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# The poetry of rights

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## ABSTRACT

Human rights are not simply rights, they are also quintessentially human; and the human experience is filled with emotion. This essay argues that human rights can be understood as emanating from emotions that we are perceived to share. Art in general and poetry in particular can provide a great service in helping us explore and bring these emotions to the fore, thereby reinforcing the distinctively human character of human rights, while also enabling us to understand them as something more than moral or legal constructs. The regulatory, legal, facet of human rights is a fundamental aspect of democratic justice systems. But so is the personal, emotional, facet, which prompts us to celebrate, communicate, debate and re-imagine the nature and content of human rights – within and beyond the courtroom – in a more empathetic and inclusive manner, with reference to the emotions that underpin them.

**KEYWORDS** Human rights; law and literature; emotions; poetry; art

## 1. Introduction

On 22 September 2005, a great proponent of legal formalism, the late US Supreme Court Justice Antonin Scalia, gave a speech at the Juilliard School, one of the most renowned performing arts conservatories in the world. It was in this most artistic setting where he stated that ‘the main business of a lawyer is to take the romance, the mystery, the irony, the ambiguity out of everything he touches’.<sup>1</sup> An artist that might have been sitting in the audience, a poet in particular for the purposes of this essay, might have felt that law is not really something she could contribute to through her work. This was certainly not the first time, or the last, that values cherished by poets were deemed undesirable, even toxic, when dealing with the practicalities of organizing our social life. More than two thousand years earlier, Plato famously expelled poets from his *Republic* as, according to the

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<sup>1</sup>Daniel J Wakin, ‘Scalia Defends Government’s Right to Deny Art Funds’ *The New York Times* (23 September 2005) <[www.nytimes.com/2005/09/23/nyregion/scalia-defends-governments-right-to-deny-art-funds.html](http://www.nytimes.com/2005/09/23/nyregion/scalia-defends-governments-right-to-deny-art-funds.html)> accessed 29 October 2021.

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Greek philosopher, poetry imitates life – which itself is a shadow of the truth – and as a result it does not seek the truth, but simply the stirring of emotions.<sup>2</sup> Indeed, predictability, precision, clarity and reasonableness of argument are fundamental in legal discourse, such being the demands of justice and impartiality. Poetry does not serve these goals, at least not invariably and certainly not as a matter of priority. A predictable poem is quite likely to be boring and of little artistic value. Precision and clarity might be desirable, but not in the legal sense. A good poem will often prompt the reader to re-imagine and re-invent for themselves the ordinary meaning of words. Reasonableness of the adopted narrative is also not necessary in a poem. To use an example, where a legal scholar sees a lamp as the object of a contract, a poet might see an electric star that fits in a living room. This considerable gap in the purpose and means of poetic and legal expression suggests that, on the face of it, any effort to talk about the interconnection or even the interaction between legal norms and poetry is futile. In fact, the very title of this essay appears to be a contradiction in terms. This is not the case.

## 2. Setting the scene

Throughout history, in famous works such as Sophocles' *Antigone* or Shakespeare's *The Merchant of Venice*, we have witnessed moral, philosophical and ultimately legal debates being rendered in a literary manner; thus becoming more accessible to people with no particular expertise – or distinct interest – in moral thinking, philosophy or the law as such. In fact, literature and the law often interact in various ways, a dedicated field of studies having evolved to map their relationship.<sup>3</sup> Besides, as claimed in what is widely seen as the first seminal work in that field, the lawyer can be thought of as a writer engaging in a literary activity.<sup>4</sup> Approaching 'the literature of the law as a literature of imagination' offers an interesting perspective on the basis of which we can reassess legal thinking and writing 'as part of a larger individual and intellectual life'.<sup>5</sup> In fact, literature can bring into the law new jurisprudential insights, it can offer ideas as to how to build a convincing narrative in litigating a case, it can help improve judicial opinion writing while it can also assist in developing one's broader perception of the social practices and controversial issues that eventually feed into the law.<sup>6</sup> The argument has been

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<sup>2</sup>See Plato, *The Republic*, edited by GRF Ferrari and translated by Tom Griffith (Cambridge University Press 2000) Books III and X.

<sup>3</sup>For two recent surveys of that area, see Kieran Dolin (ed), *Law and Literature* (Cambridge University Press 2018) and Elizabeth S Anker and Bernadette Meyler (eds), *New Directions in Law and Literature* (OUP 2017).

<sup>4</sup>See James Boyd White, *The Legal Imagination: 45th Anniversary Edition* (Wolters Kluwer 2018) xxv–xxvii.  
<sup>5</sup>*ibid.*

<sup>6</sup>For a critical overview and a sense of the debate as to the ways in which literature can – and cannot – contribute to our understanding of the law, see Richard A Posner, *Law and Literature* (3rd edn Harvard University Press 2009); and Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge

advanced that literature can even benefit the law by cultivating a better understanding of the position that different people find themselves in, thereby leading to a more compassionate legal culture.<sup>7</sup> According to that view, the 'literary imagination [is] an essential ingredient of an ethical stance that asks us to concern ourselves with the good of other people whose lives are distant from our own'.<sup>8</sup> But even if this is true about prose, things become more complicated when we move to poetry which is usually more elliptic and does not always contain the considerable amount of information or ethical observations that one may expect to build up the narrative in a novel.

Poems can surely incorporate motifs and themes drawn from the reality of legal experience.<sup>9</sup> But the same is true of the relationship of poetry with any other area of our social life. Hence, the use of legal themes and motifs alone does not automatically provide any special or even sufficiently cogent way in which law can converse with poetry and vice versa. One might also be tempted to focus on the nature of poetry as an art that accords meaning to a wide range of chaotic notions and phenomena in our social and personal lives through the medium of language and, in that way, draw parallels with legal thinking.<sup>10</sup> Still, such broad similarities in the nature of law and poetry, interesting as they might be, do not necessarily mean that there is any concrete place for poetry in the legal sphere. For instance, one may fairly argue that both in law and in poetry the text 'give[s] special and related meanings to sets of words that carry with them in ordinary usage a wide and uncertain range of possible significances and [makes] these new meanings available to others'.<sup>11</sup> The goal pursued in doing so, however, remains fundamentally different. Another interesting form of interaction between law and poetry is instances where we see poems being used in the actual administration of the law, for example, by judges delivering an opinion.<sup>12</sup> The practice of complementing a judgment with a poem may occasionally serve to make the legal process more relatable. Nevertheless, without a framework for understanding such synergies, reliance on poetry might reasonably appear tangential or unnecessary, serving simply to

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University Press 2007); and also Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge University Press 1995).

<sup>7</sup>See, for example, Martha C Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press 1995).

<sup>8</sup>*ibid* xvi; cf. Thomas Morawetz, 'Empathy and Judgment' (1996) 8 *Yale Journal of Law & the Humanities* 517–31 and Posner (n 6) 456–93.

<sup>9</sup>This is certainly not uncommon: see David Kader and Michael Stanford, *Poetry of the Law: From Chaucer to the Present* (University of Iowa Press 2010).

<sup>10</sup>For a discussion of this angle, see Edward J Eberle and Bernhard Grossfeld, 'Law and Poetry' (2006) 11 (2) *Roger Williams University Law Review* 353–401.

<sup>11</sup>James Boyd White, 'The Judicial Opinion and the Poem: Ways of Reading, Ways of Life' (1984) 82(7) *Michigan Law Review* 1669–99 at 1674.

<sup>12</sup>See, for example, David Cole, 'Poetry in the Courtroom' (*The New York Review of Books*, 11 April 2017) <[www.nybooks.com/daily/2017/04/11/poetry-in-the-courtroom-gavin-grimm](http://www.nybooks.com/daily/2017/04/11/poetry-in-the-courtroom-gavin-grimm)> accessed 26 March 2020.

describe in the language of emotion a point already entertained through the legal process. It is precisely at the crossroads of reason and emotion that law and poetry might seem to diverge; and if there is to be any meaningful synergy between the two, it is exactly at that intersection where this will have to be traced. The present essay aims to do just that, with reference to what is taken in national and international legal instruments to be the most fundamental of legal norms; our human rights.

The term *emotion* is used here in its most basic sense, to describe ‘an agitation of mind; an excited mental state [and subsequently] any strong mental or instinctive feeling, [such] as pleasure, grief, hope, fear, etc., deriving esp [ecially] from one’s circumstances, mood, or relationship with others’.<sup>13</sup> The argument is put forward that human emotion lies at the foundations of human rights. It is what makes these rights distinctively ‘human’, separating them from other rights. Human rights aim to acknowledge and secure our greatest emotional needs, those that we are entitled to have accommodated simply by virtue of being human. Such rights concern our shared humanity, the parts of our emotional posture that we are perceived to share. We are all presumed to have a need to feel respected, equal, and free from oppression; just as we are all seen as having a need to love, to hope, to experience happiness. The wide acceptance of a human right, just like the broad appeal of a good poem, does not lie on the idea that we all agree on how exactly it is to be interpreted and implemented, but on the notion that we are capable of feeling its importance and relating to it at a personal level. When we declare that each of us has a right to equality, for example, without further explanation, there still remains a great deal of uncertainty and debate as to what equality actually entails in different contexts.<sup>14</sup> If a legal scholar has a duty to suggest ways to develop the *regulatory* facet of a human right, which concerns its practical, legal application before the institutions of State, a poet must employ her craft to do the same for the *personal* facet, which deals with its deeper essence, the emotions that underpin it and render it distinctively human and fundamental.

Literary forms other than poetry may help us advance our understanding of human rights. For instance, it has been suggested ‘that human rights work is, at its heart, a matter of storytelling’<sup>15</sup>; and that stories have the power to trigger

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<sup>13</sup>See *Oxford English Dictionary*, online platform: oed.com (accessed 21 October 2021). This wide definition is preferred for the purposes of the present essay given that, as it has been accurately noted, ‘there is no consensus on a definition of the term *emotion*, and theorists and researchers use it in ways that imply different processes, meanings, and functions’: See Carroll E Izard, ‘Basic Emotions, Natural Kinds, Emotion Schemas, and a New Paradigm’ (2007) 2(3) *Perspectives on Psychological Science* 260–80 at 260.

<sup>14</sup>Indeed, the case often seems to be that ‘people who praise or disparage [equality] disagree about what it is they are praising or disparaging’: see Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 2.

<sup>15</sup>See James Dawes, ‘Human Rights in Literary Studies’ (2009) 31(2) *Human Rights Quarterly* 394–409 at 394.

emotional and ethical responses that may help promote human rights values.<sup>16</sup> The contributions of literary narration – especially novels – in the evolution of human rights have also been noted as a matter of historical analysis.<sup>17</sup> Indeed, the detail of information prose has to offer in storytelling, and the emphasis placed on that literary form, might create the impression that poetry has a lesser role to play in human rights discourse. This is not necessarily the case, as a great number of poems has been dedicated to documenting human rights violations and their effects on the victims.<sup>18</sup> It is true though that, while there are poems which might consist of thousands of lyrics, and which might contain a strong descriptive element (e.g. epic poems), a distinct characteristic of a poem is usually its relative (compared to other literary genres) brevity of form in which the appeal to emotion takes place. Even if a literary work does not bear the traditional appearance of a poem (e.g. prose poems), it can be argued that the very act of calling a text a poem and/or structuring it in verse is often a signal as to what such work entails. It acts as an instruction to the reader that they should not expect to get information as a matter of priority, but they should ready themselves to experience, first and foremost, an appeal to their emotion in a relatively condensed and immediate way.<sup>19</sup>

The present essay moves beyond the wider potential of literature (or poetry specifically) to bring about social change by narrating stories capable of provoking emotional and ethical responses. The primary purpose here is not to examine how the narration of fictional or real stories can help (or has helped) promote human rights, for example, by improving our grasp of social and historical realities. Instead, the focus is on human rights norms themselves and the emotions that their most basic articulations enshrine, through the sheer fact of their articulation. Poetry is put forward as a means of interpreting and bringing to the fore those emotions that lie in the foundation of human rights; that is, their personal facet. In addition to the goal of stressing the importance of poetic expression in human rights discourse, poetry is chosen as a case study because of the powerful and unique emotional stimulus it provides; and which nowadays can be tested and verified from a psychophysiological and neuroscientific perspective as well.<sup>20</sup> The relatively condensed and immediate manner in which poetry

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<sup>16</sup>See Kay Schaffer and Sidonie Smith *Human Rights and Narrated Lives: The Ethics of Recognition* (Palgrave Macmillan 2004) 4.

<sup>17</sup>See, for instance, Lynn Hunt, *Inventing Human Rights: A History* (Norton 2007); also see Joseph R Slaughter, *Human Rights, Inc.: The World Novel, Narrative Form, and International Law* (Fordham University Press 2007).

<sup>18</sup>For an anthology of such poems, see Carolyn Forché (ed), *Against Forgetting: Twentieth-Century Poetry of Witness* (W. W. Norton & Company 1993).

<sup>19</sup>For a similar argument regarding free verse, the special role of emotion and readers' expectations, see Jorge Luis Borges and others, *Borges on Writing* (Allen Lane 1974) 75.

<sup>20</sup>See, for example, Eugen Wassiliwizky and others, 'The Emotional Power of Poetry: Neural Circuitry, Psychophysiology and Compositional Principles' (2017) 12(8) *Social Cognitive and Affective Neuroscience* 1229–40.

engages with emotions is also considered valuable in helping us capture a glimpse of emotions that are – and will remain – elusive but may eventually give rise to moral intuitions and legal norms. It is also important to note that, with its focus on words, its brevity of form and its aspirational elements, poetry resembles the way human rights norms themselves are often articulated in national and international legal instruments. Thus, it allows for the interconnection proposed here to be drawn more clearly. Other forms of literature and a wider range of arts, such as theatre, music and dancing, can potentially help us interpret and render anew, across individuals and disciplines, the human emotions that underline our human rights. The choice ultimately also has to do with individual preference and inclination. This is the final reason why poetry is the art chosen here.

By tracking the origins of human rights within the emotional sphere, we can reassert their significance in a distinctively personal and, therefore, inclusive manner. Indeed, the regulatory, legal, facet of rights, necessary as it is, might reasonably appear a bit technical and distant to the non-expert, who can access the justice system but remains unfamiliar with legal processes and argumentation. In this sense, the personal, emotional, facet can complement the regulatory one, by providing an additional platform on which we can demonstrate and celebrate the importance of human rights, while also communicating these rights in a more open manner, debating and even re-imagining their nature and content. That process can also help make the justice system itself more open and relatable, by exploring and pushing to the front the emotional side of fundamental legal norms.

In fact, acknowledging the close relationship between law and the emotion is an ideal starting point for entertaining further the potential described here (section 3). The argument will then be advanced that human rights constitute a magnifying glass of this relationship, such rights being seen as fundamental in the sense that they emanate from that part of our emotional posture that is perceived to be shared among us. Human rights will be imagined as a tree of which emotions constitute the roots, moral intuitions represent the trunk and reasoned judgments make up the branches and the fruits, that is, the actual legal outcomes. It will be suggested that to overlook the interrelation and interdependence between the different parts of that tree would be a mistake (section 4). The essay will proceed to demonstrate why exploring the emotive roots of human rights, their personal facet, through art in general and poetry in particular can be valuable in widening our understanding of these rights (section 5). The final part of the analysis will provide some practical examples of how poetry can make the process of celebrating, communicating, debating and re-imagining human rights more inclusive, while also reinforcing their fundamental nature (section 6).

### 3. The emotional side of the law

Law regulates the human experience; and that experience is filled with emotion. To say that law itself is emotionless, then, seems to denote a contradiction. It is true that State institutions should be blind in the sense of remaining impartial when drafting and applying the law, operating on the basis of reason, that is, irrespective of personal whims and preferences; but *blind* does not mean *apathetic*. A sense of justice being served is an emotion, and if the law does not serve that emotion, it risks losing its democratic legitimacy and effectiveness, being adhered to simply because it is imposed in an authoritarian manner.<sup>21</sup> Even if, at any given time in any legal system, not everyone can always feel satisfied with the letter of the law or its implementation, due to the various disagreements, differing points of view and even imbalances in political representation, the debate itself should take place in a manner that respects the whole breadth of the human experience, examining the interaction, even the interdependence, between emotion and reason. Otherwise, we run the danger of locking more and more people out of it, nurturing a feeling of injustice, broadening the gap between the norm and its followers and thus, eventually, rendering the norm less effective. Besides, the emotional side of any specific legal issue has a lot to do with how the strict legal norm is experienced in the end.

This interplay between reason and the emotion is often acknowledged in the letter of the law. Defences relating to the emotional state of the perpetrator in criminal law constitute an example; the availability of emotional distress damages in tort law provide yet another manifestation. Moreover, our interpretation, application and wider understanding of the law is often imbued with some sort of emotion, which may range from fear or disgust to retribution or forgiveness.<sup>22</sup> For instance, the potential role of the emotions of judges or jurors when they are called upon to decide particular cases is hard to ignore, even if legal formalism would so dictate.<sup>23</sup> It is only natural that judges and jurors alike have prior beliefs and experiences which might create preconceptions they will have to overcome in order to perform their task properly. These are seen as both a source of enrichment, enabling them to relate to the issue more easily, when they have been through a similar situation, but it might also be a potential source of unwarranted prejudice, if not handled properly.<sup>24</sup> The same is true about a wide range of emotional reactions which might stem

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<sup>21</sup>For an analysis of this interplay between reason, emotion and legitimacy and effectiveness of the law, see Mortimer Sellers, 'Law, Reason, and Emotion' in MNS Sellers (ed), *Law, Reason, and Emotion* (Cambridge University Press 2017) 11–31.

<sup>22</sup>For a classic work on this subject, see Susan A Bandes (ed), *The Passions of Law* (NYU Press 2000).

<sup>23</sup>See, for example, Terry A Maroney, 'Judges and Their Emotions' (2013) 64(1) Northern Ireland Legal Quarterly 11–24; also see Carolyn Semmler and Neil Brewer, 'Effects of Mood and Emotion on Juror Processing and Judgments' (2002) 20(4) Behavioral Sciences & the Law 423–36.

<sup>24</sup>For a discussion of the distinction between prejudice and prior knowledge as regards the requirement of impartiality, see Martha Minow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' 33(4) William & Mary Law Review 1201–18.



from such preconceptions or might even be incited during trial. Impartiality before the eyes of the law requires institutional actors to acknowledge and control their emotions, not to deny their existence altogether.<sup>25</sup> From the perspective of those that come before the court, taking their emotion into account may actually serve to improve the quality of decision-making, especially when gross violations of criminal law are at stake and a victim and/or their relatives need to feel heard and vindicated at a deeply personal level.<sup>26</sup> Emotions may also play a pivotal role in enabling individuals to launch the litigation process in the first place, helping them to endure its difficulties and face the final outcome.<sup>27</sup> A variety of emotions, such as the ones of submission and obedience, can also be cultivated through the wider legal culture.<sup>28</sup> By a similar token, the importance of accommodating specific emotions (e.g. maintaining hope in the context of punishment) can itself constitute a standard with reference to which we assess the appropriateness of the legal framework.<sup>29</sup>

The significance of emotion in legal discourse becomes most evident when we deal with fundamental human rights. Such legal norms seem to provide a magnifying glass for the emotional side of law, being intended to regulate what are perceived to be the most *fundamental* aspects of our shared *human* experience. Let us use an example. A has a human right to freedom of expression, which he exercises publicly to reveal personal information about B. At the same time, B has a right to respect for her private life, which has now been interfered with as a result of A's expression. It is perfectly reasonable that a condition of complete freedom for two actors is impossible to achieve, for the freedom of the one will restrict the freedom of the other. Hence, logically, if A were to interfere with B's private life by expressing himself, there will have to be some sort of restriction on the freedom of one of them, depending on the weight of the interests at hand and taking into account the specific circumstances of a case. This conclusion seems to provide some guidance as to how such cases are to be approached, at least as a starting point. However, it is important not to overlook that the scenario presented here also contains an emotional dimension, i.e. a human being's urge to express their thoughts and emotions (e.g. anger, disgust, admiration) against another human being's need to be let alone, not to be subjected to those emotions which may be triggered by the intrusion into one's private life (e.g. fear, shame, sadness). Emotion completes and may

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<sup>25</sup>For a similar argument, see Maroney (n 23).

<sup>26</sup>For a discussion of the potential (and the necessary limitations) of formalising such an 'emotionally intelligent' approach, see Jonathan Doak and Louise Taylor, 'Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing' 64(1) Northern Ireland Legal Quarterly 25–46.

<sup>27</sup>See Kathryn Abrams, 'Emotions in the Mobilization of Rights' (2011) 46 Harvard Civil Rights-Civil Liberties Law Review 551–90.

<sup>28</sup>See Robin West, 'Law's Emotions' (2016) 19(4) Richmond Journal of Law and the Public Interest 339–62.

<sup>29</sup>See Kimberley Brownlee, 'Punishment and Precious Emotions: A Hope Standard for Punishment' (Autumn 2021) 41(3) Oxford Journal of Legal Studies 589–611.

even inform reason, either expressly or by implication, in determining the actual harm suffered by A and B. In fact, it will be argued in the next section that emotions lie at the heart of human rights norms, underlying their fundamental character.

#### 4. The interest behind the right, the emotion behind the interest

'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness'.<sup>30</sup> This is one of the most famous and eloquently drafted expositions of the idea that our shared humanity alone entitles us to certain rights; that is, irrespective of the legal and social structures we find ourselves in. A most prominent exponent of this idea, John Locke, has famously argued that the reason we are entitled to such rights is because by our very nature as human beings we want to protect ourselves against harm in our life, health, liberty or property.<sup>31</sup> Indeed, our natural inclination towards survival and well-being urges us to safeguard such interests. This appears to be the task we have delegated to a community we would characterize as democratic: Through its legal system, to regulate our relationships in a way that prevents or punishes any unwarranted harm to the interests we are entitled to enjoy freely.<sup>32</sup> Rights then, and the duties that correspond to them, may fairly be seen as being generated by interests that are considered sufficiently important to merit the protection of the law.<sup>33</sup>

But as not all interests are fundamental in a similar way, the same applies to rights. I might have a right to park my car in a specific place, but this right can be overridden when the local council, for example, wants to carry out construction work near that spot. My loss of convenience in parking my car where I prefer will surely affect me, but the interest at hand is not sufficiently salient to override the interest of the community, as represented by the council, to carry out works that are considered necessary for the common good. Nevertheless, if the council decided that it needed to build a new swimming pool for the community where my house stands, then my right to peaceful enjoyment of my possessions and my right to respect for my private life and my home would certainly be harder to set aside. The point to be made here is that fundamental human rights carry a distinct weight in the balancing process. Pursuing a collective goal is not sufficient in itself

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<sup>30</sup>See Thomas Jefferson et al., United States Declaration of Independence.

<sup>31</sup>See John Locke, *Two Treatises of Government*, edited by Peter Laslett (Cambridge University Press 2010) 271.

<sup>32</sup>*ibid* at 323–24.

<sup>33</sup>See Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 180–83.

to justify interference with the rights of the individual in this instance. Because an interference with a fundamental human right cannot be seen as legitimate unless there exists some special ground justifying it.<sup>34</sup>

This special place of human rights in the balancing exercise may fairly be understood as deriving from the distinct nature of the interests that these rights safeguard. In fact, it can be said that '[h]uman rights are the constitutive norms of a global practice whose aim is to protect individuals against threats to their most important interests arising from the acts and omissions of their governments [...]'.<sup>35</sup> The very notion that we are all entitled to certain fundamental rights simply because of our shared humanity implies quite clearly that there exist some interests which can be characterized as widely shared among human beings.<sup>36</sup> Our interest in the liberty and security of our person, for example, or our interest in leading our life without fear of having it taken away, are only few of these. The reason why such interests may be seen as broadly shared among us is that they can be said to relate most closely to our shared attributes.<sup>37</sup> The right to liberty and security of person, for instance, can be construed as a way to ensure respect for our instinctive urge to control our own body and to move freely, without fear of arbitrary detention. By the same token, we might reasonably argue that recognizing everyone's right to life amounts in reality to acknowledging and accommodating our shared fragility against death.

Analysed from this perspective, human rights become, at least at a basic level, a way to articulate, and to secure respect for, our emotional needs. This is even more so if we construe emotions as responses to evaluations of external or internal stimuli that we perceive to be relevant to our major concerns.<sup>38</sup> In fact, it has been observed that

[e]very emotion hides a concern, that is, a motive or need, a major goal or value, a more or less enduring disposition to prefer particular states of the world [and that a] concern is what gives a particular event its emotional meaning.<sup>39</sup>

In that sense, human rights can be seen as expressive of the state of the world that we have envisaged for ourselves; a world where those concerns that we are deemed to share by virtue of our humanity are properly respected and accommodated. Hence, even if agreeing on a closed list of basic emotions is a significant challenge, the human rights system enables us to build a list

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<sup>34</sup>See Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1997) 188–91.

<sup>35</sup>See Charles R Beitz, *The Idea of Human Rights* (Oxford University Press 2009) 197.

<sup>36</sup>For a discussion, see John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 45–70 at 50–56.

<sup>37</sup>For a similar argument see *ibid* at 53–54.

<sup>38</sup>See Klaus R Scherer, 'What are Emotions? And How Can They Be Measured?' (2005) 44(4) *Social Science Information* 695–729 at 697.

<sup>39</sup>See Nico H Frijda, *The Laws of Emotion* (Lawrence Erlbaum Associates 2007) 7.

of 'basic' concerns and corresponding interests that are perceived to be capable of provoking a distinctively personal, emotional response.<sup>40</sup> Such emotions may be experienced or manifested in different ways across different people and cultures, but similarities remain in our potential for engaging with them.<sup>41</sup>

Human emotions are certainly not the only reasons why we have human rights, nor is there only one set of emotions informing our understanding of a particular right. The case remains, however, that there is a strong emotional element in the emergence of each fundamental right. The trauma involved in human rights violations further illuminates this emotional, personal, facet of human rights.<sup>42</sup> Besides, the international system for the protection of human rights itself emerged in the shadow of – and in response to – the atrocities of the Second World War and the associated trauma.<sup>43</sup> The precise content of the right might differ from one place to another, depending on the culture, the politics at hand, even the economic environment, but the abstract aspiration expressed through different human rights is unaltered. In this sense, it has been suggested that the perceived universality of human rights is most easily discernible 'at the level of the concept'.<sup>44</sup> For example, the wider claim that everyone has a right to life – the demand not to fear that one's life will be taken arbitrarily by the State or other individuals – can be said to maintain its emotional appeal, irrespective of the disagreements and differences that may arise as regards the transposition of this claim within a specific legal system. The variety of debates that the regulation of issues such as assisted dying have given rise to demonstrate how difficult that transposition can be. They also reveal how emotion has a role to play even in helping us grasp and resolve such difficulties.<sup>45</sup>

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<sup>40</sup>For an exposition of the elements which distinguish basic emotions (such as fear, shame, anger, sadness/ distress) from one another and from other affective phenomena, see Paul Ekman, 'Basic emotions' in Tim Dalgleish and Mick J Power (eds), *Handbook of Cognition and Emotion* (Wiley 1999) 45–60. It is worth noting that Ekman himself recognizes at least fifteen basic emotions as well as the possibility of widening that list (ibid at 55). This is not to say, though, that the notion of basic human emotions has not itself been challenged: see, for example, Andrew Ortony and Terence J Turner, 'What's Basic About Basic Emotions?' (1990) 97(3) *Psychological Review* 315–31; and Nico H Frijda and W Gerrod Parrott, 'Basic Emotions or Ur-Emotions?' (2011) 3(4) *Emotion Review* 406–15.

<sup>41</sup>See Batja Mesquita, Nico H Frijda and Klaus R Scherer, 'Culture and Emotion' in John W Berry, Pierre R Dasen and TS Saraswathi (eds), *Handbook of Cross-Cultural Psychology, Volume 2: Basic Processes and Human Development* (2nd edn Allyn and Bacon 1997) 255–97.

<sup>42</sup>See Lisa D Butler, Filomena M Critelli and Janice Carello (eds), *Trauma and Human Rights: Integrating Approaches to Address Human Suffering* (Palgrave Macmillan 2019).

<sup>43</sup>As noted in the preamble to the Universal Declaration of Human Rights 1948, '[...] disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind [...]'. For further discussion of the historical origins of the modern human rights system, see Beitz (n 35) 14–27.

<sup>44</sup>See Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn Cornell University Press 2013) 105.

<sup>45</sup>The emotional state of those who request assisted dying, for example, is a significant and recurring theme of the debate: See Eimear Spain, 'Love in Life and Death' (2013) 64(1) *Northern Ireland Legal Quarterly* 91–109.

This understanding of the foundations of human rights is based on the acknowledgment that emotion and reason are actually confluent in legal thinking, not separate or contradictory, the former constituting an integral part of how we formulate the latter.<sup>46</sup> This is true not only from a philosophical perspective, but also from other points of view, including the psychological.<sup>47</sup> Indeed, emotions play a significant role in the formation of social and moral norms insofar as they 'are a necessary component of empathic responses, which are important drivers of prosocial behaviour'.<sup>48</sup> Furthermore, adhering to or violating such norms may lead to 'emotional responses [that] are not just consequences of social and moral appraisals but also inform these appraisals'.<sup>49</sup> For instance, the anger and indignation caused by a certain kind of behaviour can reasonably inform the assessment of the desirability of the said behaviour both from a social and a moral standpoint.<sup>50</sup> Emotions such as the one of disgust, which was originally developed to help the human species select the right food, may still play a role in deciding how we separate between right and wrong, their presence affecting the severity of our moral judgment.<sup>51</sup> It seems then that emotions are capable of informing moral thinking in a very real and potentially valuable sense, although it needs to be noted at the same time that relying too heavily on emotions will not always lead to appropriate moral responses.<sup>52</sup>

One may fairly argue that when Thomas Jefferson referred, without further explanation, to the *self-evident* truths outlined previously, in reality, he expressed a moral intuition which was only later to be rationalized through reasoning.<sup>53</sup> Indeed, when interpreting human rights norms, the courts can often be seen as performing rationalisations of broadly expressed moral intuitions. Moral intuitions are understood here 'as the sudden appearance in consciousness of a moral judgment, including an affective valence (good-bad, like-dislike), without any conscious awareness of having gone through steps of searching, weighing evidence, or inferring a conclusion'.<sup>54</sup> Emotional appraisals, intuitions and reasoning all constitute forms of cognition<sup>55</sup>; and just as moral intuitions may shape moral reasoning, emotions may guide

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<sup>46</sup>See, for example, Ronald de Sousa, *The Rationality of Emotion* (MIT Press 1987).

<sup>47</sup>See Jonathan Haidt, 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108(4) *Psychological Review* 814–34.

<sup>48</sup>See Michel Tuan Pham, 'Emotion and Rationality: A Critical Review and Interpretation of Empirical Evidence' (2007) 11 *Review of General Psychology* 155–78 at 171.

<sup>49</sup>*ibid* at 167–68.

<sup>50</sup>*ibid*.

<sup>51</sup>See Simone Schnall and others, 'Disgust as Embodied Moral Judgment' (2008) 34(8) *Personality and Social Psychology Bulletin* 1096–1109.

<sup>52</sup>For a wider discussion, see Martha C Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press 2004); and Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press 2001).

<sup>53</sup>See Haidt (n 47) at 814.

<sup>54</sup>*ibid* at 818.

<sup>55</sup>*ibid*.

moral intuitions.<sup>56</sup> Thus, human rights can be imagined as a tree of which emotions are the roots, moral intuitions are the trunk and actual legal processes and outcomes are the branches and the fruits. The higher we climb, the narrower the debate becomes, as we move from what cannot fit into a norm (emotion) to what may give rise to a norm (intuition) and, finally, to a judgment as to what the norm is and how it should be applied (reason). The roots, the foundations, are emotions, which give rise to intuitions, which, in turn, are rationalized through the legal system, acquiring precise meaning in various contexts. Art in general and poetry in particular can help us navigate these roots, the personal facet of human rights, the one that focuses on their emotive origins; and this can prove particularly useful in widening our understanding of these rights, as the next section will show.

## 5. The human, the right and the value of uncertainty

To construe human rights as a mechanism for regulating our relationships alone is to take the *human* out of the *right*. Indeed, any right that the law creates – fundamental or not – is intended to regulate human relations; and, in that sense, every right can be identified as *human*. But when we choose to characterize a certain category of rights as distinctively human, we seem to be accepting that the value of these rights relates to the state of being human in a special way. Hence, a personal facet emerges which precedes the regulatory one and complements it. It has been argued here that this personal facet of human rights, the one that refers to their distinctively human element, concerns the emotions that give rise to such rights in the first place. Thus construed, human rights are expressive of emotions and moral intuitions these emotions give rise to. For example, we are all deemed to have a fear of being subjected to physical or psychological violence, which creates an intuition that such violence should not be exercised against us and that, by the same token, it should not be inflicted upon others. Hence, there emerges a right to freedom from torture, inhuman or degrading treatment, which is the original emotion coupled with the notions of empathy and solidarity, the idea of feeling that the pain of the other is what could be (or is being) inflicted upon oneself and that the law should not allow this to happen to anyone. Even if this personal facet of rights cannot be approached in regulatory terms, it is still important to remember that it constitutes the origin of legal norms and that it can still contribute towards understanding, communicating and debating them. To use a metaphor already employed, the branches and fruits of a tree remain dependent

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<sup>56</sup>On the latter point, see Dacher Keltner, EJ Horberg and Christopher Oveis, 'Emotions as Moral Intuitions' in Joseph P Forgas (ed), *Affect in Social Thinking and Behaviour* (Psychology Press 2006) 161–76.

on its roots. The personal and the regulatory facet of human rights are inter-related; the *human* converses with the *right* and vice versa.

The question that necessarily follows is how – if at all – a closer look into the personal facet of human rights can contribute to comprehending and promoting these rights. The words of a poet are useful in this respect, as the thoughts of a legal scholar would be if we dealt with the regulatory facet of human rights. In a letter sent to his brothers, the great English romantic poet John Keats famously pondered on the quality that formed ‘a Man of Achievement especially in literature’.<sup>57</sup> He called this quality ‘negative capability’ and described it as ‘when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact [and] reason’.<sup>58</sup> This notion of navigating through an idea without expecting to tackle all of its uncertainties is particularly valuable in dealing with the personal facet of human rights. It allows us to traverse the corridors of our emotional posture without constantly looking for meaning that is sufficiently precise to be expressed in regulatory terms. Hence, it enables us to celebrate and explore the aspiration for what it is; an integral part of our human experience, capable of being articulated legally but not restricted to this. To borrow the words of another poet, ‘to be human is to be unsure, and if the purpose of poetry is to deepen the humanness in us, poetry will be unsure as well’.<sup>59</sup>

The main implication of approaching human rights through poetry, then, is the liberation of their meaning from the structures of legal thinking and, similarly, from any other frame of analysis the boundaries of which need to be clearly defined at a given moment.<sup>60</sup> The primary goal in this context is not to promote justice or to balance different interests. The aim is to reassert the right as something deeply personal and re-imagine it as such, through the platform of poetry, which fosters the enhancement of negative capability. Besides, as it was argued centuries ago, in contrast to lawyers, historians, philosophers, or other writers, the poet does not aim to affirm specific facts about ‘the cloudy knowledge of mankind’.<sup>61</sup> Instead, poetry aims to utter ‘universal truths’ about what is ‘possible in terms of probability and necessity’.<sup>62</sup> Such universal truths, the complete meaning of which might elude us, are not foreign to the legal analysis of human rights.

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<sup>57</sup>See John Keats, *Selected Letters*, edited by Robert Gittings (Oxford University Press 2002) 41.

<sup>58</sup>*ibid* 41–42.

<sup>59</sup>See Jane Hirshfield, *Ten Windows: How Great Poems Transform the World* (Alfred A. Knopf 2015) 149.

<sup>60</sup>For a discussion of the interaction between poetic thinking and human rights, with specific historical examples, see Hadji Bakara, ‘Poetry in the Shadow of Human Rights’ 28(3) *American Literary History* 512–41.

<sup>61</sup>See Sir Philip Sidney, ‘The Defence of Poesy’ (supra); also see Aristotle, *Poetics*, translated with an introduction and notes by Anthony Kenny (Oxford University Press 2013).

<sup>62</sup>Aristotle (n 61) 28.

To use an example, in *Obergefell v Hodges*<sup>63</sup> the Supreme Court of the United States was called upon to decide whether or not the due process clause and the equal protection clause contained in the Fourteenth Amendment to the US Constitution granted same-sex couples the right to marry. In ruling that it did, the majority opinion focused on a variety of arguments ranging from the evolution of the institution of marriage to the rights of children and ‘the right to personal choice [which] is inherent in the concept of individual autonomy’.<sup>64</sup> In closing the majority’s opinion, though, Justice Kennedy famously noted the following:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right. The judgment of the Court of Appeals for the Sixth Circuit is reversed. It is so ordered.<sup>65</sup>

The notions that people become something greater than they are through marriage or that love endures even after death seem to be particularly hard to rationalize. The same goes for concepts such as the one of equal dignity in the eyes of the law, which might sound plausible and widely agreed upon at first instance and yet remain hard to give specific content to when we need to implement them within a legal system.<sup>66</sup> Emotions of love, respect, loneliness and even hope are also expressly relied upon to affirm the position of the petitioners. It would seem then that the terms employed are uncertain, to a considerable extent, the passage above resembling a poem as much as part of a legal judgment. And yet, the conclusion might have been sufficient – even on its own – to justify a decision that would be based largely on evaluating the emotions and moral intuitions at hand. Such an outcome would be questionable from a legal point of view, the rule of law requiring virtues such as clarity, predictability and rationality to be prevalent in legal discourse; but this does not mean that it would be any less capable of communicating the content of the right to marry, even if not from a purely legal perspective.

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<sup>63</sup>(2015) 41 BHRC 160.

<sup>64</sup>*ibid* at 170.

<sup>65</sup>*ibid* at 178.

<sup>66</sup>For a study of how the concept of dignity operates alongside the one of equality in a specific legal system, and the complexities that come up in agreeing what either of these concepts means in practice, see Denise G Réaume, ‘Discrimination and Dignity’ (2003) 63 Louisiana Law Review 1–51.



Indeed, anyone can grasp – if not relate to – what love beyond death or what equal dignity in the eyes of the law means, as a matter of emotion and intuition, even if we cannot maintain a commonly accepted definition of what these notions signify in purely rational, practical and objective terms. And even though uncertainty cannot be a guiding factor in legal discourse, we must not forget the simple fact that rights themselves are not exclusively legal constructs; especially those rights that we take to relate to the core of our humanity. In fact, it has been noted that

[t]here are many overlaps and commonalities between the fields of the arts and human rights. Both are concerned with questions of what is (and what is not), humanity, identity, dignity, of communicating empathy, of the transformation of lives, of visions for the future and of the mission of mankind, of the full development of the person. Both are universally applicable.<sup>67</sup>

Overlaps between art and human rights do not indicate, of course, a total alignment as to the goals of the two fields. For works of art may still be used to negate human rights values.<sup>68</sup> But this is all the more reason to flesh out and highlight ways in which art can contribute to the enrichment and promotion of human rights norms. With that in mind, we can notice how extracts such as the one from the *Obergefell* case, above, enable us to grasp the nature and content of a human right in the same way as a good poem would, with reference to the emotions that underpin these rights; that is, their personal facet. Hence, it is revealed how art in general and poetry in particular can help us approach human rights in a more relatable and inclusive manner. Besides, as it has been accurately noted, a certain ‘poetic sensibility [...] is necessary to a humane future of law.’<sup>69</sup> The next section will further demonstrate the potential described here, with some examples.

## 6. Approaching human rights through poetry

A great volume of poetry has been dedicated to mapping the emotions stemming from the mere act of witnessing or suffering human rights violations.<sup>70</sup> However, as argued so far, there is also another level of analysis, one which precedes specific violations and aims to justify human rights by examining the human emotions that generate them in the first place. What poetry is examining at this latter stage is not how a violation is experienced, but how human rights constitute expressions of our shared emotional structure,

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<sup>67</sup>See European Union Agency for Fundamental Rights, *Exploring the Connections Between Arts and Human Rights: Report of High-Level Expert Meeting Vienna, 29–30 May 2017* (Publications Office of the European Union 2017) 6.

<sup>68</sup>*ibid* at p. 15.

<sup>69</sup>See Frank Pasquale, ‘The Substance of Poetic Procedure: Law & Humanity in the Work of Lawrence Joseph’ (2020) 32(1) *Law & Literature* 1–46 at 34

<sup>70</sup>For a variety of examples, see Forché (n 18).

and how this reality can be used to justify their place of prominence in the legal order, but also to enable us to explore their nature and content anew. This can be done simply by looking backwards, into existing poetry that can be read as articulating emotions that form the basis of specific human rights. At the most basic level, we could focus on poems that can serve to highlight the importance of a human right for the individual and the community, in a rather descriptive manner. An example is the poem *America*, by Walt Whitman, which can be approached as a rendition of the right to equality in poetic form.<sup>71</sup> But the potential of poetry does not end there.

Poetry can also be employed to help us analyse the meaning of human rights in a broader sense, especially when it incorporates within its themes notions that pertain to the implementation of such rights. For instance, the poem *To Mrs Ann Flaxman*, by William Blake, contains a beautiful allegorical description of the notions of equal opportunity, reasonable accommodation and personal responsibility which can play an important role in promoting our understanding of the right to equality<sup>72</sup>; even if that articulation is not complete or clear enough to constitute a legal norm. The poem can be seen as narrating how flowers (just like individual human beings) are often dependent on their surroundings being properly adjusted to their distinct characteristics in order for them to be able to grow and prosper; and only once such adjustments have taken place should a perceived disadvantage in the actual outcome of their position be attributed to them and not to adverse (social) structures. It appears then that just as we can use the powerful image of Justitia, the blindfolded deity with the scales in one hand and the sword in the other, to demonstrate the impartiality of the law and the value of equality in the administration of justice, so can we use poems to elaborate on the meaning of equality in more substantive, broader, terms.<sup>73</sup>

The emotions underlying specific human rights can also be approached even more directly, through poems in which a potential link to the regulatory element might be even less obvious. For instance, the poem *Thrush*, by George Seferis can help us grasp the personal facet of the right to privacy and also the right to respect for a person's private life and home.<sup>74</sup> The house itself is becoming human in that poem and it experiences the emotions generated by the loss of one's home and all that this represents.

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<sup>71</sup>See Walt Whitman, *The Complete Poems of Walt Whitman*, introduction and notes by Stephen Matter-son (Wordsworth 2006) 376.

<sup>72</sup>See William Blake, *The Complete Poems*, edited by Alicia Ostriker (Penguin 1977) 479–80.

<sup>73</sup>For a discussion of the formal and the substantive dimension of the right to equality, with reference to the role played by the notion of personal responsibility and the idea of reasonable accommodation, see Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (Routledge 2015) 9–49.

<sup>74</sup>See George Seferis, *Complete Poems*, translated, edited and introduced by Edmund Keeley and Philip Sherrard (Anvil 1995) 161–62.

Home is more than just a possession or a shelter; it is an integral part of our personal life, a place into which we can withdraw, but also around which we can build our social life. Losing our home, being obliged to live out of it, is to be denied security in our possessions but also the sense of autonomy our private space fosters. By the same token, notions of individual autonomy and personal fulfilment, which constitute important aspects of our freedom to lead our private life as we see fit, can be explored through poetry that demonstrates the internal contradictions and challenges one has to face in following their own path. The poem *Autonomy* by Wisława Szymborska is an interesting example.<sup>75</sup>

Such poems, which can help us grasp the emotional foundations of our rights – their personal facet – can also be traced back in the millennia, long before the notion of human rights came into being in the regulatory sphere. It is truly remarkable, for example, how Sappho, the archaic poet from the Greek island of Lesbos, has dealt in her poetry with how shame can be an obstacle to engaging in speech that is considered unjust.<sup>76</sup> Indeed, modern legal systems acknowledge that the right to freedom of expression can be qualified in various instances. For example, when speech interferes with another person's private life, or it concerns sensitive issues of national security, or when it aims solely to offend, to instigate or encourage acts of violence, it may be legitimately and reasonably restricted in a democratic society. The case seems to be then that poetry can indeed help us appreciate the emotions that underpin our fundamental human rights in a way that is, on the face of it, detached from the regulatory sphere and yet remains meaningful in understanding it. For poems such as the ones mentioned above – even if not necessarily intended to do so – allow us to approach human rights from a new perspective, which places human sensitivity and emotions at the core of the exercise, thereby strengthening the sense of ownership over such rights. In the meantime, developing our understanding of the personal facet of human rights can benefit legal thinking in direct and practical ways.

Like a doctor will often have to assess the pain their patient experiences, in order to decide what the most appropriate treatment is, a judge will often need to look into the emotional impact of a specific treatment on different parties before reaching a decision. In fact, judges may sometimes demonstrate *empathy*, understood here to be 'an affective response that stems from the apprehension or comprehension of another's emotional state or condition and is very similar to or the same as what another person feels or would be expected to feel'<sup>77</sup>; or they may feel *sympathy*, which is perceived

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<sup>75</sup>See Wisława Szymborska, *Poems: New and Collected*, translated by Stanisław Barańczak and Clare Cavanagh (Harcourt 1998) 134.

<sup>76</sup>See Anne Carson, *If Not, Winter: Fragments of Sappho* (Virago 2003) 279.

<sup>77</sup>Tracy L Spinrad and Nancy Eisenberg, 'Empathy and Morality: A Developmental Psychology Perspective' in Heidi L Maibom (ed), *Empathy and Morality* (Oxford University Press 2014) 59–70 at 60.

here as ‘an other-oriented emotional response stemming from the apprehension of another’s emotional state but [which] does not involve feeling the same emotion as the other (or what the other is expected to feel)’.<sup>78</sup> For instance, the question of what form of suffering is considered sufficiently serious to qualify as torture is but one of many examples. The less empathetic (or sympathetic<sup>79</sup>) a person is, i.e. the more emotionally detached from the actual experience of the victim, the more likely they are to underestimate the acuteness of the pain inflicted, thus failing to classify properly a specific behaviour.<sup>80</sup> To bring yet another example, in cases concerning custody or adoption claims, the feelings of the children often play a central role in legal deliberations.<sup>81</sup> The right of the parents to enjoy respect for their family life must give way to the best interests of the child, which includes, of course, the way the latter perceive any changes to their custody status.<sup>82</sup>

The application of the test of proportionality and the balancing between the interests of the State and those of the individual also provides a good illustration of how emotions might prove valuable in judicial practice, as empathy can play an important part in determining the weight of the interests at hand.<sup>83</sup> In fact, it is no surprise that the judgments of many seminal cases relating to the application of fundamental human rights have included strong elements of empathy towards the feelings of those whose rights have been interfered with, and rightly so.<sup>84</sup> It emerges that, although emotions themselves are not – and cannot be – the direct subject of adjudication, grasping the emotional position of those who come before a court to assert their human rights might often be necessary, not simply desirable. Acquiring a better understanding of the emotions underpinning human rights, through poetry, can certainly help us reinforce this relevance of the emotional state of individuals in the courtroom. Hence, the poetry of rights

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<sup>78</sup>ibid.

<sup>79</sup>Both ‘empathy’ and ‘sympathy’, as used here, refer to the ability of the judge to comprehend the emotional state of the individual who comes before the court. The difference lies on the extent to which the judge will appropriate that emotional state as their own (empathy), in addition to appreciating it (sympathy); this is something too hard to assess on the basis of a judgment and, thus, the position is maintained here that ‘empathy’ and ‘sympathy’ cannot always be clearly distinguished in legal discourse. Accordingly, the term ‘empathy’ is being used *in lieu* of both terms.

<sup>80</sup>See Mary-Hunter Morris McDonnell, Loran F Nordgren and George Loewenstein, ‘Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy’ (2011) 44 *Vanderbilt Journal of Transnational Law* 87–122.

<sup>81</sup>See Judith S Wallerstein and Tony J Tanke, ‘To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce’ (1996) 30(2) *Family Law Quarterly* 305–32.

<sup>82</sup>See, for example, the judgment of the European Court of Human Rights in *Pini and Others v Romania*, Application nos. 78028/01 and 78030/01, Judgment of 22 June 2004.

<sup>83</sup>For a discussion, providing numerous examples of how empathy is an important part of good judging, see Thomas B Colby, ‘In Defence of Judicial Empathy’ (2012) 96 *Minnesota Law Review* 1944–2015.

<sup>84</sup>For examples from other important cases decided by the US Supreme Court, and the role that empathetic judicial thinking has played in them, see Lynne N Henderson, ‘Legality and Empathy’ (1987) 85 *Michigan Law Review* 1574–1653; also see Colby (n 83).

can make the justice system more open and hospitable, by allowing the personal, emotional side of rights to be heard and acknowledged, alongside the regulatory one.

Even beyond the courtroom, focusing on the emotional side of human rights through poetry can deliver a great service in communicating these most fundamental of legal norms more openly, fleshing out elements that refer to our personal as well as our social interactions in a way that legal analysis alone cannot capture. A derivative and closely related implication is that the debating of the nature and content of rights can extend to different fora, allowing people to contribute even when they do not have relevant expertise. By dealing directly with their personal, emotional, side we can make human rights even more accessible to their proprietors, poetic expression being less technical and often more relatable than legal analysis. In contrast to the regulatory, legal, facet of rights, which requires clarity and certainty, the personal, emotional, facet embraces the uncertainty of our human nature. There are no norms in this latter context, only widely shared emotions and aspirations underlying our human rights; and poetry invites us to explore these as each of us chooses. Uncertainty, then, helps us liberate our imagination and the debate in a way that certainty, with its strict confines, never would.

This allows us to open up the dialogue between experts and laymen, and between experts from different fields alike. Indeed, the experience of individuals from different fields of study is most likely to feed into their art, if they produce any, or into how they perceive and interpret works of art, if they choose to do so. A neuroscientist might reasonably take a different approach to the one of the lawyer in interpreting, for example, the right to private life or the notion of individual autonomy enshrined therein. The idea is that even if different disciplines examine human rights through different perspectives, the conclusions reached as to the content and scope of these rights can still be communicated in the language of poetry. Hence, poetry can provide a vehicle for communicating perspectives outside the frameworks and preconceptions of particular fields of study. These perspectives can then be built upon, having been initiated through that channel of communication, encouraging synergies among the experts and the non-experts, providing a fresh look into what a human right truly is – a manifestation of shared emotions, which is no more legal than it is, for example, philosophical or scientific. That way, the poetry of rights can be a way of encouraging further interdisciplinary collaborations while, at the same time, making human rights discourse more accessible to a wider audience. The case remains, of course, that not everyone is interested in, or even moved by, poetry or art. But art in general and poetry in particular can still provide a meeting point for a great number of people, creating a platform upon which uncertainty – and the freedom that comes with it – is most welcome.

A further step in that process could be to start a dialogue through poems specifically dedicated, from their inception, to exploring the emotions that underpin human rights. Let us take, for example, the right to freedom of assembly and association, and the emotions it encapsulates: Our need for solidarity and companionship in going through the joys and struggles of life, our sense that together we can be more and do more than what we are alone. A legal text would communicate this right in the following terms: *Everyone has the right to freedom of assembly and association*; this being followed by brief explanations of what that freedom could or could not entail and/ or more general qualifications.<sup>85</sup> Subsequently, if we were to focus on the regulatory content of the right, we would immediately move to consider what is or should be its protective core in different situations and in different places, having regard to the margin of discretion allowed to public authorities in applying human rights. However, if we isolate the personal facet of the right, we can simply ask ourselves what are the emotions that it puts forward and how these can be explored anew, once again through the medium of words and in a relatively brief form. The result could be a number of poems equal to the number of people participating in that exercise.

Through such an exercise, the value of poetry could be demonstrated even more clearly, the stirring of emotion through symbolism and metaphor being the end destination as well as the starting point in interpreting our human rights. Indeed, as already suggested, human rights are distinctively human and fundamental in the sense that we are all perceived to be capable of grasping their core essence in our own personal, tangible and relatable way, not because a piece of legislation says so. The very assertion of self-evidence, which has played a pivotal role in the history and evolution of human rights, 'relies ultimately on an emotional appeal; it is convincing if it strikes a chord within each person'.<sup>86</sup> Standing close to one's beloved is as much a manifestation of freedom of assembly and association as is the act of participating in a demonstration; it is as important and as necessary to our co-existence and pursuit of a better life together.

## 7. Conclusion

This essay began by acknowledging the close relationship between law and the emotion. It continued by proposing that this relationship becomes particularly significant in the area of human rights, which were seen as constituting, in their most basic form, an articulation of widely shared emotions; of

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<sup>85</sup>Compare, for example, Article 20 of the Universal Declaration of Human Rights 1948 to Article 11 of the European Convention on Human Rights 1950.

<sup>86</sup>See Hunt (n 17) 20, 26.

those needs and concerns we are perceived to share simply by virtue of being human. Consequently, it was argued that the distinctively human and fundamental character of human rights does not stem from – nor does it concern only – the national or the international legal order. Instead, human rights can be seen as fundamental in the sense that they are relevant to us at a deeply personal level. It was suggested that art in general and poetry in particular can help us explore this reality further, offering an ideal vehicle for navigating what was described as the personal, emotional, facet of human rights. While the regulatory, legal, facet of human rights remains undeniably valuable and necessary in securing their enjoyment within the justice system, the personal, emotional, facet is as important in allowing us to celebrate and communicate their significance in and out of the courtroom, by focusing on the widely shared emotions that give rise to them. In fact, focusing on the personal facet of rights can help promote the regulatory one by making the justice system more sensitive and responsive to the emotions of individuals, thus rendering it more open and relatable. Still, its potential does not end there.

Appreciating and exploring the personal facet of human rights through the medium of poetry can make the discussion as to their nature and content more inclusive, allowing people from different disciplines and backgrounds to communicate their perspectives in the language of art in general and poetry in particular. Hence, the poetry of rights can establish yet another channel for celebrating, communicating, debating and even re-imagining human rights, with reference to the emotions that give rise to them, outside the limitations of particular professional or academic frameworks and methodologies. A dialogue based on existing poems – or poems created for that purpose – is a step towards this direction. The resulting liberation and widening of perspective might be sufficient to prove that formalist lawyers, such as those described in the opening lines of this essay, are not the only ones from whom our human rights system has something to gain. In fact, there is a need – if not a necessity – for the expelled poets, who Plato pictured as ‘airy thing[s], winged and holy’<sup>87</sup> but who Percy Bysshe Shelley properly reinstated as the ‘unacknowledged legislators of the World’.<sup>88</sup>

## Disclosure statement

No potential conflict of interest was reported by the author(s).

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<sup>87</sup>See Plato, ‘Ion’, translated by Paul Woodruff, in John M Cooper (ed), *Plato: Complete Works* (Hackett Publishing Company 1997) 937–49 at 942.

<sup>88</sup>See Percy Bysshe Shelley, ‘A Defence of Poetry’ in Zachary Leader and Michael O’Neill (eds), *Percy Bysshe Shelley: The Major Works* (Oxford University Press 2003) 674–701 at 701.