDROIT* Principles it is sufficient here to refer to M.J. BONELL, *An International 'Code' of Contract Law*, Milan, 2006[2], 64 ff.

[7] A. D'ANGELO, *Principi Unidroit e regole causalistiche*, in *I contratti in generale: aggiornamento 1991-1998*, edited by G. ALPA-M. BESSONE, Turin, 1999, 236.

[8] See C. CASTRONOVO, *Prefazione all'edizione italiana dei Principi di diritto europeo dei contratti*, Milan, 2001, XXII.

[9] See L. ANTONIOLLI, in *Principles of European Contract Law and Italian Law. A Commentary*, edited by L. ANTONIOLLI-A. VENEZIANO, The Hague, 2005, 49.

[10] Cfr. *DCFR* II, 1:101: «A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect».

cape notice that the *DCFR* does not intend to offer a list of all the constitutive elements necessary for the existence of a contract, but simply «enucleare l'unico elemento costitutivo (o gli unici elementi costitutivi) che non possono mancare affinché il contratto esista». [11]

On the other hand, the *European Code of Contracts – Avant-projet* (the so-called Gandolfi Project) of 2002 [12] keeps open the possibility of 'doubling' a real contract with a corresponding (and atypical) consensual model: cf. art. 342: «A real contract is completed by delivery of the object of the contract, unless it is deemed, because of usage or agreement by the parties, that the parties intended to make an a-typical consensual contract». [13]

The article is headed «Special form required for validity». It is true that, from a purely empirical point of view, in archaic Roman law the 'forms' served «ad assicurare la serietà, l'obiettiva riconoscibilità e l'efficacia della volontà e a rendere conseguentemente stabili i risultati ai quali si indirizzava il comportamento». [14] But from a more purely dogmatic point of view, to lump together the use of solemn forms and delivery as objective elements which the legislator may require when it considers that the cause is excessively fragile [15] seems to me to lead to the misunder-

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[11] Cf. C. MARCHETTI, *Un'introduzione al contract del DCFR: la (necessaria) bilateralità della formazione del vincolo?*, in C. MARCHETTI (ed.), *Il DCFR: lessici, concetti e categorie nella prospettiva del giurista italiano*, Turin, 2012, 2; but on this point see particularly A. PETRUCCI-G. LUCHETTI (eds.), *Fondamenti del diritto contrattuale europeo. Dalle radici romane al Draft common Frame of Reference*, II, Bologna, 2010; A. PETRUCCI, *Fondamenti romanistici del diritto europeo. La disciplina generale del contratto*, I, Turin, 2018.

[12] Book I of the Project on Contracts in General was first published in French in 1999; a second edition, with the coordinator's reports, indexes and translations, saw the light of day in 2002. Subsequently, book II, 1 concerning the sale and book II, 2 concerning 'contracts for services' were also completed. On the *Avant-projet*, among the various writings of the coordinator, see G. GANDOLFI, *Per un Codice europeo dei contratti*, in *Riv. trim. dir. e proc. civ.*, 1992, 781 ff.; IDEM, *Sul progetto di un 'codice europeo dei contratti'*, in *Rass. di dir. civ.*, 1, 1996, 105 ss.; IDEM, *Il progetto 'pavese' di un codice europeo dei contratti*, in *Riv. dir. civ.*, 47, 2001, 455 ff.

[13] The *Avant-projet can be* read in full at http://www.eurcontrats.eu/acd2/notizie-generali/ in the various languages in which it is written.

[14] See A. CORBINO, *Il formalismo negoziale nell'esperienza romana*, Turin, 2006, 55.

[15] See L. GAROFALO, *Gratuità e responsabilità contrattuale*, in *TSDP*, 5, 2012, 35 ff. (= in L. GAROFALO, *Figure e tutele contrattuali fra diritto romano e contemporaneità giuridica*, Santiago de Compostela, 2015, 122). But for delivery as a necessary form of the binding intention, see already P. FORCHIELLI, *I contratti reali*, Milan, 1952, 87 ff., with whom agrees G. MIRABELLI, *Dei contratti in generale*, in *Commentario del Codice civile*, IV.2.2, Turin, 1958, 36. On the other hand, for delivery as an element which takes the place of the cause or supplements it, see, respectively, R. SACCO, *Il contratto*, in F. VASSALLI, (dir. by), *Trattato di diritto civile italiano*, VI, 2, Turin, 1975, 613 ff.; O.T. SCOZZAFAVA, *Gli interessi monetari*, Naples, 1984, 159; M. DE TILLA, *Donazione-permuta-mediazione-mandato-mutuo-comodato*, in *Il diritto immobiliare. Trattato sistematico di giurisprudenza per casi*, Milano, 1995, 548; R. TETI, *Il mutuo*, in P. RESCIGNO (dir.), *Trattato di diritto privato,* XII, *Obbligazioni e contratti*,

standing of placing on the same level, elements which concern the structure of a contract (such as delivery in real contracts) and elements which concern its validity, such as the form.[16] And the fact that the Chinese law speaks of 'form required for validity', including in this heading also delivery in the real structure of the loan, seems to me to imply the basic view of framing the delivery not as a mechanism necessary for the perfection of the contract, but as a requirement of its validity: and I do not agree with that approach (see also below, nt. 62).

In any case, according to the letter of the Project, the parties could freely choose whether to structure the loan as a real or as a consensual contract.[17]

2. *The New Civil Code of the People's Republic of China and the contract*

As is well known, last 28th May 2019, after a long and troubled path,[18] the New Chinese Civil Code was approved, fruit of a fruitful interaction between legal science and legislation.[19] This Code takes into account the multifaceted (and entirely peculiar, although traceable to the socialist

IV, 2, Turin, 2007, 599 for the first position; V. ROPPO, *Il contratto*, in G. IUDICA-P. ZATTI (dir.), *Trattato di diritto privato*, Milan 2001, 201, for the second.

[16] See, e.g., D. CENNI, *La formazione del contratto tra realità e consensualità*, Padua 1998, 63 ff.

[17] On this point, in a critical sense towards the category, see M.L. RUFFINI GANDOLFI, *I contratti reali nella prospettiva di una codificazione europea: elementi per una discussione*, in *Jus*, 2000, 341 ss. (= in *Diritto privato. Studi in onore di A. Palazzo*, III, *Proprietà e rapporti obbligatori*, Perugia, 2009, 697 ss.); EADEM, *I c.d. contratti reali: profili problematici*, in G. GANDOLFI (ed.), *Académie des Privatistes Européens, Code européen des contrats – Avant-projet*, II, *Des contrats en particulier*, II, Rapports de membres de l'Académie et d'expert, Milan, 2008. On the subject, see also G. GANDOLFI, *Contratti reali e a favore di terzi nel 'Progetto' dell'Accademia dei Giusprivatisti Europei*, in *L'uniformazione del diritto contrattuale. Problematiche attuali e tendenze evolutive – Atti degli Incontri di Studio della Facoltà di Giurisprudenza della Seconda Università degli Studi di Napoli*, 2004.

[18] See H. PAZZAGLINI, *La recezione del diritto civile nella Cina del nostro secolo*, in *Mondo cinese*, 76, 1991, 49 ff. (which suffers, however, from bibliographical gaps); FEI ANLING, *Gli sviluppi storici del diritto cinese dal 1911 ad oggi. Lineamenti di una analisi relativa al diritto privato*, in *Roma e America. Diritto romano comune*, 23, 2007, 111 ff.; but see also below at length in the text and in the following ntt.

[19] For the very first reflections on this Civil Code, see now S. PORCELLI, *Il nuovo Codice civile della Repubblica Popolare Cinese. Osservazioni dalla prospettiva del dialogo con la tradizione romanistica*, in *Studium Iuris. Riv. per la formazione nelle professioni giuridiche*, 7-8, 2020, 811 ff. See now A. SACCOCCIO-S. PORCELLI (eds.), *Codice civile cinese e sistema giuridico romanistico*, Modena, 2021, with several essays by some Italian jurists and some of the Chinese jurists, who contributed to the drafting of the Code.

model) articulation of the sources of law in this Country [20] and is not limited to a mere operation of 'legal transplantation' of norms derived from the Western world: [21] Chinese legal science now feels mature, and, believing that it has overcome the phase of the «trapianto acritico del diritto ('uncritical transplantation of law')», feels ready to face the systematic-conceptual challenges that the launching of a codification of law imposes. [22]

Nowadays we can consider as definitively outdated for Chinese law the metaphor of the «diritto che non c'è ('law that does not exist')». [23] Clear and widely studied by the doctrine, even outside the narrow circle of jurists (and Romanists in particular) [24] are the influences of the Roman legal tradition on Chinese legislation and doctrine. [25] The highly scientific na-

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[20] On this point, cf. P. KELLER, *Sources of Order in Chinese Law*, in *The American Journal of Comparative Law*, 42, 1994, 711 ff. (= in P. KELLER [ed.], *Chinese Law and Legal Theory*, Aldershot, 2001, 239 ff.); F.R. ANTONELLI, *La 'legge sulla legislazione' ed il problema delle fonti nel diritto cinese*, in *Mondo cinese*, 119, 2004, 23 ff.; XU GUODONG, *Le fonti del diritto civile nel sistema cinese*, in *Diritto@Storia*, 4, 2005; E. TOTI, *Elementi di diritto cinese*, Roma, 2010, 15 ss.; more generally, on this point see also G. AJANI, *Le fonti non scritte nel diritto dei Paesi socialisti*, Milano, 1985; E. TOTI, *Diritto cinese dei contratti e sistema giuridico romanistico. Tra legge e dottrina*, Rome, 2020, 41 ff. On the 'absolute value' (in the sense of 'binding legal value') that the interpretations of the Supreme Court in China have assumed, see also YIN QIUSHI, *Le Interpretazioni della Suprema Corte del Popolo cinese e lo ius honorarium*, in *Roma e America. Diritto romano comune*, 37, 2016, 251 ff.; L. FORMICHELLA, *La riforma giudiziaria in Cina e il ruolo della Suprema Corte Popolare*, in *Roma e America. Diritto romano comune*, 167 ff.; and especially S. PORCELLI, *Hetong e contractus. Per una riscoperta dell'idea di reciprocità nel dialogo tra diritto cinese e diritto romano*, Turin, 2020, 84 ss.

[21] See M. TIMOTEO, *Il Codice civile in Cina: oltre i legal transplants?*, in *Mondo cinese,* 167, 2019, 13 ff.; see also EAD., *La lunga marcia della codificazione civile nella Cina contemporanea*, in *BIDR*, 110, 2016, 35 ff.

[22] See XUE JUN, *La polemica sulla codificazione del diritto civile cinese*, available online at http://www.romanlaw.cn/sub2-35.htm.

[23] See, e.g., L. MOCCIA, *Prologo breve sulla 'originalità' del diritto (tradizionale) cinese e sull'importanza del suo studio in prospettiva storico-comparatistica*, in *Riv. trim. dir. e proc. civ.*, 2004, 991 ff., which takes up the old image of MONTESQUIEU, according to whom it is the stick that governs China (cf. *Esprit des lois*, I, 8, 21), who, in turn, borrowed it (see nt. 273) from the orientalist historian Jean-Baptiste Du Halde (1674-1743).

[24] See, for example, M.G. CASTELLO, *L'ombra di Roma. La cultura romana e la Cina*, in *Historia magistra. Rivista di storia critica*, 15, 2014, 42 ff.; L. COLANGELO, *L'introduzione del diritto romano in Cina: evoluzione storica e recenti sviluppi relativi alla traduzione e produzione di testi e all'insegnamento*, in *Roma e America. Diritto romano comune*, 36, 2015, 175 ff.; EADEM, *La ricezione del sistema giuridico romanistico e la relativa produzione di testi in Cina all'inizio del XX secolo: le fonti del diritto romano in due dei primi manuali in lingua cinese*, in *BIDR*, 110, 2016, 195 ff.

[25] The literature on this point is now substantial: making a selection, we can start from the classic writings of Jiang Ping, former Rector of the *CUPL*, one of the most prestigious Chinese universities (cf. JIANG PING, *Il diritto romano nella Repubblica Popolare Cinese*, in *Index*, 16, 1988, 367 ff.; IDEM, *The Spirit of Roman Law in China* [in Chinese], in *China Legal Science*, 1, 1995; italian version in L. FORMICHELLA-G. TERRACINA-E. TOTI [eds.], *Diritto Cinese e sistema giuridico romanistico. Contributi*, Turin, 2005, 49 ff.; about the work of Jian

ture of Roman law, together with its universalist vocation and its focus on respect for the human person[26], were the basic reasons for this option, which is clearly a free choice. [27]

The Civil Code, [28] which came into force on 1 January 2021, [29] is of fundamental importance both for the choice (far from being taken for granted) of regulating the juridical system through a Code, [30] and for its role as a «pietra miliare di una nuova Cina, che vuole connotarsi per una autonomia dichiarata dai modelli esterni», expression of a «identità nazionale, sull'onda della spinta storica che va spostando il baricentro economico (e

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Ping for the dissemination of Roman law in China see extensively E. TOTI, *Diritto cinese dei contratti*, cit., 21 ff.) and then consider the numerous writings on this issue by Sandro Schipani (see, *ex multis*, S. SCHIPANI, *Diritto romano in Cina – XXI secolo*, in *Treccani.it* [http://www.treccani.it/enciclopedia/diritto-romano-in-cina_(XXI-Secolo)], 2009; IDEM, *La Cina e il nuovo diritto romano*, in *Mondo cinese*, 145, 2011, 50 ff.; IDEM, *Fondamenti romanistici e diritto cinese (riflessioni su un comune lavoro nell'accrescimento del sistema)*, in *BIDR*, 110, 2017, 35 ff.) and by Oliviero Diliberto (see O. DILIBERTO, *La lunga marcia. Il diritto romano nella Repubblica popolare cinese*, in L. CANFORA-U. CARDINALE [eds.], *Disegnare il futuro con intelligenza antica. L'insegnamento del latino e del greco antico in Italia e nel mondo*, Bologna, 2012, 53 ff.; IDEM, *Chiusura dei lavori. Diritto romano e codificazione cinese tra passato, presente e futuro. Alcune considerazioni*, in *BIDR*, 110, 2016, 293 ff.). On this point, see also MI JIAN, *Diritto cinese e diritto romano*, in *Index*, 19, 1991, 343 ff. (= in *Diritto cinese e sistema giuridico romanistico*, cit., 13 ff.); XUE JUN, *Il diritto romano in Cina*, in *Cardozo Electronic Law Bulletin*, 12, 2006, 1 ff.; IDEM, *La codificazione del diritto civile cinese e il diritto romano*, in *BIDR*, 110, 2016, 73 ff.; XU GUODONG, *La base romanistica della parte generale del codice civile cinese*, in *BIDR*, 110, 2016, 47 ff.; YANG ZHENSHAN, *La tradizione filosofica del diritto romano e del diritto cinese antico e l'influenza del diritto romano sul diritto cinese contemporaneo*, now in *Diritto cinese e sistema giuridico romanistico*, cit, 29 ff.; R. CARDILLI, *Diritto cinese e tradizione romanistica alla luce del nuovo Codice civile della RPC*, in *Mondo cinese*, 167, 2019, 25 ff. (= in R. CARDILLI-S. PORCELLI, *Introduzione al diritto cinese*, Torino, 2020, 67 ss.); S. PORCELLI, *Hetong e contractus*, cit. 15 ff. with further bibliography, also in Chinese. Finally, on this topic the very recent volume of R. CARDILLI-S. PORCELLI, *Introduzione* cit., appears of great impact, due to the depth of introspection and rigor. See also the essays in *Roma e America. Diritto romano comune*, 41, 2020, dedicated at the same subject.

[26] See S. TAFARO, Ius hominum causa constitutum. *Un diritto a misura d'uomo*, Naples, 2009.

[27] See S. PORCELLI, *Hetong e contractus*, cit., XIII.

[28] On the process that led to the elaboration of the Code starting from 2014, in addition to the authors cited *supra*, see now S. PORCELLI, *Hetong e contractus*, cit., 277 ff.; E. TOTI, *Diritto cinese dei contratti*, cit., 34 ff.

[29] The Chinese text is available on the website of the National People's Congress at http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml. See also the latest italian translation by HUANG MEILING, ed. by O. DILIBERTO, D. DURSI, A. MASI, *Codice civile della Repubblica Popolare Cinese*, Pisa, 2021.

[30] See e.g., P. RESCIGNO, *La 'forma Codice': storia e geografia di un'idea*, in *Riv. dir. civ.*, 2002, 29 ss.; with reference to China, see also N. IRTI, *La Cina verso l'unità di un codice civile* https://www.corriere.it/opinioni/17_gennaio_31/cina-l-unita-un-codice-civile-31b22dce-e705-11e6-b669-c1011b4a3bf2.shtml.

politico) del mondo da Occidente verso Oriente».[31] This point is also clearly perceived by our Chinese colleagues.[32]

Even within this new Code, the contract remains an ordering category of great epistemological, as well as social,[33] value. With the construction of the Code itself, it can be emphasized even more the principle of contractual freedom, which corresponds to a consequent greater distancing from the model that links the contract to the binding effects of the act performed in the perspective of a planned economy,[34] in which «i contratti costituivano soltanto i mezzi e le forme per regolare e realizzare le allocazioni pianificate».[35]

A number of studies have been devoted to the notion of contract in China, which have recognized its tortuous development, both from a civilistic-comparative[36] perspective and from a perspective that looks more closely at Roman law,[37] without forgetting the approach adopted by the Chinese jurists as well.[38] We can divide this development into different temporal phases.[39]

Prior to the adoption of the Code, the topic of the contract in China was mainly regulated by the General Principles Law of 1986 and by the Contract

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[31] See M. TIMOTEO, *Il Codice civile in Cina*, cit., 17.

[32] See, for instance, FEI ANLING, in the *Prefazione* to the volume by S. PORCELLI, *Hetong e contractus*, cit. Moreover, the North American jurist Nathan Roscoe Pound (1870-1964), with regard to the Chinese Code of 1931, had already pointed out how it was essentially the culmination of a series of developments in which the precipitate of Roman law had sedimented, starting from the foundation of the system with Justinian: see R. POUND, *Roman Law in China*, in *L'Europa e il diritto romano. Studi in onore di Paul Koschaker*, I, Milan, 1954, 441 ss. On the 'awareness' of the Chinese jurist today, see also *supra*, nt. 21.

[33] On the importance of the contract as a «istituzione sociale» ('social institution') see now C. DE CORES, *La teoría general del contrato a la luz de la historia*, Montevideo, 2017, quoted from the it. transl. *La teoria generale del contratto. Una prospettiva storica*, Torino, 2020, 11 ff.

[34] On this point, see particularly R. CARDILLI, *Precisazioni romanistiche su 合同e 诚实信用*, in M. PAPA-G M. PICCINEELLI-D. SCOLART (eds.), *Il libro e la bilancia. Studi in memoria di Francesco Castro*, Rome, 2011, 156 ff. (= in R. CARDILLI-S. PORCELLI, *Introduzione al diritto cinese* cit., 225 ss.); IDEM, *Diritto cinese e tradizione romanistica alla luce del nuovo Codice civile della RPC*, in *Mondo cinese*, 167, 2019, 36 (= 83 s.); on the 'economic contract' in China, see also G. AJANI, *s.v. Contratto economico nei Paesi socialisti*, in *Dig. disc. priv. Sez. civ.* IV, Turin, 1989, 259 ff. and now extensively S. PORCELLI, *Hetong e contractus*, cit., 44.

[35] See S. PORCELLI, *Hetong e contractus*, cit., 47.

[36] See M. TIMOTEO, *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*, Padua, 2004.

[37] See E. TOTI, *Diritto cinese dei contratti*, cit. and above all, with greater insights into Roman Law, S. PORCELLI, *Hetong e contractus*, cit.

[38] See now, SHI HONG, *Principali sviluppi e innovazioni nel libro sui contratti del Codice civile della Repubblica Popolare Cinese*, in *Roma e America. Diritto romano comune*, 41, 2020, 45 ss. (= in *Codice civile cinese e sistema giuridico romanistico* cit., 179 ss.).

[39] See M. TIMOTEO, *Il contratto in Cina*, cit., 254 ff.; S. PORCELLI, *Hetong e contractus*, cit., 41 ff.

Law of 1999, which have been a formidable tool in opening up China. [40]

Art. 85 of the General Principles Act 1986 defined a contract as an 'agreement between the parties to create, modify or terminate a civil relationship'. [41]

Article 2 of the Contracts Law of 15 March 1999 defines a contract as follows: «Ai fini di questa legge, per contratto si intende un accordo per costituire modificare o estinguere rapporti civili di tipo obbligatorio tra persone fisiche, persone giuridiche od altre organizzazioni, in qualità di soggetti paritari». [42]

The definition is substantially repeated, apart from a few variations that do not interest the present research, [43] in Art. 464 of the new Civil Code of the RPC. 2020 according to which: 'A contract is an agreement between civil subjects for the purpose of establishing, modifying or extinguishing civil binding relationships'.

The reference model is clearly the Franco-Italian model of the 'contract-agreement', as inheritance of natural law, although on a practical level the definition goes beyond the Italian (but before German) generalization, moving from the (Italian-German) 'legal relationship' towards the 'civil obligatory relationship', [44] in a perspective certainly closer to Roman law. [45]

The «solitario consenso che egemonizza le definizioni» ('solitary consensus that dominates the definitions'), however, cannot be reduced to the only structural element necessary for the construction of the contractual institution, unless we forget the cause, the form, the object, which even the Chinese Code (as well as the European Codes) refers to and regulates in other points, or considers in a more or less implicit manner. [46] The

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[40] On this point, see S. PORCELLI, *Hetong e contractus*, cit., 57 f.

[41] 合同是当事人之间设立、变更、终止民事关系的协议.

[42] I use the italian translation: see *Leggi tradotte della Repubblica Popolare Cinese: Legge sui contratti*, translated by L. FORMICHELLA-E. TOTI, Turin, 2002. ('For the purposes of this Law, a contract means an agreement to establish, modify or extinguish civil relationships of a compulsory nature between natural persons, legal persons or other organizations, as equal partners').

[43] E.g. the reference to 'natural persons, legal persons etc.' is replaced by a reference to 'civil subjects', while the reference to the equal position of the contracting parties disappears: on this point see R. CARDILLI, *Diritto cinese e tradizione romanistica*, cit., 37 ff.

[44] About the disappearance of the express reference to the obligation in the Code, because of the reorganization resulting from the insertion of the rules on the contract in the Code itself and therefore the need for coordination also with the provisions dictated therein, for example in the general part (art. 118) which mentions the contract among the sources of obligation, see, R. CARDILLI, *Derecho Chino y tradición romanista a la luz del nuevo Código civil de la RPC*, in *Roma e America. Diritto romano comune*, 40, 2020, 213 ff. but see also S. PORCELLI, *Hetong e contractus*, cit., 292-293.

[45] See R. CARDILLI, *Diritto cinese e tradizione romanistica*, cit., 37 (83 f.).

[46] See S. SCHIPANI, *La nuova legge cinese in materia di contratti e il diritto romano come base di essa e della comunicazione con i Codici del sistema romanistico*, in *Roma e America. Diritto romano comune*, 8, 1999, 225 ff. and particularly 231.

same can be said with reference to the binding force of good faith and to the «forza generatrice» ('generating force') and re-balancing of the *synallagma*,[47] so that, beyond the merely nominalistic-definition, also for the Chinese legal order it can be seen as misleading the perspective according to which the contract would be 'only' an agreement:[48] consequently, it appears evident that also in this case the «camicia di forza del volontarismo ('straitjacket of voluntarism')» does not fully deploy its effects.[49]

Moreover, the terminologic choice of the Chinese legislator seems to confirm this perspective, also from a mere linguistic point of view: in fact, from the 1950's onwards, the term '合同 (*hetong*)' was preferred to identify the contract, indicating rather the plurilateral legal act (*Gesamtakt*) with greater emphasis on the 'common purpose', as opposed to the term '契约 (*qiyue – Vertrag*)', which had been used until then to designate the contract in general since the time of the Qing modernization.[50]

It has been appropriately pointed out that 'the general category of contract never supplanted and eliminated the regulation of individual types of contracts'.[51] I therefore find useful to return briefly to the category of the real contract, considering in particular the loan contract in the new Chinese civil Code, in order to ascertain whether and what changes the enactment of the Code has introduced with respect to the previous legislation.

3. *The loan in Chinese Contract Law and Civil Code*

A. *The structure: reality and consensuality*

Obviously, the loan contract has been present in Chinese society since time immemorial. An interesting case is that of a loan granted by a certain Cheng Minsheng to a certain Lu Shi during the Ming dynasty (1368-1644),

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[47] Cf. R. CARDILLI, *Diritto cinese e tradizione romanistica*, cit. 38 (= 84), who reinterprets the *synallagma* of Greco-Roman tradition in the light of the Chinese principle (deriving from Confucianism) of the 'vital cycle of reciprocity' as «espressione concreta di una visione armonica del mondo»; on this point, see particularly S. PORCELLI, *Hetong e contractus*, cit., 259 ff., 271 ff., but also for the role «fondamentale, già radicato nella cultura cinese più antica» represented by equivalence in exchanges.

[48] See S. PORCELLI, *Hetong e contractus*, cit., 74; see also 91 ff. on the exception of non-performance and gift.

[49] Cf. M. TIMOTEO, *Il contratto*, cit. 122; on this point see again S. PORCELLI, *Hetong e contractus*, cit., 93.

[50] See S. PORCELLI, *Hetong e contractus*, cit., 8 f., according to whom 契约 (*qiyue*) would be more suitable to identify the meeting of wills that are not 'parallel' but 'opposed'.

[51] R. CARDILLI, *Diritto cinese e tradizione romanistica*, cit., 2019, 38 (= 84): «mai la categoria generale di contratto ha soppiantato, eliminandola, la regolamentazione dei singoli tipi contrattuali».

in which the deciding magistrate concluded that the contract was valid, even after many years. [52]

Most recently, our contract was regulated in the 1999 General Law of Contracts, which I read in the Italian translation edited by Laura Formichella and Enrico Toti. [53]

First of all, it is interesting to note that Chapter XII of the Law is expressly headed 'Money Loan', as if to acknowledge the fact that loans of fungible things other than money are nowadays rarely applied and it is not worth codifying them. [54]

The Chinese Contract Law identifies, within the money loan, a sort of 'subspecies', having as its object the loan between natural persons, for which it provides an *ad hoc* discipline. This suggests, although the legislator does not make this clear, that the intention is to diversify, in the ways we shall see, the loan of money taken out by a credit institution or a bank, which constitutes a true and proper financial operation, from the loan concluded *inter amicos*.

Generally speaking, the loan appears to be structured as a consensual contract. [55] This was in fact the position held by some Chinese scholars, who had argued against maintaining the category of real contracts, with particular reference to the loan. [56]

Nothing in this direction can be deduced from the definition of the contract contained in Art. 196: «Il mutuo è il contratto con cui il mutuatario prende in prestito denaro dal mutuante e alla scadenza lo restituisce, pagando inoltre gli interessi» ('The loan is a contract whereby the borrower borrows money from the lender and pays it back at the due date, together with interest').

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[52] Specifically, the borrower asserted that the passage from the Ming to the Qing dynasty (and the consequent increase in his political and social power, thanks to his greater closeness to the imperial hierarchy) had rendered the restitutive obligation unenforceable: on this point, see the account by WANG GUIGUO, *A Survey of China's Economic Contract Law*, in *Pacific Basin Law Journal*, 4, 1985, 14 ff.

[53] *Leggi tradotte delle Repubblica popolare cinese: la legge sui contratti*, cit. The caution with which I will sometimes express myself in the following pages necessarily depends on the fact that the sources cited, as well as the doctrine, are not (yet) accessible to me, for language reasons, in their original version.

[54] It is worth noting, however, that the restyling of the BGB seems to have moved in the opposite direction, dividing the loan into *Geld* and *Sachdarlehen*: see § 488 Abs. 1 and § 607 Abs. 1.

[55] On this point, for the first comparative observations with Mexican law, see already J. MENA BRITO PAZ, *Estudio sobre la naturaleza equivoca del contrato de mutuo en el Derecho civil mexicano y algunas consideraciones sobre su naturaleza consensual en el Derecho chino*, in *II Coloquio internacional de estudios chino y mexicanos. Del diálogo al entendimiento*, Peking, 2017, 247 ff.

[56] See, for example, in this regard, WANG HONG, *Yaowu hetong de cun yu fei. Jianlun Woguo 'Minfadian' de lifa jueze*, in *Shanghai Shifan Daxue Xuebao*, 4-2007; ZHU QINGYU, *Yisi biaoshi yu falü xingwei*, in *Bijiaofa yanjiu*, 1-2004 (both in Chinese).

The norm not only does not describes the conduct expected from the borrower in terms of duty, pointing out only the fact of the restitution, but also does not offer any element for a structural qualification of the contract. The terminology used in the Italian translation («prende in prestito ('borrows')», in fact, refers to the moment of the *accipere* and not of the *dare*, and so does not make it clear whether the *traditio* (of which the *accipere* represents the conclusive moment) is or is not a structural element necessary for the conclusion of the contract.

However, the subsequent Art. 201 of the Law seems to clarify the point sufficiently, where it provides, in par. 1, that «qualora il mutuante non fornisca il denaro nel termine e nell'ammontare convenuti, provocando perdite al mutuatario, deve risarcirle» ('if the lender fails to deliver the money on the agreed date and in the agreed amount, causing losses to the borrower, he must compensate them'); and, in the second paragraph, that: «Qualora il mutuatario non ritiri il denaro alla data e nell'ammontare convenuti, deve pagare gli interessi da tale data e su tale ammontare» ('If the borrower doesn't collect the money on the agreed date and in the agreed amount, he must pay interest from that date and on that amount').

Reading these norms, it is clear that if the lender may agree with the borrower on the time limit within which the *datio* is to be performed, and the amount of the *datio* may also be agreed upon, the *datio* cannot be elevated to an element of structure of the contract. In the same way, the norm of the second paragraph, which sanctions the borrower who does not respect the agreement on delivery, leads the interpreter to consider the contract already perfect at the time when agreement is reached on the amount and the terms of delivery and restitution (as well as on interest: see *infra*), degrading the *traditio* to a merely executive moment of the contract.

It should be noted, incidentally, that the obligation of the borrower to pay interest from the moment of the agreement, regardless of the actual disbursement of the sum, appears excessively penalizing for the borrower, even in the hypothesis that he is the party that refuses to implement the binding agreement. On this point, the Roman sources leave the borrower free not to follow through with the binding agreement, if he does not want to receive the money, which he has undertaken to repay, even if it is in the solemn form of *stipulatio*. [57]

On the other hand, the practice of consensual loans, which is becoming more widespread in Italy in the form of the so called 'mutui di scopo' and 'mutui edilizi', provides for the disbursement of the sums by the lender according the work in progress (so called '*stato di avanzamento lavori*'), which allows the borrower to better modulate, according to his needs, the receipt of the sums of the loan, which he will then have to repay.

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[57] Cf. *Paul.*, 5 ad *Plaut*. D. 12.1.30: *Qui pecuniam creditam accepturus spopondit creditori futuro, in potestate habet, ne accipiendo se ei obstringat*.

Finally, it cannot be overlooked that it is not clear from the wording of the article of the Chinese law how is sanctioned the borrower who refuses to receive the sums in the time and amount foreseen. In particular, if, as seems likely, the lender is entitled to damages following the borrower's non-performance, it seems inappropriate to impose on the borrower also the obligation to pay interest. On the other hand, the obligation to pay interest is justified in the absence of such an obligation to pay damages, but in this case we would face to a non-performing loan, capable, however, in an anomalous manner, of generating interest, which must therefore be considered not as a conventional interests, but rather as corresponding interests.

A further and definitive argument in favour of the consensuality of the loan as governed by these rules is, finally, provided by the contrast between what has been provided so far, with Art. 210 of the Law, which states that: «Il contratto di mutuo tra persone fisiche acquista efficacia dal momento in cui il mutuante dà il denaro» ('The loan between natural persons takes effect from the moment the lender gives the money').

The Chinese doctrine, in fact, seems to orient the interpretation of this article towards the reality of loans between natural persons.[58] However, the Italian translation speaks of the «acquisto di efficacia» ('acquisition of effectiveness') of the loan, starting from the delivery: this means, for our dogmatic categories, that the delivery is required for the effectiveness and not for the perfection of the contract, i.e. that the loan is to be considered concluded already from the exchange of the consents and that the delivery relates only to its performance.

Now: all constructions which, by relying on the effectiveness of the contract, attempt to move forward respect to the time of the agreement, the moment when the contract actually begins to take effect, including the more refined ones, which rely on the *condicio iuris* or construct delivery as a sort of «concausa di efficacia» ('concause of effectiveness') or speak of «realità differita» (deferred reality'),[59] they do no more than apply the scheme of the real contract (according to which the contract does not become fully effective until after delivery), thus concealing the intention to expunge the category of reality[60] from the juridical system. Nor may the usual argument be adduced in respect of leases, where, although not be-

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[58] See for example JIANG PING, *Zhonghua Renmin Gongheguo Hetongfa Jing Jie* (in Chinese), Beijing, 1999, 164.

[59] See V. DI GRAVIO, *Teoria del contratto reale e promessa di mutuo*, Milan 1989, 83 ff.; A. LUMINOSO, *I contratti tipici e atipici. Contratti di alienazione, di godimento, di credito*, in G. IUDICA-P. ZATTI (eds.), *Trattato di diritto privato*, Milan, 1995, 704.

[60] In doctrine, in this sense see already C.A. MASCHI, *La categoria dei contratti reali. Corso di diritto romano*, Milan, 1973, 7; more recently, there has been talk of an «artifizio volto a soddisfare l'assorbente proposito di conciliare la categoria dei contratti reali con la regola generale per cui il contratto si perfeziona in forza del solo accordo delle parti»: see D. CENNI, *La formazione del contratto*, cit., 49.

ing a real contract, the effects for the lessee are not produced until after the lessor has delivered the thing to him: here, in fact, we are dealing with a synallagmatic contract, in which one performance (payment of rent) cannot arise unless the other (provision of the leased thing) is performed. In the case of a loan, even if one construct it as a bilateral contract in the case of onerous loan (obligation to deliver, against obligation to pay interest), the shifting of the effectiveness to the time of delivery would not make any sense in case of a gratuitous loan, other than to conceal the occurrence of a real contract.

Hence the proposals for modification that have been circulating within Chinese doctrine: I refer, in particular,[61] to the so-called 'Project of Green Code' by Xu Guodong, professor of Roman law at the University of Xiamen, who explains that the name of his project derives from the desire to define, through his work, «un equilibrio tra umanità e risorse, un rapporto di coesistenza pacifica tra l'uomo e gli altri esseri nonché un ridimensionamento dello status umano» ('a balance between humanity and resources, a relationship of peaceful coexistence between man and other beings as well as a re-dimensioning of human status').[62] In the 'Project of Green Code', Xu Guodong, taking up a thesis that circulated in Italy in the last century,[63] proposes to construct the gratuitous loan as real, and the onerous loan as consensual; this opinion in China seems to be supported by the adhesion of other scholars.[64] Now: regardless of the criticism that this thesis has attracted in Italy, and provided that it is not an impression dictated by the translation from Chinese, the structure proposed by Xu

[61] But see also LIANG HUIXING (ed.), *Zhongguo Minfadian Cao'an Fuliyou (A propositional version with reasons for civil code draft of China)*, Peking, 2013, 537.

[62] See XU GUODONG, *Un'esposizione sintetica del principio 'verde' nel Progetto del Codice Civile Verde per la Cina*, in *Contratto Impresa Europa*, 13, 2008, 421.

[63] The thesis is actually quite old: already G. DEMELIUS, *Realkontrakte im heutigen Recht*, in *Jahrbücher für die Dogm. des heut. röm. und deutsch. Privatrecht*, III, 1859, 399 ff. and in particular 405 ff., but also J. UNGER, *Realcontracte im heutigen Recht*, in *Jahrbücher für die Dogmatik des heut. röm. und deutschen Privatrechts (Jhering's Jahrb.)*, 8, 1866, 1 ff. held that real contracts have a *raison d'être* only when they put in place an advantage for the contracting party. Closer to our times, and with reference to the Italian juridical order, see G. DE NOVA, *Il tipo contrattuale*, Padua, 1974, 110 ff.; G. D'AMICO, *La categoria dei contratti reali 'atipici'*, in *Rass. dir. civ.*, 1984, 380; F. GALGANO, *Il negozio giuridico*, in L. MENGONI (dir.), *Trattato di diritto civile e commerciale*, formerly directed by A. CICU-F. MESSINEO, III.1, Milan, 1988, 157 s. It has thus be said, on the basis of R. SACCO, *Il contratto*, cit., 613 ff.; IDEM, *Causa e consegna nella conclusione del mutuo, del deposito e del comodato*, in *Banca Borsa e Titoli di credito,* 1971, I, 502 ff., that the delivery 'takes the place' of the cause: cfr. R. TETI, *Il mutuo*, *Trattato* IV, 2, cit., 591 ff.; M. DE TILLA, *Donazione* cit., 548; P. GAGGERO, *s.v. Mutuo (dir. civ.)*, in *Enc. Treccani*, 2013 (https://www.treccani.it/enciclopedia/mutuo-dir-civ_%28Diritto-on-line%29/).

[64] See, for example, LIU JIA'AN, *'Yaowu hetong' gainian de shenjiu*, in *Bijiaofa yanjiu*, 4-2011, or the reflections in ZHENG YONGKUAN, *Yaowu hetong zhi cunzai xianzhuang jiqi jiazhi fansi*, in *Xiandai faxue*, 1-2009 (both contributions are in Chinese).