

The Thinking That Feels

International Studies in Law and Literature

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The Thinking That Feels

Practices in Law and Humanities

By

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Given the spectacle of their teeming successes, the nations of the West had no trouble exalting history, attributing to it a meaning and a finality. It belonged to them; they were its agents: hence, it must take a rational course. Consequently, they placed it under the patronage, by turns, of Providence, of Reason, and of Progress. What they lacked was a sense of fatality, which they are at last beginning to acquire, overwhelmed by the absence which lies in wait for them, by the prospect of their eclipse. Once subjects, they have become objects, forever dispossessed of that luminescence, that admirable megalomania which had hitherto protected them from the irreparable.

Cioran 1968, 48–49



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Foreword

It is not the number of pages that determines the quality of a book; there are brief, intense works that leave behind a deep and lasting impression. The book by Paola Mittica that you are about to read is one of these. It develops a demanding thesis within its radical simplicity: a true understanding of law – as well as its just practice – requires a form of thought that is also sensitive. Sensitive in the double sense of mobilizing sensations and feelings, and thus the body and our affective capacities.

Thus “provoked” (that is, questioned, called into being – from *provocare*), law is considered not only in its most familiar surface aspect – a system of axioms and concepts, of codified norms, procedural structures, and institutional frameworks – but also, and above all, in its submerged depth: the anthropological and social environment within which it develops and outside of which we perceive only its empty forms. Something like the *nomos* of which Robert Cover spoke: the normative world we inhabit, woven from evaluations, narratives, images, values, and norms – a world to which sensibility offers privileged access.

The turn toward the social sciences undertaken in legal studies a few decades ago, with its renewed interest in “interdisciplinary” approaches, led to a fruitful contextualization of law: by considering it within its economic, social, and political contexts, scholars were able to explain its evolution more fully. By inviting us to engage with the sensory and emotional turn in law, the author urges us to take a further – and indeed decisive – step: no longer a horizontal “contextualization” but a vertical “rooting,” a plunge into the physical and emotional universe that lies at the source of our evaluations and normative constructions.

It is as if one were to draw a triangle whose base is formed by aesthetics and ethics, with law representing the apex. Legal theory thus appears clearly indebted to a comprehensive vision of humanity and of the society built by human beings. It is on this plane that Plato situates himself in the *Protagoras* when he recounts that the secret of the laws ensuring concord within cities rests on *aidos* and *dike*: two political affections, two inclinations toward civilization, two “transcendental conditions,” in Kant’s language, for the successful passage to law.

In different terms, one might say that this book calls for a “reincarnation” of law: formal and procedural law, positive and state-based, impersonal and abstract, is urged to live again and recover its colors. To the appeal of the

Other, especially when weaker or suffering, juridical conscience is summoned to respond – to become responsible (from the Latin *respondere*).

To this end, it is necessary to cultivate a form of “listening,” a sensory and affective sensibility from which the constructions of modern law have often estranged us. Our codes are populated by abstract figures connected only in general terms. This formalism, characteristic of the emergence of law, has undeniable advantages – the emancipation from the possible constraints and attachments of basic social relations, the generalization, and hence, the equalization of solutions – but it also carries the risk of personal disengagement and ethical indifference.

The invitation to a “reincarnation” of law, therefore, renews the ethical demand addressed to it. It is no longer a matter merely of satisfying the (formal) “legality” of a solution, nor even its “justice,” but of seeking its “rightness,” understood as an attunement of the sensibilities at stake in a dispute or, more broadly, within social relations.

Here, then, is the aim: to conceive of an “embodied” law from the perspective of the “rightness” of its responses.

The pages that follow have no other ambition than to accompany the path of this reflection in the form of a cooperative dialog that, along the way, will pose certain questions and suggest a few extensions in order to make the text both resonate and reason (*résonner* and *raisonner*).

In the introduction, the framework, object, and ambition of the work are set out. The framework is that of a renewed appreciation for the sensibility of thought.

Here, the author introduces one of the book’s recurring themes: the ambivalent nature of sensibility, which is at once indebted to bodily limitation and marked by openness – by the capacity for affectivity and, therefore, by a preliminary apprehension of the Other and of what lies beyond.

Understood in this way, sensibility is a threshold (a word that recurs frequently throughout the book), a springboard, a condition of access to the Other, to others, to the city, and, more broadly, to the living world. This form of sensibility is immediately tied to an ethical dimension, since the openness in question is conceived not in a sensualist, materialist, or behaviorist sense, as in many contemporary studies, but rather as an ethical capacity for affection – the ability to let oneself be “touched” by the Other.

Although this book is devoted to law, one may legitimately ask what law has to do with a sensibility that brings us to the boundaries of ourselves and makes us feel our limits. The point, as the author rightly shows, is that law is precisely the art of forming bonds while ensuring respect for limits. Law is a matter of boundaries; it is the art of measure, the discernment of right proportions. For

this reason – and this is indeed the ambition of the work – it is urgent to remind jurists that their practice depends not only on technique but also on art: the art of determining the right measure, capable of offering a “responsible” (or, as some American authors put it, “responsive”) response.

In the first chapter, this reflection is situated within the modern and contemporary context of Western culture, marked by the dominance of technology. The aim is by no means anti-scientific; rather, it seeks to “re-enchant” calculating reason and to restore dialog between the two poles of human reason by reintegrating into this concert the voice of sensitive reason and imagination – to reincarnate, once again, a form of reason that has too often become “hemiplegic.”

From the very beginning, man has been marked by artificiality: as in the fable of Protagoras – and this is the tale’s first lesson – mankind survives only thanks to Prometheus’s theft of fire and the techniques that accompany it. It has often been observed that the human creature has no nature of its own but is what it becomes. Less constrained than other living beings by natural determinism, it falls to man to give sense to and transform the parameters of his condition.

In other words, culture – which also includes technology – is, for man, a second nature, a constructed nature for which he is largely responsible. Yet the naturalness of this necessity should not make us lose sight of the grounding of human culture in the sensitive and bodily condition that man shares with other living beings.

Nevertheless, since Descartes, Western reason has never ceased to sharpen the dualism between body (“extended substance”) and mind (“thinking substance”), a divide that continues today and finds reinforcement in transhumanist fantasies – dreaming, through the engineering of the “augmented body,” of freeing itself from death, the ultimate limit.

By radicalizing artifice, this binary mode of thinking becomes a thought “under equal conditions”: it can ensure the success of its models only at the cost of a radical suspension of the external world. But the world will not be sealed beneath a glass dome; reality asserts its own rights, and it is the mark of an embodied mode of thinking to recall this – especially in the face of binary, calculating rationality, now operationalized through algorithms and computers, which produce a dominant form of reasoning and governance, making all the more urgent a bodily reinscription of our being in the world.

The aim is not to replace Descartes’s radical rationalism with a form of radical sensualism – an *I feel, therefore I am* in place of *cogito ergo sum*. As the author has already emphasized, her appeal to sensibility is as much ethical as it is sensory (and within the sensory turn, this differentiation between an

empiricist dimension and an ethical or esthetic one could itself be the subject of fruitful inquiry).

It is not, therefore, a matter of reasoning in terms of mere sensory stimuli, but of mobilizing the vast domain of emotions – those reactions that, quite literally, set us in motion (from the Latin *e-movere*). Recent studies have shown that, without emotions, human beings are incapable of making decisions, regardless of the extent of their knowledge – a lesson that judges would do well to consider.

At this point, it is most fitting to call on the testimony of artists and poets, for they are the ones who have never forgotten the constitutive role of that feeling which the binary world of calculation would prefer to repress entirely. By reconnecting with this vital dimension, the poet works to make language live again – “to give a purer meaning to the words of the tribe,” as Mallarmé wrote (*donner un sens plus pur aux mots de la tribu*).

The poet’s words prove sensitive to the condition of the Other, standing at the margins of preconception; they can echo those forms of suffering that find no expression in official registers – what Lyotard called the *différend*, which leaves the victim voiceless, unable to access the authorized codes, and of which, as he wrote, literature ought instead to be the “vigilant guardian.”

For the artist – and for the responsible jurist who takes up the torch – the challenge is to give form to those voices that come from outside: to transform perceived meaning into a form that can be shared and made significant.

Reflection thus leads to a consideration of cultural forms that could be compared with Cassirer’s theses (the philosophy of “symbolic forms”) and with Wittgenstein’s (the philosophy of “forms of life”). One might also imagine a philosophy of “style,” of the different ways of “being in the world.” Or, following the author, one may return to revisit the meaning of *techne*, protecting it from the domineering and predatory *hybris* to which the Greeks were so sensitive, and linking it instead to the art of the Muses, which opens what is unsayable and not yet known.

This openness also has an ethical dimension.

The Other, toward whom this sensibility opens, is not an alter ego – that would be merely another self; we would remain enclosed within the galaxy of the one and the same, within the register of the *auto* and the *tauto* – but a true other (not totally other, for otherwise we would have nothing in common, but other enough to alter me, to make me at least in part other: “oneself as another,” in Ricoeur’s powerful expression).

In short, it is a matter of participating in a being-in-the-world that does justice both to the singularity of persons and to their shared belonging – to the realm of the living, to the city, to our common humanity.

The author once again proposes this beautiful formula: *ego cum* rather than *ego sum* – a condition in which the human being is exposed to the risk of the Other, in the awareness that to withdraw from this affection (the word is significant, for it evokes affectivity) is to fall into meaninglessness and barbarism.

In the second chapter, the discussion turns to law in order to highlight the ways in which it may be put to “good use.” This is a form of law that, in the best of cases – or according to its highest purpose – takes account of both the sensitive condition and the ethical demand already described, constructing the symbolic figure of the third: an unavailable third that nonetheless arises from the parties themselves; a third who personifies the idea of the “common” (the common good, the general interest, which is more than the individual good).

Such a conception of law should, in my view, be capable of ensuring what Ricoeur called the “long function of justice”: the capacity to grant to each of the parties involved – both the victim and the presumed perpetrator – the “merited recognition” that goes beyond the simple “short function,” which confines justice to restoring only what is due to each. For while the long function reestablishes social peace by inviting everyone to “take part once again” in social life, the short one contents itself with giving “to each his due,” thereby restoring a mere *status quo ante* that may itself be oppressive or unjust.

This “long function” also certainly mobilizes a sensitive understanding of the situation of the parties involved. In this respect, the paradigmatic example is provided by the famous judgment of Solomon, in which the king of Israel brings the just solution to light not through the formal application of the law (which, in this case, offers no determinate solution), but through the entrails of the child’s mother – who consents to an injustice so that life may prevail: “No, do not kill him; give the child to the other woman!”

As a lucid observer of the contemporary world, the author does not conceal how difficult it is for the law to attain this ideal.

The phenomenon of law shopping, for instance – where economic actors choose the legal system that best serves their particular interests – constitutes a repudiation of the very logic of the third, since in such cases the third instance of the law becomes, in a sense, privatized and instrumentalized within the balance of power that shapes basic social relations. The author conceals none of the distortions that arise, on the one hand, from the formal bureaucratization of law, nor those, on the other, that denature it when it submits to the laws of the market.

The reference to human rights likewise calls for renewed lucidity. When conceived in absolutist terms – as attributes of the sovereign subject, summed up in the maxim “the self by law, the law for me” – do they not reinforce the

solipsistic logic (*solus ipse*) of an exacerbated neoliberalism? It is, therefore, urgent to reconnect rights with the idea of human dignity – the very source of both rights and responsibilities – so as to restore their effectiveness, now threatened by the dominance of economic rules.

Finally, the use of large databases and computer-assisted decision-making systems should not proceed without critical scrutiny. Although it would be absurd to dispense with them entirely, we must nevertheless not allow such technologies – substituting for the “balanced” judgment of a judge who has long hesitated before deciding – to produce a standardizing effect in judicial decisions, at the expense of juridical creativity and careful attention to the uniqueness of each case.

How can a judge resist the overwhelming number of precedents presented by the attorney of one of the parties, even when his or her own sense of justice suggests an alternative solution? Conformism and standardization are, as we know, the automatic products of the algorithms that govern search engines such as Google, which invariably direct users to the most frequently consulted sites.

To resist such drifts and to remain on the path of a “good use of law,” the author draws on the advances of the broad Law and Humanities movement (useful bibliographical references, particularly on the topic of sensations and emotions, are provided in notes 3–5 to Chapter 2; see below, 36–37).

The field of emotions is currently very active, and it is therefore necessary to distinguish between “empathy” and “sympathy,” between primary and secondary emotions, private and collective, real and fictitious ones. It should also be recalled that emotions are, to a large extent, products of cultural construction and are thus subject both to social determinants and to change over time. And if we agree with Sophocles, who reminds us in the first stasimon of *Antigone* that “it is passions that govern cities,” we must also acknowledge that passions and emotions need to be guided, lest they destroy the social bond when driven by vengeful anger or violence.

If, for example, controlled and measured indignation can give rise to monuments such as Zola’s *J’accuse*, we know all too well, by contrast, that waves of hatred on social networks provoke dangerous storytelling and forms of media lynching. (As it happens, while I was writing these pages, a friend of mine – a magistrate – sent me these few lines by Marguerite Yourcenar (1981, 294), which I cannot refrain from quoting here: “Gradually, as in all trials which temporarily excite the mob, two strangely dissimilar cases seemed to be evolving on two different levels: the cause as it appeared to men of law and to churchmen, both of whom commonly sit as judges, and the cause as fabricated by the rabble, who thirst for monsters or victims.”)

How, then, can we distinguish the great emancipatory narratives from the alienating and divisive scenarios of contemporary storytelling? How, if not by mobilizing some of the great figures and foundational narratives of Western culture? As happens, for example, with the figure of Temperance – whom we remember seated beside Justice in Ambrogio Lorenzetti's celebrated fresco *The Allegory of Good and Bad Government* in the Palazzo Pubblico of Siena – who moderates and reconciles conflicting sensations, emotions, interests, and values.

That Temperance inscribes itself in the long time of attention – the mediation of justice in the rule of law, as opposed to the immediacy of media justice or that of social networks – and is the indispensable companion of Prudence, the cardinal virtue of responsible jurists (its etymology is recalled: from the Latin *pro-videre*, “to see from afar”). The author traces this back to Hesiod's tale of the Horae – Eunomia, Dike, and Eirene – who preside over the just order, both the natural order of things and the constructed order of cities. These Horae evoke rhythm and measure, or again, that rightness sung by the poet and inspiring the justice of the judge.

Another foundational resource of just law is the already-evoked myth of Prometheus and Epimetheus. Plato reminds us that mastery of technique alone is not enough to guarantee the survival of cities; on the contrary, human beings never cease to fight among themselves because they do not share the *philia* that “serves as a rule for the cities.” For this reason, a concerned Zeus ultimately sends his faithful messenger Hermes to mankind – not to impose a ready-made code of laws but, more importantly, to offer them the very conditions of sociality: *dike* and *aidos*.

Dike is that sense of justice which the author understands, above all, as the will and capacity to create and sustain bonds (as opposed to *adikia*, the self-enclosed withdrawal that breeds discord – the false note that ruins the sought-after harmony). And *aidos*, a complex and subtle notion (closest perhaps to “respect”), has its roots in the most intimate dimension of sensibility, presupposing something like modesty or restraint – a relation both open and attentive, a necessary condition for human interactions that honor the expectations of the other. Understood as the capacity to engage in relationships that forge bonds while respecting limits, *aidos*, as will now be clear, is the (pre-) juridical affection *par excellence*.

The story is exemplary in more than one sense. It also shows that, while among animals the distribution of qualities (by Epimetheus) is natural and unequal, among human beings the distribution of social affections (*aidos* and *dike*) is, by contrast, cultural and egalitarian. All have received them in the obligatory sharing that binds society together, such that whoever departs

from them becomes subject to sanction. Hence the idea – responding to the initial question that gives rise to the myth – that political and juridical art is not so much the object of *a priori* instruction as of a *paideia* practiced daily through lived experience.

This reference, finally, leads back to the daily practice of a “sensitive law,” nourished and inspired by the work of art, defined by the author as every work-made-with-art, whatever its expressive form and whatever artistic or cultural genre it may belong to – understanding by this any work capable of initiating a process of opening to sense, that is, of opening the transformative space of experience.

The aim of the third chapter is precisely to present several encounters with works of art in order to illustrate how the refinement of esthetic and ethical sensibility can help shape the juridical measure closest to rightness.

Eight such encounters, the fruit of the author’s teaching practice, form something like a toolbox – or rather a treasure chest – of evocations: paintings, films, philosophical meditations, and juridical reflections, all intended to set in motion (*e-movere*) the creative imagination of the responsible jurist. For it is the task of the responsible jurist to put himself into action, avoiding the temptation to practice law casually, as though it were merely a formal technique to which one could remain a stranger.

An active agent within the “limit” of social bonds, the capable jurist intervenes as an “interpreter” of discourses blocked by conflict, as an interface between “subsystems” (Walzer speaks of “spheres of justice”; Boltanski and Thévenot of “cities”) that always risk remaining enclosed within their own logic. Such should be, for example, the lawyer as a “representative” of his client – one who shares the client’s cause with sensibility while maintaining the necessary distance to allow the emergence of the third voice (that of the judge, of the law) needed to untie the knot of conflict.

Each of the encounters proposed represents, in its own way, an experience of limits – limits that, like boundaries or skin, as the author has shown, are at once a barrier (inevitable and protective) and a site of exchange and openness to the outside. And if it is true that law is the art of negotiating limits, we can clearly perceive what is at stake in these experiences.

Without claiming to be exhaustive, I recall here the boundary between the human and the sacred in Beato Angelico’s *Annunciation*; the confrontation with the animal and the robot in Sapochnik’s film *Finch*; the experience of mechanical brutality in Kafka’s *In the Penal Colony*; the tragic condition of the *entre-deux* and the *no man’s land* of migrants, suspended between two worlds and a land of no one; the limits of nonsense explored through confine-

ment within social conventions in Musil's *The Man Without Qualities*; and finally, the rich boundaries of silence and of the unsayable in the meditations of Jabès (one might think here of blindfolded Justice: what does she see through her inner gaze?).

It is impossible, in this space, to do justice to the richness of these various evocations. I will confine myself to commenting briefly on two of them.

Beato Angelico's *Annunciation*, brought into resonance with a poem by Rilke, illustrates particularly well the book's approach, which, as I have said, attempts a kind of incarnation of law – the juridical word is called upon to become flesh in order to keep its promises. The author's fine analysis of the fresco, which opens onto the infinite and the sacred through and from the limits of the cell (of the Virgin and of the convent of San Marco), could usefully be compared with the beautiful analyses that Merleau-Ponty devoted precisely to the "flesh of the world," with his way of presenting our being-in-the-world, and in particular our condition as sentient beings engaged in what he called the "chiasm of the visible" (the one who sees and the one who is seen ceaselessly exchanging positions).

My second observation concerns Kafka's *In the Penal Colony*. The story is, of course, horrifying, and it can be read as a depiction of a possible refinement of cruelty. Yet I cannot help reading between the lines an evocation – difficult, even paradoxical – of the idea that the suffering body is also a condition of access to knowledge and, as such, a step toward liberation. This is attested by the condemned man's expectant elation: he learns the sentence only once it has been completely inscribed on his body, and in that final hour, he is reunited with the community and its law. This suggests, therefore, that the true horror of the tale, as reported by the traveler, lies rather in the fact that, once the machine has been dismantled forever, the individual is henceforth destined to remain radically cut off from that knowledge and from his community.

Kafka's *Diaries* overflow with references to this learning through the suffering body, suggesting yet another aspect – again difficult and paradoxical, I admit – of a bodily conception of law.

It is clear that Paola Mittica's book is one that invites reading and rereading. One must patiently meditate on its silences, allowing its spoken and unspoken words to resonate for a long time. My hope is that, after finding its readers, it will become the object of further discussion and expansion – of which only a few possible directions have been evoked here. The challenge it poses is essential: to articulate the link between the law taught in universities (too often formalist) or practiced in the field (too often reduced to pragmatic urgencies

or economic interests) and the sensitive law evoked in this book, in search of the most fitting measure of justice.

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Translator's Note

Unless otherwise stated, all translations in this volume are my own. Where authoritative English translations were available, these have been consulted and adopted, and are referenced in the bibliography. In all other cases, the translations are mine.

