

A Note on Invention

Etym.: *in-*, *venire*: to come in or to come to [in the sense of “to fall upon”]; *inventio*: a discovery, a finding [that to which one comes, that on which one “falls upon”]; *inventor*: he who comes to something, who discovers, who finds, he who “falls upon” something.

1. To discover or to find something that exists already, thus a treasure (or a planet).

Example (i). The notion of invention relates to the discovery of a treasure that allows one, under certain circumstances, to acquire ownership of the property. One speaks of acquisition of ownership through invention as opposed to acquisition by other means. Roman law featured a doctrine of *thesauri inventio*, or treasure trove, whereby if something was found by someone on one’s own land, the trove went to the finder; however, if the trove was found on the land of another, half went to the finder and half to the other landowner. See now Article 716 of the French civil code. But particular statutes qualify this form of acquisition of movable property: through strict regulation of invention, they transfer to the State, in most cases, the product of the invention.

Example (ii). In the Roman liturgical rite, there was celebrated on 3 May the feast of the Invention of the Holy Cross (*Inventio Sancta Crucis*), that is, the discovery of the Holy Cross by Saint Helena in 326. This feast was abolished by Pope John XXIII in 1960. The Church of the East still celebrates the *Invention of the Holy Cross* on 13 September, a major feast in this Church.

Application to comparative law. The Australian comparativist who writes on French law is coming to French law in the sense that he finds it or discovers it – for instance, in the Sorbonne law library – in the shape of legislative texts, judicial decisions, or scholarly writings.

2. (since XVIth c.) To produce, shape, forge, realize first something new, to find through the force of creative imagination. *To invent an instrument, a game, a machine, a medication, a fashion, a proceeding.*

Application to comparative law. The Australian comparativist who writes on French law makes it come to him in the sense that he produces, fashions, or forges it through the interpretation that he proposes of it. Through the force of his creative imagination, he realizes an interpretation of French law, necessarily first or new — since each interpretation is inaugural, unique.

Here, “invention [...] produces what [...] was certainly not to be found there but is still not created, in the strong sense of the word, only assembled starting with a stock of existing and available elements, in a given configuration”.¹

More Thoughts

The Australian comparativist invents French law, twice. He finds or discovers it in the Sorbonne law library. Then, he produces, shapes, or forges it through interpretation.

The idea of “invention” underscores the active role of the Australian comparativist, twice. He comes to the French law that already exists, on one hand, and he makes the French law come to him so as to build or edify it – to make it exist (meaningfully) – on the other.

“[T]he concept of invention distributes its two essential values between the two poles of the constative (to discover or disclose [...]) and the performative (to produce, institute, transform)”.²

There is an “infinitely rapid oscillation” between the constative and the performative.³

¹ J. Derrida, *Psyché*, 2d ed. (Galilée, 1998), pp. 35-36 [*“l’invention (...) produit ce qui (...) ne se trouvait certes pas là mais n’est pas pour autant créé, au sens fort du mot, seulement agencé à partir d’une réserve d’éléments existants et disponibles, dans une configuration donnée”*].

² *Id.*, p. 23 [*“(L)e concept d’invention distribue ses deux valeurs essentielles entre les deux pôles du constatif (découvrir ou dévoiler [...]) et du performatif (produire, instituer, transformer)”*].

³ *Id.*, p. 25 [*“oscillation infiniment rapide”*].

“[O]ne would not say today that Christopher Columbus invented America [...]. [...] [U]sage or the system of certain modern, relatively modern, conventions would prohibit us from speaking of an invention whose object would be an existence as such”.⁴

“[O]ne must today reinvent invention”.⁵

⁴ *Id.*, p. 41 [“(O)n ne dirait plus aujourd’hui que Christophe Colomb a inventé l’Amérique (...). (...) (L)’usage ou le système de certaines conventions modernes, relativement modernes, nous interdiraient de parler d’une invention dont l’objet serait une existence comme telle”].

⁵ *Id.*, p. 37 [“(I)l faut aujourd’hui réinventer l’invention”].