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ARTICLE

The humanising imperative for effective participation: Humean virtues and the limits of procedural justice

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Abstract
Procedural justice considerations have long justified both the instrumental and intrinsic value of effective participation among court users, where ideals of impartiality, dignity and fairness remain pre-eminent. However, recent developments in socio-legal research as well as legal policy and practice point to an inchoate normative reframing of the law beyond procedural justice grounds, based on what we call the humanising imperative for effective participation. We utilise the philosophy of Hume to elucidate its distinctive features, namely the significance of partiality and the virtues of humanity. The paper further explores the putative enactment of the humanising imperative in three court settings in England and Wales – the Court of Protection, criminal courts and inquests – that indicates the precarity of this orientation in relation to procedural justice principles.

Keywords: procedural justice; Court of Protection; inquests; criminal courts; humanising imperative; effective participation

1. Introduction

The normative significance of effective participation in legal proceedings has garnered increased research attention, particularly through the theoretical prism of procedural justice. Procedures that ensure the effective participation of court users putatively help enact legal ideals regarding the proper functioning of the law in terms of transparency, fair opportunity and respectful and equitable treatment of all, thereby enhancing subjective trust of and adherence to the legal process. As such, effective participation possesses both instrumental and intrinsic value. Its instrumental value resides in its ability to improve the proficiency and legitimacy of the legal process: proficiency, in that participation will help elicit relevant and accurate information, and legitimacy, in that fostering the agency of court users through fair participatory procedures can secure compliance to the law, its processes and outcomes. Effective participation is also intrinsically valuable in its communication of respect and dignity to court users by public authorities.

Though often framed through its normative lens, procedural justice does not necessarily exhaust the deeper ethical significance behind the practices of and justification for effective participation. This paper explores the emergence of what we call the *humanising imperative* for effective participation in socio-legal research, legal practice and policy discourse within different court settings. An inchoate, ethically orientated framing of effective participation has emerged in the practice- and policy-based trends of three courts in England and Wales – criminal courts, inquest hearings, and the Court of Protection (CoP), the specialist court that arbitrates disputes of

decision-making capacity and makes decisions on behalf of persons who may lack the ability to do so themselves. This imperative, we suggest, reflects a rationale and motivation to humanise the court process through sympathetic responsiveness to the broader 'human' story behind the legal matter at hand and sensitive treatment of court users accordingly. While seemingly complementary to a procedural justice approach, the distinctiveness of the humanising imperative lies in its lens of *partiality*, intended to alleviate and sometimes challenge outright the putatively dehumanising effects of procedural ideals of impartiality and fairness. The legal status and function of the humanising imperative thus emerges as deeply uncertain, resulting in an increasingly ambiguous dimension to legal policy and professional practice.

This paper provides the broad theoretical contours of the humanising imperative and examines its different expressions through the comparative prism of three court contexts in England and Wales. Section 2 contrasts the humanising imperative for effective participation with procedural justice accounts, using the moral sentimentalist theory of Hume as a theoretical pivot to help clarify its inchoate normative features and ethical grounding. Through Hume, we highlight specifically the *partiality* that comes from sympathetic engagement, as well as the normative emphasis on *virtues of humanity* as opposed to those of justice. Our argument is that partiality signals a significant departure from standard procedural justice accounts. Sections 3–5 explore the socio-legal and policy contexts that suggest the growing prominence of this humanising imperative in the CoP, criminal courts, and inquest hearings. Section 6 draws some general observations from the comparison between the different courtroom settings, exploring the ambivalent status of the humanising imperative vis-à-vis the law, where it could be interpreted either as *compensating* for inhumane legal processes or *constitutive* of the proper functioning of the law. The paper concludes that the humanising imperative illustrates the uncertain normative boundary between ethics and law in the courtroom setting, echoing Humean insights about the precarious underpinnings of justice and its conventions.

2. The humanising imperative: a challenge to procedural justice?

The theoretical framework of procedural justice encompasses formal dimensions of the law as well as the procedural principles that apply to individuals within the legal system. Formal criteria of the law – what Fuller describes as its 'inner morality' – encompass certain ideal principles (generality, publicity, prospectivity, intelligibility, consistency, practicability and congruence) that establish a stable set of rules applicable to our conduct (Fuller 1964). Procedural justice from this angle focuses more on the ideal form of legal rules in an abstract sense rather than their concrete application through legal procedures. Procedural principles in the latter sense, however, provide crucial traction for the formal principles of the law through their clarification of the norms that ought to govern the adjudicative tasks of the courts in resolving disputes, particularly surrounding decision-making procedures and mechanisms for effective participation (Solum 2004; Tyler 2003; Tyler and Allan Lind 2001).

Procedural justice accounts attribute both instrumental and intrinsic justifications to certain processes in the law. Consider the obligation of authorities to provide fair opportunity for individuals to advance their case. Instrumental or consequentialist justifications tend to focus on the utility or outcome of the obligation: that by ensuring all parties are properly heard, the likelihood of a more correct outcome increases, reinforcing the social utility of the legal process (Meyerson and Mackenzie 2018). The effective participation of court users is justified because it helps avoid certain harms, upholds legal rights, secures improved outcomes in the decision-making process and promotes individual and collective adherence to the law (Tyler 2003). Intrinsic justifications, by contrast, appeal to deontological commitments to legitimise the inherent value of certain legal procedures, irrespective of outcome. For instance, the ideal of Kantian dignity remains a common deontological justification for mechanisms of due process

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(Rawls 1999). The right to representation, to be informed of the legal process, to respond and challenge evidence, fundamentally respects individuals as self-governing 'persons' who matter in their own right rather than as 'mere objects or things' (Meyerson 2021). There is thus a duty to establish and implement participatory measures that convey the appropriate respect owed to persons.

Procedural justice frameworks have also taken a relational turn in conceptualising the intrinsic and instrumental value of fair legal procedures (Meyerson et al. 2021). Relational approaches echo the commitments of procedural justice, such as conditions of fairness, transparency, due process and the fair and equitable treatment of all individuals, focusing likewise on how these express respect for the rational agency of individuals. This relational approach also draws from empirically grounded socio-legal and psychological research that indicates the legitimising effect of procedural justice in generating socially beneficial consequences and influencing people's attitudes and behaviour. Experiences of fair treatment through effective participation increase adherence to the law and enhance trust and confidence in legal authorities, while unfair treatment has a delegitimising effect on the exercise of legal authority and the justice system (Tyler 2006, 2007, 2009). However, the normative remit of participation has also broadened, whereby satisfactory interpersonal exchanges with legal authorities are thought to improve the social inclusion, equality and self-worth of court users (Mackenzie 2021).[1] Relational considerations ground the justness and fairness of legal procedures, including *voice* (the willingness of authorities to listen to a person's views before making decisions and irrespective of impact on the outcome); *neutrality* (the consistency, transparency and impartiality of authorities in making decisions); *respect* (polite and dignified treatment of all court users); and *trustworthiness* (that people perceive authorities are motivated to behave fairly towards them) (Tyler and Meares 2019). In other words, the moral significance of these deontological criteria lies in its ability to foster a relational context with legal authorities that confers equal status and worth on court users, which are then psychologically internalised as self-respect (Meyerson and Mackenzie 2018).

The humanising imperative behind effective participation both continues and sits in tension with procedural justice accounts in important ways. The empirical turn in procedural justice explorations has rightly brought to the forefront relational features that have been neglected in more abstract normative accounts: namely, the moral significance and psychological impact of interpersonal exchanges between authorities and court users, as well as the ways in which such intersubjective engagement itself can be constitutive of effective participation. The humanising imperative likewise emphasises the normative significance of the interpersonal dimensions of legal proceedings, as clearly articulated in socio-legal research examining the views of legal professionals in the CoP in England and Wales (Kong et al. 2022a, 2022b), but is equally resonant in the policy discourse and practices of other courts. At the same time, this shared interpersonal focus brings into sharp relief some clear tensions. For relational accounts of procedural justice, deontological principles of fairness, transparency and equality continue to guide interpersonal interactions that reinforce the inherent worth, dignity and respect of court users. These normative commitments justify the irreducible value of effective participation, place constraints on conduct and ground rational, transparent adjudication in the legal system (Meyerson and Mackenzie 2018). Yet, as discussed below, these impartial commitments sit uneasily, and at times conflict, with the more particularised ethical commitments that arise with the humanising imperative, where empathic, partial engagement with individual perspectives is seen as normatively constitutive of humanising interpersonal encounters.

Divergent theoretical underpinnings may help explain these tensions. In contrast to the deontological leanings of procedural justice, the humanising imperative is resonant of a different philosophical tradition, specifically the moral sentimentalist strand of thought, where overriding

[1]A dignity-based account of procedural justice need not be interpreted as committed to such a narrow understanding of dignity and its deontological features are likewise incorporated in the relational account.

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ethical significance is placed on disposition, appropriate feeling and the virtues that foster sociability and human connection, as opposed to principled rigour. Hume's account is particularly insightful in terms of how sentiments of benevolence – also synonymously referred to as sympathy, humanity and fellow-feeling – become the core normative grounding for moral distinctions of virtue and vice. Using Hume's language, humane, benevolent moral sentiments that express a motive of good will towards fellow human beings cultivate the obligations owed to others qua humans and foster practical judgments that reflect appropriate empathy and affect. Sympathetic identification with others enables us to receive and represent to ourselves the sentiments, interests and perspectives of others; indeed 'the force of imagination' activates the feelings of others into affections and passions that can move us (Hume 1739/1978, p. 427). As Hume writes, 'If any man from a cold insensibility, or narrow selfishness of temper, is unaffected with the images of human happiness or misery, he must be equally indifferent to the images of vice and virtue' (Hume 1751/1975, p. 225). Akin to what we commonly understand as empathy, this ability to sympathetically represent and identify with the happiness or misery of others activates and expresses one's concern and desire for the well-being of others, creating a world of shared value that grounds our moral appraisals and social standards. The flip side is that an *unsympathetic* orientation is indicative of a lack of sentiment and affect deemed appropriate to humanity and will subsequently elicit moral disapprobation.

The ethical prominence accorded to the mechanism of sympathy suggests that, for Hume, a humane disposition operates through a lens of *partiality*: it is by seeing ourselves as contiguous with others that we come to consider their interests and well-being and represent them to ourselves, feel appropriately moved by them and make moral judgments accordingly (Hume 1739/1978, pp. 318–21). The tendency towards partiality can have constraints, as Hume acknowledges that we are prone to sympathise with those whom we resemble, are near and close to, have relational bonds with, and so on (ibid., p. 488). Partiality nevertheless is not necessarily co-extensive with self-interest, social prejudice or arbitrary attachment to certain perspectives. The ability to engage with and sympathetically represent different subjective stances beyond egoistic interests is an important feature of what it means to adopt a disposition of *humanity* (Hume 1751/1975). Human concern is extended such that it overcomes considerations of subjective bias or prejudice. As Debes writes of Hume, '[p]art and parcel of this is a second manifestation of extensiveness: we can have extensive sentiments. That is, we do not just expand the scope of our disposition but also the consequent concern or desire for the welfare of others that this disposition raises' (2007, p. 37). Taylor further interprets Hume as saying that:

> 'a cultivated sense of humanity is an ethical attitude and virtue that reflects the capacity to overcome prejudice and promote the decent treatment of others. Sympathizing with others across the social barriers that often divide us can provide us with both an appreciation of difference, and help us see the need for remedies for divisiveness. Inhumanity is a vice that distorts the judgment, passions and values of both oppressors and those subjected to oppression. We express our humanity through an ability to see others as like ourselves, and with a willingness to engage in debate about what our shared preferences are, or should be' (2013, p. 82).

Sympathetically activated humanity thus involves a dialectical movement between different subjective perspectives, where we feel the sentiments of others more directly connected to us while also expanding our viewpoints such that our sentiments broaden more generally. Through what Hume calls a 'progress of sentiments' (Hume 1739/1978, p. 500), the aspiration is towards *intersubjective expansion* rather than impartiality. Numerous sympathy-based virtues capture this enlarged scope of moral consideration, which include '*generosity, humanity, compassion, gratitude, friendship, fidelity, zeal, disinterestedness, liberality*, and all those other qualities which form the character of good and benevolent' (ibid., p. 603). Indeed, 'courage and ambition, when

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not regulated by benevolence, are for only to make a tyrant and public robber' (ibid., p. 604). Also called virtues of humanity, these cultivate meaningful intersubjective bonds and are fundamentally praiseworthy for being conducive to the welfare and happiness of others (and thus enriching a sense of the human good).

Notably, these social virtues which emanate from one's humanity – deemed natural to the sympathetic mechanism in human beings – are not equivalent to the virtues of justice. Hume considers justice to be an artificial virtue built on social convention and convenience, constructed primarily to regulate property, but eventually expanded to encompass the enforcement of other rights and matters related to physical harm, injury, political rebellion, etc. (Baier 2010). The ambivalent relationship between the motives of humanity and justice is noted in the *Treatise*, as he writes,

> 'When I relieve persons in distress, my natural humanity is my motive; and so far as my succour extends, so far have I promoted the happiness of my fellow-creatures. But if we examine all the questions, that come before any tribunal of justice, we shall find, that, considering each case apart, it wou'd as often be an instance of humanity to decide *contrary* to the laws of justice as conformable to them' (Hume 1739/1978, p. 579, emphasis added).

Exemplars of virtues that stem from our innate humanity instead revolve around our social bonds motivated by other-regarding benevolence, such as love and friendship: ''Tis remarkable, that nothing touches a man of humanity more than any instance of extraordinary delicacy in love or friendship, where a person is attentive to the smallest concerns of his friend, and is willing to sacrifice to them the most considerable interest of his own' (ibid., pp. 604–605). In other words, the virtue of justice is characterised by a general observance of the rules of justice that promote societal order and peace; this virtue differs from, and can run counter to, the motives of benevolence and sympathy characteristic of the virtues of humanity (Harris 2010). Indeed, for Hume, justice and its more generalised requirements may well demand the suppression of our benevolent, more partial sympathies that naturally consider the good of particular others (Baier 2010; Harris 2010; cf. Taylor 2015).

We might initially think that Hume's demarcation between rule-driven justice and virtues-based morality indicates that the former is not that dissimilar to the deontological framework of procedural justice. But, in fact, the growing prominence of the humanising imperative suggests ways in which the boundary between morality and justice has become blurred, where considerations of benevolence have provided a normative reshaping of effective participation as a result. Humean echoes in the humanising imperative are particularly evident in two ways: first, in the moral significance of *partiality*, which requires authorities to accord special de facto *ethical* (though not necessarily legal) weight to certain perspectives that are represented. Sympathetic engagement rather than impartial disengagement demands acknowledgement of the prima facie meaningfulness of certain narratives, perspectives and experiences. Resolution of the legal matter at hand is seen to require the intersubjective validation of this particularised human context rather than a stance of neutrality and equipoise (as idealised in principles of procedural justice). In short, it is *only through* a prism of partiality that the humanity of certain court users is properly recognised and respected in the legal process.

Second, there is a Humean inflection to the growing emphasis on participatory processes that encourage direct interpersonal encounters of a particular quality between court users and legal authorities. These encounters require character traits and skills that are evocative of Humean sympathy-based virtues of humanity, and thus conducive to establishing genuine intersubjective bonds, such as imagination, compassion, rapport-building, empathy and emotional sensitivity towards psychological distress and triggers (Hume 1739/1978; Kong et al. 2022a, 2022b). Through humanising interactions that promote the welfare of others, legal authorities convey their

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attunement to the more 'human' side of their work. Such efforts, however, can often sit in tension with the formality, hierarchy, ritual and impartial reasoning characteristic of legal processes.

These Humean resonances in the humanising imperative help explain the inchoate quality of its normative commitments. Grounded in the ethical virtues of humanity, effective participation seems focused on the contextualised expression of interpersonal comportment, character traits and social virtues of legal authorities, rather than any intrinsic or instrumental justification emanating from deontological duties or principles of justice. The prism of partiality which frames those exchanges also clearly distinguishes the normative commitments of the humanising imperative from those of procedural justice. Engagement with the broader human context of the law demands a fundamental appreciation of *this* perspective, *these* voices, *that* experience, whereby legal authorities affirm their basic humanity through *particularised* rather than generic responses to prospective vulnerabilities and the complexities of human lives. The intricacies of human experience, such as relationships and emotional attachments as well as divergent narratives, values and interpretive meanings, become central rather than ancillary to what it means to treat people with humanity in legal processes involving experiences of loss, harm or trauma.

Yet the ambivalence between the virtues of humanity and of justice in Hume is also replicated in this normative reshaping of effective participation. Different court contexts simultaneously affirm and challenge the validity of the humanising imperative in the context of the law, where its realisation depends on an ambiguous sphere of extra-legal obligation that, at the same time, can lack substantive legal purpose. Some forms of interpersonal engagement between court authorities and lay participants are designed neither to uphold legal rights of court users nor to generate testimony with formal evidential status, highlighting that, though expressive of an otherwise neglected ethical orientation to effective participation, the precise legal function of the humanising imperative remains deeply contentious, particularly as court examples shed light on core tensions with widely accepted standards of procedural fairness. Indeed, comparison of the different courts in England and Wales indicates a substantive evolution of the partiality requirement where prima facie special normative weight may be accorded to specific groups of court users over others, justified by the need to recognise particular human experiences or vulnerabilities from the outset.

3. The Court of Protection

Among legal professionals working in the CoP in England and Wales, the humanising imperative for effective participation has proved resonant. The CoP has historically been a specialist court designed to adjudicate disputes regarding mental capacity to make decisions about health, welfare, property and affairs, as well as to determine best-interests decisions on behalf of adults who may be found to lack capacity due to an impairment of the mind or brain. The Mental Capacity Act 2005 (MCA) in England and Wales sets out the statutory framework for both capacity assessment and best interests decisions, the latter of which, most notably for our purposes, must promote the participation of persons who are the subject of proceedings (P). As s.4(4) states, '[the best interests decision-maker] must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him'. Under the MCA, an ethos of empowerment has been an important (if not always successful) reorientation of a legal jurisdiction where paternalistic norms have been traditionally predominant.[2]

The historical genealogy of the CoP attests to an ambiguous dynamic between formal and informal practices and justificatory strategies behind the effective participation of P. The 'rule of personal presence' in the human rights context emphasises the importance of judicial contact with

[2]For those wedded to a human rights perspective this reorientation may seem to not go far enough (Flynn and Arstein-Kerslake 2014).

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the persons on whose behalf decisions are made. The European Convention on Human Rights (ECHR) judgment *X and Y v. Croatia* (2011) states that 'judges adopting decisions with serious consequences for a person's private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons'.[3] Various non-statutory practice directions, guidelines and CoP rules also imply the significance of personal presence; for example, CoP rules (amended in 2015) highlight that P should be provided the circumstances and opportunities to address the judge directly or indirectly.[4] While evolving CoP guidance gestures towards the import of personal contact between legal authorities and P, the occurrence of illegitimate evidence-gathering in the Court of Appeal case, *Re AH*[5] (discussed below) has highlighted the contentious legal status of such judicial meetings.

Despite the questionable legal status of informal mechanisms of participation, socio-legal research reveals how legal professionals practising and judging in this area of law frame their own normative account of good practice through constitutive features of the humanising imperative.[6] Grounded in values of sociability, compassion, empathy and humility, a humanising orientation towards effective participation is often juxtaposed against a procedural or 'process'-driven approach, suggesting a broader justification for this person-centred approach beyond procedural justice considerations. As one legal professional stated in Kong et al. (2022b, p. 709), the CoP as a 'human jurisdiction' makes it 'about a human being, and meeting that human being is never going to do anything but be beneficial. It may not change [the judge's] decision, but it makes it person-centred'. Attunement to the messy realities of human life foreground CoP professional identity, such that responsiveness to the relationality and social bonds of P, as well as the countervailing value frameworks and divergent emotional attachments of different parties, are upheld as normatively desirable for practice and judging. Indeed, insight into this complex human context is critical to how professionals discharge their legal and ethical duties in the CoP, including the effective participation of P.

Yet the humanising imperative as a normative prism for CoP professional practice and judging sits uneasily within the boundaries of the law. In theory, the MCA contains the statutory obligation to ensure P's effective participation as much as practicable, while case law has highlighted the importance of putting P at the forefront of legal proceedings.[7] However, legal professionals themselves observe an ambivalent, or even contrary, relationship between this normative aspiration and formal procedures of the CoP, where the 'straightjacket' or 'regimented' nature of the law aggravates rather than mitigates the powerlessness of, and social stigma and discrimination against, persons with cognitive impairments (Kong et al. 2022a). The humanising imperative is therefore interpreted as an important counterpoint to the inhumane and alienating features of the legal process, the formality, ritual and hierarchy of which are perceived as fundamentally exclusionary.

Adopting a stance of partiality towards court users is one way CoP professionals attempt to nullify these negative features. One retired judge interviewed for *the Judging Values* project commented:

> '[This case] made a deep impression on me. I had a surge of sympathy for him, just a human feeling. I think that is really awfully important if you are exercising judgment in this field. [. . .] You relate to a human being. We all do it the whole time. All life is bumping into people and relating to them, or not relating to them, loving them or hating them. [. . .] How

[3] *X and Y v. Croatia* (2011) ECHR 1835, para. 84.

[4] Court of Protection (Amendment) Rules 2015, No. 548 (L.6), 3A(1)(d). Available at www.legislation.gov.uk/uksi/2015/548/made (accessed 20 September 2023).

[5] *Re AH (Serious Medical Treatment)* (2021) EWCA Civ 1768.

[6] This research was conducted through the *Judging Values and Participation in Mental Capacity Law* project (2018–2022).

[7] *Aintree University Hospitals NHS Foundation Trust v James* (2013) UKSC 67, COPLR 492; *Wye Valley NHS Trust v. Mr B* (2015) EWCOP 60.

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> is it that you're thrown into a crowd of strangers and to one you immediately relate and to the other you immediately are, you know, it's attraction? Yes, so I think you can't exclude that from judicial work' (RJ9, unpublished quotation).

Partiality in the CoP involves a prima facie ethical duty to accord moral weight to the subjective perspective of P, which entails professionals engaging with and understanding P's unique commitments, wishes and feelings. Though not necessarily determinative in court deliberations, this agent-relative stance nonetheless functions as a constitutive feature and achievement of effective participation. It is constitutive in that proceedings are explicitly oriented *around* P – that is, the legal process is *for* and not *about* them. The aspiration is to develop a holistic picture of P, humanising them as individual persons such that 'the court engages with P not as a detached object of concern but as a *meaningful human subject* in proceedings' (Kong et al. 2022b, p. 709). Equally, the expansion of one's agent-relative stance is itself conceived of as a professional achievement. Akin to Hume's progress of sentiments, the normative realisation of partiality comes with its intersubjective expansion – where a more extensive, sympathetic ethos towards all involved in the case, including P and their family, shapes and alters the perspective and conduct of legal professionals. One legal practitioner highlighted the need to 'do your best for P primarily, but also for everyone else' and to 'do my absolute best to certainly not exacerbate anything [. . . and] try and bring everyone together'. This practitioner explicitly stated that this 'doesn't sound very legal to me, but I don't think they are very legal in general. I think they are about a lot more things than that' (Kong et al. 2022a, p. 13).

Also prominent in professionals' own normative accounts of effective participation is the importance of fostering reciprocal human connections through interpersonal encounters that foreground P's humanity as well as humanising legal professionals *to* P. Through direct meetings, professionals seek to redress their own unease surrounding the inherent contradictions and dehumanising propensities embedded within a legislative framework that can objectify individuals (Kong et al. 2022a). Judicial meetings with P – particularly in settings outside the formality of the court – are imbued with ethical significance, enlivening the moral weight and responsibility of legal decision-making (Kong et al. 2022b). Legal professionals nonetheless observe how putative dispositional failures and poor communication skills in interpersonal encounters could accentuate social barriers and powerlessness in the legal process. As one legal professional stated, 'the problem is that the skillsets that we value as lawyers don't necessarily include that type of social work soft skills' (LP36, unpublished quotation from the *Judging Values* project). Resolution of the legal issue at hand necessarily requires extra-legal skills of emotional literacy and acute psychological observation and sensitivity, as opposed to technical prowess and knowledge of the intricacies of the law (Kong et al. 2022a). The juxtaposition of the humanising imperative against a procedural account of effective participation is particularly notable in professionals' ambivalence towards legal procedures and, indeed, the traditional skills valued in the legal profession, sometimes thought of fundamentally inhumane, exclusionary and dehumanising of P and in tension with the deep human engagement and sensitivity that is owed to court users. Effective participation is positioned as an ethical rejoinder to the law where its formal structures and ritualistic procedures are frequently perceived as *contradictory* to the respectful, compassionate and particularised treatment owed to P.

This oppositional framing of the humanising imperative and procedural notions of effective participation has proved problematic, such as in *Re AH*, which exposes acute tensions in relation to the status of evidence or information gleaned from personal contact between court users and the judge. The case concerned the best interests decision on behalf of a 56-year-old woman, AH, who had suffered serious neurological, nerve and muscle damage as a result of Covid-19, had been on a ventilator for an extended period of time and was dependent on nutrition and hydration delivered via a nasogastric tube. Various details of the first-instance decision illustrate the partiality and virtues of humanity constitutive of the humanising imperative. Careful attention

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was shown to AH in her present and past condition and her relationship with her children. The judge's response to AH son's demonstration of her enjoyment of his recorded Koranic call to prayer was notable, described as a 'a powerful, beautiful and an extraordinary expression of filial love',[8] which 'signals to me that however depleted and compromised her life may have become, AH retains the capacity to feel and receive love. This is an important facet of human autonomy and dignity.'[9] A personal visit to AH at the hospital was also arranged, as described in the appeal:

> 'The Judge spoke to AH, who appeared to be distressed and was crying. The Judge said that he did not know what AH wanted and that "it's very, very hard for you to tell me". He then said, "I think it may be that you want some peace". Later, he said: "It is not easy for you to communicate, but I think I am getting the message". The Judge then left the ward and saw two of AH's children. A asked the Judge whether he had asked her "the question". The Judge replied that he "got the clear impression she wanted some peace, she showed me that she did".'[10]

One might interpret this judicial visit as a clear illustration of the compassionate, engaged stance to humanise CoP legal practices; yet its purported violation of procedural justice requirements ground specific points of the successful appeal:

> First, it is strongly arguable that the Judge was not equipped properly to gain any insight into AH's wishes and feelings from his visit. [. . .] If the visit was used by the Judge for this purpose, the validity of that assessment might well require further evidence or, at least, further submissions. Secondly, to ensure procedural fairness, the parties needed to be informed about this and given an opportunity to make submissions.[11]

The Court of Appeal agreed with the appeal that this visit was wrongly used as an 'evidence gathering exercise to establish what AH's views were' which 'likely influenced his overall conclusions'.[12] Remarking on the common practice of CoP judges to visit P, Sir Andrew McFarlane further concluded that 'great care was needed both in the conduct of the judicial interview and the manner in which it was reported back to the parties so that a fair, open and informed process of evaluation could then be undertaken within the proceedings'.[13] Subsequent official guidance explicitly states that any judicial visits with P should not be with the purpose of information or evidence-gathering.[14] The issues raised in *Re AH* thus highlight clear tensions between the constitutive features of the humanising imperative and the safeguards embedded in procedural justice requirements.

4. Criminal courts

It might be expected that the adversarial nature of criminal proceedings (as opposed to the CoP's more inquisitorial processes)[15] necessitates strict adherence to procedural justice principles. According to Lord Bingham, the right to a fair trial is the 'cardinal requirement of the rule of law',

[8]*Cambridge University Hospitals NHS Foundation Trust v AH & Ors (Serious Medical Treatment)* (2021) EWCOP 51, para. 73.
[9]Ibid., para. 74.
[10]*Re AH*, paras 17–18.
[11]Ibid., paras 71–72.
[12]Ibid., para. 4.
[13]Ibid., paras 78–79.
[14]Hayden JP, *Official Judicial Visits to (Guidance)* (2022) EWCOP 5.
[15]According to Baker J, the CoP's processes 'are essentially inquisitorial rather than adversarial. In other words, the ambit of the litigation is determined, not by the parties, but by the court, because the function of the court is not to determine in a disinterested way a dispute brought to it by the parties, but rather, to engage in a process of assessing whether an adult is

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a right which is 'to be enjoyed, obviously and pre-eminently, in a criminal trial'. Yet Bingham also observes that fairness is 'a constantly evolving concept', and that this is 'most obviously true of criminal trials' (Bingham 2010, pp. 90–91). An independent judiciary lies at the heart of the operation of the criminal justice system; all judges swear a judicial oath that states explicitly that 'I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will',[16] effectively binding the judge by neutrality. Likewise, prosecuting counsel, when presenting the Crown's case, must lay out the facts 'fairly and impartially', while defence counsel's duty is 'within the limits prescribed by practice and propriety, to do the best he can for his client according to his instructions' (Bingham 2000, pp. 254, 255).

Effective participation by the defendant has long been regarded as integral to the right to a fair trial, under Article 6 of the ECHR. ECHR guidance further states that Article 6 'guarantees the right of an accused to participate effectively in a criminal trial [. . .] In general, this includes, inter alia, not only his or her right to be present, but also to hear and follow the proceedings' (European Court of Human Rights 2022). Defendants' participatory rights have both instrumental and normative rationales – the latter being associated with 'respect for the defendant's position as the autonomous subject of proceedings', and hence consistent with the principles of procedural justice (Owusu-Bempah 2020, p. 615). Witnesses and victims in criminal proceedings are not generally understood to have the fair trial rights enjoyed by defendants (Jacobson 2020); however, recent decades have seen the emergence of a legal and policy framework which further supports their participation within the criminal justice process.

Two developments in the criminal courts demonstrate the emergence of the humanising imperative for effective participation: first, the introduction of special measures under the Youth Justice and Criminal Evidence Act 1999 (YJCEA), designed to assist vulnerable and intimidated witnesses in giving evidence, and, second, the introduction of the Victim Personal Statement (VPS), whereby victims can explain to the court, at sentencing, how they have been impacted by the crime. At first glance, both initiatives are similar to defendants' participatory rights in straightforwardly aligning with procedural justice principles. However, a closer look reveals the special value they accord to Humean partiality and virtues of humanity (i.e., emotion and interpersonal engagement) making them important manifestations of the normative reshaping of effective participation, particularly in how certain groups of court users are treated from the outset.

First, special measures under the YJCEA form part of a 'complicated patchwork' of support that seek to mitigate the prospectively distressing, inhumane aspects of participating in criminal justice proceedings for witnesses (Jacobson and Harlow 2017). These include the giving of evidence from behind a screen; evidence by live link; evidence in private; removal of wigs and gowns; video-recorded evidence in chief; pre-trial video-recorded cross-examination; examination of the witness through an intermediary; and aids to communication.[17] Underlying the development of special measures were two contrasting motivations, as Fairclough (2021) describes: '(i) the deontological value of the humane treatment of those involved as witnesses in criminal trials and (ii) the instrumental goal of improving the quality of witness evidence' (p. 1072). This dual aspect is explicit in Crown Prosecution Services guidance which states that the 'provisions help vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence'.[18] But uniting intrinsic and instrumental rationales is the acknowledgement of the psychological impact of giving evidence, particularly when this

lacking in capacity, and if so, making decisions about his welfare that are in his best interests.' *Cheshire West and Chester Council v. P and M* (2011) EWHC 1330 (COP), para. 52.

[16]Courts and Tribunals Judiciary (n.d.) Judicial Oath. Available at www.judiciary.uk/about-the-judiciary/our-justice-system/oaths/ (accessed 3 May 2023).

[17]Youth Justice and Criminal Evidence Act 1999, s.23–30.

[18]Crown Prosecution Service (2021) Special Measures. Available at: www.cps.gov.uk/legal-guidance/special-measures (accessed 7 August 2023).

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intersects with social and other vulnerabilities. The governmental report *Speaking up for Justice* (Home Office 1998) emphasised that 'many adult victims and witnesses find the criminal justice process daunting and stressful, particularly those who are vulnerable because of personal circumstances' (p. 1). Eligibility for special measures under the YJCEA is thus defined in terms of age (under 18) or incapacity (mental or physical disorder or impairment),[19] or where fear and distress in connection to testifying may diminish the 'quality of evidence'.[20] Other particularistic factors are also taken into account, such as witnesses' 'social and cultural background and ethnic origins', 'domestic and employment circumstances' and 'religious beliefs or political opinion'.[21] Witnesses who are complainants in sexual offence cases[22] are automatically eligible – reflecting the concern highlighted in the *Speaking up for Justice* report with the especially 'traumatic' nature of sexual victimisation, which necessitates treating such victims with particular care and sensitivity, and recognises that 'the giving of evidence of an intimate nature in a public court room, and being subjected to cross-examination is likely to be an intimidating experience' (p. 61).[23]

The partial orientation embedded in the special measures provisions is especially evident from their more limited applicability to defendants compared to witnesses, albeit the latter include both prosecution and defence witnesses. The YJCEA s.17(5) explicitly excludes defendants from the measures, stating that 'a witness in criminal proceedings (*other than the accused*) is eligible for assistance' (emphasis added).[24] The initial exclusion of defendants from special measures was largely justified on the grounds that existing safeguards were adequate (Fairclough 2023). However, other policy considerations included the perceived need to protect certain categories of witness from harms arising from involvement in the criminal justice process – particularly in circumstances where such harms add to loss or trauma that might have already resulted from criminal victimisation. This implies that witnesses are a special category of court users to whom the humanising imperative applies by virtue of what they have suffered and what they may further suffer as a result of the prosecution process.

Among the specific special measures available to the courts, provision for witness intermediaries expresses the humanising imperative with particular clarity. On one hand, the intermediary role is circumscribed around procedural obligations: such as to assess the vulnerable person's communication needs, help advocates to frame questions so they can be understood and intervene if communication breaks down. But beyond these, the intermediary may also play a part in providing emotional support to the witness – for example, by placing an arm around them, advising them to take time and to breathe and letting defence counsel know that questioning is coming over harshly (Wurtzel and Marchant 2017). The very concept of the intermediary thus places an emphasis on such Humean qualities as empathic awareness and compassion, and recognises the importance of meaningful human connection. In so doing, the role brings to light some of the tensions between the humanising imperative and the expectations of fairness and impartiality – not least because the intermediary is also expected to be a neutral officer of the court, who facilitates the smooth administration of justice by supporting the vulnerable person's participation. What results is what Taggart calls the neutrality paradox:

> 'Though not vocally disavowing their neutrality, intermediaries experienced an ongoing struggle between the practical challenges of their often emotionally demanding work, their

[19]Youth Justice and Criminal Evidence Act 1999, s.16.

[20]Ibid., s.17(1).

[21]Ibid., s.17(2)(c).

[22]Ibid., s.17(4).

[23]Yet as Cooper (2017) notes, the vulnerability criteria following this report remains poorly understood.

[24]Youth Justice and Criminal Evidence Act 1999, s.16(1), 17(1). Although provision for vulnerable defendants has since been developed on a piecemeal basis, this does not yet have the same statutory footing as that for vulnerable and intimidated witnesses (Fairclough 2023).

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professional backgrounds, and their need to remain detached and objective' (Taggart 2022, p. 352).

This neutrality paradox – of empathically attending to the rich affective and psychological context yet maintaining legal impartiality – also emerges in provision for VPSs (or Victim Impact Statements (VISs) in other jurisdictions). While special measures are mostly pertinent to the conduct of the criminal trial, the VPS has primary relevance to the sentencing of offenders, whether following conviction at trial or a guilty plea. VPSs were introduced across England and Wales in 2001, and today victims have the 'right' to make a VPS under the statutory *Code of Practice for Victims of Crime* (Ministry of Justice 2020). Separate MoJ guidance on *Making a Victim Personal Statement* describes the functions of the VPS as 'your way of telling the criminal justice system about the crime you have suffered and the impact it has had on you, whether physically, emotionally, psychologically, financially or in any other way'.[25] The main driving force behind the development of VPS regimes in various jurisdictions has been the intention to grant victims a 'voice' within criminal proceedings that were otherwise perceived as silencing or exclusionary (Booth et al. 2018). While clearly resonant of relational considerations within procedural justice approaches, the VPS also fundamentally challenges ideals of impartiality and fairness through its conferring on victims a special but ambiguous status at the hearing, which entails an explicit invitation to express the subjective impact of the crime.

Legal scholars thus disagree as to the legal function of VPSs, reflecting varying interpretations of the partiality involved in attending to victims' affective or emotional experience of crime. For instance, Doak and Taylor express confidence about the potential communicative, relational and justice benefits delivered through the introduction of VPSs. Welcoming the growing significance of emotions as a counterpoint to the traditional preoccupation with rationality and objectivity, they perceive VPSs as a positive step towards the wider goal of greater victim–offender communication, which could 'not only help to resolve conflicts between individuals, but might also send out a broader message to society concerning the social causes of crime and punishment and how to address them' (Doak and Taylor 2013, p. 43). This echoes Roberts and Erez's case for the VPS as 'an important form of communication between the victim and the offender', which may even 'introduce a restorative element to adversarial proceedings, without undermining important [. . .] principles of sentencing such as equity and proportionality' (Roberts and Erez, 2004, p. 227).

Yet this view is far from unanimous. A strong critique of the humanising imperative embodied in the VPS also comes through a critical interrogation of emotion in the law, especially in circumstances where its particularised propensities are left unscrutinised. While acknowledging that '[w]e cannot cordon emotion off from legal reasoning or legal practice even if we want to' (Bandes 2021, p. 2431), Bandes cautions against the inherent partiality embedded within the VPS, suggesting it raises difficult questions about '*which* emotions to consider in judging, *which* narratives to privilege or silence, and *how* to circumscribe the decision-making contexts in which these devices should be used' (1996, p. 365). With particular reference to US capital sentencing hearings, she argues that VISs illustrate 'the pitfalls of acontextually prioritizing any emotion – no matter how benign the emotion may seem' as well as 'the emptiness of the concepts of empathy and narrative when they are not constrained by extrinsic normative, political, or moral principles' (ibid., p. 393). Even if one subscribes to the communicative potential of VPSs, in acknowledging emotion and foregrounding the subjective narratives of victims in legal proceedings, the justification for privileging certain emotions and narratives over others remain problematic, particularly as 'VISs are one-way presentations and not catalysts for dialogue with other participants' (Booth et al. 2018, p. 1485). For the victim with the relative privilege of being able to

[25]Ministry of Justice (n.d.) Making a Victim Personal Statement. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264625/victims-vps-guidance.pdf (accessed 11 August 2023).

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make such a 'presentation', the expressive function of the VPS and the constraints of legal rules can also be fundamentally at odds. The VPS guidance leaflet on *Making a Victim Personal Statement*[26] champions the 'voice' of victims on its title page, yet a variety of caveats, restrictions and warnings follow, including:

> 'You cannot change or withdraw your original VPS. However, you can make a further VPS to add to or clarify your original VPS [. . .]
>
> Your VPS must not include your thoughts or opinion on how the alleged offender should be punished [. . .] Any inappropriate content [. . .] may be removed from the final version of the statement [. . .]
>
> The court and/or the defence could cross-examine you about the contents of the VPS in order to clarify or challenge certain points [. . .]
>
> It is for the court to decide whether and what sections of the VPS should be read aloud or played in court and who will read the VPS aloud.'

Thus, although victim participation has increasing emphasis in the formal criminal justice process, victims remain subject to 'narrative pressures', whereby there are limits to their capacity to express themselves, and '[s]ticking to the script, and following the expected role is an important determinant of societal support' (Pemberton et al. 2019, p. 411). Both special measures and VPSs illustrate how the strictures of the law can render precarious the humanising measures designed to mitigate the trauma, stress and often inhumane aspects related to criminal proceedings.

5. Inquests

Despite their divergent inquisitorial and adversarial orientations, both the CoP and criminal courts reveal how features of the humanising imperative have shaped and justified notions of effective participation, highlighting at the same time tensions with the strictly legal nature of these proceedings. Inquests in England and Wales are a particularly interesting comparator. Though inquisitorial in official function, the coronial process can take on an adversarial tone informally, particularly when a contentious death occurs within state custody or otherwise involves public institutions (MoJ 2019).

Coroners are charged with investigating sudden, violent or unnatural deaths, which may or may not have occurred in some form of state custody, framed through four questions: who died and how, when and where did the death occur. These four questions designate the explicit inquisitorial purpose of the coronial process and proscribe coroners from apportioning blame for the death. Additionally, a preventative role of coroners is outlined under Schedule 5(7) of the Coroners Justice Act 2009 (CJA). Designated 'interested persons' (such as bereaved family members, those with 'sufficient interest' (s.47) and others whose act or omission may have been contributory to the death) are accorded formal participation rights, which legally entitle such parties to receive evidence and relevant information prior to the inquest, as well as to question witnesses.

Despite bereaved people possessing formal legal rights, numerous reports have pointed to their historically poor and often inhumane treatment as significant barriers to their meaningful participation in inquest proceedings.[27] Alongside clear procedural justice failings (i.e. institutional

[26]Ministry of Justice (2018) Making a Victim Personal Statement. Available at https://assets.publishing.service.gov.uk/media/5a7cd21040f0b6629523c02e/victims-vps-guidance.pdf (accessed 5 December 2024).

[27]For example, Brodrick Committee (1971), Luce Review (2003) and Shipman Inquiry (Smith 2003).

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hostility towards the bereaved, non-disclosure, lack of transparency and inequality of arms in contentious circumstances of death, where public bodies are legally represented and family members may not be) (Easton 2020) the 'dehumanising' nature of inquests has also been a prominent, long-standing theme, with examples of 'condescending, unsympathetic and disrespectful' treatment towards the deceased as well as bereaved families (Jones 2017, p. 38). As Scraton (2016) writes, 'The shock of sudden death and the pain of survival are mind-numbing, debilitating [. . .] The law, the investigations, the inquiries, seem to operate in another world' (p. 176). Indeed, the legal processes surrounding the coronial system 'may *themselves* be retraumatising and alienating' (JUSTICE 2020, s.1.10), as a bereaved family member recounted in one study:

> 'what was clear was what they'd done to her to get that information. I felt she'd been violated. I had to sit there listening to people talking about her and describing her clinically as a piece of meat. It was obvious she'd been hacked around to get this information. I felt so helpless. It was almost like she'd been raped by the institution' (Biddle 2003, p. 1040).

The policy response to reports of adversarial proceedings, poor practice and failing procedural mechanisms has been to explicitly foreground the coronial process with the emotional needs and participation of bereaved people, putting them 'at the heart' of inquests. A 2004 Home Office 'position paper' on coronial reforms emphasised 'the need to make the system sensitive to the needs of the bereaved and to provide a high standard of service in what are inevitably difficult circumstances. We will balance the need to put families at the heart of the system with the requirement for the service' (Home Office 2004, para. 23). The foreword to a previous incarnation of the Coroners Bill (2006) further set out that 'Coroners have a vital task, giving certainty and re-assurance to bereaved people' (Department for Constitutional Affairs, 2006), a sentiment echoed in a speech by the first chief coroner, Peter Thornton (2012), where he stated, 'The family has now become, quite rightly, the focus for this public process, to give them answers, where that is possible. They are at the heart of the process.'

Though ill-defined and vague in practice, the discursive framing of the policy of putting bereaved people 'at the heart' of inquests is highly reminiscent of the humanising imperative in two ways. First, the policy explicitly signals the elevated moral status of families by virtue of their relational proximity to the deceased and the disproportionate impact of the death. Similar to the rationale for VPSs in criminal courts, partiality towards the perspectives of the bereaved is hinted at through practices that signal the de facto significance of their particular narratives. A clear example is the emergence of pen portraits as a key device for bereaved families to reclaim the humanity of the deceased, stemming from the report on the injustices experienced by bereaved families following the Hillsborough disaster, where 97 people lost their lives in April 1989 during a crush in a football stadium. The Hillsborough report cited pen portraits or photographs of the deceased as overt learning exemplars for the 'proper participation' of bereaved families, which help 'put the families at the heart of proceedings', describing these mechanisms as 'vital in humanising the inquests' (Jones 2017, 2.96(iv)). Through an emphasis on the particularised lens of the bereaved families, such participatory mechanisms are thought to mitigate the tendencies of inquests to objectify the deceased and, at a symbolic level, do justice to the 'extra-legal life' of the facts around a person's death, where 'the call of justice is loaded with particular histories' (Bray and Martin 2016, p. 122). As one family stated in Jones's Hillsborough report, '[i]nstead of our son being Number 17 we were able to tell the jury about his life. For the first time our son was dealt with as a person rather than just a number' (2017, p. 39). Pen portraits and similar, in other words, not only reflect the prima facie significance of the perspective of bereaved families but reclaim the subjectivity of the deceased to create a more holistic account of their life and death. Indeed, the Chief Coroner in 2021 suggested that pen

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portraits not only 'give dignity to the bereaved' but could also be seen as falling within the remit of the four statutory questions (HHJ Teague, QC 2021).

Second, policy documents imply that sympathy-based virtues of humanity that exhibit appropriate empathic awareness, compassion and sensitivity are critical to the meaningful participation of bereaved families. There is growing recognition of how complexities of trauma, grief and bereavement contextualise what is an essentially bureaucratic legal procedure, with the House of Commons Justice Select Committee reaffirming the central aim of the CJA as 'putting the needs of bereaved people at the heart of the coroner system' as well as the commitment of the government to 'supporting the bereaved and to make sure that inquests are as sympathetic to their needs as they can be' (2021, p. 1). In other jurisdictions, such as the state of Victoria in Australia, reforms have explicitly sought to extend the bureaucratic remit of inquests to encompass 'the human dimension' in coronial work, which has included the implementation of less formal processes and greater sensitivity in communication with bereaved families (Freckelton 2016). Establishing common humanity or solidarity with bereaved families through humanising encounters is all the more significant when the hierarchical, highly formalised rituals within the courtroom setting can themselves exacerbate grief and distress, as reflected in the experiential accounts of bereaved people (Biddle 2003).[28] A family member in one empirical study described the coroner as looking like 'God Almighty sitting up there at a 10 foot long maple bench with a light shining over his head' (ibid. p. 1036). Other bereaved individuals spoke of the profound impact of the 'unsympathetic', 'perfunctory', 'insensitive' manner of coroners, of there being no acknowledgement of loss, and the status of the bereaved as 'witness was clearly placed above their identity as a grieving person in need of support and consideration' (ibid. p. 1038). One family member said, 'The coroner was reading through my statement and I was thinking, "why am I here?" And then when we got to the bit where I found him (her son) I was shaking and crying but he (the coroner) wouldn't stop. No one reassured me' (ibid.). Another described that '[I]t is almost like a conveyor belt, you know, one lot in then that lot out, next one in, that lot out' (ibid.). Like the CoP, virtues of humanity that cultivate solidarity could mitigate the power dynamics, hierarchy and formal ritual of the legal process, commonly perceived as alienating, exclusionary and contrary to the purportedly central role of bereaved families.

While it is another example of the trend towards the humanising imperative towards participation in the courts, the enhanced status of bereaved people in the official policy sits in tension with the formality and procedural constraints of the law itself. On the one hand, partiality emerges as an important normative feature of putting bereaved people 'at the heart' of inquests, where honouring the 'extra-legal life' around a person's life involves doing justice to the bereaved family's relational proximity to the deceased, the particularity of their grief and loss and their understanding of the irreducible subjectivity of the deceased person. Virtues of compassion and empathy are, quite understandably, naturalised as situationally appropriate in interpersonal encounters between the bereaved and coronial legal professionals, given the innately human experience of grief and distress, especially where a loved one suffered an unexpected or traumatic death. On the other hand, reconciling the humanising imperative within the legal boundaries of the inquest remains problematic. The partiality towards bereaved families seems prima facie irreconcilable with procedural justice requirements of fairness and impartiality that are arguably owed to the different narratives and interests of prospective witnesses or interested persons. Even those deeply sympathetic to the purported 'therapeutic' aspirations of inquests express scepticism towards an overly partial orientation, as Freckelton (2016) writes:

[28]While most empirical research into bereaved families' experiences was conducted prior to CJA reforms to place bereaved people 'at the heart', the *Voicing Loss* project's (2021–2024) emerging findings confirm this research following the reforms. See also Jacobson et al. (2024).

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> 'For others affected by coronial investigations, a risk is that the improved sensitisation to the needs and wishes of family members will be perceived as tilting the coronial process in favour of families and without proper acknowledgment that coronial processes and the aftermath of reportable deaths can be adverse in their effects for others as well. [. . .] The issue is how the court can find a compromise between acknowledging that the inquest is about the death of a particular deceased person, who lived a unique and valuable life that perhaps should not have ended as it did, preserving the dignity and objectivity of the process, and avoiding the balance of the inquiry appearing to tip too far in the direction desired by family members who have a particular perspective on how they wish a deceased person to be remembered' (p. 23).

Historically, 'the inquest is not and has never been for the bereaved, but for the crown. As such, traditionally the bereaved have been assigned little, if any, importance and therefore may be easily neglected by an uninformed coroner and the procedures adopted' (Biddle 2003, p. 1043). This may explain the persistent gulf between the humanising orientation of the policy and actual practices on the ground.

Long-standing issues around discretionary interpretations of scope among coroners illustrate these tensions well. The partiality embedded within the humanising imperative implicitly recommends attributing substantive weight to the needs and perspectives of bereaved families, yet their narratives of, and envisaged scope surrounding, the circumstances of death are rarely determinative, with sometimes little or no opportunity to provide their own account of events due to coroners interpreting the remit of the four questions more narrowly than hoped. According to Biddle, '[t]his resulted in resentment at losing control of the story to a strange who had not known the deceased, and anger at the recording of what was considered an incorrect version of events' (ibid. p. 1040). As one bereaved individual stated, '"There was lots of evidence that though I told them was never brought out at the inquest [. . .] they had quite obviously made up their minds and not even bothered to read it and when I gave evidence the coroner just scribbled on his pad and brought in the suicide verdict. As far as I'm concerned the official hearing didn't listen"' (ibid.). The policy thus causes an inevitable mismatch between the ethical obligations to the family and the strictly legal function of inquests, further illustrating an ambiguous sense in which the humanising imperative is seen as simultaneously (and incongruously) constitutive of, as well as compensation for, a formal legal process that may be legitimately interpreted as demanding detachment from particularised human experience.

6. The precarity of the humanising imperative in the law

Human stories of trauma and loss, as well as the disproportionate subjective impact of the legal process, often unite the experiences of different participants in the CoP, criminal proceedings and inquests. In Humean terms, contemporary practices of law suggest contradictory views about the place of humanising virtues within the constraints of the law. Brought to bear on court examples, the humanising imperative for effective participation appears both *constitutive of* and *compensating for* the law, expanding and constraining legal boundaries accordingly. Viewed as constitutive of the law, the realisation of effective participation demands attunement to the broader human context of legal issues and places prima facie ethical weight on certain subjective standpoints. This priority is justified due to the disproportionate emotional and psychological impact of legal proceedings on these parties. The navigation of human emotion and attachments is therefore envisaged to be part and parcel of how professionals discharge their ethical as well as legal obligations. An exemplar of this view would be jurisprudential approaches that conceptualise the law as a therapeutic agent. Therapeutic aspirations to reduce the psychological harm of the law and, indeed, to promote well-being as much as possible are presumed to have *justice*

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correspondence and are constitutive of legitimate legal processes.[29] Judges and practitioners therefore have a professional duty (both legal and ethical) to develop the virtues of the humanising imperative, to communicate that they are 'empathic, accepting, warm, and willing to permit self-expression' in order to realise the therapeutic objectives contained within the law (Winick 2003, p. 1068).

Equally common, however, is a notion of the humanising imperative as compensating for the putatively inhumane experiences, procedures or consequences of the law – particularly those that emanate from its impartial lens. What is notable about the different court examples is the extent to which legal professionals and policy developments explicitly frame the humanising imperative as a way of mitigating the non-ideal reality of the statutory frameworks and court process. As compensation, the humanising imperative carves out an extra-legal domain of virtues, skills and processes that possess ambiguous legal status. While expressive of Humean ethical virtues, humanising efforts may be reduced to tokenistic gestures that could even be deemed *illegitimate* according to the law, where evidential and procedural standards conflict with the partiality that is innate to an empathic stance (Kong et al. 2022b).[30] Even those endorsing an enlarged therapeutic vision of law caution against the dangers of partiality: writing on inquests, for example, Freckelton warns that focus on the priorities and needs of bereaved families 'may redirect the proceedings into a level of emotionality that is not consistent with a dignified, calm or balanced exploration of the factual and policy issues surrounding a death' (Freckelton 2016, p. 27).

In many ways, contemporary uncertainty about the legal function of the humanising imperative tracks the precarious underpinnings of justice in Hume, in terms of its ambiguous orientation and its relationship to our broader ethical commitments. First, as Hume shows, internal to the law are dual (and sometimes conflicting) expectations, where the 'Janus-faced' orientation of justice is both blind and 'keen-sighted' (Baier 2010, p. 117). Justice blindfolded reflects societal expectations that the law treats all with impartiality, through which due consideration is shown to the general community and its need for observable, stable rules. At the same time, justice must be 'keen-sighted', capable of seeing and evaluating particularity – that is, specific relationships between individual persons, through which due consideration is shown to individual persons bound by mutual promises and contracts. An internal dialectic thus characterises the developing conventions of the law, where its normative functioning is designed to be simultaneously responsive to the needs of the general and particular. Second, there is a deeper ambivalence about the grounding of justice in relation to our ethical commitments, particularly the extent to which the 'progress of sentiments' comes to encompass the concerns of justice. At the heart of Humean justice is a conundrum: while our ethical, other-regarding concern emerges naturally through our intrinsic sociability and benevolence, he queries how we come to care about or feel a sense of obligation towards justice and its rules. Why do we come to value justice even if it does not benefit us personally? Some read Hume as suggesting that the 'natural' virtues of humanity come to encompass the 'artificial' virtues of justice: our sentiments come to include a moral disposition or deontological duty to adhere to and approve of considerations of justice such that natural benevolence transcends and expands its innate partiality, enlarging our sympathetic sentiments and motivations to encompass the more common perspective demanded of the law (Cohon 2008; Hanley 2011; Shaver 1992). Others, however, adopt a more extrinsic view of justice, challenging the temptation to 'moralise' legal adherence as an ethical virtue or duty: the generality of justice matters not for its ability to promote human flourishing or welfare, but in its broad utility to society in securing peace, order and stability (Baier 2010; Harris 2010).

We are not seeking to resolve these debates. Rather, the exegetical and theoretical uncertainties in Hume provide insight about the inherent precarity of humanising virtues in the context of the

[29]Pemberton and Reynaers (2011) refer to the *criminal justice correspondence* between therapeutic jurisprudence and criminal justice processes.

[30]*Re AH*.

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normative expectations and conventions of law. From one direction, we can see the potential merit of an account of law that envisages its function as consistent with the moral virtues that foster relational connection, sociability and welfare. One could make a case that this way of framing effective participation is normatively valuable – indeed, when we consider the 'keen-sighted' nature of justice, one could say this includes the ability to 'see', validate and recognise individuals, responding to particularised needs and human contextuality. Calls to make the law more compassionate and empathic rightfully draw attention to the constraints of narrow 'legalistic thinking' and the ways in which character traits and skills beyond legal reasoning and technical brilliance can improve subjective experiences of the law as well as enrich deliberation and decision-making. But this move to a more 'humane' orientation in the law is not without significant tensions, particularly in relation to the impartial and neutral procedures also seen as constitutive of the law. Through a moral sentimentalist lens, partiality remains an intrinsic part of our ethical story – the root of human connection and other-regardingness. Yet its normative creep into the legal domain remains deeply uncertain (Sorial 2021), not least in the substantive developments that seem to indicate a move away from a general humanising imperative to recognise context-specific, human circumstances to the prima facie privileging of certain court users, on the assumption that these individuals have specific experience of vulnerability, loss or victimisation that warrants special attention or measures.[31] Recent approaches to the law have presumed these two orientations are coherent and easily reconcilable (i.e. Gur and Jackson 2021; Meyerson and Mackenzie 2021; Wexler 2000): both Hume and the court exemplars above indicate that this is simply not the case.

7. Conclusion

The normative reshaping of effective participation around the humanising imperative is a significant development: its ambiguous grounding speaks of a dual impulse to blur the normative boundaries between ethics and law on the one hand, and draw a firm line that demarcates the putatively legitimate considerations and motives of justice on the other. Despite increasing normative emphasis in current policy and practice, it nonetheless remains an open question whether framing effective participation through a humanising prism is sustainable and justifiable: should the humanising imperative be a normative framing for the effective participation? How we answer this question raises a deeper second issue: namely, the (il)legitimate function and scope of the law, where, depending on our view, the humanising imperative either endorses or eschews a more expansive vision of law and justice to actively respond to the human complexities of emotion and psychological welfare, and may even sanction the prima facie normative weighting of certain perspectives or experiences over others. These tensions become very real in court settings, where the humanising imperative for effective participation sits uneasily with the impartiality and neutrality embedded within procedural justice commitments, revealing the fundamental precarity of a more humane, ethical orientation in legal practice and the law more generally.

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