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# Roman Law and the Armenian Draft Civil Code

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# FACULTY SCHOLARSHIP

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*Prof. Alan Watson, who is fluent in nearly 20 languages, served with other eminent scholars this spring as a consultant to the drafters of the new Armenian civil code. The article that follows is condensed from a chapter of his forthcoming book,* Ancient Law and Modern Understanding: at the Edges.

One would be hard-put to it to detect much direct Roman law influence on part 2 of the draft civil code of the Republic of Armenia as the draft existed in April, 1997. There is none. I find that fact unsurprising. One would still be rather hard-pressed to find *recognizable* traces of indirect Roman law influence. The influence is there but it has been transmuted in its transmission through French, German, Dutch, and Russian law. So why do I want to write about Roman law and the draft civil code of the Republic of Armenia?

From the beginning of my academic career my main interest in law has been legal development; that is, in its turn, the relationship of law to the society in which it operates. Why does law change when it does and in the way that it does? My approach is through an examination of a number of systems of law, preferably related, over centuries, looking for patterns or their absence. Since it happens that the main vehicle of change in almost any society is borrowing from another, a substantial element of my inquiry has focused on what has been borrowed, how it has been borrowed, and from what chosen system.

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Since its separation from the Soviet Union, the Republic of Armenia has been preparing a new civil code. On behalf of USAID I and one other professor from the U.S., and also other 'western experts,' met with the Armenian drafting team of book 2 of the code, on obligations, at The Hague, Netherlands, from April 19 to 26, 1997.

The Armenian delegation was very powerful, led by V.R. Nazaryan, head of the Legal Service of the National Assembly. Mr. Nazaryan has had a distinguished career in criminal law, rising to be procurator general of Armenia. He never really worked previously in the area of civil law.

The language of the sessions was Russian, not just because Armenian, which has no living linguistic relative – ancient Thracian was the closest – was unknown to the westerners. The code is drafted in Russian, and will only later be rendered into Armenian. Computer analysis revealed that 97 percent of the book on obligations is taken straight from the Russian civil code. The extent of borrowing is not surprising and can be paralleled elsewhere: 19th century Dominican Republic from France, 20th century Turkey from Switzerland, for example. But that the borrowing is from Russia is revealing for legal transplants. After all, the draft code includes in its aims promotion of business enterprises, and Russia is not noted for satisfactory commercial law or a successful private (lawful) economy. But Russian law had the prime advantage of being accessible: it was already codified, in a language known to the drafting committee, and was a system very familiar to the Armenians. The fact that it did not provide a very good model for a developing capitalist state was at most a secondary consideration.

But Russian legal input into the Armenian draft was not mentioned, not even

once, during our discussions. Why not? My answer would be that law, even legislation, requires authority to be persuasive, and Russian law was just not the correct authority. On the other hand, Roman law influence was exaggerated. It was raised time and time again. It did not exist, but was often there in the discussion. Much apparent borrowing is fake borrowing.

One example of the supposed input of Roman law can be taken from the contract of loan which occupies chapter 43 of the draft. The term 'loan' here concerns loan for consumption, the Roman *mutuum*, rather than loan for use, the Roman *commodatum*. The second paragraph of article 852.1 in chapter 43 reads: "The contract of loan shall be considered made from the time of transfer of the money or other things." Article 853.1 then has: "The contract of loan shall be made in written form." A western consultant observed that possibly loan could be a consensual contract with no need for an actual transfer of ownership to create the contract. Mr. Nazaryan objected that the Romans had *mutuum* 2000 years ago, and that that was the basis of the article. The Roman *mutuum* was created by delivery. It was then suggested that if transfer of ownership created the contract, there was no need for a requirement that the contract be in writing. The response to that was that in Armenia a requirement of writing was necessary because there would be no shortage of witnesses who would testify on the Holy Bible to a non-existent written contract. If we take articles 852.1 and 853.1 together as meaning that a contract of loan requires for its creation both a transfer of ownership and writing then we have a contract that is very far removed from Roman *mutuum* for which writing played no legal role. If, as is perhaps more plausible, article 853.1 is taken to mean nothing more than that whatever the formalities required for the formation of a contract, the existence of the contract can be proved only by writing, then we still have an entity of loan that is very different from Roman *mutuum*. Writing played no *legal* role in *mutuum*. So what was going on? My suggestion is that the Armenian first response when questioned on the legal issue was in this instance to appeal to legal authority rather than to think out the social consequences of their decision. I imply no criticism here: such an appeal to authority is absolutely typical for legal development. What is of interest is the choice of *noticed* authority: Roman, not Russian, law. But the Armenian articles come directly from the Russian civil code. Russian influence was not mentioned because, as I said, it was not authoritative enough: perhaps because the Armenians were reluctant to uncover the extent of indebtedness, more likely because the western consultants would not be impressed since part of their ostensible role was to help indicate law suitable for a market economy. Roman law was provided by the Armenians for the justification, simply because of its appeal in the past. Legal authority is wanted. Where to find it? Roman law. Why? Because that is where civilized nations have traditionally found authority. No matter that the Roman world was so very different. Not only that, the very use of Roman law here is spurious. As a contract, *mutuum* was of necessity gratuitous. All that could be claimed by the action for loan (the *condictio*) was the exact equivalent of what was lent. Chapter 43 expressly provides for interest in the contract. It remains to add that articles 852.1 and 853.1 of the Armenian draft were unchanged at the end of the consultation. But in the modern western world, a contract of loan created by simple agreement might be more satisfactory. You ask your bank for a loan, the request is granted, and the sum is credited to your account. But the money has not been transferred: money in bank accounts is the property of the bank. It was theirs before the loan; it is still theirs. I believe that such a transaction will be considered a loan in Armenia in the sense of chapter 43. Still, its justification in terms of the code will require considerable intellectual juggling.

Piling example upon example is pointless. Still, one other small illustration is instructive. Chapter 57, "Joint Activity," concerns largely what in the west we would call "Partnership." The second paragraph of article 1089 reads: "An agreement fully freeing any of the participants from participating in the coverage of the common expenditure is void." The article is concerned with loss adjustment between the partners. With regard to liability towards outsiders the issue is different: all the partners are then liable. That is one issue. Another, the one here, is how then do the partners distribute loss among themselves? The question was raised by a western consultant whether such an arrangement forbidden in article 1089 might be just: for example, if a financially poor genius provided his talent while others provided capital to exploit it. Should he not be freed from liability towards his partners?

Mr. Nazaryan again defended the article on the basis of Roman law. Such an agreement would be a *societas leonina*, which was void. But Mr. Nazaryan was mistaken. A *societas leonina* which in Roman law is void is something quite different, though it concerns only adjustment between partners. A *societas leonina* is a contract in which one party is to take *all* of the profit and bear *none* of the loss. No one opposed Mr. Nazaryan's understanding of Roman law, and article 1089 remains in the code. Roman law was not the issue. In fact, in most instances when Roman law was adduced as the source it was mis-stated.

I could continue with further examples, but enough has been said here. I would make the following points.

First, the extent of borrowing law from a foreign system can scarcely be exaggerated for the western world. Such borrowing may be hidden, or it may be emphasized, for cultural reasons. To understand this is vital if we want to know the relationship between law and society.

Second, borrowing is very useful: if not for the society as a whole or the social elite, then at least for lawmakers. It saves them from the very difficult and dangerous problem of thinking. To understand this is vital if we want to know the relationship between law and society.

Third, the need for authority plays a vital role in legal change. Where none exists it will be invented. And it will tend to be attributed to the system that somehow has won esteem. Historical arguments should always be regarded with suspicion.

Fourth, misunderstandings and mistakes play a substantial role in legal development.

**—Alan Watson**