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Open Justice and Investigations into Deaths at the Hands of the Police, or in Police or Prison Custody

By

**Sam McIntosh
PhD Candidate**

**CITY UNIVERSITY, LONDON
LAW SCHOOL**

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Publications During Candidature

I have had one peer-reviewed article published in the journal Public Law whilst writing the thesis, and one peer-reviewed article accepted for publication in a forthcoming special issue of the International Journal of Law in Context. The former ('Fulfilling their Purposes: Inquests, Article 2 and Next of Kin' (2012) Public Law 3, 407-415) is a case analysis which looks at the issue of public funding for next-of-kin in Article 2 compliant inquests. The latter ('Taken Lives Matter: Open Justice and Recognition in Inquests into Deaths at the Hands of the State') deals much more with the core issues explored in the thesis and its conclusions.

Abstract

Lord Neuberger describes open justice as a procedural principle requiring that "what goes on in court and what a court decides is open to scrutiny".¹ The prime rationale typically given for this principle is that it is a safety check on the right to a fair trial, and so instrumental to the fulfilment of the justice purposes of criminal and civil justice processes. The thesis argues that such a conception of open justice only applies on a relatively superficial level to inquests into use-of-force deaths at the hands of the state. Rather it is clear that openness in these inquests is intrinsic to the purposes of the inquests themselves, and that this is also true of other types of investigation in these circumstances. The thesis examines the practice of, and rationales behind, opening up deaths at the hands of the police, or in police or prison custody to scrutiny in order to frame a context-specific conception of open justice in the aftermath of such deaths. The focus of the thesis is police and PPO investigations into deaths in prisons, IPCC investigations into deaths involving the police, and inquests and inquiries under the Inquiries Act 2005 (where the latter replace and fulfil the role of an inquest). The thesis introduces recognition theory both as a way of understanding the potential harms that may be associated with a lack of openness regarding deaths in these circumstances, and to provide a normative link between openness and justice in these circumstances—a link that is implicit in the term 'open justice' but rarely explored in these non-retributive, non-compensatory justice processes.

¹ Neuberger, Lord, 'Open Justice Unbound?' (JSB Annual Lecture, London, 16 March 2011) <<http://tinyurl.com/6e7tw5f>> accessed 16 January 2012.

List of Abbreviations

Access to Justice Act 1999	AJA 1999
Association of Chief Police Officers	ACPO
American Convention on Human Rights	ACHR
Attorney General	AG
Coroners (Inquests) Rules 2013	C(I)R 2013
Coroners (Investigations) Regulations 2013	C(I)Regs 2013
Coroners Act 1988	CA 1988
Coroners and Justice Act 2009	CJA 2009
Coroners Rules 1953	CR 1953
Coroners Rules 1984	CR 1984
Coroners Society of England and Wales	CSEW
Crown Prosecution Service	CPS
Death or Serious Injury	DSI
Director of Public Prosecutions	DPP
European Commission on Human Rights	ECmHR
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
Human Rights Act 1998	HRA 1998
Independent Commission for Police Complaints (Northern Ireland)	ICPC
Independent Police Complaints Commission	IPCC
Inquiries Act 2005	IA 2005
Inquiry Rules 2006	IR 2006
Irish Republican Army	IRA
Legal Aid Agency	LAA
Legal Aid, Sentencing and Punishment of Offenders Act 2012	LASPOA 2012
Memorandum of Understanding	MoU
Metropolitan Police Service	MPS
National Offender Management Service	NOMS
Non-Governmental Organisation	NGO
Parliamentary Joint Committee on Human Rights	JCHR

Partiya Karkerên Kurdistanê (Kurdistan Workers' Party)	PKK
Police (Complaints and Misconduct) Regulations 2012	P(CM)R 2012
Police Action Lawyers Group	PALG
Police Reform Act 2002	PRA 2002
Prison and Probation Ombudsman	PPO
Prison Service Instruction	PSI
Prison Service Order	PSO
Public Interest Immunity	PII
Regulation of Investigatory Powers Act 2000	RIPA 2000
Royal Ulster Constabulary	RUC
Secret Intelligence Service	SIS
Senior Investigating Officer	SIO
Special Air Services	SAS
The Security Service	SyS
Truth and Reconciliation Commission	TRC
Ulster Freedom Fighters	UFF

Chapter 1

Introduction

1.1 Background to the study

Whenever the state may bear responsibility for an individual's death, there will be an inquiry. This will ordinarily be by way of an inquest and will be carried out in public, consistent with principles of open justice and public accountability. While there have been advocacy pieces, practitioner guides and court cases which discuss the openness of inquests to the public and the media, the concept of open justice has never been framed in the context of this particular justice system. This constitutes a significant gap in (open) justice theory.

Lord Neuberger describes open justice as “a common law principle that stretches back into common law's earliest period” whose ideal is that “what goes on in court and what the courts decide is open to [public] scrutiny.”¹ It is typically thought of as a procedural principle, its rationales both directly and indirectly instrumental to the ends of justice.² In particular, the prime rationale for open justice is generally considered to be that it is a safety check for the constitutional guarantee of a fair trial.³ Most famously, in *Scott v Scott* Lord Shaw quoted Bentham and Hallam in arguing the importance of the principle and the rationales behind it:

It moves Bentham over and over again. “In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.” “Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”⁴

The principle, then, is subsidiary to the ends of justice, and thus departure from the ideal may be justified “to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.”⁵

¹ Neuberger, Lord, ‘Open Justice Unbound?’ (JSB Annual Lecture, London, 16 March 2011) <<http://tinyurl.com/6e7tw5f>> accessed 16 January 2012.

² *AG v Leveller Magazine Ltd* [1979] AC 440 (HL), 450.

³ *ibid*, 449–550; *Scott v Scott* [1913] AC 417 (HL).

⁴ *Scott (ibid)*, 477.

⁵ *Leveller Magazine* (n 2), 450.

The nexus between open justice and the free speech rationales of participatory democracy and an informed citizenry, have begun to be recognised in the context of our civil and criminal justice systems. Sharon Rodrick points out that:

[... R]ecently, there has been a tendency to regard open justice [...] as a stand-alone exercise of freedom of expression. Treating open justice as an adjunct of free speech has a number of consequences. First, unlike the traditional approach to open justice, it does not demand a link between open justice and the administration of justice.⁶

However, free speech rationales are still described as peripheral concerns, subsidiary to the role of open justice in ensuring a fair trial.⁷

When it comes to investigations into deaths at the hands of the state there has been a greater tendency towards public participation and openness for reasons more explicitly concerned with accountability in terms of *the subject matter* of the investigation rather than its fair and/or proficient conduct.⁸ The role of open justice in securing public accountability for such fatalities has been advanced significantly by both European Court of Human Rights (ECtHR) and domestic jurisprudence addressing Article 2 of the European Convention on Human Rights (ECHR).⁹ Here the development of a procedural obligation under Article 2, for the state to initiate an independent, effective and public investigation into deaths at the hands of the state, has been justified on the basis of a need for public accountability. In *Jordan v UK*, the ECtHR stated that such investigations required “a sufficient element of public scrutiny” in order “to ensure *accountability* in practice as well as in theory.”¹⁰ And in *Amin*, Lord Bingham famously defined the purposes of Article 2-related investigations as including the need: “to ensure so far as possible that the full facts are *brought to light*; that culpable and discreditable conduct *is exposed and brought to*

⁶ Sharon Rodrick, ‘Open Justice, the Media and Avenues of Access to Documents on the Court Record’ (2006) 29 Un SWLJ 90, 94–95.

⁷ Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (OUP 2002) 2; see also the discussion on Binyam Mohamed at 9.3.1 below.

⁸ Although openness as a check on the fairness and proficiency of the investigation obviously remains a feature.

⁹ See ch 2 and 5.1.1 and 5.1.2 below.

¹⁰ (2003) 37 EHRR 2, 109 (*emphasis added*). See 2.8 below.

public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed.”¹¹ These examples help illustrate that open justice has a more significant role to play in such investigations than the traditional characterisation of open justice as a procedural principle concerned with ensuring fairness would admit.

If the rationales behind open justice in investigations into deaths at the hands of the state are distinct from those in our criminal and civil justice systems, it is also likely that the most appropriate procedural manifestation of open justice will also be different to meet these distinct rationales. This thesis explores the extent to which it can be argued that the public’s role in open justice is not just confined to observing, reading or hearing about proceedings, but involves an element of active engagement in processes. This is reflected in the role of juries at inquests.¹² The involvement of the deceased’s next-of-kin in investigations may also be seen as another element of open justice.¹³ While this primarily enables them “to safeguard [their] legitimate interests”,¹⁴ they can also play an important role in representing wider public interests at inquests.¹⁵

There is an open justice literature that defines and delimits the procedural principle of open justice as it applies to criminal and civil justice processes.¹⁶ Academics, practitioners and the courts have defined the principle as it relates to these processes in terms of its origins, contents and rationales.¹⁷ This is not a completely uncontroversial area, but there is broad agreement as to what the principle’s core content and rationales are in the context of these judicial systems.

¹¹ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, 31 (*emphasis added*). See 5.1.2.1 below.

¹² See 5.1.3.2 and 9.2.1.9 below.

¹³ See 5.1.3.2, 5.1.4, 5.1.5 and 9.2.1.9 below.

¹⁴ *Jordan* (n 10), 109.

¹⁵ See 5.1.3.2, 5.1.4, 5.1.5 and 9.2.1.9 below and *R (Main) v Minister for Legal Aid* [2007] EWHC (Admin) 742.

¹⁶ See, for example, Jaconelli (n 7); Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart Publishing 2002); Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2007) 312–352; Geoffrey Robertson and Andrew G.L. Nicol, *Media Law* (4th ed, Sweet & Maxwell 2002) 410–519; H.M. Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 167–382; Garth Nettheim, ‘Open Justice versus Justice’ (1983) 9 Adel L Rev 487; Colleen Davis, ‘The Injustice of Open Justice’ (2001) 8 JCULR 92; JJ Spigelman, *The Principle of Open Justice: A Comparative Perspective* (Lawlink NSW 2005).

¹⁷ For cases on open justice see, for example: *Scott* (n 3); *Leveller Magazine* (n 2); *Re S (FC)* [2004] UKHL 47; *Terry v Persons Unknown* [2010] EWHC 119 (QB); *DL v SL* [2015] EWHC 2621 (Fam).

Openness is plainly important in inquests and other investigatory processes engaged in these circumstances, and there is a literature that discusses this openness to the public and the media.¹⁸ But while there has been some recognition of the distinctive procedural manifestation of open justice in the context of investigations into deaths at the hands of the state,¹⁹ there has been no systematic analysis of the place and characterisation of open justice, nor its normative function. In so far as the *principle* of open justice relates to the transference of information from judicial processes to members of the public, one might presume that it is as relevant to one judicial system as to another. But even if we confine our analysis to judicial processes (i.e. here, the inquest), the relevance, role and content of open justice must depend on the type of justice that these processes are directed at achieving. Normally, when open justice is considered in the context of inquests, there is a failure to contextualise what is effectively a principle whose core content has been critically defined by the very different contexts of criminal and civil justice. Perhaps most significantly, any link between openness and justice—implicit in the term ‘open justice’, and relatively well-explored in the criminal and civil justice contexts—is rarely considered in inquests.

1.2 Aim

The aim of the thesis is to frame a context-specific conception of open justice in the aftermath of deaths at the hands of the police, or in police or prison custody, with a focus on non-retributive and non-compensatory justice related processes.

This conception of open justice will be comprised of four elements. Three of these are derived from the interpretive account of practice in England and Wales in Part 1 of the

¹⁸ See, for example, Greg Martin and Rebecca Scott Bray, ‘Discolouring Democracy? Policing, Sensitive Evidence, and Contentious Deaths in the UK’ (2013) JL Soc 624; Rebecca Scott Bray and Greg Martin, ‘FOI: Closing Down Open Justice in the UK’ (2012) 37 Alt LJ 126; Rebecca Scott Bray, ‘Paradoxical Justice: The Case of Ian Tomlinson’ (2013) 2 JLM 447; and practitioner guides such as Leslie Thomas QC, Adam Shaw, Daniel Machover and Danny Friedman QC, *Inquests: A Practitioner’s Guide* (3rd edn, LAG 2014) especially 279-287; Christopher Dorries, *Coroners’ Courts: A Guide to Law and Practice* (3rd edn, OUP 2014) especially 195-206.

¹⁹ See, for example, Robertson & Nicol (n 16) 492-496; Thomas *et al* (n 18); John Beggs and Hugh Davies, *Police Misconduct, Complaints, and Public Regulation* (OUP 2009) 541-559; Jack Waterford, ‘The Media and Inquests’ in Hugh Selby (ed), *The Inquest Handbook* (Federation Press 1998); Michael Hogan ‘Let Sleeping Watchdogs Lie’ in Michael Hogan, David Bentley Brown and Russell Hogg (eds), *Death in the Hands of the State* (Redfern Legal Centre Publishing 1988) 161.

thesis: the procedural manifestation of openness; the rationales that are given for openness; and a general procedural principle of open justice that can be derived from this practice. The fourth element is a normative account of the link between openness and justice—a link that is implicit in the term ‘open justice’.

It is argued that, rather than open justice being primarily a check on the fairness of processes in these circumstances, it is something akin to a *form of justice*—an end in itself, if not *the* end—to which the processes concerned are geared. Theories of procedural justice, legitimacy and justice as recognition are used to provide a moral basis for the prioritisation of openness in these circumstances. Such a project is important because an understanding of the normative value and purposes of openness will assist in the prioritisation and implementation of appropriate corresponding procedures.

1.3 Scope

1.3.1 The types of death which form the focus of the study

The thesis focuses on investigations into deaths at the hands of the police, or in police or prison custody, in England and Wales.²⁰ These are at times referred to collectively below as “use-of-force deaths at the hands of the state”. Their particular significance was encapsulated by the ECtHR in *Ramsahai v Netherlands*, when it stated “What is at stake here is nothing less than public confidence in the state’s monopoly on the use of force.”²¹ Cases that involve deaths in other circumstances at times form part of the discussion where they set (or may set) precedents, or are otherwise instructive.²² The focus, however, is on instances where a person has died in circumstances in which the state, or state actors, exercised, or were exercising coercive force over the deceased in the policing or criminal justice contexts. This includes deaths in prison resulting from self-inflicted injuries.

The use of force within the criminal justice system is at times unavoidable. Public confidence is often based on a perception that it is governed by an intricate and nuanced

²⁰ A detailed consideration of the Saville Inquiry therefore falls outside of the scope of the thesis.

²¹ *Ramsahai v Netherlands* (2008) 46 EHRR 43, 325.

²² See, for example, *R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479, a healthcare-related case which potentially has implications for public funding of the deceased’s next-of-kin in all Article 2-related inquests (see 2.5 below).

system of laws, rules, procedures and safeguards regarding its exercise. But it is only at the most sanitised and controlled stage of the criminal justice system, the criminal trial, that there is a clear window into the system for the interested public. An investigation into a death occurring within the criminal justice system is a rare opportunity to open up normally unseen processes where the state exercises its monopoly on the coercive use of force over its citizens.

1.3.2 The types of investigation which form the focus of the study

The thesis analyses processes that pursue non-retributive/punitive justice and non-compensatory justice forms. The primary focus is on coroners' inquests, and inquiries under the Inquiries Act 2005 (IA 2005) where these perform a function analogous to coroners' inquests. The secondary focus is Independent Police Complaints Commission (IPCC), Prison and Probation Ombudsman (PPO) and (in the case of deaths in prison custody) police investigations. While IPCC and police investigations are also associated with broader criminal and disciplinary investigative processes, they play crucial roles in identifying lines of inquiry, and collecting evidence in preparation for inquests. A discussion which treats inquests and inquiries in isolation from these preliminary investigations would be incomplete.

1.3.3 Justice theory

Theories of procedural justice, restorative justice, justice as recognition, and transitional justice inform a discussion on the nature and place of open justice in investigations into use-of-force deaths at the hands of the state. However, the critical analysis of these theories are necessarily limited due to issues of length. In particular, the consideration of restorative justice is confined to its invocation in some literature on justice during transitions. A critical analysis based on recognition theory is preferred as means of explaining, amongst other things, many of the benefits often associated with restorative justice approaches.

The discussion of recognition theories is also necessarily limited, and based primarily on Axel Honneth's seminal theory of recognition in *The Struggle for Recognition: the Moral Grammar of Social Conflicts*.²³ Honneth acknowledges that there remains dispute about what the content of a unifying theory of recognition should be.²⁴ But a detailed analysis of the philosophical polemics surrounding recognition as a normative model for social and political theory is not possible in this thesis.²⁵

Similarly, while Chapters 7 and 8 discuss aspects of theories of procedural justice and justice during transitions respectively, it has not been possible to cover all competing theories in these areas. Rather these chapters concentrate on those issues and arguments considered most relevant for an understanding of any link between openness and justice in the circumstances that are the focus of this thesis.

1.4 Methodology

The investigation involves a traditional doctrinal legal analysis of domestic and ECtHR jurisprudence, primary and secondary legislation, guidance, policy documents and literature on the investigatory processes engaged following use-of-force deaths at the hands of the state. The thesis also discusses relevant literature on justice theory and research in the areas of procedural justice, restorative justice, justice as recognition and transitional justice.

Use has been made of data including: consultation submissions and evidence; parliamentary debates; inquest and inquiry transcripts; and interviews (including with families and practitioners) and reports published by the media, the government, organisations such as the IPCC, the PPO and the organisation INQUEST. Research also

²³ Axel Honneth, *The Struggle for Recognition* (MIT Press 1996).

²⁴ Axel Honneth, 'Recognition as Ideology', in Bert van den Brink and D. Owen (Eds) *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory* (CUP 2007) 328.

²⁵ For more on the nature of some of these polemics see, for example, Nancy Fraser, and Axel Honneth *Redistribution Or Recognition? A Political-Philosophical Exchange* (Verso 2003); Jonathan Allen, 'Decency and the Struggle for Recognition' (1998) 24 Soc TP 449; Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (ERIC 1994); Mattias Iser, 'Recognition', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2013) <<http://tinyurl.com/ofrqfye>> accessed 4 October 2013; Nancy Fraser, 'Rethinking Recognition' (2000) New Left Rev 207.

involved attendance during most of the Ian Tomlinson inquest (2011), the Azelle Rodney Inquiry (2012) and the Mark Duggan inquest (2013-14). This helped to achieve a better understanding of how the relevant law, rules and guidance are put into practice, and how things may have changed, when compared to accounts of earlier inquests.

In Chapter 6 there is a discussion of the predictable harms that may arise in the aftermath of deaths at the hands of the state and inadequate institutional responses to those deaths. The thesis could not include an empirical analysis of how individuals from three categories of interested persons (family, community and general public) tend to interpret and relate to state action or inaction in the aftermath of a death at its hands—whether or not such an analysis is even possible and could produce empirically useful material. The description of harms is, therefore, largely intuitive, but has been informed by the candidate’s personal experience of practicing law in this area, and public statements where individuals have given expression to similar senses of injustice to those described, or to a sense of *justice* that has come with reliable official explanations about the circumstances of deaths. As well as the fact that these experiences are highly subjective, their public expression is relatively rare. The examples given in the chapter are, therefore, purely illustrative, and the conclusions drawn from the discussion in this chapter are done so guardedly.

1.5 Chapter outline

Part 1 of the thesis is primarily explicatory and looks at the practice of opening up the circumstances of deaths at the hands of the police, and in police and prison custody, to scrutiny. Critical analysis is limited and mainly left to Part 3. Chapter 2 describes the historical development of the investigative obligation under Article 2 ECHR in ECtHR jurisprudence whilst focusing on the obligation’s open justice requirements. Chapter 3 examines domestic law, jurisprudence, rules and guidance governing police and PPO investigations into deaths in prison, and IPCC investigations into deaths at the hands of the police or otherwise in police custody. Chapter 4 assesses the history of the inquest in England and Wales from its origins in the twelfth century until the late twentieth century. Finally Chapter 5 examines current practice in inquests and inquiries under the IA 2005

into use-of-force deaths at the hands of the state. All four chapters focus on the openness of processes to public participation and scrutiny.

Part 2 begins by taking something akin to a negative morality approach in Chapter 6, by outlining the types of harm that might predictably arise when there are inadequate state responses to use-of-force deaths at the hands of the state. These harms may impact upon one or more of three categories of people: those personally close to the deceased; any community or group that identifies with the deceased; and members of the wider general public. It is argued that these harms are analogous to the types of harm that are often the focus of certain theories of procedural justice and justice as recognition.

Chapter 7 considers aspects of ongoing debates in procedural justice theory concerning the intrinsic justice value of procedures for those engaged in judicial and other decision-making processes. This includes a consideration of the notion of legitimacy. Rawls's account of political legitimacy provides an analogy to illustrate the general normative importance of participatory rights within decision-making and narrative formation processes. It also provides a direct explanation of why open and effective investigations into use-of-force deaths may contribute to the legitimacy of the state's monopoly on the use of force, by making the state accountable for the social and individual exercise of that monopoly. The second part of Chapter 7 introduces recognition theory and outlines its core elements.

In Part 3, Chapter 8 begins the synthesis of the practice described in Part 1 with the theory described in Part 2, by looking at 'transitional justice' and truth commissions. The chapter draws from existing debates in the one area of law where there has been some analysis and discussion of the relative normative value of (non-retributive justice-related) truth discovery and narrative formation processes concerning (amongst other things) deaths at the hands of the state. In particular, discussions about the normative function of truth commissions provides some insight into the potential justice value of truth discovery and narrative formation processes in non-transitional contexts.

Finally, Chapter 9 outlines the elements of a context-specific conception of open justice. It begins by summarising the main aspects of the practice described in Part 1 in terms of

both the form that openness takes in the aftermath of use-of-force deaths at the hands of the state in England and Wales, and the rationales provided for openness. The chapter then discusses the most appropriate form for a general procedural principle of open justice in this context that is consistent with the practice. Finally, the chapter concludes by describing the normative value of openness in these circumstances in relation to the elements of Honneth's theory of recognition. This illustrates the real and important link between openness and justice as recognition in these circumstances.

In addressing the thesis aim described above, and reaching conclusions, Chapter 9 summarises the main points made in Parts 1 and 2 of the thesis. As such, Chapter 10, which concludes the thesis, is relatively brief in order to avoid repetition, and is mainly confined to some tentative suggestions as to the practical implications of the analysis.

PART 1

Practice

Chapter 2

ECtHR Jurisprudence on Article 2's Procedural Obligation

2.1 Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was drafted in the aftermath of the Second World War by the then members of the Council of Europe. It came into force on 3 September 1953. The Convention and six of its 14 Protocols set out basic rights and freedoms that state parties undertake to secure to all persons within their jurisdiction.¹ The UK ratified the Convention on 8 March 1951. Under the UK's dualist approach to international law, the Convention does not have direct application in domestic law. Since 1966, the UK has recognised the right of individuals to petition the ECtHR and until 2001 this was the only way individuals could seek redress for alleged breaches of their Article rights by the state.

In October 2000, the Human Rights Act 1998 (HRA 1998) came into force and made it unlawful for public authorities to act incompatibly with Convention rights, unless prevented from doing otherwise by primary legislation.² Section 6(3) states that public authorities include courts and tribunals. Under the Act individuals can also challenge alleged breaches of Article rights by public authorities in domestic courts.³ All UK courts and tribunals must, so far as possible, read and give effect to all primary and secondary legislation in a way that is compatible with Convention rights,⁴ taking into account ECtHR jurisprudence.⁵ Where this is not possible certain courts may make a Declaration of Incompatibility under s 4.⁶ This does not affect the continued validity of the legislation concerned, but is intended to prompt the legislature to remedy the incompatibility—if necessary with fast-track procedures.⁷

Convention jurisprudence now permeates the current domestic framework of legislation, case-law, rules, regulations, protocols, policy documents and memoranda of

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

² Human Rights Act 1998 (HRA 1998), s 6.

³ *ibid*, s 7.

⁴ *ibid*, s 3.

⁵ *ibid*, s 2(1)(a).

⁶ *ibid*, s 4. For this section 'courts' includes the Supreme Court, the Judicial Committee of the Privy Council, the Court Martial Appeal Court, the High Court, the Court of Appeal and the Court of Protection in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court. (s. 4(5))

⁷ HRA 1998, s 4(6)(a), 10 and sch 2.

understanding etc. that set out essential and best practice for investigations into deaths at the hands of the state in England and Wales. This chapter analyses the ECtHR's development of a procedural obligation under Article 2 for there to be an official and public investigation into deaths at the hands of the state. It is worthwhile considering this obligation separately, before looking at its influence on domestic practice.

It will be seen in Chapter 4 that for centuries domestic law has required that the types of death with which this thesis is concerned are publicly investigated in inquests, and that families of the deceased can participate in them. The origins of this requirement are not rights-based, however, and the rationales that have sustained the requirement have evolved considerably. In contrast, while ECtHR jurisprudence alludes to various purposes behind the procedural obligation that it has developed, *its* obligation is, first and foremost, derived from the requirement under Article 2 to provide practical protection for the substantive right to life. One aim of this thesis is to understand the normative function of openness in the aftermath of a death at the hands of the state, and to understand any connection between openness and justice in inquests and related processes—a connection which is implicit in the term 'open justice'. By looking at the evolution of the Article 2 obligation separately we should get a clearer picture of its discrete character.

Article 2 has been described by the High Court as “the most fundamental of all human rights.”⁸ It requires states to have laws in place which protect everyone's right to life, and prohibits states from deliberately taking anyone's life, except in certain limited circumstances.⁹

This chapter describes the beginnings of the procedural obligation on states to investigate certain deaths, and how ECtHR case-law has refined the principles and minimum requirements which make up the obligation. The focus is on two questions: When is the obligation engaged? And, what are its constituent elements? Particular

⁸ *R v DPP, ex p Manning* [2001] QB 330 (QB) 33.

⁹ Where it is the result of no more force than absolutely necessary in defence from unlawful violence, during a lawful arrest, preventing the escape of someone lawfully detained, or to quell a riot or insurrection (ECHR, art 2).

attention is given to the open justice and participatory aspects of the obligation. The chapter is explicatory; analysis is mostly left to later chapters.

2.2 *McCann v UK* – The beginnings of a procedural obligation under Article 2 ECHR

*McCann v UK*¹⁰ (1995) was brought by the parents of three Provisional IRA members shot dead by members of the Special Air Service (SAS) in Gibraltar in March 1988. The deceased had been under surveillance and were in Gibraltar to carry out a terrorist attack. The soldiers who carried out the shootings stated they believed the deceased intended to detonate a bomb using a remote detonating device and were likely to be armed. In fact, none were armed or carrying detonating devices when killed. A bomb was later found in a car hired by one of the deceased. The inquest jury returned a “lawful killing” verdict by a nine – two majority.¹¹ The parents of the deceased complained that the killings violated Article 2, and that the investigation and inquest into the shootings were defective.

On whether there had been a breach of Article 2’s substantive negative obligation, the Court ruled that it must examine “all the surrounding circumstances including such matters as the planning and control of the actions under examination.”¹² As Ní Aoláin points out, this “widened the mantle of state protection, preventing the moment of death alone becoming defining of liability.”¹³ This had important implications for the procedural obligation the Court also developed.

On the substantive obligation, the Court accepted the soldiers’ assertions, but nevertheless held that there had been a breach of Article 2 because state actors missed opportunities to arrest the suspects prior to lethal force being “rendered inevitable”.¹⁴

The Court then developed the procedural obligation that is the focus of this chapter. It held:

¹⁰ (1996) 21 EHRR 97.

¹¹ *ibid*, 121.

¹² *ibid*, 150.

¹³ Fionnuala Ní Aoláin, ‘The Evolving Jurisprudence of the European Convention Concerning the Right to Life’ (2001) 19 NQHR 21, 29.

¹⁴ *McCann* (n 10) 201.

[... A] general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State.¹⁵

The Court concluded that there had been no breach of this requirement.¹⁶ It pointed out that a public inquest had taken place, lasting 19 days and involving 79 witnesses with a "detailed review of the events" surrounding the killings, and that lawyers for the families of the deceased had had the opportunity to cross-examine witnesses and make submissions.¹⁷

The Court was reluctant to specify what form an investigation should take, but noted that the inquest had been held in public, provided a degree of participation for the families, and took in the wider circumstances of the killings.¹⁸ In subsequent ECtHR case-law, all three of these characteristics developed into explicit minimum requirements.

It is important to point out that the European Commission on Human Rights (ECmHR), had similarly indicated the need for a procedural obligation to investigate use-of-force deaths at the hands of the state in its Report on *McCann*. The Commission held that the purpose of such an obligation was to ensure that "the circumstances of a deprivation of a life by agents of the state may receive public and independent scrutiny."¹⁹ It gave two rationales behind this need: first, the need to have "regard to [...] the necessity of ensuring the effective protection of the rights guaranteed under the Convention", and, in particular, that "everyone's right to life [...] be "protected by the law"";²⁰ and second, that it was "essential both for the relatives and for public confidence in the administration of justice

¹⁵ *ibid*, 161.

¹⁶ *ibid*, 163.

¹⁷ *ibid*, 162–164.

¹⁸ *ibid*, 162.

¹⁹ *McCann v UK* App no 18984/91 (Commission Report, 1994) 193.

²⁰ *Ibid*.

and in the state's adherence to the principle of the rule of law that a killing by the state is subject to some form of open and objective oversight."²¹ As seen above, the Court only adopted the first of these rationales, sharpening it with reference to Article 1, and the Commission's second rationale is notable in its absence from the Court's reasoning.

This was the first case in which the procedural obligation had been read into Article 2. The Court must have been aware that it would be accused of judicial activism by creating a procedural obligation which had no textual basis in Article 2. By adopting only the former rationale, and sharpening it with reference to Article 1, the Court makes a strong argument that a natural reading of the two Articles *must* imply some independent and effective investigation into killings by state actors. How can a state give effective protection to the substantive right without investigating alleged breaches?

It is argued in later chapters that public confidence in the administration of justice and the state's adherence to the rule of law are obviously important, and can be threatened where use-of-force deaths occur at the hands of state actors. There is an argument that such confidence is necessary for effectively protecting the substantive requirements of the right to life, although it is a relatively nuanced one—particularly if used as a basis for a relatively onerous positive obligation. It is understandable then, that the Court preferred to limit its reasoning for the obligation to what falls within the spirit of a plain reading of Articles 1 and 2—even if there are other, equally good reasons (including those associated with democratic accountability) for states publicly investigating certain deaths. As the investigative obligation has become more established, the rationale of accountability being intrinsically valuable has also entered the Court's reasoning in judgments on Article 2.

2.3 *Kaya v Turkey* – The need for independence and public scrutiny

The next significant case was *Kaya v Turkey* in 1998.²² Here, the applicant alleged that members of the Turkish security forces had unlawfully killed his brother. The deceased

²¹ *ibid*, 192.

²² (1999) 28 EHRR 1.

had been apprehended by Turkish forces, and it was alleged that when he attempted to flee, he was shot by the security forces who planted a gun next to his body.

The Court reiterated the investigative requirement established in *McCann*; that there be an “effective official investigation” into deaths at the hands of the state.²³ It added that this required “some form of *independent* and *public* scrutiny capable of leading to a determination on whether the force used was or was not justified in a particular set of circumstances”²⁴—thus confirming the requirements of independence and openness alluded to in *McCann*. According to the Court, the procedural obligation “secures the accountability of agents of the state for their use of lethal force.”²⁵ This could be interpreted as a rationale that is important in its own right, or something instrumental to securing for everyone the substantive right to life.

Kaya blurred the line between the procedural obligation under Article 2 and the right to an effective remedy under Article 13, only distinguishing between them by saying that Article 13’s requirements were “broader”.²⁶ According to the Court, Article 13:

[...] entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure.²⁷

It is unclear exactly how this requirement is broader than *McCann*’s procedural requirement. The difference for the Court at the time may have been that Article 13 required an investigation to be capable of leading to the identification and punishment of those responsible for a death. If this was the case, it was a distinction that did not last.²⁸

²³ *ibid*, 86.

²⁴ *ibid*, 87 and 91 (emphasis added).

²⁵ *ibid*, 87.

²⁶ *ibid*, 107. The reasoning in *Kaya*, stemmed from the Article 3-related cases of *Aksoy v Turkey* [1996] ECHR 68; *Aydin v Turkey* [1997] ECHR 75.

²⁷ *ibid*.

²⁸ The Court concluded in *Kaya* that there had been a breach of Article 2’s procedural obligation and that there has been a denial of an effective remedy under Article 13; *ibid* 108.

Yasa v Turkey ((1999) 28 EHRR 408) referred to the two obligations without distinguishing between them (74). *Assenov v Bulgaria* ((1999) 28 EHRR 652) referred to the need for an investigation to be capable of leading to the identification and punishment of wrongdoers under Article 2 (102).

2.4 *Ergi v Turkey* – The burden to initiate an investigation falls on the state

Ergi v Turkey (1998) concerned the death of a two-year-old girl during a security operation by Turkish forces in South-East Turkey.²⁹ The deceased's brother alleged that state forces opened fire on the deceased's village with an indiscriminate bombardment of houses, killing his sister. The Turkish government claimed that the operation was directed at members of the PKK, and that a PKK bullet had killed the deceased.

As in *Kaya*, the Court found that it was unable to determine whether the victim had been killed unlawfully by state actors.³⁰ But it rejected the Turkish government's argument that the investigative obligation should only arise where it was beyond reasonable doubt that state officials caused a death.³¹ The Court also held that it was irrelevant whether or not the family of the deceased had lodged a formal complaint with authorities. Instead, "the mere knowledge of the killing on the part of the authorities gave rise *ipso facto*" to the procedural obligation.³² Therefore, along with the now explicit requirements for effectiveness, openness to the public, and independence, states had to undertake investigations on their own initiative.

2.5 *Powell v UK* and *Tarariyeva v Russia* – Article 2 and failures on the part of healthcare workers

The early ECtHR case-law quickly established that the procedural obligation under Article 2 required independent, public, and effective investigations into violent deaths involving state actors, and these had to be initiated by the state, involve the family of the deceased and be capable of leading to the identification of persons responsible.

Most early cases focused on the effectiveness of investigations. It was noted that in *McCann* the Court was impressed by what it saw as the inquest's thoroughness.³³ In

²⁹ (2001) 32 EHRR 18.

³⁰ *ibid*, 78.

³¹ *ibid*, 82.

³² *ibid*, 82.

³³ *McCann* (n 10) 162.

contrast, the Court found a breach of Article 2's investigative obligation in *Kaya* because of the lack of a thorough investigation by the public prosecutor. The Court criticised several elements of the investigation, including the fact that the prosecutor: appeared to assume that the deceased was a terrorist who died in a clash with security forces;³⁴ did not scrutinise the soldiers' accounts or take statements from those present;³⁵ made "no attempts [...] to confirm whether there were spent cartridges over the area consistent with an intense gun battle";³⁶ did not test the deceased for gunpowder residue, or dust the weapon he was alleged to have used for fingerprints;³⁷ and relied on a deeply flawed autopsy report that did not even indicate how many bullets had struck the deceased.³⁸ In *Ergi*, the Court was likewise critical of the public prosecutor's investigation: he had relied almost entirely on an incident report prepared by a gendarme commander who was not present during the alleged clash between the security forces and the PKK.³⁹

The subject matter of *Powell v UK* does not strictly fall within the scope of this study, but it may have an effect on prison-related deaths in light of the later case of *Tarariyeva v Russia*.⁴⁰ *Powell* was a decision on admissibility. It concerned the death of a 10-year-old boy from Addison's disease. The applicants alleged that their son would not have died had it not been for the negligence of healthcare staff, and that hospital records had been falsified in order to cover-up staff failures.

The Court began by stating that Article 2 requires states not only to refrain from unlawfully taking lives, but also to take appropriate steps to protect life.⁴¹ As such, acts or omissions by healthcare authorities may, in certain circumstances, engage a state's responsibility under Article 2. However:

[...W]here a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the

³⁴ *Kaya* (n 22) 89.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*, 86–92.

³⁹ *Ergi* (n 29) 131. No statements were taken from the victim's family, other villagers or any of the military personnel present (83).

⁴⁰ (*Admissibility*) (2000) 30 EHRR CD362; [2006] ECHR 4353/03.

⁴¹ *ibid.*, 12.

lives of patients, [the Court] cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life.⁴²

Thus individual negligence by healthcare staff resulting in death does not alone constitute a breach of the obligation to protect life under Article 2.

The Court then considered whether a death in these circumstances triggered the investigative obligation under Article 2. It “attached particular weight” to the procedural obligation, which was not confined to cases involving the use of force by the state,⁴³ and held that the obligation could arise in cases involving healthcare workers. However, the Court left room for confusion:

The Court considers that the procedural obligation as described cannot be confined to circumstances in which an individual has lost his life as a result of an act of violence. In its opinion, and with reference to the facts of the instant case, the obligation at issue extends to the need for an effective independent system for establishing the cause of death of an individual under the care and responsibility of health professionals and any liability on the part of the latter.⁴⁴

The problem here is that the Court refers to both “the procedural obligation as described” (i.e. that which involves an effective, public investigation initiated by the state), and what has been interpreted as a different procedural requirement for “an effective independent system for establishing the cause of death of an individual”. Reading this paragraph in isolation, it is easy to dismiss these as simply different words to describe the same thing. However, this interpretation is problematic in light of subsequent comments by the Court that do not correspond to what have elsewhere been accepted as the full investigative obligation’s minimum requirements. In particular, the Court noted that the applicants had abandoned an appeal against a Medical Services Committee investigation,

⁴² *ibid*, 12.

⁴³ *ibid*, 13.

⁴⁴ *ibid*.

the implication being that *the applicants* bore responsibility for ensuring there was an effective investigation. This was compounded by the Court's observation that by settling their civil claim, the family "had closed another and crucially important avenue for shedding light on the extent of the doctor's responsibility for their son's death."⁴⁵ This was ultimately behind the Court's decision that the case was inadmissible because the applicants were no longer "victims" under Article 34.⁴⁶

Subsequent ECtHR case-law seems to confirm that there is a hierarchy of investigative obligations under Article 2 in healthcare-related cases.⁴⁷ This approach was also endorsed domestically in *Goodson v HM Coroner for Bedfordshire and Luton*, *Moss v HM Coroner for the North and South Districts of Durham and Darlington*, and *Humberstone*.⁴⁸ However, other case-law (albeit case-law that does not refer to *Powell*) has at least held that the *full* procedural obligation under Article 2 cannot be bypassed through payment of compensation.⁴⁹

That *Powell* may have concerning implications for prison deaths appears more likely following the 2006 judgment in *Tarariyeva v Russia*.⁵⁰ Here, the deceased was a prisoner who died because of poor medical treatment whilst in custody in both civilian and prison health institutions.⁵¹ His mother alleged breaches of Articles 2 and 13 for failing to carry out a comprehensive or adequate investigation; that her civil action attached to the criminal proceedings had been refused; and that she had no prospects of obtaining redress in bringing separate civil proceedings.⁵² These matters were considered exclusively under Article 2 by the Court. Under the heading "Adequacy of the investigation", it opened its discussion, saying:

⁴⁵ *ibid*, 13–14.

⁴⁶ See also *Calvelli and Ciglio v Italy* [2002] ECHR 51–55.

⁴⁷ *ibid*.

⁴⁸ [2004] EWHC 2931 (Admin); [2008] EWHC 2940 (Admin); *Humberstone* (ch 1, n 22).

⁴⁹ See the discussion of *Kelly* below (2.8.3). However, Happold and Chevalier-Watts argue that *Akman v Turkey* (App. No. 37453/97, 26 June 2001) indicates the Court may still turn a blind eye to the procedural obligation where compensation for a death has been paid (Matthew Happold, 'Letting States Get Away with Murder' (2001) 151 NLJ 1323; Juliet Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21 EJIL 701, 718).

⁵⁰ *Tarariyeva* (n 40).

⁵¹ In the civilian hospital he was handcuffed to the hospital bed.

⁵² *Tarariyeva* (n 40) 72.

The Court also has to examine whether the respondent Government discharged their obligation under Article 2 to put at the applicant's disposal *an effective judicial system*, enabling liability for the loss of life to be established and any appropriate redress to be obtained.⁵³

While the Court referred to *Keenan v UK*,⁵⁴ and the fact that it was “incumbent on the State to account for any injuries suffered in custody”, it made no reference to the full investigative obligation under Article 2 to initiate an independent, effective and public investigation into deaths in custody.⁵⁵ Instead it dealt with the matter under a duty to provide an “effective judicial system”.⁵⁶ The Court complained that there were delays in the criminal investigation, that it was not comprehensive, and that the applicant's right to participate was not secured.⁵⁷ The rest of the discussion centred on the collapse of the trial against one doctor, the failure to bring to trial cases against other staff,⁵⁸ and the applicant's inability to bring civil proceedings. In its conclusion, the Court used another form of wording for a procedural obligation under Article 2:

In these circumstances, the Court finds that there has been a violation of Article 2 of the Convention on account of the Russian authorities' failure to discharge their positive obligation *to determine, in an adequate and comprehensive manner, the cause of death* of Mr Tarariyeva and bring those responsible to account. The Court considers that no separate examination of the same issue from the standpoint of Article 13 of the Convention is necessary.⁵⁹

Much of the Court's analysis of the facts would have been equally germane to both a full investigative obligation—as expressed in *McCann et al*—or a more limited obligation as described in *Powell*. However, it failed to consider the need for the investigation to be public, or the need for any investigation to have been initiated by, and pursued by, the state.

⁵³ *ibid*, 90 (emphasis added).

⁵⁴ (2001) 33 EHRR 38. See below at 2.7.

⁵⁵ *Tarariyeva* (n 40) 74.

⁵⁶ *ibid*, 75.

⁵⁷ *ibid*, 91–93.

⁵⁸ “[D]espite the medical experts' unanimous finding that there had been a causal link between their failings and Mr Tarariyeva's death” (*ibid*, 95).

⁵⁹ *ibid*, 103 (emphasis added).

It is difficult to gauge the significance of *Tarariyeva*. The Court found in favour of the applicants so overwhelmingly that the minimum requirements of the obligation, including that it be public, were never really tested. But the implication is that there is a lesser obligation in some healthcare-related cases (as *Powell* and some subsequent cases indicate⁶⁰) even where the death occurs in custody.

The issue could arguably be dealt with more cleanly if, where appropriate, the full investigative obligation is addressed by the Court under Article 2, and any lesser investigative obligation in basic negligence cases, under Article 13—especially as the issue of an “effective judicial system” is invariably connected by the Court to questions concerning the availability of potential criminal or civil remedies. At the moment, the danger is that one obligation can be lost behind the other, and this is what appears to have happened in *Tarariyeva*. The Court made no mention of the importance of investigations into prison deaths being *public*: an obligation that can often only be guaranteed if the duty to initiate (and sustain) an investigation is borne by the state. If pure healthcare-related cases do not engage the full investigative obligation when only individual negligence is alleged, that must be accepted. But this case involved a death in custody, where the deceased was being confined involuntarily, and was subject to the coercive use of force (including allegedly having his medication taken away from him by the prison, being handcuffed to the bed in the civilian hospital’s resuscitation unit, and being transferred back to the prison despite being “unfit for transportation”).⁶¹

2.6 *Salman v Turkey* – The burden on the state to explain deaths in custody

Salman v Turkey involved a death in police custody.⁶² The case is significant because it imported into such cases an important development in Article 3-related cases: where someone has been injured in custody, the onus falls on the state to explain the injuries:⁶³

⁶⁰ *Vo v France* (2005) 40 EHRR 12, 89; *Calvelli* (n 46) 51–55.

⁶¹ *Tarariyeva* (n 40) 44.

⁶² (2002) 34 EHRR 17.

⁶³ See *Tomasi v France* (1993) 15 EHRR 1; *Selmouni v France* (2009) 29 EHRR 403.

[...] Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for treatment of an individual in custody is particularly stringent where that individual dies.

[...] Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.⁶⁴

The implication, therefore, is that failure to investigate and provide a plausible explanation for a death in custody may not only breach Article 2's procedural obligation, but may lead the Court to conclude by default that there has also been a breach of the substantive negative obligation.

2.7 *Keenan v UK* – Responsibility for self-inflicted deaths in prison

Keenan v UK (2001) concerned an alleged breach of Article 2 in circumstances which correspond to an unfortunate number of deaths in custody.⁶⁵ The applicant's mentally ill son, Mark Kennan, took his own life in HM Prison Exeter. He was serving a 28-day punishment which had been added to his sentence for assaulting two prison wardens. Mark's mother alleged breaches of Articles 2, 3 and 13 by the state for failing to protect her son's right to life and subjecting him to cruel and inhuman and/or degrading punishment before his death.

Powell indicated that it cannot be taken for granted that just because a death occurs in a state institution, or that state actors contributed to a death, the full investigative obligation under Article 2 will be engaged. The Court first has to be satisfied that a death is *prima*

⁶⁴ *Salman* (n 62) 99–100.

⁶⁵ *Keenan* (n 54).

facie of a type capable of engaging the substantive obligation under Article 2. *Keenan* answered this question in relation to self-inflicted deaths in custody.⁶⁶

The Court began by reiterating the duty upon states to take appropriate steps to safeguard the lives of those within its jurisdiction. This, it said, includes a duty to have in place a criminal justice system to deter offences against the person,⁶⁷ and extends, in appropriate circumstances, “to a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”⁶⁸ This extended duty arises where authorities know, or ought to know, of a real and immediate risk to the life of an identified individual.⁶⁹ They must then take reasonable steps to avoid the risk to the individual’s life.⁷⁰ The question for the Court was whether this duty arose “where the risk to a person derives from self-harm.”⁷¹

In *Osman v UK*, the Court indicated a relatively high threshold for when a state may be responsible for a death at the hands of a non-state actor.⁷² However, in *Keenan* the Court noted that prisoners were in a particularly vulnerable position and therefore authorities had a general duty to protect them from harm⁷³ and account for injuries which occurred in prison.⁷⁴ The duty to protect had to be balanced against potentially competing rights—e.g. Articles 5 (Liberty and Security of Person) and 8 (Private and Family Life). However, the Court stated that “[t]here are general measures and precautions which will be available to diminish the opportunities of self-harm, without infringing personal autonomy, [...w]hether any more stringent measures are necessary [...] and whether it is reasonable to apply them will depend on the circumstances of the case.”⁷⁵

⁶⁶ *ibid*. The Court makes no mention of the procedural obligation under Article 2 in *Keenan*—although it does mention an investigative obligation under Article 13.

⁶⁷ *Keenan* (n 54) 88; *See also Osman v UK* (2000) 29 EHRR 245.

⁶⁸ *Keenan* (n 54) 88.

⁶⁹ *ibid*, 89.

⁷⁰ *ibid*; *See also Osman* (n 67) 116.

⁷¹ *Keenan* (n 54).

⁷² *Osman* (n 67).

⁷³ *See Salman* (n 62) 99; and *Keenan* (n 54) 90.

⁷⁴ *Keenan* (n 54) 90.

⁷⁵ *ibid*, 91.

Mark Keenan was acknowledged by all concerned to be mentally ill. While the immediacy of the risk he presented to himself varied, the Court was satisfied that the prison authorities knew that he posed a risk to his own life.⁷⁶ The test was whether the authorities had done all that was reasonably expected of them, “having regard to the nature of the risk posed.”⁷⁷ The Court found that they had.

2.8 *Jordan et al v UK* – The essential elements of the procedural obligation are confirmed

Jordan v UK,⁷⁸ *Kelly v UK*,⁷⁹ *McKerr v UK*⁸⁰ and *Shanaghan v UK*⁸¹ involved deaths connected to ‘The Troubles’ in Northern Ireland and were dealt with by the Court simultaneously.

2.8.1 The facts in brief

2.8.1.1 Jordan v UK

The applicant’s 22-year-old son was shot three times in the back by a Royal Ulster Constabulary (RUC) officer on 25 November 1992. The circumstances of the shooting were disputed, but an official statement by the RUC, acknowledged that:

[...] an RUC unit had pursued a car on the Falls Road and brought it to a halt. On stopping the car, the officers had fired several shots at the driver, fatally wounding him a short distance from where his car had been abandoned. No guns, ammunition, explosives, masks or gloves had been found in the car and the driver, Pearse Jordan, had been unarmed.⁸²

On 29 November 1993, the coroner was informed that the Director of Public Prosecutions (DPP) had decided not to prosecute anyone for the death. No reasons were

⁷⁶ *ibid*, 94–95.

⁷⁷ *ibid*, 96.

⁷⁸ *Jordan* (ch 1, n 10) (n 10).

⁷⁹ [2001] Inquest LR 125.

⁸⁰ (2002) 34 EHRR 20.

⁸¹ [2001] Inquest LR 149.

⁸² *Jordan* (ch 1, n 10) 13.

given. This decision was reviewed and upheld by the DPP shortly after the inquest began, again with no reasons given. Before the inquest, the Secretary of State for Defence issued two Public Interest Immunity (PII) certificates which “identified information whose disclosure at the inquest he believed would be contrary to the public interest on grounds of national security”.⁸³ He also applied for the identify of certain military witnesses not to be made public at the inquest. The family brought judicial review proceedings against the coroner, primarily in order to challenge the non-disclosure of witness statements. Delays and litigation about the conduct of the inquest meant that when the case came before the ECtHR, the inquest was still on-going. Civil proceedings were also still pending when the ECtHR gave judgment in 2001.

2.8.1.2 Kelly v UK

In *Kelly*, 24 soldiers and three RUC officers ambushed a Provisional IRA attack on an RUC station. During a fire-fight, eight IRA members and a passing civilian were killed—all by bullets fired by the security forces. Relatives of the deceased alleged *inter alia* that the deceased were killed by the use of excessive force and the security operation was not conducted in compliance with Article 2’s substantive negative obligation. They also alleged a breach of the obligation to carry out an effective investigation into the deaths due to the scope of the inquest being too limited, a lack of legal aid for relatives, a lack of advanced disclosure of witness statements, the extensive use of PII certificates, and the inability of the coroner to compel police officers to attend the inquest.

2.8.1.3 McKerr v UK

On 11 November 1982, Gervaise McKerr and two passengers were shot and killed whilst driving a car in East Lurgan. None were armed. At least 109 rounds were fired into the car by RUC officers. Three officers were initially prosecuted for their involvement. At the close of the prosecution’s case, Gibson LJ ruled that there was no case to answer, and all three were acquitted.

⁸³ *ibid*, 31 and 33.

A combined inquiry was set up into the *McKerr* killings and three other killings and a serious injury of unarmed individuals by the RUC in Armagh. The course of the so-called Stalker/Sampson Inquiry was controversial. The original inquiry leader, Assistant Chief Constable John Stalker (Greater Manchester Police), was suspended before its conclusion, apparently shortly after writing to the RUC's Chief Constable stating that evidence suggested RUC officers had been involved in unlawful killings.⁸⁴ The inquiry's final report was completed by Sir Colin Sampson of West Yorkshire Police and submitted to the DPP, who concluded that it "would not be proper to institute any criminal proceedings" on the basis of the inquiry and its report.⁸⁵

An inquest into the deaths was also opened, but the coroner's requests for documents collected as part of the Stalker/Sampson inquiry were refused, and 11 years after the deaths the coroner concluded that the aims of the inquest were "no longer achievable".⁸⁶

2.8.1.4 *Shanaghan v UK*

In *Shanaghan*, the applicant was the mother of the deceased, Patrick Shanaghan, a member of Sinn Féin. He had been arrested on suspicion of being an IRA member and involved in terrorism, but was never charged. In April 1989, the RUC informed him that security force materials, including personal information, had accidentally fallen out of an army vehicle and may have fallen into the hands of loyalist terrorists. In August 1991, he was shot and killed by a masked gunman. The Ulster Freedom Fighters (UFF) claimed responsibility for the murder. Patrick's mother alleged collusion between the RUC and/or other members of the security forces and the UFF.

⁸⁴ John Stalker, *Stalker* (Harrap 1988) 91-92, 78-111.

⁸⁵ *McKerr* (n 80) 29-31. Eight officers were subject to disciplinary proceedings and received "admonitions and advice as to their future conduct." (*McKerr* (n 80) 30).

⁸⁶ *ibid*, 61.

2.8.2 The law

In all four cases the applicants alleged *inter alia* breaches of both the substantive negative obligation under Article 2, and the procedural obligation to conduct an effective investigation into the deaths. They also alleged breaches of Article 13.

As in *Salman*, the Court began by stressing the importance of Article 2, stating that the right to life “...ranks as one of the most fundamental provisions in the Convention [which together with Article 3] enshrines one of the basic values of the democratic societies making up the Council of Europe.”⁸⁷ It repeated the principle that, together, Articles 1 and 2 require states to conduct an official investigation where an individual has been killed in circumstances involving the use of force by the state. It underlined that investigations must consider, not just the individual actions of state actors, but also the surrounding circumstances.⁸⁸ According to the Court the ultimate purpose of such investigations was “to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state actors or bodies to ensure their accountability for deaths occurring under their responsibility.”⁸⁹ While the Court reiterated that the form of an investigation will vary in different circumstances,⁹⁰ it set out the minimum requirements.⁹¹

The first of these is the state’s duty to initiate an investigation once a matter has come to its attention.⁹² The Court held that the state “cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures”.⁹³ This goes further than *Ergi* by emphasising that, not only is there no burden on the applicant to lodge a complaint, but she is also not responsible for driving the investigation forward. This contradicts a possible interpretation of *Powell*—at least as far as the “full” investigative obligation is concerned—that an applicant’s failure to

⁸⁷ *Jordan* (ch 1, n 10) 102.

⁸⁸ *ibid.*

⁸⁹ *ibid.*, 105.

⁹⁰ In particular the form of the investigation will depend on the circumstances of the death, the domestic legal framework and the practical realities of investigative work. See Alistair Mowbray, ‘Duties of Investigation under the European Convention on Human Rights’ (2002) 51 ICLQ 437, 438; *See also Velikova v Bulgaria* [2000] ECHR 198.

⁹¹ It set this out in a summary of the law repeated in each judgment: *Jordan* (ch 1, n 10) 102–109; *Kelly* (n 79) 91–98; *McKerr* (n 80) 108–115; *Shanaghan* (n 81) 85–92.

⁹² *Jordan* (ch 1, n 10) 105.

⁹³ *ibid.*

appeal the conclusions of an inadequate investigation absolves the state of responsibility for ensuring an investigation is, in the end, effective.⁹⁴

The Court then turned to the need for independence, holding that “the persons responsible for and carrying out the investigation [must be] independent from those implicated in events”.⁹⁵ This entailed “not only a lack of hierarchical or institutional connection but also a practical independence.”⁹⁶

Regarding an investigation’s effectiveness, the Court held that it should be “capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances, and to the identification and punishment of those responsible.”⁹⁷ This was an obligation of means and not result.⁹⁸ The court listed a number of technical requirements which should ordinarily be fulfilled:

The authorities must have taken the reasonable steps [...] to secure the evidence concerning the incident, including [...] eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.⁹⁹

The next requirement was for “promptness and reasonable expedition”.¹⁰⁰ The Court pointed out that “a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”¹⁰¹

⁹⁴ See above at 2.5.

⁹⁵ *Jordan* (ch 1, n 10) 106.

⁹⁶ *ibid.*

⁹⁷ *ibid.*, 107.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*, 108.

¹⁰¹ *ibid.*

Finally, the Court referred to the need for openness and, in particular, for the deceased's family to be involved in the investigation:

There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.¹⁰²

2.8.3 Application to the cases

In all four cases, the Court did not consider it appropriate to try to determine whether there had been a breach of the substantive negative obligation under Article 2.¹⁰³ It anyway held that those applicants who had not pursued civil actions domestically would not have standing before the ECtHR in terms of the alleged breaches of Article 2's *substantive* obligation, because they had not exhausted domestic remedies.¹⁰⁴ In *Kelly*, the wife of the passer-by killed had accepted a settlement in her civil claim and so was also no longer considered a victim in respect of the alleged breach of that obligation.¹⁰⁵

However, *contra* the decision in *Powell*, the Court held that all applicants had standing regarding their complaints that the state had failed to fulfil the investigative obligation. The Court categorically rejected the link between potential civil proceedings and the investigative obligation under Article 2, pointing out that "the obligations of the state under Art.2 cannot be satisfied merely by awarding damages."¹⁰⁶ In particular, civil proceedings involve "a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator." They can not, therefore, "be taken into account in the assessment of the state's compliance with its procedural obligations under Article 2."¹⁰⁷

¹⁰² *ibid*, 109.

¹⁰³ *Kelly* (n 79) 101-103; *Jordan* (ch 1, n 10) 111; *McKerr* (n 80) 117-118; *Shanaghan* (n 81) 95-96

¹⁰⁴ *Kelly* (n 79) 108-10.

¹⁰⁵ *ibid*, 106-7.

¹⁰⁶ *Jordan* (ch 1, n 10) 115.

¹⁰⁷ *ibid*, 114; *McKerr* (n 80) 156; *Kelly* (n 79) 135; *Shanaghan* (n 81) 121.

2.8.3.1 The police investigations – Effectiveness

In *Jordan* and *Kelly*, the Court found no evidence to suggest significant shortcomings in the original police investigations.¹⁰⁸ In *Shanaghan*, the Court was concerned that it was “not apparent to what extent, if any, the initial police investigation included possible collusion by the security forces in the targeting of Patrick Shanaghan by a loyalist paramilitary group.”¹⁰⁹ In *McKerr*, the Court was troubled by the fact that some officers under investigation had, at the behest of a senior officer, concealed information from the investigating officers, and this raised “legitimate doubts as to the overall integrity of the investigative process.”¹¹⁰

2.8.3.2 The police investigations – Openness and independence

In terms of the openness of the *police* investigations to public scrutiny, the Court made the same point in each case, stating:

The Court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim’s relatives may be provided for in other stages of the available procedures.¹¹¹

However, the Court was concerned about the lack of *independence* of all the police investigations. In *Jordan* and *McKerr*, despite the RUC investigations being “supervised” by the Independent Commission for Police Complaints (ICPC – “an independent monitoring body”), the Court found that there was “a hierarchical link between the officers in the investigation and the officers subject to investigation, both of whom were under the responsibility of the RUC Chief Constable.”¹¹² In *Shanaghan*, the ICPC played a lesser role than in *McKerr* and *Jordan* and the Court held there were insufficient safeguards given the

¹⁰⁸ *Jordan* (ch 1, n 10) 118–119; *Kelly* (n 79) 113.

¹⁰⁹ *ibid*, 103.

¹¹⁰ *McKerr* (n 80) 127.

¹¹¹ *Jordan* (ch 1, n 10); *Kelly* (n 79) 115; *McKerr* (n 80) 129; *Shanaghan* (n 81) 105.

¹¹² *Jordan* (ch 1, n 10) 120; *McKerr* (n 80) 121.

connection between the investigating officers and those who could fall under investigation.¹¹³ In *Kelly*, those investigated were soldiers rather than RUC police officers. Nevertheless, the Court pointed out that “[w]hile the investigating [RUC] officers did not appear to be connected structurally or factually with the soldiers under investigation, the operation at Loughgall was nonetheless conducted jointly with local police officers, some of whom were injured, and with the co-operation and knowledge of the RUC in that area.”¹¹⁴ Again, the Court found that the involvement of the ICPC was insufficient to ensure the requisite independence.

2.8.3.3 The role of the Director of Public Prosecutions

The Court did not doubt the DPP’s independence. Nevertheless, in all but one of the cases (*McKerr*, where three of the officers were prosecuted) the Court criticised the fact that reasons were not given for decisions not to prosecute: “[w]here no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence.”¹¹⁵ It also argued that this “denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.”¹¹⁶ The Court found that the circumstances of many of the deaths made the lack of reasons all the more concerning.¹¹⁷

2.8.3.4 McKerr and The Stalker/Sampson Inquiry

As seen above, the UK government set up an inquiry to look into the alleged cover-up of misconduct by police and the security services and an alleged policy of ‘shoot to kill’ by the British Army and the RUC. Despite some concerns about the RUC Chief Constable’s role in the Stalker/Sampson Inquiry, the Court held it was sufficiently independent.¹¹⁸ However, the Court found that there were unnecessary and unacceptable delays in its conduct. It also

¹¹³ *Shanaghan* (n 81) 104.

¹¹⁴ *Kelly* (n 79) 114.

¹¹⁵ *Jordan* (ch 1, n 10) 123; *McKerr* (n 80); *Kelly* (n 79) 117; *Shanaghan* (n 81) 107.

¹¹⁶ *Jordan* (ch 1, n 10) 123.

¹¹⁷ *Kelly* (n 79) 118; But see also *Jordan* (ch 1, n 10) 124; *Shanaghan* (n 81) 108.

¹¹⁸ *McKerr* (n 80) 140.

took issue with the fact that the inquiry's findings were not published. The resultant lack of transparency "added to rather than dispelled the concerns that existed".¹¹⁹

2.8.3.5 The inquests – Effectiveness

In *Jordan*, *Kelly* and *Shanaghan*, the Court began by discussing inquest procedure in positive terms, pointing out that they had "strong safeguards as to the lawfulness and propriety of the proceedings"¹²⁰, and noting its earlier approval of the *McCann* inquest.¹²¹ However, it felt that there were several differences between the inquest in *McCann* and those in the cases before it. Inquests in Northern Ireland follow different procedures to those in England and Wales. Most notably, r 9(2) of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 provided that a person suspected of causing a death could not be compelled to give evidence. This detracted "from the inquest's capacity to establish the facts immediately relevant to the death, [and] in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Art.2."¹²²

The Court also pointed out that in England, Wales and Gibraltar, juries could reach verdicts including "unlawful killing". Juries in Northern Ireland were confined to stating the identity of the deceased and the date, place and cause of death.¹²³ Where there was an "unlawful killing" verdict in England and Wales, the DPP was required to "reconsider any decision not to prosecute and give reasons which are amenable to challenge in the courts."¹²⁴ No such obligation existed in Northern Ireland. The Court conceded that this did not necessarily mean that the scope of inquests would be too narrow for Article 2's purposes.¹²⁵ In particular, it did not prevent the inquest in *McCann* from examining "those aspects of the planning and conduct of the operation relevant to the killing of the three IRA suspects."¹²⁶ In *Kelly*, the Court felt that the inquest's inability to address issues relating to

¹¹⁹ *ibid*, 141. The Court also criticised the lack of reasons given for not prosecuting anyone as a result of the inquiry.

¹²⁰ *Jordan* (ch 1, n 10) 125; *Kelly* (n 79) 119; *Shanaghan* (n 81) 109.

¹²¹ *Jordan* (ch 1, n 10) 125.

¹²² *Jordan* (ch 1, n 10).

¹²³ *ibid*, 129.

¹²⁴ *ibid*.

¹²⁵ *ibid*, 128.

¹²⁶ *ibid*.

the planning, control and execution of the operation, resulted less from formal restrictions to the inquest's scope, and more from non-attendance of the soldiers concerned.¹²⁷ And in *Jordan*, it felt that the inquest was able to "play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Art.2."¹²⁸ It had similar concerns in *McKerr*, but additionally, while noting that a "detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary", here there were legitimate concerns that required public investigation.¹²⁹ PII meant that the inquest had been prevented from doing this.¹³⁰ Finally, in *Shanaghan*, the Court criticised the inquest's failure to address alleged collusion between security personnel and paramilitaries. The result was that "[s]erious and legitimate concerns of the family and the public were therefore not addressed by the inquest proceedings."¹³¹

2.8.3.6 The inquests – The public nature of proceedings and access for next-of-kin

The Court did not dispute the general public nature of the inquest proceedings. Many applicants complained that they were prejudiced by a lack of public funding for legal representation, but while the Court sympathised with this, it noted that the applicants had, nevertheless, been represented by lawyers throughout.¹³²

In all cases, the inquests' inability to access certain documents formed an important part of the Court's judgments. It distinguished the inquests in the cases before it from that in *McCann*,¹³³ while additionally noting that, since *McCann*, the Court had increasingly emphasised the importance of involving the next-of-kin in investigations and giving them access to information.¹³⁴ It was particularly concerned that the applicants were generally not provided with advanced disclosure. This put them at a considerable disadvantage

¹²⁷ *Kelly* (n 79) 122.

¹²⁸ *Jordan* (ch 1, n 10) 130.

¹²⁹ *McKerr* (n 80) 143.

¹³⁰ On PII in inquests, see 5.1.6 and 9.2.1.6 below and in civil proceedings see 9.3.1

¹³¹ *Shanaghan* (n 81) 111.

¹³² *Jordan* (ch 1, n 10) 132; *McKerr* (n 80) 146; *Kelly* (n 79) 126; *Shanaghan* (n 81) 115.

¹³³ *Jordan* (ch 1, n 10) 133.

¹³⁴ *ibid.*

compared to other interested persons, and affected their ability to prepare lines of questioning. The Court commended the change in policy following the Stephen Lawrence inquiry and the MacPherson Report. This had recommended families receive witness statements at least 28 days before an inquest. The Court held that this was “a positive contribution to the openness and fairness of the inquest procedures.”¹³⁵ Prior to this, however, the Court was “not persuaded that the applicants’ interests as next-of-kin were fairly or adequately protected”.¹³⁶

In terms of the use of PII certificates, in *Jordan* and *Kelly*, the Court found that (as in *McCann*) PII had not in itself significantly hampered the effectiveness of the inquests.¹³⁷ However, it ruled the same could not be said of *McKerr*: where non-disclosure of the Stalker/Sampson Report, and associated documents, meant that the inquest was “unable to fulfil any useful function.”¹³⁸

2.8.3.7 The inquests – Delay

Finally, the Court considered the lengthy delays in the inquests and, in the case of *McKerr*, the inquiry. While it acknowledged that the applicants themselves had sought adjournments, and that this had contributed to delays, the court found that ultimately, responsibility rested with the state.¹³⁹ The Court held this was incompatible with the state’s obligation to ensure investigations were carried out promptly.¹⁴⁰

2.9 *Edwards v UK*¹⁴¹ – Openness and the public interest in cases

Christopher Edwards was beaten to death by his cell-mate in HM Prison Chelmsford in 2002. Christopher was a 30-year-old with mild mental health problems being held on remand for a breach of the peace.¹⁴² His attacker, Richard Linford, was a paranoid

¹³⁵ *ibid*, 134.

¹³⁶ *ibid*.

¹³⁷ *In Kelly*, no PII certificates had been issued (*Kelly* (n 79) 129).

¹³⁸ *McKerr* (n 80) 151.

¹³⁹ *Jordan* (ch 1, n 10) 138.

¹⁴⁰ *ibid*, 136–140; *Kelly* (n 79) 134.

¹⁴¹ (2002) 35 EHRR 19.

¹⁴² ‘Jail Death Inquiry Criticises Prison Service’ *BBC* (16 June 1998)

schizophrenic with a long history of violence who was acutely mentally ill.¹⁴³ There was no public examination of the circumstances of the death during the criminal trial because Linford pleaded guilty to manslaughter. There was also no inquest. An inquiry was set up to examine the circumstances surrounding the death. This was held in private, although its report was made public.¹⁴⁴

The ECtHR concluded that there had been a breach of the substantive obligation under Article 2 as the relevant authorities failed to pass information about Richard Linford to the prison, and the prison's inadequate screening process led to Christopher and Richard being placed together.¹⁴⁵

Regarding the investigative obligation, the Court provided guidance on the requirement of openness. It found that the inquiry into Christopher Edwards' death was generally rigorous and thorough, involving many witnesses and a detailed review of how the two men were treated by the relevant agencies.¹⁴⁶ But the Court criticised the inability of the inquiry to compel witnesses to give evidence, and noted that this had detracted from its effectiveness.¹⁴⁷ But most of all, the Court was highly critical of the lack of public scrutiny of the inquiry.

The Court acknowledged that public scrutiny of the investigation *or the results* may satisfy the requirements of Article 2. But in this case it held:

[W]here the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore responsibility to safeguard his welfare, the Court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible."¹⁴⁸

<<http://tinyurl.com/j8r4ehs>> accessed 19 November 2014.

¹⁴³ *Edwards* (n 141) 19–21.

¹⁴⁴ *ibid*, 31.

¹⁴⁵ *ibid*, 64.

¹⁴⁶ *ibid*, 76.

¹⁴⁷ *ibid*, 79.

¹⁴⁸ *ibid*, 83.

The UK government had given no reason why the inquiry was private, and the Court noted that considerations of medical privacy had not prevented the publication of either party's medical histories.¹⁴⁹ The Court also noted that the applicants were unable to attend the inquiry other than to give evidence, and had had no opportunity to question witnesses.¹⁵⁰ The Court held that "given their close and personal concern with the subject matter of the Inquiry, the Court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests."¹⁵¹

2.10 *Nachova v Bulgaria* – The test for whether force is lawful

In *Nachova v Bulgaria* (2004) the Court found breaches of all of the constitutive obligations under Article 2.¹⁵² The case concerned the killing of two 21-year-old Bulgarian nationals of Roma origin. Both men were conscripts in a division of the army dealing with civilian projects, but they absconded and hid in a village. When police caught up with them they tried to escape and the police shot and killed them. Relying on Articles 2, 13 and 14, the applicants argued that: domestic law permitting lethal force when not absolutely necessary was deficient; prejudice and hostility towards Roma people had played a role in the shootings; and no meaningful investigation had taken place.

The Court held that "the circumstances in which deprivation of life may be justified must [...] be strictly construed" and, in particular "any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-
paras (a) to (c) [of Article 2].¹⁵³ It concluded that:

[The] respondent State is responsible for deprivation of life in violation of Art. 2 of the Convention, as firearms were used to arrest persons who were suspected of non-violent offences, were not armed and did not pose any threat to the arresting officers or others. The violation of Art.2 is further aggravated by the fact that excessive fire-power was used. The respondent State is also

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*, 84.

¹⁵¹ *ibid.*

¹⁵² (2004) 39 EHRR 37.

¹⁵³ *ibid.*, 92–93.

responsible for the failure to plan and control the operation for the arrest of Mr Angelov and Mr Petkov in a manner compatible with Art.2 of the Convention.¹⁵⁴

Regarding the effectiveness of the investigation the Court held that “with respect to the right to life, the authorities’ duty to secure its effective protection will not be discharged unless the investigation in cases of death implicating agents of the State applies standards comparable to those required by Art.2 of the Convention.”¹⁵⁵ The domestic authorities had not charged the officers concerned because they deemed that the force used complied with the relevant domestic regulations. The Court stated that this finding was, in itself, questionable. However, even if this was accepted, the investigation “did not apply a standard comparable to the “no more than absolutely necessary” standard required by Art.2(2).”¹⁵⁶ The Court also doubted “the objectivity and impartiality of the investigators and prosecutors involved”¹⁵⁷ and found that the investigation and its conclusions were “characterised by serious unexplained omissions and inconsistencies.”¹⁵⁸ Finally, the Court found a breach of the positive obligation to protect life by law because “the “absolutely necessary” standard [...] was not applied.”¹⁵⁹

2.11 *Oneryildiz v Turkey* – Some clarity on Article 13 and an “effective judicial system”

The circumstances behind the deaths in *Oneryildiz v Turkey* fall outside the scope of this study, but the Court provided a useful explanation of the link between Article 2’s procedural obligation and Article 13. It also threw some light on the relationship between the duty to set up an “effective judicial system” and the obligation to initiate an independent, effective and public investigation into a death.

The applicant was a relative of 8 of 39 people who died when an explosion on a refuse tip caused a landslide in a slum quarter of Istanbul. The Court explained the various

¹⁵⁴ *ibid*, 115.

¹⁵⁵ *ibid*, 121.

¹⁵⁶ *ibid*, 128.

¹⁵⁷ *ibid*, 139.

¹⁵⁸ *ibid*, 140.

¹⁵⁹ *ibid*, 143.

positive obligations under Article 2 in a circular way. First, states have a primary duty to create a legislative and administrative framework designed to provide an effective deterrence against risks or threats to the right to life.¹⁶⁰ Secondly, states must ensure an adequate *response* to deaths—judicial or otherwise—so that the former legislative and administrative framework is properly implemented and breaches of the right to life are punished.¹⁶¹ The obligation to institute an effective investigation with certain minimum requirements is an essential part of the obligation to maintain an “effective judicial system”. The ability of a judicial system to effectively engage with a potential breach of Article 2, inevitably depends on such an investigation. Criminal proceedings will only be effective if they are preceded by an effective criminal investigation, and because “the true circumstances of [a] death are, or may be, largely confined within the knowledge of state officials or authorities”, families are also unlikely to appreciate the potential, or otherwise, for civil proceedings in the absence of an effective public investigation.¹⁶²

The Court noted that previous case-law on Articles 2 and 13 largely concerned use-of-force deaths involving Turkish security forces in the 1990s. These were characterised by the lack of an effective investigation capable of leading to the identification and punishment of those responsible. This in turn led to the lack of an effective remedy for the applicants as they were denied the possibility of establishing liability for the incidents and seeking appropriate relief.¹⁶³

When considering a potential breach of Article 13, therefore, the Court must consider “the impact which the state’s failure to comply with its procedural obligation under Article 2 had on the deceased’s family’s access to other available and effective remedies for establishing liability on the part of state officials or bodies for acts of omissions entailing the breach of rights under Article 2 and, as appropriate, obtaining compensation.”¹⁶⁴ The ECtHR’s task therefore often consisted of determining “whether the applicant’s exercise of

¹⁶⁰ [2004] ECHR 657, 89.

¹⁶¹ *ibid*, 91.

¹⁶² *ibid*, 93.

¹⁶³ *ibid*, 149.

¹⁶⁴ *ibid*, 148.

an effective remedy was frustrated on account of the manner in which the authorities discharged their procedural obligation under Article 2.”¹⁶⁵

2.12 *Ramsahai v Netherlands* – There can be a breach of Article 2 even where a killing is lawful

In *Ramsahai* (2007) the Court found a breach of Article 2’s positive investigative obligation despite finding that there had been no breach of the substantive negative obligation.¹⁶⁶ In previous cases, the Court had only found breaches of the procedural obligation where it had also found a breach of the substantive obligation or found itself unable to make a determination one way or the other. The decision was controversial.¹⁶⁷

The applicants were the grandparents and father of 18-year-old Moravia Ramsahai, who was shot and killed by police officers after stealing a motor scooter at gunpoint. In its judgment, the Court made an observation that goes to the heart of one of the main concerns addressed in Parts 2 and 3 of the thesis: “[w]hat is at stake here is nothing less than public confidence in the state’s monopoly on the use of force.”¹⁶⁸ The importance of the stakes at play means that:

[...] the obligation to carry out a prompt and effective investigation when individuals have been killed as a result of the use of force, and to bring, or enable, such proceedings as may be appropriate to the case, is not dependent on whether the said use of force itself is ultimately found to constitute a violation of art 2 of the Convention.¹⁶⁹

Despite relying on the conclusions of the investigation (that the shooting of Moravia had been lawful), the Court found that it was impaired both technically and because the officers conducting it belonged to the same force as those involved in the shooting.¹⁷⁰ The Court criticised failures to test the two officers for gunshot residue, examine their weapons

¹⁶⁵ *ibid*, 149.

¹⁶⁶ *Ramsahai* (ch 1, n 21).

¹⁶⁷ See the separate Judgments 2 and 3 *ibid*.

¹⁶⁸ *ibid*, 325.

¹⁶⁹ *ibid*, 322.

¹⁷⁰ *ibid*, 342–346.

and ammunition, stage a reconstruction, or record the trauma caused to the deceased's body.¹⁷¹ It also took issue with the fact that the two officers were not kept separate following the incident and were not questioned until nearly three days after the shooting. While there was no evidence to suggest collusion, the court found that this was "a significant shortcoming."¹⁷²

Following the investigation, the public prosecutor concluded that officers had acted in self-defence and would not be prosecuted. The applicants applied to challenge this decision in Amsterdam's Court of Appeal, and for it to hear the challenge in public. The Court declined to hear the application in public but allowed the applicants' lawyer to make written submissions to the judge on the alleged inconsistencies in the original investigation. The complaint was eventually dismissed.

The ECtHR held that the applicants had sufficient access to participate in the proceedings challenging the decision not to prosecute. It emphasised that Article 2 does not require investigating authorities "to satisfy every request for a particular investigative measure made by a relative in the course of the investigation."¹⁷³ It also held that "Article 2 does not [...] require all proceedings following an inquiry into a violent death to be public"¹⁷⁴ and, "the degree of public scrutiny required may well vary from case to case."¹⁷⁵ In this case, the applicants had access to the investigation file, participated in the Court of Appeal's hearing, and were provided with a reasoned decision. The applicants were able to make the decision public themselves, and generally "publicity was [...] sufficient to obviate the danger of any improper cover-up by the Netherlands authorities."¹⁷⁶

¹⁷¹ *ibid*, 329.

¹⁷² *ibid*, 330.

¹⁷³ *ibid*, 348.

¹⁷⁴ *ibid*, 353.

¹⁷⁵ *ibid*.

¹⁷⁶ *ibid*, 354.

2.13 *Al-Skeini v UK* – The procedural obligation where investigators are hindered by circumstance

Al-Skeini v UK, concerned alleged breaches of the substantive and procedural obligations regarding the killing of 6 individuals in separate instances in 2003, by, or allegedly by, British soldiers in Iraq.¹⁷⁷ The main issue before the Court—the Convention’s territorial application—falls outside the scope of this thesis, but, the judgment also considered the degree to which the Court will take into account difficult security situations when assessing whether an investigations is Article 2 compliant.

The Court was careful to acknowledge the endemic nature of crime and violence in Iraq at the time, and that the coalition forces were targeted in over a thousand violent attacks in 13 months.¹⁷⁸ Nevertheless, it held:

the Court’s approach must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.¹⁷⁹

The Court pointed out that the conflicts and difficult security conditions characterising previous cases concerning Turkey and Chechnya did not absolve those states of the investigative obligation.¹⁸⁰ In five of the six cases, the Court held that the UK had breached its procedural obligations.¹⁸¹ While acknowledging that there may exist “concrete constraints [which] may compel the use of less effective measures of investigation or may cause an investigation to be delayed”,¹⁸² the Court held that “*all reasonable steps* must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.”¹⁸³ This meant applying Article 2 “realistically, to take account

¹⁷⁷ [2011] ECHR 1093.

¹⁷⁸ *ibid*, 161.

¹⁷⁹ *ibid*, 162.

¹⁸⁰ *Isayeva v Russia* (2005) 41 EHRR 38; *Akhmadova v Russia* ECtHR [2008] ECHR 896; *Goncharuk v Russia* (2010) 50 EHRR 24.

¹⁸¹ *Al-Skeini* (n 177) 176. In the sixth case, a public inquiry was nearing its completion and the applicant was held to no longer be a victim.

¹⁸² *ibid*, 164.

¹⁸³ *ibid*, (*emphasis added*).

of the specific problems faced by investigators.”¹⁸⁴ The Court stressed that it had taken as its starting point “the practical problems caused to the investigatory authorities by the fact that the UK was an occupying power in a foreign and hostile region in the aftermath of invasion and war.”¹⁸⁵ It noted the shortage of pathologists, the scope for linguistic and cultural misunderstandings between the occupiers and the local population, and the inherent danger that existed in Iraq at the time. However, the Court held that in the five cases “all reasonable steps” had not been taken for an effective investigation.

2.14 Conclusions

The ECtHR’s development of Article 2’s procedural obligation to initiate an independent, effective and public investigation into a death, has not always been a smooth or unambiguous process. The Court only gradually set certain fixed minimum requirements as each case raised its own particular issues concerning the circumstances of the death, or the particular alleged short-comings of an investigation.

In summary, the obligation requires:

1. an official investigation.¹⁸⁶
2. that must be initiated by the State.¹⁸⁷
3. that must be carried out promptly and with reasonable expedition.¹⁸⁸
4. that must be effective: i.e. in cases involving the use-of-force “capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible.”¹⁸⁹

This is an obligation of means and not result.¹⁹⁰

¹⁸⁴ *ibid*, 168.

¹⁸⁵ *ibid*.

¹⁸⁶ *McCann* (n 10).

¹⁸⁷ *Ergi* (n 29).

¹⁸⁸ *Jordan* (ch 1, n 10) 108.

¹⁸⁹ *ibid*, 107.

¹⁹⁰ *ibid*.

5. that the persons responsible for and carrying out the investigation be “independent from those implicated in events.”¹⁹¹ This entails “not only a lack of hierarchical or institutional connection but also a practical independence.”¹⁹²
6. that there must be “a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.”¹⁹³
7. that the victim’s next-of-kin “must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”¹⁹⁴

Chapters 3 and 4 suggest that the impact of the procedural obligation on death investigations in England and Wales has been considerable. Perhaps the biggest has been in terms of the scope of investigations. The procedural obligation also had both personal and significant political ramifications in the context of the Troubles in Northern Ireland. Bell and Keenan, for example, argue that:

This story [of the procedural obligation under Article 2] is integral not just to future state accountability, but to communal attempts to move to a shared understanding of the conflict that could enable the peace process to move forward.¹⁹⁵

But as well as high profile cases such as *Jordan*, cases such as *Keenan* have provided families with a crucial weapon for ensuring that deaths in prison, self-inflicted or otherwise, are investigated seriously, and not simply dismissed as lost causes.

It is important to be cautious about the rationales given for the procedural obligation under Article 2. It is not really a single obligation at all, but contains overlapping duties with overlapping rationales. The duty to open up the circumstances of a death to public scrutiny is clearly an end in itself. But it also serves the purpose of leading to potential criminal and/or civil liability. Therefore, when the ECtHR underlines the importance of

¹⁹¹ *ibid*, 106.

¹⁹² *ibid*.

¹⁹³ *ibid*, 110.

¹⁹⁴ *ibid*.

¹⁹⁵ Christine Bell and Johanna Keenan, ‘Lost on the Way Home: The Right to Life in Northern Ireland’ (2005) 32 *JL Soc* 68, 71–72.

opening up the circumstances of deaths to scrutiny, and the need for accountability for deaths, it is difficult to judge the relative intrinsic importance the Court attributes to accountability through an effective and public truth discovery process, versus the importance of wrongdoers being held to account through criminal or civil remedies.

The ECtHR has given various overlapping rationales behind the procedural obligation. It was observed that in *McCann*, the Commission and the Court differed slightly in the purposes they attributed to it, with the Court preferring to present the obligation as simply a practical necessity given that Article 2 has to be read with Article 1.¹⁹⁶ While the Court repeats this primary rationale in subsequent cases, it also variously describes the obligation's purposes as being: to "secure[] the accountability of agents of the state for their use of lethal force";¹⁹⁷ "to allay rumours and suspicions of how a death came about";¹⁹⁸ "to secure the effective implementation of the domestic laws which protect the right to life";¹⁹⁹ and "in those cases involving state actors or bodies to ensure their accountability for deaths occurring under their responsibility."²⁰⁰ In *Jordan*, the Court also underlined that it is vital that accountability be secured "in practice as well as in theory."²⁰¹

The Court's approach and reasoning is (at least in theory) restricted by what is necessary to fulfil the explicit requirements of Articles 1 and 2. Chevalier-Watts argues that "the duty to carry out an effective investigation is only an implied provision, and is not an unambiguous requirement [...]."²⁰² This likely contributes to the fact that the Court has generally highlighted a rationale that is tied to a reading of Article 2 in the light of Article 1, i.e. a need to effectively secure for individuals the substantive right to life.²⁰³ But the need to allay (unfounded) rumours or suspicion, referred to in *Jordan*, and the Court's concern for public confidence in the state's monopoly of the use of force in *Ramsahai*, suggests that the Court also shares the concerns expressed by the Commission in *McCann*.²⁰⁴ This is

¹⁹⁶ *McCann* (n 10) 161, 192-193.

¹⁹⁷ *Kaya* (n 22) 87. This links to the purposes of an investigation, set out by Bingham in *Amin*.

¹⁹⁸ *Jordan* (ch 1, n 10) 128.

¹⁹⁹ *ibid*, 105.

²⁰⁰ *ibid*.

²⁰¹ *ibid*, 109.

²⁰² Chevalier-Watts (n 49) 705.

²⁰³ See 2.2 above.

²⁰⁴ See above at 2.2 and *McCann* (n 10).

consistent with the Court's emphasis on investigations being public and involving the deceased's family. There is a valid argument that the instrumental effectiveness of investigations—as a means for helping to ensure that the right to life is protected in practice—is aided by investigations being open and involving the family of the deceased. But it is hard to believe that this is the only motivating factor behind these requirements. Rather, it seems reasonable to assume—if only on the basis of the judgment in *Ramsahai*—that these requirements are also motivated by the intrinsic value of democratic accountability, and the intrinsic justice in recognising the special interest of the family of the deceased in an investigation. Ferguson argues:

The burden of the ECtHR decisions can, however, be reduced to one broad issue. The object of an investigation, if it is to be effective and adequate, is to allay the general public (and the family's) fears and suspicions over deaths at the hands of the state by a public canvassing of the circumstances of the death which is capable of leading to a determination of whether the force used was justified and, if it was not, to the identification and punishment of those responsible. This object is therefore the vindication of the rule of law, which the ECtHR has consistently stated lies at the heart of the Convention. It is [...] for the state, as it were, to "come clean" and account for the deaths.²⁰⁵

There remain several ambiguities regarding the procedural obligation: not least the future course of case-law on deaths in prison involving healthcare issues.²⁰⁶ The extent of the requirement for openness and the involvement of the next-of-kin also remains uncertain. On the one hand, the requirement for openness has been expressed with regard to the investigation *or* its results. But in *Edwards* it was noted that the publication of the conclusions of an inquiry held in private, will sometimes be insufficient. There has also been movement regarding the requirement to involve the next-of-kin in an investigation on account of the Court's characterisation of the Convention as a living instrument.²⁰⁷ Finally, there is uncertainty concerning the extent to which the state can withhold evidence from an investigation because it claims it is sensitive. Indeed, there is little clear guidance on the

²⁰⁵ P Ferguson, 'The Right to Life: Some Procedural Requirements' (2001) 151 NLJ 808, 809.

²⁰⁶ See above at 2.5.

²⁰⁷ *Jordan* (ch 1, n 10) 133.

priority to be given to openness when it comes up against such conflicting interests. Given the Court has aligned the investigative obligation to a need for public accountability, there is arguably scope for it to give more active scrutiny to the government's use of PII certificates.²⁰⁸

Chevalier-Watts suggests that the lack of clearer guidance in these areas may be a result of various factors:

First, the duty to carry out an effective investigation is only an implied provision, and is not an unambiguous requirement of the Convention; therefore, it may be subject to a wider margin of appreciation than that which would be awarded to states in areas of common ground between the High Contracting Parties. Secondly, the concept of an effective investigation is a novel one, as *McCann* was the first case to set out such a requirement; therefore, to expect dramatic or draconian measures would be unrealistic. Thirdly, the Court must have a mind to respect the rights and obligations of a member state, in this case its obligation to maintain law and order, and protect its public servants. To maintain a flexible and pragmatic approach is more likely to achieve an effective balance of the differing interests [...].²⁰⁹

It may also be that further particularising the obligation's minimum requirements is impractical due to the considerable differences in the investigative mechanisms used by different states.

²⁰⁸ See *ibid*, 105–128; *Kaya* (n 22) 87; *Ramsahai* (ch 1, n 21) 321 and 325.

²⁰⁹ Chevalier-Watts (n 49) 705.

Chapter 3

Preliminary Investigations

3.1 Introduction

Domestically, there is more to investigations into deaths at the hands of the police, or in police or prison custody, than just the inquest or inquiry. Lines of investigation first need to be pursued and evidence collected. Those investigatory processes that precede inquests or inquiries are referred to here as ‘preliminary investigations’. There may be several such investigations, by different investigating bodies. Each body will differ in terms of its investigatory powers and its primary focus. However, there will always be some overlap and a need for some interaction, coordination and cooperation.

The following briefly describes the main types of preliminary investigations into deaths in prisons, and at the hands of the police or in police custody, and the nature and declared role of openness within such investigations. As well as their openness to the family of the deceased and the public, it is important to look at the degree to which these bodies exchange information and evidence with each other. The police, for example, may not generally disclose witness statements to families or the public, but they do share them with the coroner and the PPO, who, in turn, are more proactive in sharing information with families and the public.

3.2 Deaths in prison

After a death in prison, there will be a police investigation, a PPO investigation, and a Clinical Review by the prison’s primary healthcare provider.¹ The prison may also carry out its own investigation.²

3.2.1 Police investigations into prison deaths

Deaths in prison are initially investigated by the police. The Association of Chief Police Officers (ACPO), the Prison Service, the Immigration and National Directorate, the Youth

¹ This will usually be coordinated by the PPO.

² Usually limited to ensuring there are no immediate ongoing risks to other prisoners and staff. See HM Prison Service, ‘PSO 1300: Investigations’ (19 June 2003, updated 25 July 2005); and National Offender Management Service (NOMS), Ministry of Justice, ‘PSI 64/2011: Management of Prisoners at Risk of Harm to Self, to Others, and from Others’ (2011) (PSI 64/2011 Safer Custody).

Justice Board, and the Crown Prosecution Service (CPS) are all parties to the 2012 *ACPO Protocol for Police Investigations into Prison, Probation and Immigration Related Deaths* (ACPO Protocol).³ This immediately refers to human rights considerations to be noted by the police when investigating deaths in prison—whether in relation to the rights of the deceased, any suspects, members of the deceased’s family, prison staff or members of the public.⁴ It lists for special consideration Articles 2, 3, 6 and 8 ECHR,⁵ but refers to the need to pay particular attention to the state’s investigatory obligation under Article 2.⁶

Deaths in prison are initially treated as potential homicides.⁷ The Protocol observes that “even deaths due to ‘natural causes’ may warrant substantial investigation beyond just the clinical treatment given”.⁸ It states that “[i]ssues can arise about the quality of care received by the deceased, whether there has been compliance with standard procedures or the suitability of those procedures, and investigations may even reveal the sophisticated staging of a crime scene.”⁹ It stresses that:

[...] persons in custody are in a vulnerable position and *there is a particular obligation on public authorities to account for the treatment of an individual in custody, where that individual dies*. It is a matter not only of concern to the deceased person’s family *but also the wider community*.¹⁰

This echoes the ECtHR’s sentiment in *Salman* and the requirement that states “provide a satisfactory and convincing explanation” for deaths in custody.¹¹ It also acknowledges that deaths in a prison can be of concern to members of the public beyond the family of the deceased.

³ Jon Stoddart ‘Prison, Probation & Immigration related Deaths in Custody – A Protocol for Police Investigations’ (ACPO 2012) (ACPO Protocol). ACPO originally refused access to this document as it was classified ‘Restricted’. This was in part successfully challenged by the candidate through an appeal to ACPO’s Freedom of Information Central Response Unit. Annex B remains withheld under s 31 FOI 2000, as it addresses “police forensic methods and capabilities”, the “publication of which may be prejudicial to law enforcement”. The title of the Annex suggests it adds nothing to the subject of this Section.

⁴ *ibid*, 1.3.

⁵ *ibid*.

⁶ *ibid*, 5.4.

⁷ *ibid*, 2.4.

⁸ *ibid*, 2.7.

⁹ *ibid*.

¹⁰ *ibid* (emphasis added).

¹¹ *Salman* (ch 2, n 62).

The police investigation has primacy over other investigations unless and until either the Senior Investigating Officer (SIO) decides a full criminal investigation is not required, or the CPS decides no criminal charges will be brought.¹² This ensures that the criminal justice process is not prejudiced. Nevertheless, the Protocol acknowledges the importance of PPO investigations in fulfilling the state's duties under Article 2, and notes that ultimately it is for the PPO to decide if its investigation should exceptionally take place in parallel with the police investigation.¹³ The 2009 Memorandum of Understanding (MoU) between ACPO and the PPO, also emphasises the importance of the PPO investigation in contributing to the fulfilment of Article 2's procedural obligation.¹⁴

If and when the criminal investigation ends, the police may continue to investigate on behalf of the coroner, in order to establish more generally the circumstances of the death.¹⁵ There is a subtle difference between this and the role of the PPO, which acknowledges a duty to assist the coroner to fulfil her investigative duty under Article 2, but maintains that it does not conduct investigations on behalf of the coroner.¹⁶

3.2.1.1 Openness and liaison with family, community and public

Importantly, the Protocol states that “[a]n attitude of openness and accountability is fundamental” and places “communication with the deceased’s family” and “communication with the community” at the top of the considerations behind such an attitude.¹⁷

The benefits derived from such an approach are listed as including:

- Improved and effective dialogue with families and communities

¹² NOMS ‘PSI 64/2011 Safer Custody’ (n 2) 58. Stoddart ‘ACPO Protocol’ (n 3) 3.1–3.2. The PPO’s ‘Terms of Reference’ only state that the Ombudsman *may* defer all or part of an investigation while police are conducting a criminal investigation (PPO, ‘Prison and Probation Ombudsman Terms of Reference’ (2013) <<http://tinyurl.com/hyrfblp>> accessed 27 January 2016 (Terms of Reference) para 34).

¹³ Stephen Shaw and Jon Stoddart, ‘Memorandum of Understanding Between the Association of Chief Police Officers and the Prison and Probation Ombudsman’ (2009) (MoU ACPO and PPO) para 7.

¹⁴ *ibid*, para 9.

¹⁵ Stoddart ‘ACPO Protocol’ (n 3) 6.6. This is becoming increasingly rare with coroners relying more on the PPO.

¹⁶ Nigel Newcomen and André Rebello, ‘Memorandum of Understanding between the Prison and Probation Ombudsman and the Coroners Society of England and Wales’ (2012) <<http://tinyurl.com/hhmkxw9>> accessed 28 January 2016 (MoU PPO and CSEW) para 7.

¹⁷ Stoddart ‘ACPO Protocol’ (n 3) 2.9.

- Better understanding of issues raised by families and communities
- Long term confidence of witnesses, jurors and community advocates
- Improved confidence in the investigative process
- Better community intelligence
- Enhanced investigative opportunities
- Improved inter-agency co-operation.¹⁸

Openness is therefore partly motivated by the perceived instrumental benefits for policing that come with good relations between the police, communities and the public. But, the list also acknowledges some intrinsic value to openness for the family of the deceased and the community.¹⁹

The Protocol also warns of the potential for a death and investigation to have negative public or prison-order implications and raises the possibility of designating a death as a ‘critical incident’ in order to “prevent the situation from escalating.”²⁰ Critical instances are defined as “incidents where the effectiveness of the National Offender Management Service [(NOMS)], HM Prison Service, National Probation Service, UKBA, Youth Justice Board or police response is likely to have a significant impact on the confidence of the victim, their family or the community”.²¹ Unfortunately, the practical consequences of a situation being so defined are not explained.

Part 8 of the Protocol deals with the relationship between the police investigation and the family of the deceased. It refers to Article 2 and “the principle that the family are entitled to be involved in the investigative process, to the extent necessary to protect their legitimate interests.”²² If reference to the principle is intended as a statement of intention, it is undermined somewhat by a lack of commitment to the role of police Family Liaison Officers. The Protocol highlights the limits of the Family Liaison role and suggests the

¹⁸ *ibid*, para 2.10.

¹⁹ Hampshire Constabulary, for example, links the need for openness with a concern that “[s]udden deaths, particularly within establishments such as prisons, can generate suspicion and concern amongst relatives as to the true circumstances surrounding the death.” Hampshire Constabulary, ‘01502 Procedure – Deaths in Prison Custody Management of Police Response’ <<http://tinyurl.com/nf6f99d>> accessed 17 November 2014.

²⁰ Stoddart ‘ACPO Protocol’ (n 3) 2.11.

²¹ *ibid*.

²² *ibid*, para 8.1.

family may be better supported by other agencies—singling out the charitable organisation INQUEST for particular mention.²³

The family of the deceased may need significant pastoral and technical support throughout the preliminary investigation and the inquest. Attempts to do this by the police, the prison service and (to a lesser extent) the PPO, may be hindered by their association with institutions which may be viewed with suspicion by the family. The MoU between ACPO and the PPO envisages family liaison being co-ordinated between both bodies, but hints that it may be appropriate for one body to take over the role.²⁴ This is probably a sensible approach, and the PPO is arguably better placed to engage with the family given its independence from the criminal justice system.

Generally, while the Protocol exhibits an understanding of Article 2 requirements—particularly in terms of family and community engagement—it avoids anything more than vague commitments to positive action.²⁵ The only exception to this is paragraph 8.9, which requires that families be notified of the time and location of the post-mortem and their right to have someone attend on their behalf.²⁶ This right comes from Regulation 13(1) of the Coroners (Investigations) Regulations 2013, (SI 2013/1629) (C(I)Regs 2013). In the past, the coroner was under no duty to inform the family of the existence of this right unless the family has expressed an interest in being represented at the post-mortem.²⁷ If there is a delay in first contact and/or the right is not communicated immediately, the family will often miss this opportunity. A second post-mortem can only be held with the coroner's permission. While coroners rarely refuse this, it will be necessary to secure extra funding for it to be carried out.²⁸ The compulsory tone of this provision in the Protocol is therefore to be welcomed.

²³ *ibid*, paras 8.2–8.3.

²⁴ Shaw and Stoddart, 'MoU ACPO and PPO' (n 13) para 12.

²⁵ See Stoddart 'ACPO Protocol' (n 3) 8.3, 8.5–8.7.

²⁶ *ibid*, para 8.9.

²⁷ Coroners Rules 1984, SI 1984/552 (CR 1984) r 7(1) and (2).

²⁸ INQUEST, *The Inquest Handbook: A Guide for Bereaved Families, Friends and Their Advisors* (INQUEST 2011) s 2.2.

If criminal proceedings are brought or contemplated, liaison with the family is given a higher priority—although the relevant provisions in the Protocol are still not couched in mandatory terms:

The police should appropriately consider the concerns of the family and pay due regard to any further lines of inquiry they may suggest. For instance, the family may have important information concerning health problems of the deceased, and be concerned as to whether the care the deceased received in relation to such problems was appropriate. This may suggest further lines of inquiry, where the latter is relevant to the circumstances of the death.²⁹

A meeting between the family and the SIO is advised, during which the family should be provided with information and the likely timetable towards trial.³⁰ This increase in interaction with the family may be motivated by two factors. It may promote good relations with the family where their co-operation may aid a prosecution. But also, if a prosecution is successful, there may not be an inquest.³¹ There would then be no other opportunity to fulfil the requirement that the family be involved in the investigatory process.

Finally, Part 9 deals with “media management”.³² This seems more concerned with controlling information than facilitating openness. It *warns* that deaths in custody may attract a lot of media attention and public interest, and places an emphasis on “protecting” the investigation and minimising “the causing of inappropriate and unnecessary alarm to the family, general public and prison community.”³³ While protecting the criminal justice process may receive understandable prioritisation, it is questionable whether a legitimate public interest in the circumstances of a death should be subjugated to highly subjective opinions on what might constitute “unnecessary” alarm.³⁴

²⁹ Stoddart ‘ACPO Protocol’ (n 3) 8.12.

³⁰ *ibid*, 8.13.

³¹ If important issues are not considered at the criminal trial, an inquest or inquiry will still be necessary (*Amin* (ch 1, n 11)).

³² Stoddart ‘ACPO Protocol’ (n 3) Part 9.

³³ *ibid*, 9.1.

³⁴ *ibid*, 9.2–9.3.

3.2.1.2 Disclosure to other investigating bodies

Part 6 addresses “Access to Relevant Material and Exchange of Information”.³⁵ While re-iterating the primacy of the police investigation, it emphasises the need to agree with other bodies how the exchange of information and material will be managed. The first point of principle is that, wherever possible, the coroner should have unimpeded access to all relevant material.³⁶ However, the Protocol raises an important caveat in paragraph 6.4: the sharing of certain types of information and evidence may be restricted by statute. As examples, it references the Data Protection Act 1998, the Police and Criminal Evidence Act 1984, and the Criminal Procedure and Investigations Act 1996, as well as associated Codes of Practice. Interestingly it does not mention the Regulation of Investigatory Powers Act 2000 (RIPA 2000).³⁷

The Protocol also refers to the “duty of confidentiality attaching to information provided to police during the course of investigations” and the need to balance the public interest in keeping information confidential and the public interest in sharing information.³⁸ This should not affect the exchange of material between the police and the coroner which is presumptive. Officers should warn witnesses that their statements may be shared with the PPO, although consent is not required.³⁹ The MoU between the police and the PPO states that, “As soon as possible, without prejudicing any criminal proceedings, the police will share with the PPO all evidence obtained in the course of the investigation”.⁴⁰ It warns that the consequence of this will be eventual disclosure to the bereaved family, the prison and the coroner.⁴¹ This is a slightly over-simplistic summary of PPO disclosure policy, but it does reflect the reality that the police lose control over further disclosure unless *ad hoc* agreements are in place.⁴² Where the police continue an

³⁵ *ibid*, Part 6.

³⁶ *ibid*, 6.3. The Protocol warns of potential difficulties in disclosing information to other bodies while the investigation remains a criminal one, advising that police should consult the CPS beforehand (*ibid*, para 6.5).

³⁷ Discussed below at 5.2.

³⁸ Stoddart ‘ACPO Protocol’ (n 3) 6.4.

³⁹ *ibid*, 6.9 and repeated in the Shaw and Stoddart, ‘MoU ACPO and PPO’ (n 13) para 19.

⁴⁰ Shaw and Stoddart, ‘MoU ACPO and PPO’ (n 13) para 18.

⁴¹ *ibid*, 20.

⁴² PPO, ‘Prison and Probation Ombudsman Disclosure Policy’ (2009) <<http://tinyurl.com/j34p76l>> accessed 28 January 2016 (Disclosure Policy).

investigation on behalf of the coroner, the Protocol envisages that it will be more appropriate to share evidence with other investigating bodies.⁴³

3.2.2 PPO investigations into prison deaths

The PPO is sponsored by the Ministry of Justice, and reports to the Secretary of State. Nevertheless, it is a non-statutory body which claims to have complete operational independence.⁴⁴ It conducts investigations into all deaths in prisons, and acknowledges that it plays a part in fulfilling Article 2's procedural obligation.⁴⁵ PPO investigations can include scrutiny of services provided outside of the public sector.⁴⁶ Each investigation ends with a report, and the coroner will usually wait for this before proceeding with an inquest.⁴⁷

The PPO's Terms of Reference set out the following aims behind their investigations into deaths:

1. establish the circumstances and events surrounding the death, especially regarding the management of the individual by the relevant authority or authorities within remit, but including relevant outside factors;
2. examine whether any change in operational methods, policy, practice or management arrangements would help prevent a recurrence;
3. in conjunction with the NHS where appropriate, examine relevant health issues and assess clinical care;
4. provide explanations and insight for the bereaved relatives;
5. assist the Coroner's inquest to fulfil the investigative obligation arising under Article 2 of the European Convention on Human Rights ('the right to life'), by ensuring as far as possible that the full facts are brought to light

⁴³ Stoddart 'ACPO Protocol' (n 3) 6.6.

⁴⁴ It is hard to see how the PPO can claim to be entirely operationally independent from the Ministry of Justice if it also "reports to the Secretary of State" (PPO "Terms of Reference" (n 12) 2).

⁴⁵ *ibid*, 29.

⁴⁶ *ibid*, 30.

⁴⁷ Leslie Thomas, Adam Straw and Danny Friedman, *Inquests: A Practitioner's Guide* (2nd edn, LAG 2008) 432-3.

and any relevant failing is exposed, any commendable action or practice is identified, and any lessons from the death are learned.⁴⁸

As noted above, this final point does not mean that the PPO investigates *on behalf of* the coroner.⁴⁹

The scope of PPO investigations can be relatively broad. Its website states that investigators “will find out as much as possible about what was happening to the person before their death.”⁵⁰ The Terms of Reference also state that investigations may include a consideration of other deaths where there appear to be common factors.⁵¹ This opens up the possibility of more probative investigations into prison life and culture, where there are suggestions of institutional or systemic concerns that may have escaped scrutiny in previous death investigations.

As a non-statutory body, the PPO has no power to seize documents or compel individuals to submit to interview, and is therefore reliant on the prison service and other bodies requiring their staff to cooperate with their investigations.⁵²

3.2.2.1 Openness to family, public and other investigatory bodies

There is a range of guidance on the exchange of information and material between the PPO, other investigating bodies, individuals or institutions with an interest in the death, and the public.⁵³ The most important is the PPO’s *Disclosure Policy*.⁵⁴ Its introduction states:

⁴⁸ PPO ‘Terms of Reference’ (n 12) 31.

⁴⁹ Newcomen and Rebello, ‘MoU PPO and CSEW’ (n 16) para 7.

⁵⁰ PPO, ‘How We Investigate Fatal Incidents’ (undated) <<http://tinyurl.com/l77bmabb>> (accessed 13 October 2014) (‘How We Investigate’).

⁵¹ PPO ‘Terms of Reference’ (n 12) 32.

⁵² PPO and NOMS, ‘Protocol on Death Investigation by the PPO’ (2005) para 1.2. For example, the MoU between ACPO and the PPO requires police officers to co-operate fully with PPO investigators (Shaw and Stoddart, ‘MoU ACPO and PPO’ (n 13) para 18).

⁵³ Newcomen and Rebello, ‘MoU PPO and CSEW’ (n 16); PPO and NOMS ‘Protocol on Death Investigation by the PPO’ (n 52); PSI 2710 (n 47); Ministry of Justice ‘PSI 58/2010 The Prison and Probation Ombudsman’ (2010); PPO ‘Disclosure Policy’ (n 42); PPO ‘Terms of Reference’ (n 12); Shaw and Stoddart, ‘MoU ACPO and PPO’ (n 13); PPO, ‘How We Investigate’ (n 50).

⁵⁴ PPO ‘Disclosure Policy’ (n 42).

1. At the heart of the Prison and Probation Ombudsman's work on fatal incidents is a commitment to full, fair, open and transparent investigations. This commitment is essential if the Ombudsman's investigation is to meet the aims set out in his terms of reference. Of particular relevance is the aim of assisting the inquest to meet the State's obligations under Article 2 of the European Convention on Human Rights. This includes enabling the family to participate fully in the inquest, and ensuring that the full facts are brought to light. One of the Ombudsman's aims is also to provide explanations and insight for bereaved relatives.

2. When dealing with disclosure under this policy, the question of what information should be disclosed to whom, and when, has to be set against the background of these aims.

The Ombudsman's policy is that disclosure should occur as fully and as early as his terms of reference, and the law allows.⁵⁵

The Policy, therefore, recognises both the PPO's Article 2 duties *vis-à-vis* the family of the deceased, *and* its duties *vis-à-vis* the wider general public (in terms of "ensuring that the full facts are brought to light"). It also indicates a presumption in favour of public disclosure, "unless it is clearly not in the public interest to do so."⁵⁶

Despite the above, openness to the public appears in practice to be confined to the publication of investigation reports after the inquest. While it is unlikely that members of the public will seek disclosure from the PPO, journalists might. However, the section of the Policy entitled "To whom should information be disclosed", makes no mention of the public or press.

In terms of disclosure, there will be *sub judice* issues, because—quite apart from any prosecution contemplated—the inquest will be held with a jury.⁵⁷ This should not necessarily mean that information is withheld from the press, as *they* are responsible for ensuring that their publications do not prejudice court proceedings. Paragraphs 10 to 13

⁵⁵ *ibid*, paras 1–2 (original emphasis).

⁵⁶ *ibid*.

⁵⁷ Shaw and Stoddart, 'MoU ACPO and PPO' (n 13) para 24.

address disclosure to designated properly interested persons, specialist advisors and other investigatory bodies. The Policy emphasises that the Ombudsman alone decides to whom information should be disclosed “in order to meet the aims of his investigation.”⁵⁸ A two-stage test is applied:

1. The investigator should first consider whether the document is relevant to the investigation.
2. The investigator should then consider whether there are any restrictions on disclosure or exemptions, for example, because of information on third parties or sensitive information which it is in the public interest not to disclose.⁵⁹

The Disclosure Policy states that in making decisions on disclosure, PPO investigators should consult other bodies such as prison security, the police, the CPS and the coroner.⁶⁰

When assisting the coroner, the Disclosure Policy states that “[i]t is the responsibility of the Ombudsman to make pre-inquest disclosure in order to satisfy the Article 2 investigation obligation” and it is “particularly important in the pre-inquest phase to disclose information to the family of the deceased [and] their personal representatives [...] so that they can prepare for it.”⁶¹ Early disclosure to the family also helps ensure they can have an informed input into the PPO investigation.⁶²

Draft and final investigation reports remain confidential until after the inquest. This is interpreted in practice as referring only to publication to the wider public, rather than the family of the deceased.⁶³ Drafts are also provided to those subject to criticism. Despite the PPO’s insistence that they alone are responsible for decisions on disclosure, in practice investigators usually defer to the coroner.⁶⁴ Until recently, this included decisions on

⁵⁸ PPO ‘Disclosure Policy’ (n 42) paras 10 and 12.

⁵⁹ *ibid*, paras 14–15.

⁶⁰ Unredacted documents are supplied to the coroner upon request (*ibid*, para 15).

⁶¹ *ibid*, paras 9–10.

⁶² The issue of pre-inquest disclosure to the family of the deceased is dealt with more fully in sub-chapter 5.1.4.

⁶³ Thomas *et al* (ch 1, n 18) 492.

⁶⁴ See also *ibid*, paras 29–30 where letters and papers written by the deceased should only be disclosed with the coroner’s agreement (*ibid*, 29–30).

whether or not to disclose draft investigation reports to the family. However, since July 2012 the new MoU between the PPO and CSEW indicates that they should be disclosed.⁶⁵ This is in keeping with the PPO's Terms of Reference which, since 2009, have directed that draft reports be sent, *with relevant documents*, to bereaved families and other interested persons, *and* that they be allowed an agreed period to respond.⁶⁶

The family's input after the first draft of the report can be crucial. This is the first time they can consider the investigation as a whole and the conclusions being considered. If they are dissatisfied with the draft report, it is not too late for them to ask the PPO to investigate issues further. Thomas *et al* point out that families' lawyers can often correspond constructively with the PPO at this stage with the PPO "being willing to discuss alterations."⁶⁷

An anonymised version of the final report is published on the PPO's website after the inquest.⁶⁸ The significance of the report, and the investigation that produces it, cannot be overstated in terms of the *active* role it can afford the family of the deceased in the investigatory process. The PPO is far from perfect. It suffers (as many such bodies do) from insufficient resources to always fulfil its role effectively. But while all PPO investigators are different, the tendency for them to be genuinely open to the meaningful input of families, has, at times, been in contrast to IPCC investigations and even inquests, (despite inquests providing a more formal role for families).⁶⁹ The difference appears to be mainly attitudinal, and in this respect the Terms of Reference and various policy documents set a positive tone regarding openness, which investigators seem to take to heart.

⁶⁵ Newcomen and Rebello, 'MoU PPO and CSEW' (n 16) para 27.

⁶⁶ PPO 'Terms of Reference' (n 12).

⁶⁷ Thomas *et al* (ch 1, n 18) para 19.39.

⁶⁸ PPO, 'How We Investigate' (n 50).

⁶⁹ See 5.1.3 below and: Tony Murphy, 'Policing the Police' The Guardian (26 February 2008) <<http://tinyurl.com/mjbbscj>> accessed 16 July 2014; and INQUEST, 'How the Inquest System Fails Bereaved People: INQUEST's Response to the Fundamental Review of the Coroner Services' (INQUEST 2002).

3.3 IPCC investigations into deaths involving police

The Independent Police Complaints Commission was set up by the Police Reform Act 2002 (PRA 2002), and took over from its predecessor, the Police Complaints Authority, on 1 April 2004. It is a non-departmental public body, funded by the Home Office but legally independent of the police and any interest groups. Its general functions include “the recording of matters from which it appears that a person has died or suffered serious injury during, or following, contact with a person serving with the police”;⁷⁰ and making effective arrangements regarding “the manner in which [they] are investigated or otherwise handled and dealt with.”⁷¹ The purpose of the IPCC is described as being “to increase public confidence by demonstrating the independence, accountability and integrity of the complaints system and so contribute to the effectiveness of the police service as a whole.”⁷²

Since July 2005, any qualifying Death or Serious Injury (DSI) involving the police must be referred to the IPCC, even in the absence of a complaint or any evidence of a conduct matter.⁷³ This reflects the Article 2 requirement that states initiate investigations of their own motion.⁷⁴ Under section 12(2A) PRA 2002 a qualifying DSI involves any circumstances where a person has died or sustained serious injury during arrest or detention by the police, or where there was contact with the police at or before the death or injury, which may have directly or indirectly caused or contributed to it.

Investigations by the IPCC can take various forms.⁷⁵ However, the IPCC will initially investigate all DSIs independently. The investigation’s form may be reviewed, but investigations into deaths at the hands of the police should only be downgraded in

⁷⁰ Police Reform Act 2002 (PRA 2002) s 10(2)(ba).

⁷¹ This includes ensuring the investigation is sufficiently independent (PRA 2002, s 10(2)(3)).

⁷² PRA 2002, s 10(1)(d)–(e); Allyson MacVean and Peter Neyroud, *Police Ethics and Values* (SAGE 2012) 137; CPS, ‘Allegations of Criminal Offences against the Police: Legal Guidance’ <<http://tinyurl.com/ntkoyur>> accessed 23 July 2014; IPCC and CSEW, ‘A Memorandum of Understanding Between the Coroners Society for England and Wales and the Independent Police Complaints Commission’ (2007 – On Nov 2015 in process of being revised and no longer current).

⁷³ PRA 2002, sch 3.

⁷⁴ See above 2.4 and *Ergi* (ch 2, n 29).

⁷⁵ Categorized as local, supervised, managed or independent.

exceptional circumstances.⁷⁶ Independent investigations carried out by the IPCC, must be led by one of the Commission's own staff.⁷⁷ Staff that carry out independent IPCC investigations have the powers of police constables for the purposes of the investigation.⁷⁸

The statutory guidance describes the aims of DSI investigations as:

[...] to establish facts, the sequence of events and their consequences. Its role is to investigate how and to what extent, if any, the person who has died or been seriously injured had contact with the police, and the degree to which this caused or contributed to the death or injury.⁷⁹

While a DSI investigation is “not an inquiry into any criminal, conduct or complaint allegation against any person servicing with the police”, the IPCC must determine whether there are indications of a crime having been committed or behaviour that justifies disciplinary proceedings. If there is, the IPCC must notify the relevant authority. Other than lesson-learning, none of the various policy documents or guidance seem to indicate any particular qualitative purposes behind IPCC investigations into deaths. One assumes they coincide with the wider purposes behind the IPCC described at PRA 2002, s 10(1)(d) (see above). The fact that Article 2 “shapes the way” the IPCC carries out its investigations, could also be interpreted as importing those purposes implicit in Article 2's procedural obligation.⁸⁰

An investigation will aim to establish the facts and reach conclusions: including whether there is a case to answer for misconduct, gross misconduct or unsatisfactory performance.⁸¹ According to the statutory guidance, “it is also an opportunity to ascertain whether there is any learning for the force arising from the incident itself or the way it was handled.”⁸² An investigation's scope should be broad, given that it should be proportionate

⁷⁶ IPCC, ‘Review of the IPCC's Work in Investigating Deaths: Final Report’ (2010) (Review Report) <<http://tinyurl.com/gmenjqtq>> accessed 28 January 2016; A decision on the form of an investigation must consider the seriousness of the case and the public interest (PRA 2002, sch 3, Part 3, 15(C)).

⁷⁷ PRA 2002, sch 3 para 19.

⁷⁸ *ibid*, sch 3 para 19(4)(b).

⁷⁹ IPCC, ‘IPCC Statutory Guidance to the Police Service on the Handling of Complaints’ (2015) (Statutory Guidance) <<http://tinyurl.com/zjgmqe2>> accessed 27 January 2016, para 11.49.

⁸⁰ See below at 3.3.2; IPCC, ‘Review Report’ (n 76) 16.

⁸¹ IPCC, ‘Statutory Guidance’ (n 79).

⁸² *ibid*, para 9.2.

to the seriousness of the matter investigated, the public interest, and the prospects of producing learning.⁸³ Its conduct should additionally take into account the need to establish all the facts, and the fact that Article 2 is engaged.⁸⁴

3.3.1 The review of the IPCC's work in investigating deaths

The IPCC's relatively short history has been controversial. Its remit is not just to investigate DSI cases, but to oversee the entire police complaints system. The amount of IPCC oversight of individual complaints ranges from rare cases where the IPCC investigates independently, to the vast majority where the police investigate themselves with limited IPCC oversight.

Expectations were high when the Commission took over from the largely discredited Police Complaints Authority. However, lawyers representing complainants became increasingly frustrated at what they saw as: a lack of effective oversight of the majority of cases investigated by the police; a perceived bias amongst IPCC investigators in favour of police; the rejection of complaints out of hand despite supporting evidence; badly managed investigations overseen by caseworkers with few relevant qualifications, experience or training; and an unacceptable number of case decisions being overturned by the Commission only after threats of court action.⁸⁵ Things reached a head in February 2008, when more than 100 lawyers—members of the Police Action Lawyers Group, who had played an advisory role in the setting up of the IPCC—resigned *en masse* from its Advisory Board.⁸⁶ The relationship between the IPCC, complainants, their lawyers, and even the police, continued to deteriorate, with public confidence seemingly reaching an all-time low in 2011, when the IPCC wrongly told the press that Mark Duggan had shot at police before they shot and killed him.

⁸³ *ibid*, para 9.14.

⁸⁴ *ibid*, para 9.15.

⁸⁵ Nick Davies, 'Crisis at Police Watchdog as Lawyers Resign' *The Guardian* (London, 25 February 2008) <<http://tinyurl.com/zqjajqv>> accessed 1 December 2014.

⁸⁶ *ibid*; Nick Davies, 'The IPCC: A Catalogue of Delays, Rejections and Basic Failures' *The Guardian* (London, 25 February 2008) <<http://tinyurl.com/hytnqwl>> accessed 21 July 2014; Nick Hardwick, 'Yes, We Are Independent – and We've Cut Down Delays Too' *The Guardian* (London, 27 February 2008) <<http://tinyurl.com/l3rwc3o>> accessed 21 July 2014.

In February 2012, Dame Anne Owers took over as Chair of the IPCC. She brought with her a degree of respect amongst civil and human rights lawyers following her nine years as HM Chief Inspector of Prisons. She seems to have brought with her a more proactive attitude towards winning and maintaining public confidence. This can be seen in the independent review she commissioned into the IPCC investigation into the death of Sean Rigg.

Sean died in 2008 in Brixton Police Station following restraint by police officers. The original IPCC investigation concluded that there were no significant concerns about Sean's treatment by police officers.⁸⁷ However, an inquest jury reached starkly different conclusions, producing a narrative verdict that was highly critical of the police.⁸⁸ The review reflected a concern to see why there was such a discrepancy, and what lessons might be learnt. It concluded with a report (the Casale Report), which seemed to confirm, at least in Sean Rigg's case, some of the accusations made by PALG lawyers in 2008.⁸⁹

Shortly after the independent review, the IPCC conducted its own, wider-ranging review of its investigations into deaths, including consultations with stakeholders. In the foreword to the resulting report, Anne Owers acknowledged that:

Those who have lost relatives or friends have little reason to trust either us or the system, particularly in communities where such trust is already low. We can only earn that trust by engaging with them, and enabling them to participate in the investigation process.⁹⁰

3.3.2 The scope of IPCC investigations

The Review Report acknowledges that "Article 2 investigations should be inquisitorial and broad in scope, establishing what happened and why, who (if anyone) is responsible

⁸⁷ IPCC 'IPCC Independent Investigation into the Death of Sean Rigg Whilst in the Custody of Brixton Police' (2012) <<http://tinyurl.com/jpuz66d>> accessed 28 January 2016.

⁸⁸ Vikram Dodd, 'Sean Rigg Death in Custody: Police Used Unnecessary Force, Jury Finds' *The Guardian* (London, 1 August 2012) <<http://tinyurl.com/jbmhksw>> accessed 1 December 2014.

⁸⁹ Silvia Casale, 'Report of the Independent External Review of the IPCC Investigation into the Death of Sean Rigg' (2013), in particular 95–98.

⁹⁰ IPCC, 'Review Report' (n 76) 7.

[...] drawing conclusions beyond misconduct and criminal behaviour such as systemic problems or poor practice”, and investigating “how a death could be prevented in the future”.⁹¹ The narrow scope of IPCC investigations was a source of contention for many stakeholders during the review and the report acknowledges that many, including the police and the IPCC’s own staff, were frustrated at their narrow scope.⁹²

It is hard to measure how much of a practical effect Article 2 has on IPCC investigations *per se*, because they are normally followed by inquests—the primary means by which the state fulfils the obligation. This arrangement can let the IPCC off the hook in terms of any legal challenges for breaches of Article 2, because it is effectively for the coroner to ensure that any inadequacies in the IPCC investigation are corrected by the inquest. The IPCC itself underlines that:

Our work is an important *part of* the way the state meets [the procedural] obligation, *alongside* the work of the coroners and the Crown Prosecution Service. The obligations arising from Article 2 *shape the way* that we investigate deaths involving the police.⁹³

Coroners often rely on IPCC investigations for the gathering of evidence and the identification of relevant issues, and they therefore play an important practical role in helping ensure that the process as a whole is Article 2 compliant. When the IPCC fails to adequately fulfil this role, it can lead to significant additional expense and delays, with coroners or inquiry chairmen having to instruct their own officers to gather evidence and interview witnesses.⁹⁴

3.3.2.1 The IPCC’s powers, remit and competence

While the government recently renewed its commitment to providing the IPCC with sufficient resources to perform its functions effectively, its budget is still obviously

⁹¹ *ibid*, 27–28.

⁹² *ibid*, 27.

⁹³ IPCC, ‘Review Report’ (n 76) 16 (emphasis added).

⁹⁴ This was the case with both the Azelle Rodney Inquiry and the Mark Duggan inquest.

limited.⁹⁵ It is understandable, therefore, that it may at times seek to limit the scope of its investigations. It often relies on three factors in order to do so: its understanding of what its remit is; its limited powers; and its limited expertise. These are important considerations where police contact is just one feature of the broader circumstances of a death.

The IPCC's ability to investigate bodies other than the police is becoming more of an issue as police services are contracted out to private firms: e.g. the use of contracted 'detention officers' and 'custody assistants.' But it is also a problem that extends to where health care providers may also have been involved in a death. The Review's report acknowledges that:

Police forces are also increasingly outsourcing some of their functions (particularly in relation to staffing custody suites) to non-police private providers. We currently only have limited powers over staff employed by private contractors. Only people who have been specifically designated as a detention or escort officer by the chief constable of the force they work for fall directly within our remit.⁹⁶

After pressure from the IPCC and stakeholders, a provision was included in the Anti-Social Behaviour, Crime and Policing Act 2014, to allow the Secretary of State to extend the IPCC's powers over contractors, sub-contractors and their employees.⁹⁷ Regarding what the IPCC considers its remit to be, the Casale Review specifically recommended that it not only look at police involvement in a death, but also other issues, including the acts of other agencies.⁹⁸ However, in the Review Report, the IPCC still argues that "[t]he focus of an IPCC investigation will always be the actions of the police and we will not always be best placed to consider the actions of non-police agencies."⁹⁹

⁹⁵ Theresa May, Speech to the Police Federation (Bournemouth International Centre 2014) <http://tinyurl.com/phbr567> accessed 17 January 2016.

⁹⁶ IPCC, 'Review Report' (n 76) 26.

⁹⁷ That is, as though they were police officers. At the time of writing, the provision is not yet in force (Anti-social Behaviour, Crime and Policing Act 2014, s 135); *See also ibid*, 29.

⁹⁸ Casale (n 89) 92.

⁹⁹ IPCC, 'Review Report' (n 76) 28. Regarding this claim of limited expertise, the police, for example, usually manage by consulting experts.

Effectively, the IPCC interprets its role as not being to investigate the circumstances of a death, but rather any police involvement in a death.¹⁰⁰ Article 2 investigations need to consider the broad circumstances of a death, including the role played by all relevant individuals or institutions. Problems can arise if there is a patchwork of mutually exclusive investigations bearing no relationship to the interconnectedness of circumstances and experiences. If an inquest is left to piece together different preliminary investigations which examine different aspects of a death, lines of inquiry might fall between the gaps. Where other lines of investigation are left to the police, this can also give rise to concerns that the combined investigative process may lack independence.¹⁰¹

3.3.3 Family liaison and openness

The Review Report acknowledges that the effective engagement of bereaved families is a fundamental part of the IPCC's responsibilities under Article 2 at all stages of the investigation.¹⁰²

It is essential that families are as involved as they can be, or want to be as our work progresses. The investigation should seek to answer the questions they have about how and why the person close to them died. That is why family involvement is a specific requirement in any investigation into a possible breach of Article 2[...] [W]e will contact the family as soon as possible, and offer meetings with the commissioner and lead investigator to explain our role and what we will be doing. We will also provide information about their right to legal representation and where to go for independent advice and support. In some cases, we will appoint a family liaison manager to act as a link between the investigation and the family.¹⁰³

¹⁰⁰ *ibid*, 27.

¹⁰¹ See *R (Reynolds) v IPCC* [2008] EWCA Civ 1160, 24.

¹⁰² IPCC, 'Review Report' (n 76) 57.

¹⁰³ *ibid*, 58.

3.3.3.1 Openness to the family

Under PRA 2002, the IPCC must keep families informed about the progress of investigations, including provisional findings and when an investigation report has been completed.¹⁰⁴ Additionally, the Police (Complaints and Misconduct) Regulations 2012 (P(CM)R 2012), require the family to be updated at least every four weeks.¹⁰⁵ The IPCC's statutory guidance states that "communication with complainants and interested persons should be based on a presumption of openness", and that "[m]aking the investigation report available to the complainant and/or interested person is the most transparent way of showing what the investigation has found."¹⁰⁶ As such, the report "should usually be provided to the complainant and an interested person, subject to the harm test and any necessary redactions."¹⁰⁷ The IPCC's disclosure policy states that "We will be as open as reasonably practicable in discharging our duties to provide information during the course of, and following the completion of a [PRA 2002] investigation."¹⁰⁸ Finally, the Review Report states that "A key part of maintaining open and meaningful engagement with families is the timely disclosure of evidence throughout the investigation":¹⁰⁹

Openness is one of our core values and disclosure of information is one of the ways we ensure transparency in our work. *This disclosure of evidence to families in an investigation into a death is also vital if they are to be effectively involved with the investigation.*¹¹⁰

Regulation 13 P(CM)R 2012 requires a "harm test" to be applied to all disclosure decisions.¹¹¹ Information may be withheld for the purposes of:

¹⁰⁴ PRA 2002, s 20.

¹⁰⁵ Police (Complaints and Misconduct) Regulations 2012, SI 2012/1204 (P(CM)R 2012), reg 12.

¹⁰⁶ IPCC, 'Statutory Guidance' (n 79) para 12.5.

¹⁰⁷ *ibid*, para 12.5.

¹⁰⁸ IPCC, 'Making Information Available' (undated) para 2.3 <<http://tinyurl.com/ptp57cj>> (accessed 22 June 2014).

¹⁰⁹ IPCC, 'Review Report' (n 76) 64.

¹¹⁰ *ibid*, 66 (emphasis added).

¹¹¹ P(CM)R 2012.

- a) preventing the premature or inappropriate disclosure of information that is relevant to, or may be used in, any actual or prospective criminal proceedings;
- b) preventing the disclosure of information in any circumstances in which its non-disclosure—
 - (i) is in the interests of national security;
 - (ii) is for the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders;
 - (iii) is required on proportionality grounds; or
 - (iv) is otherwise necessary in the public interest.¹¹²

Information should only be withheld where the risk is real and the potential adverse consequences significant.¹¹³ Strangely, neither the Regulations nor the Disclosure Policy reference statutory impediments to the disclosure of information, including RIPA 2005, which caused so many problems in the Azelle Rodney case, and led to the inquest being abandoned.¹¹⁴ The Review Report, however, does mention RIPA 2005:

In some circumstances our hands are tied by the law. One such provision is Section 17 of the Regulation of Investigatory Powers Act 2000. The impact of this is not only that some information cannot be disclosed, but also that we cannot even explain why this is, as this itself would be a breach of the law.¹¹⁵

It goes on to express the view that the law should be changed in this regard.¹¹⁶

On the ‘harm test’, the Review Report acknowledges the prevalence of the opinion that it has sometimes been applied “too rigidly or restrictively because of a risk averse stance on [the part of the IPCC], because disclosure is time-consuming, or because of a resistance

¹¹² *ibid*, reg 13.

¹¹³ *ibid*, reg 13(2).

¹¹⁴ Andrew Walker (Assistant Deputy Coroner), ‘Pre-Inquest Ruling Touching Upon the Death of Azelle Rodney’ (2 August 2007); discussed at 5.2 below.

¹¹⁵ IPCC, ‘Review Report’ (n 76) 66.

¹¹⁶ *ibid*.

to providing information to families.”¹¹⁷ This causes distress and confusion and, when not adequately explained, “creates general mistrust of the IPCC.”¹¹⁸

The charity INQUEST agreed with this analysis, observing:

For a bereaved family trying to engage in an IPCC investigation the organisation’s reluctance to provide early and full disclosure (or to clearly explain why they cannot provide this at early stages of investigations and when they expect to do so) fosters mistrust. It is alienating and unhelpful.¹¹⁹

In response, the Review Report renewed a commitment that “IPCC investigators will begin from the position that families of a deceased person will be given access to information gathered during the investigation” and that they will “explain to families if we cannot release information to them at this stage, and tell them why.”¹²⁰

3.3.3.2 Liaison with the general public

Sub-section 6.3 of the Review Report deals with “Engaging with communities and the public through the media.”¹²¹ Significantly, it recognises that “it is not only the families of those who have died but also communities who are affected by a death.”¹²² The review’s research showed “a significant” lack of trust in the IPCC amongst certain communities.¹²³ It heard arguments from various sources, including police organisations, that it should be “more robust in carrying out community engagement”, particularly with “marginalised groups in local communities, including young people, members of black and minority ethnic communities, and people with mental health problems.”¹²⁴

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

¹²⁰ IPCC, ‘Review Report’ (n 76) (original emphasis)

¹²¹ *ibid.*, 67.

¹²² *ibid.*, 75.

¹²³ *ibid.*

¹²⁴ *ibid.*, 74. Greater Manchester Police argued that “[w]ork within the communities by the IPCC needs [...] to be built on a real concept and understanding of the specific community, their needs and the challenges facing them.” (*ibid.*).

Deaths at the hands of the police often have to be viewed in the broader context of a community's experience of, and relationship with the police. It is important that investigators understand the objective realities of community members' day-to-day experience of interaction with the police, and the historical context of community relations. The report seems to half grasp this. But its emphasis is on "community engagement" as a means of "promoting our profile and helping to build trust in local communities."¹²⁵ While building trust within communities is vital, community engagement should arguably be treated as an end in itself. Recognising this can be the difference between genuine, meaningful engagement with communities, and superficial engagement which risks unfulfillable assurances being made, and can be counterproductive in the long term.

The review received various suggestions on how the IPCC could engage more effectively with communities, including public meetings and community briefings on the progress of investigations; a more visible presence where a death may trigger public disorder; and working more closely with local police forces to address community tensions.¹²⁶ There may be problems with the IPCC directly aligning itself with police attempts to improve community relations. Arguably, the IPCC's purpose of increasing trust and confidence in the police should be pursued indirectly by demonstrating that they are accountable to independent oversight. Anything more could risk compromising public confidence in the IPCC's independence.¹²⁷

The Review Report gives a statement of intention that "where an IPCC investigation into a death raises significant community concerns, the lead investigator will consider how to engage with the community, recognising the importance of community confidence and trust in ourselves and the police."¹²⁸ It also makes welcome reference to the potential for representatives of communities to be 'involved' in investigations:

¹²⁵ *ibid*; See also *ibid*, 72.

¹²⁶ *ibid*, 74.

¹²⁷ A concern not helped by recent revelations that police exploited community liaison for intelligence gathering purposes. Jason N Parkinson and Rob Evans, 'Sussex Police Criticised for Harassment during Protester Liaison' *The Guardian* (4 September 2012) <<http://tinyurl.com/ok8ogz4>> (accessed 24 July 2014); Press Association, 'Secret Met Police Unit Held Information on 17 Campaigns for Justice' *The Guardian* (24 July 2014) <<http://tinyurl.com/pzpf5b>> accessed 24 July 2014.

¹²⁸ IPCC, 'Review Report' (n 76) 73.

[We w]ill seek to develop better links with people and organisations who work in the community, including groups that have low levels of trust in the police and the complaints system. We will use these links to help identify appropriate representatives for involvement in individual investigations (e.g. through community reference groups).¹²⁹

In terms of engaging the public through the media, the IPCC often struggles to strike the right balance. The Review Report begins by acknowledging the importance of media engagement to inform communities and the wider public about the investigation.¹³⁰ The IPCC faces issues about how much information it makes public, especially in the immediate aftermath of a death. The balance to be struck is a fine one. As noted above, too little information can instil suspicion about the investigation and give a sense that things are being covered up. But premature statements of fact that turn out to be wrong can also be very damaging. The Review Report undertakes that “Statements issued at the start of an investigation (when few details have been confirmed or tested) will be brief and limited to facts verified by the IPCC investigator.”¹³¹ The brevity of information released can frustrate families and communities, but this may outweigh the damage caused by erroneous information being released. This is more likely if the IPCC keeps to its commitment to engage with communities and communicate why there are limits to information being released, and gives a timetable for the investigation.¹³²

3.4 Conclusions

The above shows that the police, the PPO and the IPCC are all keen to exhibit a principled commitment to openness in their investigations: both to public scrutiny and the active involvement of the family of the deceased in investigations. As institutions, they are conscious of Article 2’s basic procedural requirements. But the extent to which they back up their general commitments to openness with specific practical action varies significantly between organisations, and can depend on the approach of individual investigators.

¹²⁹ *ibid.*

¹³⁰ *ibid.*, 75.

¹³¹ IPCC, ‘Review Report’ (n 76) 75.

¹³² *ibid.*, 76. The Review Report also undertakes to share advance copies of all press releases with the family and “the force in remit” to ensure that they are factually accurate.

The primary focus of police investigations into prison deaths is to determine whether criminal offences have been committed.¹³³ The policy and practice guidance show an awareness of Article 2's procedural requirements, but they tend to see these as more of a concern for the PPO and for coroners.¹³⁴ The guidance generally asserts the primacy of police investigations.¹³⁵ However, at times the police show a certain deference to the PPO's role in fulfilling the procedural requirement under Article 2.¹³⁶ This is arguably misplaced. Criminal prosecutions, where appropriate, are also a crucial part of Article 2's procedural obligation, and given that they are more easily prejudiced, they should arguably be prioritised more unambiguously.

It was noted that the police appear to recognise the importance of communicating with the family of the deceased and communities during investigations,¹³⁷ and the intrinsic and instrumental operational value of this.¹³⁸ However, the possibility of some situations being designated as "critical incidences" could give cause for concern. So-called "public order concerns" can be used as a pretext for preventing the dissemination of information that might lead to criticism of the authorities.

In terms of any practical guidance on how family and community engagement should be implemented, it seems that unless charges are brought, this is typically left to the PPO and the coroner.¹³⁹ With PPO investigations and inquests being more firmly geared towards public scrutiny and accountability (these being their explicit purposes), this is again probably understandable. Evidence gathered by the police usually reaches the family of the deceased in pre-inquest disclosure if not before, and enters the public domain through the inquest and the PPO report. The main caveat to this is where there are statutory restrictions on what the police (and the IPCC) are allowed to share.

¹³³ See 3.2.1 above and, for example Stoddart 'ACPO Protocol' (n 3) 2.4.

¹³⁴ See, for example, *ibid*, paras 2.7, 8.2-8.3; Shaw and Stoddart, 'MoU ACPO and PPO' (n 13) paras 7 and 9.

¹³⁵ Stoddart 'ACPO Protocol' (n 3) 3.1-3.2; Shaw and Stoddart, 'MoU ACPO and PPO' (n 13) para 7.

¹³⁶ Shaw and Stoddart, 'MoU ACPO and PPO' (n 13) para 7.

¹³⁷ Stoddart 'ACPO Protocol' (n 3) 2.10.

¹³⁸ *ibid*.

¹³⁹ See 3.2.1.1

PPO investigations are explicitly geared towards providing answers for families, learning lessons, and helping fulfil Article 2's procedural requirements.¹⁴⁰ The relevant guidance shows that the latter role is at the forefront of the PPOs formal approach.¹⁴¹ Their investigations tend to be more open to the family of the deceased, providing them with information and disclosure during an investigation, and providing them with opportunities to raise concerns and engage with the investigation.¹⁴² While the PPO also sets out a general commitment to openness *vis-à-vis* the public, there are few specific concrete commitments other than the publishing of its report after the inquest.¹⁴³

As for the IPCC, it appears to be going through significant attitudinal changes in the way it views its role, how it conducts DSI investigations, and how it engages with families and the public after a death.¹⁴⁴ Of the three investigating bodies looked at, the IPCC appears the least in touch with the intrinsic normative value of investigations, instead focusing on instrumental benefits such as learning lessons and improving trust in the police. The IPCC's statutory guidance makes no mention of accountability in the context of death investigation, and learning lessons (the one qualitative purpose it does refer to), while admirable, is a police-centred objective. While there has been recent progress, in the past engaging with families and the public appears to have been treated as a chore, separate from its main investigative function.¹⁴⁵ It is hoped that the acknowledgment that Article 2 should "shape" IPCC investigations, will see its public accountability requirements given more of a priority in the IPCC's approach.¹⁴⁶ Indeed, the IPCC seems to be going through a watershed moment, in terms of reassessing how it operates, and addressing a lack of confidence amongst complainants and the wider public. This extends to the way it carries out DSI investigations. At least in the Review Report, Anne Owers acknowledges that:

One of the most important functions of the [IPCC] is the investigation of deaths following contact with the police. It is important, for the families of those who

¹⁴⁰ See 3.2.2 above and, for example PPO 'Terms of Reference' (n 12) 31.

¹⁴¹ PPO 'Terms of Reference' (n 12) 31.

¹⁴² See 3.2.2.1 above.

¹⁴³ PPO, 'How We Investigate' (n 50).

¹⁴⁴ See 3.3.1 above

¹⁴⁵ IPCC, 'Review Report' (n 76); Casale (n 89).

¹⁴⁶ IPCC, 'Review Report' (n 76) 16. See 3.3 and 3.3.2.

have died, that they know and understand what happened and why. It is equally important, for the police themselves and for public confidence in policing, that these events are seen to be fully and independently investigated, that there is proper accountability for actions or failures to act, and that lessons are learnt.¹⁴⁷

Crucially she also points out that this is “an essential part of the democratic accountability of the police.”¹⁴⁸

Involving the family in the investigation is generally confined by the guidance to providing them with information about the IPCC and the investigation’s progress. There is little indication that it might include a two-way conversation, with the IPCC taking on board family and community concerns. A renewed commitment to community engagement is seen as a means to improve public trust in the IPCC and it is a shame that in this regard even the Review Report fails to reflect on its intrinsic value for communities.

¹⁴⁷ Foreword to IPCC, ‘Review Report’ (n 76) 5.

¹⁴⁸ *ibid*, 6.

Chapter 4

The Evolving Nature and Purposes of Inquests

4.1 Introduction

It is important to consider the history of the inquest and its evolution into the natural domestic forum for fulfilling the procedural obligation under Article 2 ECHR. The ECtHR found in favour of the UK when creating the investigative obligation in *McCann*, and it is likely that the requirement was inspired at least in part by the inquest.¹ Indeed it could be argued that for literally hundreds of years there has been a procedural requirement in England and Wales, largely equivalent to the procedural obligation under Article 2. This claim may appear paradoxical given that many of the lead ECtHR cases were brought against the UK, and practice was often found to be lacking. But the inquest's history reveals the development of a permanent independent forum that, amongst other things, holds public investigations into deaths in prisons and at the hands of the police or in police custody, in which the family of the deceased can participate.

The motivations behind the holding of inquests has changed over time. At certain points in history, amongst certain groups, a particular constitutional purpose was attached to inquests into deaths in custody or otherwise at the hands of the state. But it would be wrong to assume that there was ever a tidy consensus as to what their qualitative purposes were, or how different aims or purposes should be prioritised. So while in theory there may for centuries have been a similar, if not equivalent, domestic procedural obligation to that imposed by Article 2, in reality, the wide discretions exercised by coroners, the periodic confusion over the inquest's purposes, and its troubled relationship with other judicial forums, meant that the practice in inquests was not always consistent, and its social function not always clear.²

¹ *McCann* (ch 2, n 10). Of course the Court found against the UK on the substantive obligation.

² Even when that social function has been relatively clear, it has not necessarily been consistently pursued.

4.2 The early history of the inquest

The office of coroner is one of the oldest in England and Wales.³ It is unclear exactly when it was established, but it is referred to in the Articles of Eyre in 1194.⁴ James Upshaw Downs recounts that:

In order for the knight to be elected coroner, he had to be a freeman of sufficient means to resist potential corruption. Towards that end, the office was unpaid. The specific concern was the general level of financial misconduct rampant at the time in the office of the Sheriff.⁵

The main role of the local nobles elected as coroners was to look after the Crown's revenue interests.⁶ In this regard, the death of one of the Crown's subjects could raise certain issues. Brennan observes:

Although the medieval coroner's duties were many [...], first and foremost, the coroner was an administrator who was responsible for record keeping of complex codes regarding fines and penalties having to do with deceased bodies, including homicides and suicides.⁷

If a death appeared unnatural or suspicious, it would be necessary to establish whether anyone should be held responsible for any resultant loss of Crown revenue. This meant there had to be an investigation. Medieval inquests often took place outdoors and could be held with more than 50 jurors. The inquisition would view the body of the deceased and hear from witnesses with any knowledge about the circumstances of the death.⁸ The jury would then reach a verdict on the cause of death. Where appropriate, the

³ Phil Scruton and Kathryn Chadwick, *In the Arms of the Law: Coroner's Inquests and Deaths in Custody* (Pluto, 1987) 22.

⁴ However, according to James Upshaw Downs, the existence of the office can be traced to the 10th century. Its reinvention was necessitated by the depletion of the treasury in ransoming King Richard from Vienna ('Coroner/Medical Examiner' in Michael John Brennan (ed), *The A-Z of Death and Dying: Social, Medical, and Cultural Aspects* (ABC-CLIO 2014) 107).

⁵ Upshaw Downs (n 4) 107.

⁶ Thomas *et al* (ch 1, n 18) 13–14.

⁷ Upshaw Downs (n 4) 107.

⁸ In the middle ages witnesses would also often sit on the jury.

jury would also identify who they believed was responsible for the death. If unable to account for a violent or unnatural death, a community could be fined.⁹ If a suspect was not already detained, a warrant would be issued for her apprehension and she would be held in custody to await criminal trial. The coroner would also 'attach' witnesses, who would be obliged, sometimes through payment of a surety, to give evidence at trial.¹⁰ A crucial part of a coroner's and jury's role was to assess the value of the deceased's goods, and, where the verdict was murder, the goods of any accused. If the accused was found guilty, the family of the deceased might be compensated by being given some of her property, with the remainder being forfeited to the Crown. Where an inquest jury reached a verdict of suicide, (or *felo de se* – self-murder), the deceased's property would go to the Crown.¹¹

Another of the coroner's roles was to make a record of any crimes committed within the jurisdiction and present it to the Eyre, a travelling court that stopped at villages and towns at fixed times of the year to try criminal and civil cases.¹² So, originally at least, there was a strong connection between the role of the coroner and a developing criminal justice system. Gradually, however, the judicial and administrative duties of coroners diminished: particularly in the late middle ages, with the rise of escheators and Justices of the Peace.¹³ According to Knapman, by the sixteenth century, "almost the sole remaining function performed by the coroner was the holding of inquests into violent death."¹⁴

For almost three hundred years there was little significant change in the office of the coroner, other than how it was financed. In the eighteenth century local Justices of the Peace were responsible for their payment according to the number of inquests "duly held". This led to disputes as to what types of death required investigation. Some coroners, and many magistrates, considered it only appropriate to hold inquests into obviously violent deaths. Others felt they had a duty to investigate all deaths in custody (not just prison), and

⁹ Thomas *et al* (ch 1, n 18) 13.

¹⁰ *ibid*, 14.

¹¹ Scraton and Chadwick (n 3) 22–28.

¹² *ibid*, 24.

¹³ Thomas *et al* (ch 1, n 18) 15.

¹⁴ Paul Knapman, 'The Crowner's Quest' (1993) 86 JR Soc Med 716, 719.

all sudden or “unnatural” deaths.¹⁵ This fuelled bitter disputes between some coroners and magistrates.

4.3 Nineteenth- and early twentieth-century inquests

Originally, then, the inquest was less about justice for the deceased or their family, and more about establishing whether the Crown had been denied a source of revenue.¹⁶ Over the centuries the demographic and political landscape of the country changed and with it the popular motivational sentiment behind investigations into unexplained, unnatural or violent deaths. The nineteenth century marked a watershed in this regard. This did not manifest itself in significant changes to the inquest’s fundamental procedural characteristics (although important changes did take place), rather it was exhibited in debates about the inquest’s purpose and perceived constitutional significance.

As the inquest evolved, its relationship with the criminal justice system began to throw up important legal and conceptual problems, especially in terms of their often preliminary (some would argue *ex parte*), inquisitorial and public nature. Perhaps the most important period in the evolution of the inquest occurred during the nineteenth and early twentieth centuries. During that time the office barely survived being squeezed out of existence by hostile justices of the peace, and a rapidly evolving criminal justice system. The inquest was becoming increasingly unpopular amongst powerful vested interests and there was growing disquiet about the reputational impact that it could have. This was exacerbated by a developing modern press, and the relative lack of procedural protections for those who might face criticism at inquests. Despite these pressures (or perhaps because of them), this was also a period in which inquests acquired renewed constitutional significance for many; particularly when investigating deaths in prisons, workhouses, or otherwise at the hands of state actors.

¹⁵ *ibid*, 719.

¹⁶ Or otherwise an opportunity for the Crown to secure additional revenue.

4.3.1 Inquests into deaths in prison

While inquests were usually confined to violent or unnatural deaths, they have always been held into deaths in prison, regardless of the circumstances.¹⁷ This peculiar historical pre-occupation with discovering the cause of prison deaths should not be misinterpreted as driven by humanist concerns. Writing about the medieval inquest, Burney observes that “Prison inquests as tokens of the transhistorical tenderness of English common law were artefacts of a much later political reconfiguration”:¹⁸

Sovereign dignity and profit, at stake in every inquest, was implicated in the particular instance of prison death by virtue of the Crown’s prerogatives in imprisonment and the infliction of bodily punishment. As a general principle, since prisons were coextensive with the person of the king, any wrongdoing on the part of the franchise holder constituted an affront to his dominion. Prison deaths, furthermore, represented a breach of sovereign interest with a unique set of consequences. As John Langbein observed in his work on torture, medieval incarceration served a well-recognised coercive function, “designed to compel someone to take some other procedural step, characteristically the payment of a crown debt or a civil judgment debt.” In this sense prison deaths attributable to abuse or mismanagement could be counted as direct losses to the fiscal well-being of the Crown, requiring compensation of some sort...¹⁹

However, inquests rarely led to verdicts critical of either the prisons as institutions, or individual gaolers.²⁰ Hunnisett and Overstone describe how in the middle ages, verdicts of ‘Natural Death’ or ‘Visitation by God’ took on very wide meanings: “Deaths from disease, cold, hunger and thirst and from *peine forte et dure* were common to all gaols, but were regarded as ‘natural deaths’.”²¹ Incredibly, for example, despite concluding that a

¹⁷ Joe Sim and Tony Ward, ‘The Magistrates of the Poor? Coroners and Deaths in Custody in Nineteenth-Century England’ in Michael Clark and Catherine Crawford (eds), *Legal Medicine in History* (CUP 1994) 246.

¹⁸ Ian A Burney, *Bodies of Evidence: Medicine and the Politics of the English Inquest, 1830-1926* (JHU Press 2000) 25.

¹⁹ *ibid.*

²⁰ Thomas *et al* (ch 1, n 18) 13–15; Sim and Ward (n 17).

²¹ RF Hunnisett and Samuel JL Overstone, *The Medieval Coroner* (CUP 2008) 37.

prisoner's death at Canterbury Gaol in 1313 had been caused by flogging, a City of London jury still returned a verdict of "Natural Death".²²

This was still a problem by the nineteenth century. Between 1795 and 1829, 376 prisoners died in Coldbath Fields prison. T. R. Forbes concluded that the inquests revealed:

[...] an apparent lack of official interest in determining why prisoners died. Indeed one wonders whether the vagueness of the record represents an effort to conceal actual causes of death—a state of affairs which would not be surprising in a prison in utter disrepute. No cause was recorded for almost one third of the deaths. Almost one fifth were piously ascribed to a 'Visitation of God', a whitewashing phrase that also was frequently used by coroners' juries of the time for deaths in prison; it was as nonspecific as it was unassailable [...].²³

Similarly, in the 7 years between 1825 and 1832, there were 158 deaths in the King's Bench debtors' prison.²⁴ The inquests reached verdicts of Visitation of God or Natural Death in 150, and in only six cases of cholera was an actual cause of death given.²⁵ The statistician, Dr William Fair, who compiled the Register General's reports, noted in 1837 that:

[...] the inquest in gaols is at present very much a matter of form [...] The causes of death registered as the result of a solemn, juridical, investigation are the most unintelligible in the register.²⁶

Until 1823, juries could include a significant proportion of prisoners from the institution being investigated, leading to concerns that jurors were under the influence of prison governors.²⁷

²² *ibid*, 36.

²³ Sim and Ward (n 17) 246, quoting T.R. Forbes, 'A mortality record for Cold Bath Fields' (1977) 53 *Bulletin of the New York Academy of Medicine* 666, 668-9.

²⁴ *ibid*, 247.

²⁵ *ibid*.

²⁶ *ibid*.

²⁷ Sim and Ward (n 17) 247. See also Colonel Blennerbasset Fairmen in Thomas Wakley (ed) *The Lancet London: 1830-31 in Two Volumes, Vol. I* (Elsevier 1831) 144.

There was a counter argument that without juries including people from the institutions concerned, they would be ill-equipped to understand the realities of a regime. This was Thomas Wakley's view on inquests into deaths in prison, and it held for other categories of death. Karl Marx, for example, makes the same point

4.4 The evolving constitutional significance of inquests

There is evidence of people increasingly challenging the tendencies described above. Ignatieff points to a 1798 example where a vagrant died in Coldbath prison.²⁸ At the inquest, the jury returned a verdict of Visitation by God. Members of the London Corresponding Society, who were serving sentences in the same prison for treason, queried the verdict in a letter asking:

Were the Jury informed, Sir, that this man was barely clothed? Did they inquire into the quantity of food given him, did they know that he was put into a cold damp cell during a very severe frost without the use of a fire or anything to keep him from perishing? Did they hear that he complained 36 hours before his death that his legs would mortify if he was left in that state? Did they inquire what medical assistance he received after his complaints were known? Were any inquiries made of the prisoners near him of the circumstances of his death, and did the jury know that he was not a criminal?

[...] When our humane statutes made provision for passing the poor to their parishes they never intended that their lives should be sported with like the worthless felon who is speculated upon to calculate what degree of hunger he can sustain! What degree of cold he can bear.²⁹

Another example can be seen in a letter from a Colonel Blennerbasset Fairmen to the *Lancet* complaining that:

‘Died by the visitation of God’ is the return nine times out of ten when the verdict ought to be ‘of a broken heart through persecution of the most relentless and unjust kind’ – ‘of disease brought on by the removal from a bed of sickness to a place of incarceration’ – ‘of abstinence and starvation through the absolute

regarding deaths in mines (Karl Marx, *Capital: A Critical Analysis of Capitalist Production, Volume 1*, translated by Samuel Moore and Edward Aveling (Wandsworth Editions Ltd, 2013) fns. 378, 379, 380).

²⁸ Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (Penguin 1989) 131-132.

²⁹ *ibid.*

want of the necessitates of life' – or perhaps 'from excessive drinking brought on by anxiety and dejection of mind, through a long confinement'.³⁰

During this period the office of coroner was under constant attack from two different sides. The first was reactionary and tended to believe magistrates were better placed and qualified to investigate deaths. They targeted, in particular, the independence and the wide discretions that attended the office, as well as inquest juries. They complained that coroners carried out too many inquests, at too much cost, into deaths which were either from natural causes, or—with deaths in prisons and workhouses—ultimately the consequences of the deceased's own life-long excesses and poverty of spirit.

As for attacks on jurors, Sim and Ward point out they “were easy targets; since there was, uniquely, no property qualification for this form of jury service, the jurors were often poor, and sometimes illiterate.”³¹ The magistrates of Middlesex, for example, set up a Committee to investigate the conduct of inquests in the area. Its report derided juries' “misplaced interference and irrelevant questions”³² and recommended abolishing them and transferring control of death investigation to the magistrates.³³

The other source of criticism came from radicals and reformers. They generally recognised the potential value of the office, but advocated urgent reform. They were particularly concerned about coroners' lack of medical training. *The Lancet*, for example, railed against “the imbecility and ignorance of coroners”.³⁴ In 1841, the surgeon, Jonathan Toogood, argued in a letter to *The Times*:

Men are often elected to the office of coroner who are so totally unfit for its duties, as to be quite unequal to conduct an inquiry themselves, or direct a jury [...]. In this part of the country the evidence of a medical man is generally dispensed with, and a post-mortem examination is a matter of very rare occurrence; so that unless the cause of death be obvious and visible, it is

³⁰ Wakley (n 27) 144.

³¹ Sim and Ward (n 17) 254.

³² *ibid.*

³³ *ibid.*

³⁴ Sim and Ward (n 17).

scarcely ever ascertained, and the coroner directs the jury to find a verdict of 'death by visitation of God', which they return accordingly.³⁵

Coroners were rarely medically trained and, until the Remuneration of Medical Witnesses Act of 1836, could not pay for qualified doctors to conduct post-mortems. Critics were also appalled by the tendency for the office to, at best, be filled by those lacking the rigour necessary to fearlessly investigate deaths; and, at worst, by those who were simply corrupt. Between these two extremes there were many coroners who exhibited a natural bias towards institutions implicated in deaths. In one example, Parliament heard how an inquest jury was "swayed by the coroner's 'improper' summing up", and told there was no middle ground between a verdict of 'Murder' and 'Died by the visitation of God'.³⁶ This:

[...] induced the jurors to bringing in the latter verdict, though three of them afterwards said, they thought it would have been more proper to declare, that the prisoner died through the negligence of the gaoler or his servant.³⁷

Such examples were common.³⁸ Another can be seen in the context of the battle between prison reformers, and those who believed that prison should be "as lonely and as inconvenient and irksome as the human mind could bear", such as the Tory MP, C. C. Western.³⁹ The regime at Millbank prison was singled out for particular derision by hardliners, with the chairman of the Millbank Committee accused of overseeing a "fattening house".⁴⁰ Ignatieff observes that bread riots at the prison in 1818 had the ironic effect of encouraging the myth that the administration was weak and indulgent.⁴¹ After criticism in Parliament and the press, the prison diet was reduced to disastrous levels. Ignatieff describes the new regime as an "experimentation with the outer limits of terror"—although noting that this was not unique to Millbank.⁴²

³⁵ Jonathan Toogood, 'To The Editor of the Times' *The Times* (Issue 17577, London, 26 January 1841) 6.

³⁶ *Parliamentary Reports*, 1812, III, p. 418, quoted in Sim and Ward (n 17) 247.

³⁷ *ibid.*

³⁸ And neither are they confined to the nineteenth century. See, for example, Scraton and Chadwick (n 3) 72–98.

³⁹ Ignatieff (n 28) 175.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.*, 177.

[C]ounty and borough magistrates introduced bread and water diets and banned the supply of outside food. By the early 1840s, the paring away of institutional diets had reached the point that the Home Secretary felt it was necessary to warn [Justices of the Peace] against using diets as “an instrument of punishment”.⁴³

In the winter of 1823-24, starving and freezing prisoners succumbed *en masse* to typhus, dysentery and scurvy. Thirty-five died and around four hundred were incapacitated in just one winter. *The Times* observed that at the inquest into the death of one prisoner, “the body (which was quite skeleton) presented the same deplorable appearance to which so many unfortunate convicts have been reduced within the last nine months.”⁴⁴

The coverage of the inquest illustrates the active role played by juries in questioning witnesses.⁴⁵ The coroner is constantly interrupted by questions and exclamations from jurors, who at times express incredulity at claims that the death had nothing to do with the prisoner’s diet. At one point the coroner pleads:

You are not to insult a gentleman examined here. Put your question through me. A professional gentleman must know better than we do. You are bound to believe him; but do put your question civilly.⁴⁶

The Times reports that the jury was split with six wishing to record a verdict of “Natural Death, occasioned by the former bad dietary.”⁴⁷ But, “the coroner impressed strenuously upon the minds of [these] jurymen [...], the discontent such a verdict would occasion out of doors, and ultimately succeeded in getting the whole to sign a verdict of “Natural Death, occasioned by diarrhoea.”⁴⁸

⁴³ *ibid*, 176–177.

⁴⁴ ‘Penitentiary Millbank: Death of Another Convict’ *The Times* (Issue 11928, London, 19 July 1823) 3.

⁴⁵ *ibid*.

⁴⁶ *ibid*.

⁴⁷ *ibid*.

⁴⁸ *ibid*.

It is important to note, however, that *The Times* did not “bow to the coroner’s suasion”⁴⁹ publishing details of the evidence, the jury’s original opinion, the coroner’s interference, and the jury’s U-turn.⁵⁰

4.5 Thomas Wakley and the inquest as radical theatre

So despite a bleak picture of the beginnings of the modern inquest and any association it might have with holding state actors to account for deaths at their hands, things were being challenged by a determined coalition of radicals and reformers, commentators, journalists, newspaper and periodical editors, doctors and parliamentarians. In particular, because inquests were held in public and the press reported on them, reformers were well-informed and able to comment upon the realities of the system.

Much of the literature that describes inquests during this period focuses on their perceived ineffectiveness due to the inconsequential verdicts often reached. But this arguably misses the significance of the proceedings as a whole. It is true that a verdict of Natural Causes or Visitation by God meant there would be little chance of a criminal prosecution⁵¹, but evidence heard at inquests was widely disseminated by a developing modern press, successfully and widely exposing cruelties suffered in e.g. workhouses,⁵² prisons,⁵³ orphanages,⁵⁴ and at the hands of Yeomanry Cavalry.⁵⁵ Inquests had a significant impact on national conversations surrounding state institutions, informing debates on policing, prison and poor law reform, and other social issues. These appear in Parliamentary debates, newspaper editorials, and letters to newspapers and journals of the time, with evidence from specific inquests being referred to.

Furthermore, not all coroners or inquests in the nineteenth century merited all of the criticisms outlined above. Sim and Ward argue that:

⁴⁹ Ignatieff (n 28) 176.

⁵⁰ Ignatieff (n 28) 176.

⁵¹ Although this was not absolutely determinative in this regard. See *The King v Ferrand* (1819) 3 B & ALD 260 (KB).

⁵² See the inquests into deaths at Hendon Workhouse referred (below at 4.5.1).

⁵³ See the inquest into an unnamed person who died at Millbank Prison referred (above at 4.4).

⁵⁴ See the inquest into deaths at Tooting Child Farm referred (below at 4.5.1).

⁵⁵ See the John Lees inquest (below at 4.5.2).

[...] the coroners court was a forum where some of the most marginalised groups in Victorian society, such as prisoners, paupers and their relatives, could challenge the practices of disciplinary institutions and the medical profession. It was also the only court in which working-class people could participate as jurors. While there were many inquests in which juries tamely recorded 'visitation of God' verdicts as instructed by the coroner, there were others in which their verdicts reflected a form of popular justice. The coroners' claim to be the 'magistrates of the poor' was not entirely unfounded.⁵⁶

With coroners normally elected by local freeholders, and inquests including local jurors, they point out that inquests could have "a distinctly popular flavour" and provide "a forum in which the poor could challenge the powerful."⁵⁷ Specifically, coroners' courts "played an important part in raising popular discontent about the disciplinary orientation of the prisons",—and this also extended to other institutions.⁵⁸

4.5.1 Thomas Wakley

Some coroners fulfilled their role with a considerable sense of duty. Probably the most famous of these was the Victorian coroner and "radical surgeon", Thomas Wakley.⁵⁹ In 1835, Wakley was elected as an MP, and in a move that alleviated one of the most repeated criticisms levelled against coroners—their lack of medical knowledge—he guided the Remuneration of Medical Witnesses Bill through Parliament.⁶⁰ This allowed coroners to pay doctors to conduct post-mortems and give evidence at the inquest.⁶¹

In 1839, Wakley was elected coroner to Western Middlesex, and instructed that all deaths in custody (including prisons, workshops, asylums and police stations) be referred to him. With magistrates being both the *ex officio* guardians of poor law workhouses in

⁵⁶ Sim and Ward (n 17) 263.

⁵⁷ *ibid*, 246.

⁵⁸ As well as "the numerous inquests which revealed 'a harrowing compound of neglect and mindless cruelty'" in workhouses, they point to the example of the 1877 inquest into the death of Fred Chalkey at the hands of the police where "[t]he inquest jury was scathing in its indictment of the police's behaviour" (*ibid*, 262).

⁵⁹ *ibid*.

⁶⁰ An Act to provide for the Attendance and Remuneration of Medical Witnesses at Coroners Inquests 1836.

⁶¹ *ibid*.

rural areas, and controlling the payment of coroners, there ensued an almost inevitable battle between the two groups of office holders in Middlesex;⁶² a battle so fierce that a Parliamentary Committee was tasked with looking into it.⁶³ Wakley argued before it that the office of coroner was the only thing that stood “between all persons in authority and the people”:⁶⁴

The justices of the peace are the controlling authorities in gaols and in lunatic asylums; they are sometimes concerned in cases where life is lost in conflicts between the people and the civil power; the magistrates are the persons to whom the poor apply in cases of urgent necessity, when the requisite aid is refused to them by the parochial officers; in the whole of these cases the coroners may be brought into conflicts with the magistrates in the discharge of the most solemn and important portions of their public duties. If coroners be subject to the control of persons who are thus engaged, seeing the tyranny that might be exercised over them in relation to their accounts, they might shrink from the performance of their duty at a time when their most powerful energies should be called into action in the public service.⁶⁵

Wakley oversaw several inquests where juries returned damning verdicts on institutions.⁶⁶ Two inquests into deaths at Hendon Workhouse pitted Wakley against the local vicar, magistrate, and chairman of the workhouse’s board of guardians, the Rev. Theodore Williams. In the first, a jury found that a pauper’s death from scalding was contributed to by the workhouse failing to erect a safety railing. The second, was into the death of James Lisney, whose daughter claimed had died due to an illness caused by him

⁶² Sim and Ward (n 17) 246.

⁶³ *ibid*, 249.

⁶⁴ *ibid*, 250.

⁶⁵ *ibid*.

⁶⁶ e.g. James Linsey (described below); an unnamed child who died at Tooting Child Farm (described below); and Private John White, whose death after a punishment of 150 lashes at Hounslow Barracks in 1846 caused a public scandal after its details were made public through the inquest (US National Library of Medicine, *Visible Proofs: Forensic Views of the Body*, <<http://tinyurl.com/gymbjuk>> accessed 18 October 2015).

being locked in a cold and damp room as a punishment.⁶⁷ Wakley's opening statement to the inquest provides an interesting illustration of his attitude regarding its purpose:

Now the allegation of the daughter was of a very serious import; and it is quite clear that, if allegations of this kind get forth without inquiries being instituted, and investigations too, somewhat of a searching nature, the poor would very soon believe [...] that the inquest afforded them no protection whatever [...]. I am the more particular in alluding to the protection which the inquest is capable of affording, and ought to afford, to poor persons in workhouses [...].⁶⁸

Wakley obviously believed it was important for the inquest to take seriously the concerns of the deceased's family. It was on the basis of the daughter's allegations alone that he ordered a post-mortem.⁶⁹ The quote also reflects his belief that one of the inquest's tasks was to reassure the public that wrongdoing would be exposed, or an exonerating verdict would only be reached after a thorough investigation. These fit the purposes that Lord Bingham gave Article 2 compliant investigations in *Amin* over 150 years later.⁷⁰ Finally, Wakley obviously believed that if governors were held to account, real protection would be afforded to the poor by deterring future excesses by those in authority. This corresponds with the ECtHR's view, a century and a half later, that for Article 2 to provide meaningful protection, it must be read in combination with Article 1.⁷¹ Wakley also impressed on the jury what he saw as the particular importance of inquests into deaths in prisons and workhouses.⁷²

The report of the inquest illustrates how much juries were involved in the investigative function of inquests. Wakley repeatedly asks the jurors for their opinions on the inquest's course, including whether they agree there should be a post-mortem, and whether they can

⁶⁷ Poor Law Commission, *Accounts and Papers of the Poor Law Commission, Session 26 January-22 June 1841*, vol 9 (1841).

⁶⁸ *ibid*, 265.

⁶⁹ *ibid*.

⁷⁰ *Amin* (ch 1, n 11).

⁷¹ i.e. A state can not realistically give effect to the substantive right unless processes are in place to root out and deter fatal wrongdoing by state actors.

⁷² Poor Law Commission (n 67) 265–266.

suggest a reliable surgeon, commending their suggestion that one be requested from London with no connection to the case.⁷³

Another feature of interest is Wakley's use of what we would call today 'special measures'. Whenever a pauper from the workhouse gave evidence, Wakley emptied the courtroom, save for the jurors. Their evidence was heard and depositions prepared, which were then read out in open court. In terms of open justice, this was a worrying practice. It was obviously thought prudent by Wakley to protect witnesses from intimidation—real or imagined—by workhouse staff. But it also raised real questions of fairness and propriety, and was justifiably seized upon by the Rev. Williams as unfair. Wakley's response to the Reverend's complaints may have been canny (pointing out his hypocrisy), but failed to address a valid point (even if the origins of that point lay in Williams's prejudices):

The Rev. T *Williams*.] [...] I submit to you that the paupers you may be about to examine are not belonging to the most intellectual class of persons, and therefore a great deal depends upon the way the questions may be put to them. This being the case, I have to request, that although you may exclude the guardians, you will at least allow the reporters of the public press to be present.

Coroner.] It is singularly curious that so much anxiety is manifested about the presence of reporters, when I find that by a resolution of the Board of guardians themselves in October 1837, it is resolved "That no reporters or members of the public press be permitted to be present at any of the meetings of this Board."⁷⁴

The jury concluded that Lisney's death was "caused by an imprisonment in the gaol-room of the Hendon Union Workhouse", and expressed its view that it "was not humane to imprison, without fire and on low diet, [...someone] in an infirm state of health, in consequence of [...] diabetes."⁷⁵

Wakley's peculiar concern amongst his profession for justice can be seen in the aftermath of 180 deaths in Tooting Child Farm in 1848-9. Surrey coroners failed to carry out a single inquest, but one of the sick children happened to die in Wakley's jurisdiction.

⁷³ *ibid*, 265.

⁷⁴ *ibid*, 286.

⁷⁵ *ibid*, 311.

But for this happenstance, Charles Dickens wrote in the Examiner, “the conditions at the Farm might never have come to light”.⁷⁶

Wakley called an inspector of the Board of Health to produce a report on the conditions at the Farm. It was damning, describing how they:

[exceeded] in offensiveness anything yet witnessed [...] in hospitals or elsewhere, occupied by the sick [...]. Drouet [the manager], despite warnings, had overcrowded his accommodation and had put four cholera patients in one bed. They lay, of course, covered with each other’s diarrhoea, which the inspector described as ‘every offensive, indecent and barbarous circumstances that can aggravate the horrors of their condition [...]’⁷⁷

The jury brought in a verdict of manslaughter against the manager.⁷⁸

4.5.2 The inquest into the death of John Lees

The Oldham/Manchester inquest into the death of John Lees had a singular impact on debates about the role of inquests and their openness to the public. Lees was fatally wounded on 26 August 1819 at Saint Peter’s Fields in Manchester (the Peterloo Massacre). According to Burney:

In the course of the inquest, discussion centred on “constitutional” issues; most notable were the status of the inquest as an “open” court to which “the public” had a fundamental right of access and the role of the press in transmitting its proceedings onto a national stage. These connected with broad jurisprudential debates that, in the context of the political repression of the revolutionary era, had been consistently before the courts in previous years. Equally, abstracted from the specific institutional location of the coroner’s inquest, principles of open justice were matters of major concern for a radical politics founded on the defence of ancient liberties. The Oldham hearings definitively placed the inquest and open justice in the same frame: the coroner and his supporters

⁷⁶ *ibid.*

⁷⁷ Michael Alpert, *London 1849: A Victorian Murder Story* (Pearson Education 2004) 81.

⁷⁸ He was acquitted at a criminal trial on the direction of the judge who found it could not be proved that Drouet’s regime directly caused the deaths (Sim and Ward (n 17) 252).

argued that, in the climate of intense agitation surrounding it, the inquest was best kept out of the public eye; radicals saw in the full public hearing a chance to expose government repression to public opinion in a clear forum.⁷⁹

Paradoxically, the inquest and its outcome illustrated both the forum's importance, and its vulnerability to abuse and corruption. The formal outcome of the inquest was a travesty of any notion of justice. However, the proceedings themselves led to the wide dissemination of eye-witnesses evidence, testifying to the carnage inflicted upon the peaceful gathering at Saint Peter's fields. Every day the courtroom was packed, with *The Times* describing how:

The interest excited by the proceedings before the Coroner is most intense. The pressure of the crowd into the room obliged the Coroner repeatedly to interfere for fear the floor should give way. A considerable multitude continued assembled at the doors and windows of the house during the whole time [...] ⁸⁰

Despite the very real local anger at the events at Peterloo, the reporter observed that:

Up to this moment the utmost order has been observed, and I have no reason whatever to apprehend that any disturbance will arise. There is a deep and settled melancholy on every countenance; and the immense assemblage now before the house are waiting patiently for the result of the inquiry.⁸¹

Inside the Tavern where the inquest was originally being held, its chaotic and bad-tempered opening on 8 September 1819 set the tone for the next few weeks of angry exchanges on points of legal and constitutional principle, and the on/off hearing of evidence. The inquest was opened by the coroner's clerk who, after becoming aware that the family had legal representation and were prepared with witnesses, adjourned proceedings until the return of the coroner. First, he insisted that the coroner would not allow the press to report on proceedings or others to attend. At this the family's barrister, Mr Harmer, observed:

⁷⁹ Burney (n 18) 29.

⁸⁰ 'Oldham, Saturday Night: Inquest on John Lees (Evidence Continued)' *The Times* (Issue 10736, London, 28 September 1819) 2.

⁸¹ 'Oldham, 7 o'clock, Saturday Evening' *The Times* (Issue 10735, London, 27 September 1819) 2.

[T]his is an open Court; any man is at liberty to publish anything which takes place here [...The coroner] could not legally exclude us; for as this is a public Court of Justice [...] if all the people of England could be so compressed, they are entitled to be present in this room [... T]o exclude us would be contrary to the law of the land: for not merely professional agents, but any passing strangers, are at liberty to enter this public Court.⁸²

In fact, when the inquest reconvened, the coroner, Mr Ferrand, did open the court to the public and the press, and allowed them to take notes. However, he insisted that the press not publish anything until all related proceedings had finished.⁸³ He could rely on *R v Fleet* as authority for this order.⁸⁴ In that case, the King's Bench ruled that a court could grant a criminal information for "publishing, in a newspaper, a statement of the evidence given before a coroner's jury, accompanied with comments, although the statement be correct, and the party has no malicious motive in the publication."⁸⁵ That case concerned the publication of an account of an inquest also into the death of a man at the hands of soldiers during a civil disturbance. The jury brought in a verdict of "wilful murder" against the high constable and two others. During the proceedings, *The Brighton Herald* published minutes of the evidence and a comment suggesting the military had been unnecessarily called out, and the high constable's conduct was, "to say the least, [...] imprudent."⁸⁶

In *R v Fleet* all four judges held that the publication was unlawful with two singling out the comment for particular criticism.⁸⁷ Bayley J. went a step further than the other judges, arguing that the inquest was:

[...] wholly *ex parte*, and where there is no opportunity for cross-examination. A jury who are afterwards to sit upon the trial ought not to have *ex parte* accounts previously laid before them. They ought to decide solely upon the evidence

⁸² 'Oldham, Sept. 8: Coroner's Inquest on the Body of John Lees' *The Times* (Issue 10735, London, 27 September 1819) 3. The coroner appears to sometimes be referred to in reports as "Ferrand" and sometimes "Farren".

⁸³ *The Times* (27 Sept 1819) (n 81).

⁸⁴ *R v Fleet* (1818) 106 ER 140 (pre SCJA).

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

which they hear on the trial. It is therefore, highly criminal to publish, before such a trial, an account of what has passed on the inquest before the coroner.⁸⁸

Back at the Lees inquest, the coroner's order—that any notes taken should not be published—was ignored by *The Times* and other newspapers. *The Times* gave a verbatim account of the second day's proceedings including the evidence given by witnesses. Despite stating that the coroner's conduct was “as wise as it was honest”, *The Times* questioned “the propriety of suppressing the evidence”, and insisted it would follow the practice in London and publish all that transpired.⁸⁹

The coroner—who during the following days very quickly lost the sympathy of *The Times*⁹⁰—was furious. On the third day, he stated he would institute criminal prosecutions against all who violated his order. Again, Mr Harmer weighed in, arguing that “This Mr Coroner, is an open court as much as any kind of court”, and pointing out that inquests of old were even held in the open air.⁹¹ The coroner then banned anyone from taking notes, at which Mr Harmer observed that “surely the fair and correct reports given by those who took notes in that Court, were far better grounds of opinion than the vague recollections and inaccurate statements of mere spectators.”⁹²

The Times continued to publish accounts of proceedings, seemingly from a mixture of memory and surreptitiously made notes. Things reached a head on the eighth day of proceedings, with the coroner squabbling with members of the public and press on the legality of his prohibition on note-taking.

The CORONER here asked the gentleman [...] whether he was taking notes [...]
The gentleman declined to answer. Then you must leave the Court [...] The
gentleman remarked, that in taking notes in that Court he was exercising as
undisputed a right as in walking the highway or breathing the common air. The

⁸⁸ *ibid.*

⁸⁹ ‘Leader’ *The Times* (issue 10740, London, 27 September 1819) Issue 10735, 2. *The Times* also wrongly predicted that the inquest would anyway be over before their reports reached Manchester (*ibid.*).

⁹⁰ *The Times* implied he was too close to the Manchester magistrates who were implicated in Lees’ death, secretly meeting with them during the first days of the inquest (‘Coroner’s Inquest on Lees: Third Day’ *The Times* (Issue 10740, London, 2 October 1819) 3).

⁹¹ *ibid.*

⁹² *ibid.*

giving of evidence in that Court was a publication. Whatever is aired in a public Court is already published, and how can a journal be restrained from publishing what has been already published?⁹³

At this point another member of the public argued that “the publication of the evidence might be punished if it was illegal; but that it was contrary to law [... and] the practice of our Courts, to forbid using one’s hand in noting what took place.”⁹⁴ At this, the coroner finally lost patience and had the reporter forcibly removed.⁹⁵

Unfortunately, the Lees inquest was halted when the coroner ordered a lengthy adjournment. This was challenged in the High Court, which ruled that because the jury had viewed the body in the absence of the coroner, the inquest was “utterly illegal.”⁹⁶ The adjourned inquest was therefore never resumed, but neither was a new one ordered.⁹⁷

The suspension of the inquest helped ensure that no one was ever prosecuted in connection with Peterloo, but it was too late to cover up what had happened.⁹⁸ The evidence of numerous witnesses was widely circulated—most of whom swore to the peacefulness of the gathering and the unprovoked nature of the attack by the cavalrymen—and so too was the alleged bias of the coroner, his alleged collusion with the Manchester magistrates,⁹⁹ and the denial of justice by the High Court. Burney describes how in Parliament, Henry Brougham did not let the injustice of the High Court’s judgment pass without comment, arguing that legal principle had been sacrificed to “base political expediency”, making “a mockery of the people of England.”¹⁰⁰

⁹³ ‘Inquest on John Lees, Oldham, Monday, Oct 4: (fifth day)’ *The Times* (Issue 10743, London, 6 October 1819) 3.

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ *Ferrand* (n 51) 263.

⁹⁷ On 4 January 1919, *The Times* published a letter from 7 out of the inquest’s 12 jurors, addressed to the Coroner and giving their unofficial verdict that Lees had been murdered (‘The Oldham Inquest’ *The Times* (Issue 10819, London 4 January 1820) 2).

⁹⁸ Technically criminal proceedings could have been brought through other means, but none were (*Ferrand* (n 51) 265).

⁹⁹ *The Times* alleged the coroner had surreptitiously met with the Manchester magistrates (who were implicated in the death) during the first days of the inquest, and arranged for a lawyer to act on their behalf at the inquest (*The Times* 2 Oct, 1919 (n 90)).

¹⁰⁰ Burney (n 18) 29, quoting *Hansard* 41 (Nov-Feb 1819-20): 1184.

Despite the above, Burney argues that the Lees inquest had the paradoxical affect of re-invigorating the ancient institution with a renewed constitutional significance, and that this was quickly picked up on by the press:

For the opposition press, the Lees inquest struck critics as part of a broad-scale assault on the foundations of English liberties, of which Peterloo was itself the most obvious and flagrant instance. Opponents of despotism, an Examiner correspondent declared, were facing a constitutional crisis of epic proportions: “As if the atrocious sabring of an unarmed inoffensive population were not sufficient of itself to make the triumph of arbitrary principles, supported by military power, over the constitutional rights of the people, we are doomed to witness the scandalous perversion of judicial proceedings in support of that system of state policy which will either destroy this country, or it must be destroyed by the spirit of the British nation.” The resort to legal machination thus provided a means to invest in the popular inquest the emotions attached to the most traumatic martyrdom in the annals of radical politics. The inquest, at least in principle, emerged from Peterloo as a constitutionally sanctioned answer to the problem of reconciling the tension between appeals to public opinion and the spectre of public disorder. Small wonder, then, that the opposition press took the opportunity over the next several years to realise other cases of inquests that equally promised to expose abuse.¹⁰¹

4.6 Ongoing tensions about the openness of nineteenth-century inquests

The controversy surrounding public access to inquests and the publication of proceedings continued for two decades. In an 1827 case brought against the same Mr Ferrand, the High Court considered whether an action for trespass could be brought against a coroner for forcibly removing a member of the public from the courtroom.¹⁰² Two questions were considered. Was the coroner’s court an open court; and, if so, did the coroner still have the power to remove individuals as he deemed fit. The coroner’s barristers stressed the fact that the plaintiff was not in any way connected to the inquest

¹⁰¹ *ibid*, 28–30.

¹⁰² *Garnett v Ferrand* (1827) 108 ER 576 (KB). It has not been possible to ascertain whether this related to the Lees inquest.

proceedings: “he was not summoned, nor accused, nor suspected, nor a relation of the deceased, nor even an inhabitant of the vill where the body was found.”¹⁰³ As such, they argued, he had no right to be present because the inquest was a “preliminary investigation only, and, therefore, not open to the public.”¹⁰⁴

Counsel for the plaintiff argued that both statute and old authorities defining inquests and the public’s obligations towards them necessitated that they be open. Certain members of the public had certain rights at inquests, which could only be exercised if they were present. They pointed out that “if a person has not a right to be present, he cannot tell when evidence tending to criminate him is given, so as to be able to adduce evidence in answer.”¹⁰⁵ Further, unlike grand juries, inquests were required to hear both evidence for and against anyone implicated in a death. An inquest would also not necessarily lead to an accusation against any individual, and the fact that it sometimes would was “not sufficient ground for saying the inquiry should be secret.”¹⁰⁶ In particular, the notion of a closed inquest flew in the face of the tendency in the past to have enormous juries, and the ongoing practice of impanelling juries publicly and then viewing the body “in the street, in an open place, and in *coronâ populi*.”¹⁰⁷ They observed that the 1207 Statute of Marlbridge had required all persons over twelve years old to be present at inquests.¹⁰⁸ Also, in contrast to grand juries, inquests could conclude with decisions which would not be “traversable”—the issuing of fines upon villagers, for example, or a verdict of *felo de se*.

Despite these arguments, the court ruled in Ferrand’s favour. The judges expressed their view that the inquest was, indeed, only a “preliminary enquiry” and that “such an enquiry ought, for the purposes of justice, in some cases to be conducted in secrecy.”

[...S]ecrecy and exclusion may be proper and necessary when charge and accusation begin, it is obvious, that this may begin as soon as the evidence begins. Cases also may offer, in which privacy may be requisite for the sake of decency; others, in which it may be due to the family of the deceased. Many

¹⁰³ *ibid*, 614.

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid*, 622.

¹⁰⁶ *ibid*, 620.

¹⁰⁷ *ibid*, 621.

¹⁰⁸ *ibid*, 618.

things must be disclosed to those who are to decide, the publication whereof, to the world at large, may be productive to mischief without any possibility of good.¹⁰⁹

The *ratio* of the case, however is limited to the finding that the coroner's court is a Court of Record, of which the coroner is the Judge, and that no action will lie against a Judge of Record for any matter done by him in the exercise of his judicial functions.¹¹⁰

In 1832, the issue of inquests' openness to the public was debated in the House of Commons.¹¹¹ Mr Warburton MP rose to advocate inserting into the Coroners Bill a clause "declaring that all inquests should be public."¹¹² In debate, the Lees inquest was referred to explicitly:

What security was there that the Coroner's inquiry would lead to a full and fair investigation, if the inquest could be held in secret? In all such cases, the only protection which the people could have was by the free admission of the reporters of the public Press. [Mr O'Connell] looked upon the case of those who were concerned in the celebrated murders at Manchester to have been secured by the imperfection of the law respecting the Coroner's Court. The highest Courts of Law were open, although in them there was some guarantee of justice, in the education, experience, previous character, and responsibility of the Judge; whereas, neither experience, nor education, nor any qualification whatever was required in the Coroner, who had the power of deciding absolutely and in secret.¹¹³

It was pointed out that in inquests suspects could adduce evidence in their own favour and that a public verdict of murder at an inquest was as likely to prejudice a criminal jury as the evidence on which that verdict was founded. Referring to the Lees inquest, Henry Hunt observed that "[t]he right of excluding the public from Coroner's Inquests was first

¹⁰⁹ *ibid*, 627.

¹¹⁰ *ibid*, 625.

¹¹¹ HC Deb 20 June 1832, vol 13, cols 921-38.

¹¹² *ibid*.

¹¹³ *ibid*.

assumed, twelve years ago, at Manchester [...] In fact, a Coroner's Inquest, as the law now stood, was little better than the Star Chamber or the Inquisition."¹¹⁴

The clause was agreed to by a significant majority, whereupon it went to the House of Lords for consideration. The Lords struck out the clause, saying it was unnecessary. The Attorney General and Solicitor General both stated that "the present state of the law was, that the Coroner's Court was an open Court."¹¹⁵ Lord Chief Justice Denman (the principal Coroner of England) and the Lord Chancellor also confirmed that "there could be no doubt but [the coroner's court] was an open Court."¹¹⁶ When the amended Bill returned to the Commons, they rejected it, pointing out that the actions of Mr Ferrand and other coroners proved the need for statutory clarity.¹¹⁷ A conference was arranged to attempt to persuade the Lords to reinsert the clause. Unfortunately, the issue does not seem to have been pursued any further, and the Bill itself was never passed.¹¹⁸

Despite the Law Lords' assurances that coroners' courts were open to the public, Sewell's *A Treatise on the Law of Coroner: With Copious Precedents of Inquisitions*, published in 1843, still cited *Garnett v Ferrand* as authority for them being closed, unless at the discretion of the coroner.¹¹⁹

4.7 Separating inquests from the criminal and civil justice systems

Along with the Remuneration of Medical Witnesses Act 1836, two other important pieces of legislation came into force towards the end of the nineteenth century. The Coroners Act 1887 made it clear that inquests should be held into all violent, unnatural and (where the cause of death was unknown) sudden deaths, as well as deaths in prison.¹²⁰ It

¹¹⁴ *ibid.*

¹¹⁵ HL Deb 6 August 1834, vol 25, cols 1008-11.

¹¹⁶ *ibid.*

¹¹⁷ It was pointed out that the Lord Chief Justice himself had provided an opinion supporting Ferrand's power to exclude the press in the Lees inquest, and given judgment in *Garnett* (*ibid.*).

¹¹⁸ Hansard (n 115).

¹¹⁹ Richard Clarke Sewell, *A Treatise on the Law of Coroner: With Copious Precedents of Inquisitions, and Practical Forms of Proceedings* (O Richards 1843) 155. Exactly the same wording was also used in John Jervis and William N. Welsby, *A Practical Treatise on the Office and Duties of Coroners. With an Appendix of Forms and Precedents* (WC Chewett 1854) 248.

¹²⁰ Coroners Act 1887, s 3(1).

also made it a statutory requirement that: juries be summoned for all inquests; inquest into deaths in prison should not include prisoners on the jury; and juries number no less than 12 and no more than 23. The Local Government Act 1888, finally released coroners from the power of magistrates, and the office was made a salaried one.¹²¹

The renewed constitutional significance attributed to inquests in the nineteenth century, in terms of their potential to secure public accountability for deaths at the hands of state institutions or actors, receded into the background during the early to mid-twentieth century. Nevertheless, it arguably played a part in ensuring the inquest's survival in the face of interest groups who were losing patience with the forum. These could also call upon a cause with constitutional significance: the need for natural and procedural justice protections for those accused of criminal or civil wrongdoing.

In 1909, the Parliamentary Select Committee on Coroners was set up to look into possible reform.¹²² Its proposals eventually contributed to some significant changes to the law governing inquests. Possibly the most important was that the police, not coroners, should investigate murders, and that inquests be adjourned while they did so.¹²³ This was given effect in the Coroners (Amendment) Act 1926.¹²⁴ Despite this, Scraton and Chadwick point out that tensions between inquests and criminal proceedings remained.¹²⁵ This led to another significant review by a departmental committee chaired by Lord Wright (set up in 1935 and reporting in 1936). This was greeted by a *The Times* editorial that reflected the waning association of inquests with popular justice.¹²⁶ In stark contrast to the paper's attitude a century before—it criticised the wide press coverage of inquests as serving only “the public demand for sensation.”¹²⁷ It condemned inquests as superfluous and liable to abuse, and accused coroners of “dragging into the glare of publicity private and doubtfully relevant correspondence [and] parading to a receptive Press their unessential views on

¹²¹ Paid for by county and borough councils (Local Government Act 1888, s 5).

¹²² Burney (n 18) 221.

¹²³ Scraton and Chadwick (n 3) 35.

¹²⁴ Coroners (Amendment) Act 1926. The Act also required that coroners be either medically or legally qualified for at least five years.

¹²⁵ Scraton and Chadwick (n 3) 35–36.

¹²⁶ ‘A Coroner’s Functions’ *The Times* (Issue 46978, London, 2 February 1935) 13.

¹²⁷ *ibid.*

modern society.”¹²⁸ It concluded by stating that the age when inquests were necessary was now “mercifully as dead as the age of chivalry.”¹²⁹

Thomas *et al*, point out that whereas the 1910 report “had been concerned with enhancing the utility of investigations”, the Wright Report “was more personal in its concerns”, focusing on what it saw as the need to limit coroners’ powers.¹³⁰ The Report mirrored the *Times*’s editorial cited above: criticising coroners for going “beyond the mere investigation of the facts of an unnatural death and to deal with questions of civil and criminal liability for the consideration of which the coroner’s court was ill equipped.”¹³¹ This was “all the more problematic because the coroners lacked the necessary forensic and judicial skills to justify their influence.”¹³² The Report recommended further measures to isolate coroners’ courts from criminal and civil justice processes, including that inquests should no longer proffer indictments for murder against named persons, and that a declaratory provision should be enacted in legislation to the effect that coroner’s courts were not concerned with questions of civil liability.¹³³

The Coroners Rules 1953 (CR 1953) were significantly influenced by the Wright Report.¹³⁴ But r 14 at least stated unequivocally that:

Every inquest shall be held in public: Provided that the coroner may direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interest of national security so to do.¹³⁵

The Rules also gave the police formal responsibility for investigating murders, and repeated the now statutory requirement that inquests be adjourned in the event of a criminal prosecution.¹³⁶ Finally, they gave rather clumsy effect to Wright’s

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ Thomas *et al* (ch 1, n 18) 18.

¹³¹ *ibid.*, 19.

¹³² *ibid.*

¹³³ *ibid.*, 20.

¹³⁴ Scraton and Chadwick (n 3) 37.

¹³⁵ Coroners Rules 1953, SI 1953/205 (CR 1953), r 14.

¹³⁶ *ibid.*, r 24.

recommendation for a declaratory provision, by prohibiting inquests from ‘appearing’ to determine questions of civil liability.¹³⁷

On the impact of Wright, Thomas *et al* conclude:

The 1953 Rules (so heavily reliant on Wright) were consolidated by the Coroners Rules 1984. Up until the coming into force of the [Coroners and Justice Act 2009] regime, those rules were critical in determining the scope and limitations in the inquest system. Their origins can be traced back to the pre-welfare state concerns of the Wright Committee, in which Edwardian ideals of a gentleman’s reputation and good governance outweighed the broader priority of rendering the conduct of public authorities in the modern world more accountable. On a structural level, coroners moved from being magistrates of the poor to administrators of the embryonic welfare state.¹³⁸

The Coroners Rules 1953 failed to resolve the problematic relationship between inquests and criminal and civil justice processes. Partly as a response to this, another commission was set up to look into inquests in 1965, led by Judge Norman Brodrick QC. It took six years to produce its report.¹³⁹ This recommended abolishing juries’ power to attribute individual criminal responsibility for a death, and the coroner’s power to proffer individuals for criminal trial.¹⁴⁰ However, it also unequivocally declared that “the existing coroner’s service, subject to [the] modification[s] we propose [...], is worthy of retention”,¹⁴¹ and included 114 recommendations for improving its effectiveness.¹⁴² Some were particularly relevant for inquests into deaths at the hands of the state:

1. All interested persons should be publicly funded to pay for legal representation;¹⁴³
2. Juries should be selected as in other courts;¹⁴⁴

¹³⁷ *ibid*, r 33.

¹³⁸ Thomas *et al* (ch 1, n 18) 21.

¹³⁹ Norman Brodrick, ‘Report of the Committee on Death Certification and Coroners’ (Cmnd 4810, 1971).

¹⁴⁰ *ibid*, para 16.08.

¹⁴¹ Introduction to *ibid*, para 16.

¹⁴² Summarised at *ibid*, pp 346–360.

¹⁴³ *ibid*, paras 16.59–60.

¹⁴⁴ *ibid*, para 16.50. This was largely to address the fact that some coroners often avoided choosing female jurors.

3. All deaths in custody (including in police stations and under the Mental Health Act 1959) should be reported to the coroner;¹⁴⁵
4. Inquests should be held into all deaths in custody;¹⁴⁶
5. Coroners' officers should be civilians (not policemen);¹⁴⁷
6. The decision on whether to summon a jury should be entirely for the coroner.¹⁴⁸

It was to take many years before some of the Report's recommendations were given effect.¹⁴⁹

The preoccupation with the inquest's relationship with the criminal justice system was one-sided, focusing on the perceived problems posed to the criminal justice process by the inquest. The Brodrick Report, while recommending procedural changes to protect the criminal justice system, nevertheless recognised that a solution to this troubled relationship also required a restatement of the inquest's own purposes. These needed to be defined on their own terms, rather than simply negatively vis-à-vis the purposes of other judicial processes.

The Committee suggested certain "grounds of public interest" which the inquest should serve, including: determining the cause of death; allaying rumours or suspicion; drawing attention to circumstances which "if unremedied, might lead to further deaths"; advancing medical knowledge; and preserving the interests of the deceased's family or other interested persons.¹⁵⁰ Regarding deaths in custody, the Report argued that:

Most people, we think, want to have assurances that prisoners (and other persons set apart from society as a whole) did not die from maltreatment. We

¹⁴⁵ *ibid*, paras 12.06–12.09.

¹⁴⁶ *ibid*, para 14.13.

¹⁴⁷ *ibid*, para s 21.11–21.12.

¹⁴⁸ *ibid*, para 16.49. The Committee concluded that juries had become almost entirely symbolic, with little practical benefit from their participation.

¹⁴⁹ The first of these was in 1976 when the Sandra Rivett inquest named Lord Lucan as guilty of her murder. This prompted the insertion of a provision into The Criminal Law Act 1977 (s 56(1)), abolishing coroners' power to make findings of, and proffer criminal indictments for, murder, manslaughter or infanticide (Scruton and Chadwick (n 3) 38).

¹⁵⁰ *ibid*, para 14.19.

accept that it is perfectly proper for a coroner's court to be used for this purpose and that, to be fully effective, the procedure must apply to all deaths in such circumstances.¹⁵¹

4.8 A changing society

In the nineteenth century, coroners at times struggled to keep control of juries in the face of interruptions and heckling.¹⁵² The “justifiable homicide” verdict in the 1833 inquest into the death of PC Robert Culley during a riot, illustrates how wary many of the public were of state authority and the nascent police force in particular.¹⁵³ Gradually deference to those in positions of authority, including the police and coroners, seems to have increased. But in the 1970s and 80s, Thomas *et al* (drawing upon Mick Ryan's account of the origins of the NGO, INQUEST) argue that such attitudes began to shift again as the post-war consensus in politics came to an end:

[...D]uring this time that the police and the Prison Service lost much of their uncritical support among the general public as people became aware of major instances of malpractice and manslaughter. One thinks of the alleged perjury surrounding the convictions of the Birmingham Six, the Guildford Four or Stefan Kisko; the apparent culture of organised police violence that led to the death of Blair Peach and others; the spate of high-profile deaths of black people in custody in the 1990s, some giving rise to disturbances; and the institutional and individual racism that was so apparent in the failure to bring Stephen Lawrence's murderers to justice.¹⁵⁴

¹⁵¹ Even here, the emphasis is on the *exculpating* potential of inquest: to “allay suspicion” and assure people that “prisoners did not die from maltreatment.” (*ibid*, para 14.13).

¹⁵² See 4.4 above and *The Times* report of the death of a prisoner at Millbank Prison in 1923 (n 44)

¹⁵³ The coroner only accepted the verdict after a long stand off with the jury, who refused to back down (Richard Cowley, *A History of the British Police* (The History Press 2011) 30-35). After the inquest the foreman received an anonymous package with medals for all the jurors, inscribed “In honour of the men who nobly withstood the dictation of the coroner; independent, and conscientious, discharge of their duty; promoted a continued reliance upon the laws under the protection of a British jury” (Gavin Thurnston, *The Clerkenwell Riot: The Killing of Constable Culley* (Allen & Unwin 1967) 166).

¹⁵⁴ Thomas *et al* (ch 1, n 18) 25-26; Mick Ryan, *Lobbying From Below: Inquest in Defence of Civil Liberties* (Routledge 1995) 9-10.

Thomas *et al* observe that these changing attitudes could also be observed in inquests, which “became more focused and critical.”¹⁵⁵ But these shifts were not one directional. Political polarisation was just that. Those who were increasingly vocal in their demands for social justice were met by a reactionary lurch to the right by other sections of the population. Amongst other things, this was reflected in sections of the popular press, which was undergoing its own revolution and, some would argue, becoming increasingly dominated by a pro-authority and pro-Thatcherite right.¹⁵⁶

4.9 Failing inquests: Blair Peach, the New Cross fire and *Jamieson*

The 1970s and 1980s saw a number of controversial deaths and inquests in which state actors and institutions were implicated in some form or another.¹⁵⁷ Time and again the inquests revealed shortcomings in a process that had seemingly lost its way. For example:

- Roman Musial died in 1974 after being restrained by police in St James’s Park in London. The inquest failed to even acknowledge written statements from civilian witnesses and failed to call any of them to give evidence.¹⁵⁸
- Liddle Towers died in 1976, three weeks after allegedly being given a “severe beating” by police. Seven officers refused to answer questions during the inquest. The jury returned a verdict of ‘justifiable homicide’, which was quashed, and a second inquest returned a verdict of ‘death by misadventure’. The conduct of both was widely criticised.¹⁵⁹ In particular, the family was denied advanced disclosure and

¹⁵⁵ *ibid.*

¹⁵⁶ See, for example, Phil Scraton and Kathryn Chadwick, ‘Speaking Ill of the Dead: Institutionalised Responses to Deaths in Custody’ (1986) 13 *JL Soc* 93.

The Wapping Dispute (1986-7) saw News International, chaired by Rupert Murdoch, battle the National Union of Journalists following changes in trade union legislation under Thatcher which led to the summary dismissal of striking workers and the imposition of new working conditions including flexible hours, and a no-strike clause.

¹⁵⁷ See Scraton and Chadwick (n 3) 70–98: e.g. Kevin Gateley (1974), Roman Musial (1974), Liddle Towers (1976), Jimmy Kelly (1979), Blair Peach (1979), Richard Campbell (1980), Barry Prosser (1980), Paul Worrell (1982), Jim Heather-Hayes (1982), James Davey (1983), Colin Roach (1983) and Helen Smith (1979), and the New Cross Fire inquest (1981).

¹⁵⁸ *ibid* 71-72.

¹⁵⁹ ‘New inquest granted on Mr Liddle Towers’ *The Times* (Issue 60312, London, 27 May 1978) 1; Ronald Kershaw ‘Controversy in the Towers case’ *The Times* (Issue 60435, London, 18 October 1978) 2; ‘MP calls for Liddle Towers public inquiry’ *The Times* (Issue 60437, London, 20 October 1978) 4.

many of their questions were disallowed by the coroner “on the grounds that no one was on trial.”¹⁶⁰

- Jimmy Kelly died in 1979 in police custody, again after allegedly being severely beaten by police.¹⁶¹ The inquest was again the subject of criticism. For example, Michael Meacher MP pointed out that important pieces of evidence were withheld from the jury; and while police were given access to their original statements, civilian witnesses were not.¹⁶²
- Richard Campbell was a diagnosed schizophrenic who died, according to the examining doctor, as a result of dehydration due to schizophrenia at Ashford Remand Centre in 1980. Scraton and Chadwick recount how the jury was pressured to return a verdict of ‘death by self-neglect’.¹⁶³ The jury foreman asked if it was possible to return a verdict of “negligence by the authorities”, to be told “there is no such verdict as the one you are suggesting.”¹⁶⁴ An unofficial inquiry chaired by Alf Dubs MP criticised the fact that Richard’s Rastafarianism was taken as an indication of a mental condition, and concluded that “Richard did not die of ‘self-neglect’, rather he was a helpless victim of a series of crucial failures by the authorities.”¹⁶⁵
- James Davey died in 1983 after being restrained by police officers. The jury’s original verdict was “accidental death but an unreasonable amount of force was used”.¹⁶⁶ The coroner instructed that this was contradictory and told them to reconsider, whereupon they returned a verdict of accidental death.¹⁶⁷
- Helen Smith was found dead at the bottom of a block of flats in Jeddah, Saudi Arabia, in 1979.¹⁶⁸ Relationships between the UK and Saudi Arabia were sensitive at the time,

¹⁶⁰ Scraton and Chadwick (n 3) 73-74.

¹⁶¹ e.g. David Nicholson-Lord. "Inquest witness says he saw police officers beat James Kelly shortly before death." *The Times* (Issue 60585, London 26 March 1980) 4.

¹⁶² Michael Meacher. 'Deaths in police custody' *The Times* (Issue 60612, London, 28 April 1980) 15.

¹⁶³ Scraton & Chadwick (n 3) 87-89.

¹⁶⁴ *ibid* 89.

¹⁶⁵ *ibid* 88, quoting the Battersea and Wandsworth Trades Council, *The Death of Richard "Cartoon" Campbell: Report of the public inquiry led by Tom Cox MP* (Friends and Family of Richard Campbell Committee 1981) 23-24.

¹⁶⁶ Warwick Inquest Group, 'The Inquest as a Theatre for Police Tragedy: The Davey Case' (1985) 12 *JL Soc* 35, 36.

¹⁶⁷ *ibid*.

¹⁶⁸ See Scraton & Chadwick (n 3) 93-97; Gordon Wilson and Dave Harrison, *Inquest: Helen Smith the Whole Truth* (Methuen 1983).

and some felt that this impacted on how the case was dealt with in the UK.¹⁶⁹ Initially, two coroners refused to hold an inquest despite one post-mortem suggesting she may have been attacked and raped prior to death.¹⁷⁰ Eventually, the Court of Appeal ruled an inquest must be held.¹⁷¹ Amongst other criticisms, it became apparent that one pathologist removed reference to evidence of a possible rape on the instruction of the coroner. Despite the second coroner summing up heavily in favour of accidental death, the jury returned a majority open verdict.

Just as the aborted John Lees inquest in 1819 helped define nineteenth-century debates on inquests, the Blair Peach and New Cross Fire inquests had a similar impact on debates in the 1980s and 90s. Once again, hopes that the inquests might be a source of accountability were largely disappointed.

4.9.1 Blair Peach

Blair Peach was killed by a police officer at an anti-fascist demonstration in London on 23 April 1979. Thomas *et al* describe the inquest as being a “landmark event both politically and legally.”¹⁷² Two pathologists agreed that Blair’s skull had been crushed by what may have been an unauthorised police weapon such as a lead-weighted cosh or a police radio. An investigation was carried out by Commander John Cass from the Metropolitan Police. He submitted a report to the DPP who decided that there was insufficient evidence to charge any officers over the death. Cass’s investigation team was composed of thirty-one officers, and conducted interviews with civilian witnesses and police officers known to have been in the area of the assault on Blair. In 2010, after years of campaigning by Blair’s friends and family, this report was made public—albeit with redactions and anonymisation.¹⁷³ It recounts that fourteen of the witnesses interviewed

¹⁶⁹ Frances Gibb, ‘Appeal Court orders inquest in Helen Smith case’ *The Times* (London, England) Jul 31 1982, Issue 61300, 1.

¹⁷⁰ The original coroner retired on medical grounds while the refusal to hold an inquest was being challenged in the courts.

¹⁷¹ Frances Gibb (n 169).

¹⁷² Thomas *et al* (ch 1, n 18) 24.

¹⁷³ Commander Cass, ‘Investigation Report into the Death of Blair Peach: Investigation into Complaint Against the Police C.O. OG1/79/2234’ (First Report—Blair Peach) (Metropolitan Police 1979); and

said they saw a police officer striking Blair, and concluded that there was no evidence to suggest that he received his injuries in any other way. The report stated that Blair's killer had almost certainly been one of six identified police officers from the Special Patrol Group Unit, and there was one main suspect. The report also recommended that three officers be prosecuted for obstructing the investigation.¹⁷⁴

The inquest was carried out by Dr John Burton. He refused to summon a jury or disclose the Cass Report to Blair's family or their legal representatives (although he had a copy of the report, as did counsel for the police).¹⁷⁵ Both decisions were unsuccessfully challenged by Blair's family at the High Court.¹⁷⁶ They appealed the failure to summon a jury.¹⁷⁷ At the time, the law on when a jury had to be summoned was governed by s 13 of the Coroners (Amendment) Act 1926, as amended by s 56 of the Criminal Law Act 1977. Inquests into deaths in prison had to have a jury, but there was no requirement then that juries be called in cases involving the police. However, the Court of Appeal held that because there was evidence that police may have used unauthorised weapons the death fell within s 13(2)(e) of the Act: i.e. the death may have occurred in circumstances the continuance or possible recurrence of which was prejudicial to the health or safety of the public.¹⁷⁸ A jury was therefore required.

When the inquest reconvened it was moved to Hammersmith, where there was "little or no accommodation for the public."¹⁷⁹ Dr Burton refused to call important witnesses like Commander Cass, or Commander Helm (responsible for the police operation that day). Knowing what the coroner was aware of from the Cass Report, and what was kept from the family and the jury, it is difficult to avoid concluding that the jury's statutory role as finders of fact was denied. For example, Dr Burton allowed the Metropolitan Police's barrister to refer to some of the more neutral findings of the Cass investigation, while omitting to

Commander Cass, 'Second Report—Death of Blair Peach' OG1/79/2234 (Second Report—Blair Peach) (Metropolitan Police 1979).

¹⁷⁴ *ibid.*

¹⁷⁵ 'Peach case papers withheld' *The Times* (Issue 60608, London, 23 April 1980) 2.

¹⁷⁶ 'Blair Peach inquest to continue without a jury' *The Times* (Issue 60476, London 16 November 1979)

14.

¹⁷⁷ *R v HM Coroner at Hammersmith, ex p Peach* [1980] QB 211 (CA).

¹⁷⁸ *ibid.*, 227.

¹⁷⁹ Scraton and Chadwick (n 3) 75.

mention the Report's more damning conclusions, giving the jury the impression that it had exonerated the police.¹⁸⁰ He also repeatedly pushed his view of the evidence, and overtly expressed contempt for what he saw as an anti-establishment conspiracy being pushed by Blair's family and their supporters. Scraton and Chadwick observe that:

It was his submission that there were two "extreme theories" about the death of Blair Peach. The first theory was that an Anti-Nazi League demonstrator had killed Blair Peach in order to give "the cause" a martyr [...The second] was that the police had murdered Blair Peach with an unauthorised weapon. The evidence of civilian eye-witnesses and the pathologists was consistent with a police attack, yet this theory was given the same status and treatment as the martyrdom theory which had absolutely no grounding in the evidence.¹⁸¹

The jury returned a verdict of death by misadventure.

4.9.2 New Cross/Deptford fire

The inquest into the deaths of 13 black teenagers killed in a fire at a house party in 1981 technically falls outside the scope of the thesis. However it deserves brief attention because it informed debates on inquests, including those into deaths at the hands of the state. The New Cross fire and the state's response to it (i.e. the police investigation and the inquest) contributed to rising tensions between the black community in London and the police. Some suspected the fire had been started by a petrol bomb thrown through a window in a racist attack. By the time the inquest opened, many in the local black community accused the police of carrying out their investigation in an oppressive way, and putting pressure on witnesses to corroborate a narrative that the fire started during or shortly after a fight between party-goers.

¹⁸⁰ 'Coroner refuses calls for inquiry's findings over Blair Peach death' *The Times* (Issue 60631, London, 22 May 1980) 4.

¹⁸¹ Scraton and Chadwick (n 3) 76.

The extent of Dr Burton's bias only became fully apparent much later. Paul Lewis, 'Secret Document Which Implicated Blair Peach Coroner Withheld by Home Office' *The Guardian* (22 January 2010) <<http://tinyurl.com/okkx53u>> accessed 3 December 2014.

The conduct of the inquest—which reached an open verdict—was criticised by the black community, the press, and MPs in the House of Commons.¹⁸² Lawyers for the families of the deceased repeatedly clashed with the coroner, Dr Arthur Gordon Davies, who had refused to grant them pre-inquest disclosure. On the third day, lawyers noticed he was not taking notes of the evidence, as required by CR 1953, r 30. They also objected to Dr Davies's indications from the start that he had already reached conclusions broadly reflecting the police narrative. His summing up to the jury largely consisted of him reading out police statements, while glossing over other important evidence.¹⁸³

The legality of the inquest was challenged twice in the High Court: once, shortly before its conclusion; and again, after the jury reached an 'open verdict'. In the former case, Mr Justice Comyn acknowledged that "serious irregularities had occurred in the coroner's conduct of the case".¹⁸⁴ In the latter, the court's criticism was limited to Dr Davies's failure to take notes. Nevertheless, in both cases, the High Court refused to intervene.¹⁸⁵ In Parliament, Christopher Price MP summed up that the inquest had done "enormous damage" to "the processes of justice and to race relations."¹⁸⁶

Both the Blair Peach and the New Cross Fire inquests, raised serious concerns amongst the public about the conduct of inquests. To an extent it was understandable that these focused on the 'competence' of the coroners. But this was, perhaps, to the detriment of more systemic issues. It was mainly in response to these inquests that amendments were tabled to the Administration of Justice Bill in 1982 relating to inquests. These included provisions requiring that: High Court judges take over inquests into controversial deaths, including those occurring in police or prison custody;¹⁸⁷ legal aid be made available for all interested persons;¹⁸⁸ police reports on investigations be disclosed to *all* interested

¹⁸² See below; A *Times* editorial worried there were "justifiable doubts about the fairness of [the coroner's] summing up." 'Inquest On An Inquest' *The Times* (Issue 60926, London, 13 May 1981) 15.

¹⁸³ Scraton and Chadwick (n 3) 91–92; and *ibid* 15.

¹⁸⁴ *The Times* (n 182) 1; *R v South London Coroner ex parte Thompson*, QBD 8 July 1982, LexisNexis Official Transcript 1980-1990.

¹⁸⁵ *ibid*.

¹⁸⁶ 'Case for judges conducting inquests' *The Times* (Issue 60976, London, 10 July 1981) 8; Twenty years later, even Scotland Yard belatedly backed the family's calls for a new inquest to be held into the deaths (Stewart Tendler, 'Deptford fire 'was arson' *The Times* (Issue 67138, London, 14 May 2001) 6).

¹⁸⁷ New Clause 3 (HC Deb, 19 October 1982, vol 29, cols 235-60).

¹⁸⁸ New Clause 12 (*ibid*).

persons;¹⁸⁹ and that all deaths in police custody or at police hands trigger inquests automatically.¹⁹⁰

The debate mainly focused on the perceived need for more qualified coroners for complicated or controversial inquests, with the Blair Peach and the New Cross Fire inquests being cited as illustrative of this need.¹⁹¹ Christopher Price MP, who attended the New Cross Fire inquest, was horrified at the way it was conducted and argued that Parliament had a responsibility “to ensure that if similar tragedy takes place, never again shall we see such a spectacle.”¹⁹² John Tiley MP also made reference to the New Cross fire and stressed the importance of inquests for the public:

[...]It was not merely a private tragedy for the families involved, but something that led to a reaction of *considerable and important public significance* in the response of the black community [...].

These people were angry at the inadequate response, as they saw it, of the rest of society, and particularly the judicial process, to the loss of the lives of those young black people. [...]hey were upset with the courts and particularly with the inquest, which was clearly inadequate to meet the needs of the case. [...] If the people concerned with the Deptford fire are saying, and saying strongly, to British society and the British establishment that they are unhappy—the slogan that summed it up was “13 dead—nothing said”—we should in Parliament, late though it is, pay some heed to what happened. We should at least draw the one lesson that if we had a different system of conducting inquests so that in a special case of public interest—a death or a series of deaths—there should be a procedure *to ensure that the public, not only the families and their friends and relatives*, should be satisfied that justice has been done.¹⁹³

¹⁸⁹ New Clause 8 (*ibid*).

¹⁹⁰ New Clause 16: HC Deb, 19 October 1982, vol 29, col 283.

¹⁹¹ Hansard (n 187).

¹⁹² *ibid*.

¹⁹³ *ibid*, (*emphasis added*).

Twenty-three years after the New Cross fire, a second inquest was held. While the coroner concluded that the fire was probably deliberately started, he could not be sure and was compelled to repeat an open verdict.¹⁹⁴

4.9.3 What it means to know 'how' someone died – *Jamieson*

Into the 1990s the coroners' courts continued to narrow the scope of inquests to the extent that at times they investigated little more than the medical causes of deaths. Thomas *et al* observe that:

Invariably the main controversial issue in an inquest is 'how' a deceased came by his or her death. [...] Yet the development of inquest law, until recently, has seen a highly reduced concept of causation. There was a concerted move away from a public inquiry into the circumstances of a death towards a more limited inquiry into the immediate 'means' by which a person came by his death.¹⁹⁵

There are two issues relating to the scope of inquests that were considered in *R v HM Coroner for North Humberside and Scunthorpe Coroner Ex p. Jamieson*.¹⁹⁶ First, there is the scope of the actual inquiry. At the time, this was governed by CR 1984, r 36:

(1) The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely – (a) who the deceased was; (b) how, when and where the deceased came by his death; (c) the particulars for the time being required by the Registration Acts to be registered concerning the death.¹⁹⁷

Second, there is what issues should be addressed in the inquest's verdict. This was governed by s 11 of the Coroners Act 1988 (CA 1988), and Rules 36(2) and Rule 42 of the CR 1984. The relevant parts of Sub-section 11 (5) of the 1988 Act state:

¹⁹⁴ David Pallister, 'Coroner Repeats Open Verdict on New Cross Fire' *The Guardian* (7 May 2004) <<http://tinyurl.com/gl46y4y>> (accessed 16 October 2015).

¹⁹⁵ Thomas *et al* (ch 1, n 18).

¹⁹⁶ [1995] QB 1 (CA).

¹⁹⁷ CR 1984, r 36(1).

(5) An inquisition shall [...] (b) set out, so far as such particulars have been proved (i) who the deceased was; and (ii) how, when and where the deceased came by his death.¹⁹⁸

Rule 36(2) states:

Neither the coroner nor the jury shall express any opinion on any other matters.¹⁹⁹

And Rule 42 states:

No verdict shall be framed in such a way as to appear to determine any question of (a) criminal liability on the part of a named person, or (b) civil liability.²⁰⁰

Michael Jamieson died at Full Sutton Prison on 25 January 1991. The inquest jury's verdict was that Michael had killed himself by hanging. His brother, Roy, sought judicial review of the coroner's direction that the jury should not return a verdict that included a reference to "lack of care". Much of Lord Bingham's lead judgment concerned the meaning of "lack of care" and when it might be appropriate as a free-standing verdict, or an ancillary observation that could be attached to other verdicts.²⁰¹ Crucially, Bingham tied the issue to what should be included within the scope of the inquest.

While the scope of the *verdict* may have been curtailed by rules 36(2) and 42, the only fetter on what was investigated, was that it be confined to who the deceased was and when, where and how he came by his death.²⁰² This would not prevent the coroner and jury *per se* from inquiring into evidence that might, if true, indicate criminal or civil liability, and Bingham acknowledged this.²⁰³ Nevertheless, despite the issue being the appropriateness of certain verdicts rather than lines of inquiry, Bingham arguably conflated the issue, asserting that the restrictions on *findings* of criminal or civil liability—or *any* sort of blame—required the question of how a person died (in the context of *both* the inquiry *and*

¹⁹⁸ Coroners Act 1988 (CA 1988), s 11(3) and (5).

¹⁹⁹ CR 1984.

²⁰⁰ *ibid*, r 42.

²⁰¹ Judgment in the case was given on 25 April 1994. *Jamieson* (n 196) 18.

²⁰² CR 1984, r 36(1)

²⁰³ *ibid*.

the verdict) to be given a narrow interpretation: i.e. ‘by what means’ and *not* ‘in what broad circumstances’.²⁰⁴

[T]he task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but “how...the deceased came by his death,” a more limited question directed to the means by which the deceased came by his death.²⁰⁵

Bingham also repeated a commonly held belief amongst judges, coroners and the representatives of state institutions, that families see inquests as a “stepping-stone” to civil actions for damages.²⁰⁶ This is a rather simplistic and questionable interpretation of the motivations of bereaved families. But even if families do have an eye on potential civil proceedings, the concern this engenders amongst the judiciary arguably derives from an inflation of its practical (and even moral) significance.

Thomas *et al* argue that this attitude significantly informed judicial decisions concerning inquests in the 1980s and 90s.²⁰⁷ They also point out there was no corresponding uneasiness about state actors and state institutions using inquests to try to *legitimise* their role regarding a death.²⁰⁸ If verdicts of neglect, lack of care or unlawful killing risked crossing a line by apportioning blame, verdicts of lawful killing, suicide, natural causes, or open verdicts, were often seen as—and held out as—exonerating state actors and state institutions, and also appearing to determine issues of liability.

The accusation is also loaded with negative moral connotations. But why, as well as seeking a reliable and tested narrative in an inquest, should a family not also seek official recognition through an award of damages, where a loved one died as a result of a legal wrong? This is particularly understandable when state institutions may be dismissive of critical inquest verdicts.²⁰⁹ The preoccupation with families’ motives in inquests also

²⁰⁴ *ibid*, 4. McCowan and Hirst L.JJ. concurring.

²⁰⁵ *ibid*, 17.

²⁰⁶ *ibid*, 18. See also Brodrick (n 139) para 14.24.

²⁰⁷ Thomas *et al* (ch 1, n 18) 27-28.

²⁰⁸ *ibid*.

²⁰⁹ The following illustrative example comes from a letter from a Home Office Minister to the family of Jim Heathery-Hayes following a “lack of care” verdict:

obscures community and wider public interests in public accountability for such deaths when these interests can be bypassed in civil proceedings by out-of-court settlements.

Jamieson was before the Court of Appeal when *McCann* was being considered by the ECmHR.²¹⁰ However, there was no mention of Article 2 ECHR either in submissions or Lord Bingham's judgment. While this was years before the HRA 1998, the courts can take into account treaty obligations when statute or common law is unclear on an issue—as was arguably the case here.²¹¹

4.10 Conclusions

Historically, the types of deaths with which this thesis is concerned have fallen within a wider category of deaths that have required public investigation by an independent tribunal (the inquest) since the twelfth century. Originally, the purpose of these investigations was to protect the revenue interests of the Crown.²¹²

Writing about criminal justice systems in Europe, Foucault argues that towards the eighteenth century “a new theory of law and crime, a new moral or political justification of the right to punish” was beginning to evolve.²¹³ This included a view that “the power to judge should no longer depend on the innumerable, discontinuous, sometimes contradictory privileges of sovereignty, but on the continuously distributed effects of public power.”²¹⁴ The significance of Foucault's historical interpretation, here, is not the “punishment strategy” he goes on to describe, but on whose behalf it was exercised: *society's*. The inquest saw a corresponding shift from a forum concerned with asserting

“I am afraid that suicides are often unpredictable and the internal inquiries into James's death do not in fact suggest that there were any failings on the part of the staff at Ashford [Remand Centre], or any significant matters on which action was required. The verdict “lack of care” seems to have stemmed mainly from a number of misunderstandings at the inquest, in particular about the instructions given to prison staff about those who may be suicidal.” Scruton and Chadwick (n 3) 90–91.

²¹⁰ See 2.2 above; *McCann* (ch 2, n 19) 192.

²¹¹ *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 (HL), 771; *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770 (CA), 812; Anthony W Bradley, ‘The United Kingdom, The European Court of Human Rights, and Constitutional Review’ (1995) 17 *Cardozo L Rev* 233, 246.

²¹² See 4.2 above.

²¹³ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Knopf Doubleday Publishing Group 1977) 7.

²¹⁴ *ibid*, 81–82.

and protecting the rights and privileges of the Crown, to a forum that served a recognised need for justice that resided in the people. Regarding inquests into prison deaths, Burney argues, for example, that “the Crown yielded to “the public” as the guarantor of order and the injured party whenever that order was breached.”²¹⁵ The inquest evolved into something which performed a *public* function, in the interests of all society: if wrongdoing caused the death, it was in society’s interest that justice be done; if dangerous living or working conditions were responsible for a death, it was in communities’ interests that those dangers be understood and remedied.

The history of the inquest’s purpose then, can be characterised as evolving from being concerned with the Crown revenue implications of a death, to being concerned with both the criminal justice implications of a death, and what Sim *et al* characterise—with reference to Foucault—as the bio-political implications of a death.²¹⁶ In particular, it was observed that inquests began to take on a particular significance when investigating deaths at the hands of state actors or institutions, which corresponded to demands for public accountability.²¹⁷ The most notorious nineteenth century example was the Lees inquest, which Burney describes as having been regarded by many as “a chance to expose government repression to public opinion in a clear forum.”²¹⁸

Despite the renaissance of the nineteenth century inquest in the popular consciousness as a potential source of justice, by the twentieth century it was again subject to attack on multiple fronts. Its relative social value was doubted, and it was increasingly associated with considerable social burdens—both financial and deontological: including the perceived unfair impact they could have on reputations, public confidence in society’s institutions, and the perceived threat they posed to fair criminal and civil proceedings. Despite the continued confidence shown in the inquest by the Brodrick Report, the forum was undoubtedly in decline towards the end of the twentieth century as popular confidence was eroded by inquests like those into the death of Blair Peach and the New Cross fire.

²¹⁵ Burney (n 18) 25.

²¹⁶ Sim and Ward (n 17) 245.

²¹⁷ See 4.4 and 4.5 above

²¹⁸ Burney (n 18) 29.

Chapter 5

Modern Inquests, and Inquiries under the Inquiries Act 2005

5.1 The scope and openness of modern inquests

There are three elements to the procedural manifestation of openness following deaths at the hands of the state. First, there is the issue of when an investigation will be held. The conducting of an investigation is a prerequisite for opening up the circumstances of a death to scrutiny. Second, there is the scope of the investigation. Again, on the most basic of levels, what is not investigated—because it falls outside an investigation’s scope—is not opened up to scrutiny. Third, there is the manner and degree to which investigations and their conclusions are “open”. This chapter reviews the practice in inquests and inquiries into use-of-force deaths at the hands of the state, by examining these three elements and the purposes that have been attributed to them.

5.1.1 The inquest as the forum for fulfilling Article 2

The HRA 1998 has had a considerable impact on the modern inquest. As observed in Chapter 1, most of its provisions came into force on 2 October 2000. The Act seeks to give domestic effect to Article rights, whilst maintaining the sovereignty of Parliament. Section 3 requires courts, so far as possible, to give effect to primary and subordinate legislation in a way that is compatible with Convention rights.¹ In doing so, it requires courts to take into account ECtHR and ECmHR jurisprudence.² Where it is impossible for courts to do this, s 4 provides that the higher courts may make a ‘declaration of incompatibility’.³ This triggers procedures which allow the government, if it is so minded, to fast-track legislation in order to remedy the conflict.⁴ Under s 6 public authorities must also act in accordance with Convention rights unless primary legislation makes it impossible for them to do so. Public authorities include coroners and coroners’ courts.

Initially it was unclear exactly what the HRA 1998 would mean in practical terms for inquests. Section 6 HRA 1998 did not necessarily specifically require *coroners* to ensure the UK fulfilled Article 2’s procedural requirements. So, for example, in *R (Wright) v*

¹ HRA 1998, s 3.

² *ibid*, s 2(1).

³ That is the House of Lords (now Supreme Court), the Court of Appeal and the High Court (*ibid*, s 4).

⁴ *ibid*, s 10.

Secretary of State for the Home Department, the Divisional Court found that an inquest had failed to fulfil the procedural obligation, but did not conclude this meant the inquest was unlawful.⁵ Rather, it simply meant that *the state* had not met the obligation and, therefore, had to set up another investigation, the precise form of which “should be left to [its] discretion.”⁶

The issue came before the Court of Appeal in the (at the time conjoined) cases of *R (Middleton) v HM Coroner for West Somersetshire* and *R (Amin) v Secretary of State for the Home Department*.⁷ In *Middleton*, the Court quoted submissions made by the coroner that it was wrong to equate the coroner’s responsibilities with those of the state.⁸ Whether or not an inquest complied with Article 2 depended on the circumstances, and the obligation might equally be fulfilled by a combination of procedures, including some over which the coroner had no control.⁹ Despite finding this argument had force, the Court held that the inquest was, in practice, the way the state usually fulfilled the procedural obligation and, as such, “it is for the Coroner to construe the Rules in the manner required by s 6(2)(b) HRA 1998.”¹⁰

5.1.2 The purposes and scope of Article 2 compliant inquests

For some time now, inquests must be held where a coroner has reason to suspect that: the deceased died a violent or unnatural death; the cause of death is unknown; or the deceased died whilst in prison custody.¹¹ This last category was recently broadened to include any death “in custody or otherwise in state detention.”¹² Deaths that occur during or as a result of arrest or restraint by the police will normally qualify as deaths in

⁵ [2001] EWHC (Admin) 520.

⁶ Jackson J. did lament the financial implications of this, stating that in future everything should be done to try and ensure inquests fulfilled the obligation (*ibid*, 67–68).

⁷ [2002] EWCA Civ 390.

⁸ *ibid*, 90.

⁹ *ibid*.

¹⁰ *ibid*, 91. This was confirmed by the House of Lords on appeal (*R (Middleton) v Coroner for the West District of Somerset* (2004) WL 343872, 47 (HL)).

¹¹ While these categories would not necessarily cover deaths in police custody, the recommendation from the Home Office since at least 1969 was for inquests to be held in all deaths in custody (HC Deb, 19 October 1982, vol 29, cols 235–60).

¹² Coroners and Justice Act 2009 (CJA 2009), s 1.

detention, or violent or unnatural deaths. But a requirement under Article 2 ECHR that investigations be held into all deaths at the hands of the police has been confirmed as the responsibility of coroners by *Keenan* and *Middleton*.¹³ This investigative obligation represents the core of the first pillar of the practice of open justice in these circumstances.

It will be seen below that the scope of modern inquests is influenced by their purposes, so it is appropriate to consider first the rationales that are attributed to opening up the circumstances of use-of-force deaths to scrutiny.

5.1.2.1 Amin – The purpose of an Article 2 compliant investigation

Amin was the first of a group of important post-HRA 1998 cases concerning Article 2 to reach the House of Lords.¹⁴ Zahid Mubarak, a 19-year-old prisoner at Feltham Young Offenders Institute, was murdered by his racist and mentally disturbed cell-mate, Robert Stewart. Stewart admitted to the killing, and the only issue at his criminal trial was whether he was guilty of murder or manslaughter.¹⁵ Zahid's uncle originally brought the case to force the Home Secretary to either hold a public inquiry, or require the coroner to resume the adjourned inquest into Zahid's death.¹⁶ The Court of Appeal ruled that the police investigation and an internal prison investigation were, in combination, sufficient for the purposes of fulfilling Article 2. Zahid's family appealed, but dropped the issue of whether the coroner should resume the inquest, instead concentrating on trying to compel the government to set up a public inquiry.

The lead judgment in the case was given by Lord Bingham. He acknowledged that the coroner's refusal to resume the inquest into Zahid's death was not an issue before the court, but stated that it was "very unfortunate that there was no inquest, since a properly conducted inquest can discharge the state's investigative obligation." He then went on to

¹³ *Keenan* (ch 2, n 54); *Middleton* (n 10).

¹⁴ *Amin* (ch 1, n 11).

¹⁵ He was convicted of murder.

¹⁶ There were questions why Zahid was placed in a cell with a known violent racist, and a rumour that some prison officers placed certain prisoners together to see if they would fight, in what were known as "gladiator games" (Keith J, *Report of the Zahid Mubarek Inquiry: Vol 1* (TSO 2006) Ch 5).

interpret what the investigative obligation entailed, pausing in particular to consider its purposes:

Where a death has occurred in custody [the state's duty to investigate] is not a minor or unimportant duty. In this country [...] effect has been given to that duty for centuries, by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. *The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.*¹⁷

While inquests are not mentioned here by name, Bingham is clearly talking about them when referring to the centuries old requirement that “such deaths [...] be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate.”¹⁸ The implication is that these purposes have always formed the rationales behind inquests into deaths at the hands of the state. As seen in the previous chapter, the history of inquests is not quite so simple. While similar purposes have sometimes been popularly attributed to these types of inquest, this has not always been consistent over the centuries. Previous cases had considered and interpreted inquests’ aims (to discover who, how, when and where), but prior to *Amin*, there was little if any real consideration of their qualitative purposes.¹⁹

As discussed in Chapter 1, open justice in the contexts of civil and criminal justice systems is typically described as a procedural principle which acts as a safety check on the right to a fair trial. A fair trial helps to achieve the purposes of criminal and civil justice systems: the conviction of the guilty and the acquittal of the innocent; or a fair and accurate

¹⁷ *Amin* (ch 1, n 11) 31 (*emphasis added*).

¹⁸ *ibid.*

¹⁹ Other than the negative requirement that they not attribute criminal or civil liability. Bingham, for example, makes no mention of their qualitative purposes in *Jamieson* (ch 4, n 196).

determination of the legal status of the parties in a civil trial and, where appropriate, their compensation. Opening up circumstances to public scrutiny is not generally considered part of the purposes of criminal and civil justice.²⁰ However, with the first two of the purposes listed by Bingham above, openness is effectively being described as the purpose of the investigation itself. And while openness is instrumental to “allaying unjustified suspicions of wrongdoing”, it is unlikely, in the absence of an open investigation, that those who suspect wrongdoing will be satisfied by mere assertions that there was none. The same may be said of reassuring relatives that lessons have been learnt if they see no evidence of an effective learning process being undertaken. Only with regard to the penultimate purpose listed by Bingham does openness serve an instrumental end similar in nature to the main rationales for openness in criminal and civil proceedings: those in authority are more likely to act in good faith—and rectify dangerous practices—if they feel the pressure of public scrutiny.

5.1.2.2 Middleton – The scope of an Article 2 compliant inquest²¹

Colin Middleton took his own life in prison. His family argued that he should have been on suicide watch as the authorities knew he was a suicide risk. At the inquest, the coroner ruled that “the issue of “neglect” should not be left to the jury,”²² but, if they wished, they could provide him with a note indicating any matters they thought relevant to his decision on whether to make recommendations to the prison under CR 1984, r 43.²³ The jury found that Colin had killed himself while the balance of his mind was disturbed. They also handed the coroner a note “which communicated the jury’s opinion that the Prison Service had failed in its duty of care for the deceased.”²⁴ The family requested that the coroner append this to the inquisition. The coroner refused. Colin’s mother challenged this and his direction to the jury.

²⁰ See the discussion on Binyam Mohamed at 9.3.1.

²¹ *Middleton* (n 10).

²² *ibid*, 42.

²³ *ibid*, 43.

²⁴ *ibid*.

The Lords (who included Lord Bingham) acknowledged that it was “remarkable” that Article 2 had not been referred to in *Jamieson*.²⁵ They then held that with ECtHR jurisprudence not specifying the required form that investigations should take, the crucial test was that “the prescribed procedure must work in practice and must fulfil the purpose for which the investigation is established”.²⁶ This was a watershed moment in the way the courts approached Article 2 inquests. As seen previously, prior to *Amin* and *Middleton*, the courts interpreted the relevant statutes and rules with little consideration of inquests’ positive purposes.

The judgment then reflected on the aims and purposes ascribed to the procedural obligation in *Jordan*,²⁷ including: determining who was responsible for the death; whether any force used was justified; and, if appropriate, punishing those responsible. These ends potentially conflicted with CR 1984, r 41, as would a verdict that appeared to indicate negligence had led to or contributed to a prisoner’s death. However, the Lords ruled that:

It seems safe to infer that the state’s procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, [...] and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of [a] decision not to prosecute. [In Article 2 compliant inquests] it seems that an explicit statement [...] of the jury’s conclusion on the central issue is required.²⁸

While referring (like Bingham had in *Amin*) to the equivalence of existing domestic requirements and the Article 2 obligation,²⁹ the Court concluded that the regime for holding inquests, as interpreted by *Jamieson*, did not meet the requirements of the Convention.³⁰ It concluded that:

²⁵ *ibid*, 28.

²⁶ *ibid*, 8.

²⁷ See 2.8 and 5.1.2 above.

²⁸ *Middleton* (n 10) 16.

²⁹ “The requirement to summon a jury [in inquests into deaths in prison] recognises the substantive and procedural obligations of the state which are *now derived from Article 2 as well as from domestic law*.” (*ibid*, 23 (*emphasis added*)).

³⁰ *ibid*, 31.

Only one change is in our opinion needed: to interpret “how” in section 11(5)(b)(ii) of the Act and rule 36(1)(b) of the rules in the broader sense previously rejected [in *Jamieson*], namely as meaning not simply “by what means” but “by what means and in what circumstances.”³¹

The judgment thus significantly extended the scope of Article 2 compliant inquests and the conclusions they could reach.

The judgments in *Amin* and *Middleton* had an immediate and significant impact on subsequent inquests into deaths at the hands of the state. The inquest as a forum whose broad purposes have arguably long-corresponded to those of Article 2’s procedural obligation, had suffered from the lack of a constitutional guarantor of those purposes. Prior to the HRA 1998, the inquest did not consistently live up to many of the purposes that had been popularly attributed to it since the nineteenth century. It was observed that a large part of the problem was concern about the inquest’s impact on due process in criminal and civil settings. This was—and to a certain extent, remains—a genuine concern. But it was also arguably used as a convenient foil for state accountability. *Amin* finally provided badly needed clarity on the qualitative purposes of these types of inquest. Most importantly, it defined them positively and on their own terms rather than only negatively in relation to other court proceedings. Finally in *Middleton*, the Lords reached a practical conclusion about what the scope of inquests must logically include if they are to fulfil those purposes.

5.1.3 How inquests are open to the public

There are two issues to consider here: 1) The inquest’s openness to members of the public and the press, in terms of their ability to attend proceedings or, in the case of the former, receive information through the reporting of proceedings; and 2) The extent to which inquests are open to the active participation of members of the public (including the family of the deceased), either personally or through those who might symbolically and/or actually represent their interests.

³¹ *ibid*, 35 (*emphasis added*).

5.1.3.1 Openness to public and press attending and observing proceedings

With regard to the first question, we saw that CR 1984, r 17 required that:

Every inquest shall be held in public:

Provided that the coroner may direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interest of national security so to do.³²

This is still the case under the new Coroners (Inquests) Rules 2013 (C(I)R 2013), although the new Rules now allow the coroner to exclude the public from *pre*-inquest hearings where this is in the interests of justice.³³ This limited ability to exclude the public only in the interests of national security is in stark contrast to coroners' wide discretions in other procedural matters, and the much broader range of exceptions to openness that exist in the civil courts.

We have also seen that ECtHR jurisprudence requires there to "be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."³⁴ Again, the most important thing is for investigations to be sufficiently open in order for them to fulfil their purposes.³⁵

The jury are also an important feature here. We typically think of juries in terms of their active role in proceedings. However, in inquests that are the focus of this thesis, they have an important role in ensuring that (whether or not anyone turns up to watch proceedings from the public or press gallery) between 7 and 11 members of the public are present throughout the hearing of evidence.³⁶

³² CR 1984, r 17.

³³ The Coroners (Inquests) Rules 2013, SI 2013/1616 (C(I)R 2013) r 11(5).

³⁴ *Jordan* (ch 1, n 10) 109.

³⁵ These purposes will be returned to below when considering the purpose of openness.

³⁶ Section 7(2) of CJA 2009. However, it is important to note that natural deaths in prison no longer *require* the inquest to be conducted with a jury.

5.1.3.2 *The openness of inquests to the active participation of the public*

Of course, as well as the jury being present watching proceedings, they also have an active role to play. They can put questions to witnesses and must come to a verdict/conclusion as to how the deceased died. As observed above, *Middleton* encouraged an increasing trend for coroners to allow juries to reach narrative verdicts, whether as an alternative to a short-form verdict or in addition.³⁷ Thomas *et al* point out that the presence of a jury “provides a powerful symbolic and historical indication that the ordinary peers of the deceased are anxiously inquiring into the facts of his or her death.”³⁸

The presence of a jury ensures that the inquest is a more democratic and accountable process. One of the purposes of the inquest is to allay public anxiety about the death—especially where a death occurs behind closed doors. This act of determination will, at least in controversial cases, be best done by members of the public rather than a servant of the state. This goes beyond the fact that the jury is free of establishment considerations—the pace and tone of the proceedings may be tamed by the presence of the jury.³⁹

The inquest jury has arguably been significantly tamed over the centuries, especially when one considers historical accounts which suggest that their numbers, outspokenness and enthusiasm could sometimes mean coroners struggled to control proceedings.⁴⁰ This change is likely due in part to their diminished numbers and the increased formality of proceedings, particularly when one considers that in the past, inquests could be held outdoors or in public houses. Nevertheless, in contrast to the conclusions of the Brodrick Report, it is argued in Part 3 that the jury’s role in inquests—at least where these inquire into deaths at the hands of the police, or in police or prison custody—remains an important one.⁴¹

There are important practical limits on the jury in the performance of its roles. They are prevented from expressing an opinion on matters other than who the deceased was

³⁷ See 5.2.1.4 above.

³⁸ Thomas *et al* (ch 1, n 18) 294.

³⁹ *ibid.*

⁴⁰ See, for example, 4.4 above and *The Times* report of the death of a prisoner at Millbank Prison in 1923 (ch 4, n 44).

⁴¹ Brodrick, (ch 4, n 139) para 16.49.

and when, where and how they came by their death;⁴² or framing a verdict that appears to determine civil liability or criminal liability of a named person.⁴³ Most importantly, the jury is confined to considering those verdicts the coroner decides are legally open to it on the evidence. In theory, this should have no other effect than to un-clutter its deliberations by removing verdicts which, if properly instructed, it would anyway be bound not to reach due to a lack of evidence. The coroner has no discretion to exclude a verdict just because he or she prefers a different one.⁴⁴

There are also practical limits on the jury's ability to question witnesses. First, in contrast to interested persons and the coroner, the jury does not have prior access to statements or evidence. Jurors therefore have no opportunity to prepare lines of questioning. Unlike interested persons, they also cannot receive individually tailored confidential legal advice.⁴⁵ Coroners will also disallow questions they believe are "not relevant or otherwise not a proper question".⁴⁶ This could be a fetter on the role of the jury if jurors' views of what is relevant to a death do not correspond with the coroner's.

The exact procedure followed for jury questions will vary according to the preferred practice of individual coroners. Some ask jury members if they have any questions at the end of each witness's evidence, and may use open and encouraging language. Other coroners may simply refer to the jury's right to ask questions in their opening address, and not mention it again, leaving it to determined jury members to get the coroner's attention before a witness is released. Some coroners allow jury members to put their questions directly and orally. At the Ian Tomlinson and Mark Duggan inquests, the coroners instructed jurors to write down their questions, which were passed to the coroner by a clerk, and they then put them to witnesses.⁴⁷

⁴² CJA 2009, s 5.

⁴³ *ibid* s 10(2).

⁴⁴ *Thomas et al* (ch 1, n 18) 314; *R (Cash) v HM Coroner for Northamptonshire* [2007] 4 All ER 903 (QB), 25.

⁴⁵ The only legal advice they can take is from the coroner. All communications between the coroner and the jury must be done in open court.

⁴⁶ C(J)R 2013, r 19. This rule is framed in terms of the ability of interested persons to ask questions and is applied equally to jury members.

⁴⁷ Duggan Inquest, 'Transcript of the Oral Hearing of 7 September 2013', <<http://tinyurl.com/joocwy5>> accessed 28 January 2016, pp 14-15.

There may be natural inhibitions on jury members asking questions, such as a reluctance to interrupt or hold up proceedings. The inquest is sometimes considered a relatively informal procedure when compared to other court proceedings. It is true that some coroners' courts can look more like office conference rooms than courts. However, most coroners' courts will still have the look and feel of a courtroom. The sombre nature of the subject matter being considered will also add to the formality of the occasion. In deaths involving state institutions there will often be many lawyers present, and there can also be a significant media presence. In such an atmosphere, it can take a particularly strong-willed jury member to draw attention to what he or she feels is a gap in the evidence being elicited from a witness.

Where the deceased's family is represented, the jurors' role as representatives of the public may be eclipsed in terms of influencing the direction of the inquiry and raising issues of public concern. But, there may be times when the deceased's family has little or no interest in the inquest, or they feel unable or unwilling to pursue concerns that have not been taken up by the coroner. In such cases the opportunity for members of the jury to put questions could be very important.

This brings us to the ability of the family to play an active part in inquests and the extent to which they may play a role in representing the public interest as well as their own interests in inquests. This is looked at more at 5.1.5 and 5.2.1.2 below, and is also considered in Chapter 9. On a general level, however, we have seen that the right of the family of the deceased to be present and question witnesses has been a feature of inquests for centuries. Most recently it was confirmed by s 47 Coroners and Justice Act 2009 (CJA 2009) and r 19 C(I)R 2013.⁴⁸ Under the rule, the coroner must allow an interested person to examine a witness in person, or through their legal representative, provided their questions are relevant.⁴⁹ The family of the deceased are members of the public who have the status of "interested person" in light of their special interest in the subject matter. They

⁴⁸ This includes spouses, civil partners, partners, parents, children, siblings, grandparents, grandchildren, children of siblings, step-parents, half-brothers and sisters or "any other person who the senior coroner thinks has a sufficient interest". CJA 2009, s 47.

⁴⁹ The C(I)R 2013, r 19.

will often receive public funding to be legally represented at an inquest.⁵⁰ In every case they should now be given pre-inquest disclosure of witness statements, reports and other evidence, from which lines of questioning can be prepared.⁵¹

5.1.3.3 Who are 'the public' in inquests?

We have seen that coroners' powers to exclude the public from inquests is only exercisable where it is "in the interest of national security to do so."⁵² But there is a question regarding what is meant by 'the public'. This came before two Appeal Court judges sitting in the High Court, in relation to the inquest into the deaths caused by the July 2005 London bombings.⁵³ Assistant Deputy Coroner, Hallett LJ, had ruled at a pre-inquest hearing that she was unable to accede to the Home Secretary's application that certain sensitive evidence be heard in the absence of the families of those killed.⁵⁴ The High Court agreed.⁵⁵

Maurice Kay LJ summarised the issue in the following way:

Do ["the public" (referred to in r 17 CR 1984)] they include properly interested persons and their legal representatives who are participating in the inquests? Or are they limited to members of the public in a wider sense, meaning all those who are not "properly interested persons"? In the latter case, once the public in the wider sense had been excluded, the hearing would continue in camera, but

⁵⁰ See 5.1.5 below.

⁵¹ See 5.1.4 below.

⁵² Of course the coroner also has a common law power to exclude individuals from the courtroom where they are being disruptive. Coroners Rules 1927, SI 1927/344, r 17.

⁵³ *R (Secretary of State for the Home Department) v AD Coroner for Inner West London* [2010] EWHC 3098 (Admin).

⁵⁴ Heather Hallett LJ, 'Coroner's Inquest into the London Bombings of 7 July 2005: Ruling of Dame Heather Hallett' (3 November 2010) <<http://tinyurl.com/hqj86nz>> Accessed 28 January 2016.

⁵⁵ The inquests in question were not into deaths at the hands of the state and so would not necessarily involve the full procedural obligation under Article 2 ECHR. Nor, in the opinion of the Assistant Deputy Coroner, was she required to summon a jury under s 8(3) CA 1988 (Justice Hallett LJ, 'Coroner's Inquest into the London Bombings of 7 July 2005: Decision Following Pre-Inquest Hearing from 26 to 30 April 2010' (30 April 2010) <<http://tinyurl.com/zapfxyg>> accessed 28 January 2016, paras 137–165).

with all properly interested persons and their legal representatives able to attend and participate.⁵⁶

Amongst reasons for preferring the latter interpretation, Maurice Kay LJ pointed out that r 17 CR 1984 applied as much to inquests with a jury as it did to inquests without a jury:

It cannot have been contemplated that a properly interested person and his legal representative would be excluded while a jury sees and hears closed material.⁵⁷

Significantly, he also referred to the government's recent failed attempts to introduce closed material procedure into inquests:

Interestingly, in the Counter Terrorism Bill of 2008 there were clauses in Part 6, "Inquests and Inquiries", the purpose of which was to provide for the reshaping of inquests raising national security issues. Parliament refused to enact the provisions. A similar fate befell clauses in the Coroners and Justice Bill 2009. What all this demonstrates is that the construction sought to be placed on rule 17 by [counsel for the Home Secretary] is, in effect, an attempt to pre-empt legislation which is either not yet in force or has been rejected in the recent past by Parliament. If these are steps which Parliament is not yet prepared to take, I am fortified in my unwillingness to adopt what would be a forced construction of rule 17.⁵⁸

The court therefore held that the meaning of the public in r 17 CR 1984, did not include interested persons.

5.1.4 Disclosure

As well as the impact the HRA 1998 had on the purposes and scope of inquests into deaths at the hands of the state, it also had implications for pre-inquest disclosure and public funding for families. As seen in the previous chapter, pre-inquest disclosure was a

⁵⁶ *Coroner for Inner West London* (n 53) 2.

⁵⁷ *ibid*, 25.

⁵⁸ *ibid*, 30.

frequent source of conflict between coroners and relatives of the deceased.⁵⁹ When it was refused, the family of the deceased often had little idea of the nature of competing narratives surrounding a death and was greatly hindered in preparing lines of questioning for witnesses. Not only was this frustrating for families, but it also meant the coroner carried more of a responsibility to challenge inconsistencies in evidence. Where a witness's evidence merited robust challenge, this could put at risk the apparent objectivity of the process if it was carried out by coroners, and this may in turn have inhibited them in their approach.

Advances in this area were a combined result of the 1999 Macpherson Report and ECtHR jurisprudence.⁶⁰ Following Macpherson, the Home Office advised police to disclose documentary evidence relating to a death at the hands of the police, to other interested persons 28 days prior to the inquest.⁶¹ In *Jordan*, the ECtHR confirmed that in the absence of this change in policy, it would not have been persuaded that families were fairly or adequately protected in inquest proceedings.⁶² In *R (D) v Secretary of State for the Home Department* (2006), the Court of Appeal agreed that Article 2 required coroners to provide relatives of the deceased reasonable access to all relevant evidence before an inquest began.⁶³ This requirement is now contained in Part 3 C(I)R 2013.⁶⁴ Rule 13 requires the coroner to disclose, or make available for inspection, any documents relevant to the inquest, *as soon as reasonably practical* when requested by any interested person.⁶⁵ Under r 14(b) documents may be redacted, but, as Thomas *et al* point out, "legal challenges are likely to arise if coroners fail to comply with fair process and other public law principles in

⁵⁹ e.g. the inquest into the death of Blair Peach and the New Cross fire described at 4.9.1 and 4.9.2 above.

⁶⁰ "There should be advance disclosure of evidence and documents as of right to parties who have leave from a coroner to appear at an inquest." (Sir William Macpherson, *Report of the Stephen Lawrence Inquiry* (Cm 4262-I, 1999), rec 43).

⁶¹ Home Office, 'Circular 20/1999: Deaths in Police Custody: Guidance to the Police on Pre-Inquest Disclosure', para 7.

⁶² *Jordan* (ch 1, n 10) 134.

⁶³ *R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, 46; see also the 2008 case of *R (Smith) v AD Coroner for Oxfordshire*, where Collins J held that post-*Middleton* there must be a "presumption in favour of as full disclosure as possible", and that in Article 2 cases "it will be very difficult to justify any refusal to disclose relevant material." ([2008] EWHC 694 (Admin), 37).

⁶⁴ CJA 2009, s 5. This should be read in conjunction with coroners' powers under para 1 of sch 5 CJA 2009 to compel the disclosure of materials relevant to the circumstances of a death.

⁶⁵ C(I)R 2013, r 2(1): This includes photographs and video evidence.

exercising this discretion.”⁶⁶ Rule 15 provides that there may be restrictions on disclosure where:

1. there is a statutory or legal prohibition on disclosure;
2. the consent of any author or copyright owner cannot reasonably be obtained;
3. the request is unreasonable;
4. the document relates to contemplated or commenced criminal proceedings;
or
5. the coroner considers the document irrelevant to the investigation.⁶⁷

We saw in Chapter 3 that there is a presumption that IPCC and PPO reports will be disclosed to the coroner and to all interested persons. There is some controversy whether police reports are disclosable or whether they fall under Rule 15(a). Dorries claims that police reports *and* IPCC reports will usually fall under this exception.⁶⁸ However, IPCC reports are now generally disclosed to relatives of the deceased.⁶⁹ With investigations into police deaths invariably being investigated independently by the IPCC, police reports are less of an issue than at the time of the Blair Peach inquest. However, as we have seen, the police still investigate all prison deaths. Thomas *et al* argue that despite the Chief Coroner’s guidance, “[t]here can be no justification for a clear cut rule against the disclosure.”⁷⁰ Indeed, if there is sensitivity about the disclosure of a police report, it should be subject to normal procedures regarding PII. Finally, the coroner must also inform interested persons *before* admitting written evidence, that they are entitled to a copy of the evidence.⁷¹

⁶⁶ *ibid*; Thomas *et al* (ch 1, n 18) 168-169.

⁶⁷ C(I)R 2013.

⁶⁸ Dorries, (ch 1, n 18) *para* 6.76.

⁶⁹ Thomas *et al* (ch 1, n 18) 170.

⁷⁰ *ibid*, 169-170; Peter Thornton HHJ, *The Chief Coroner’s Guide to the Coroners and Justice Act 2009* (2013) <<http://tinyurl.com/j5dj4g9>> accessed 28 January 2016, para 121.

⁷¹ C(I)R 2013.

5.1.5 Public funding for families' legal representation

Public funding for legal representation at inquests into deaths at the hands of the state is an important consideration regarding the openness of proceedings to the participation of families of the deceased and the public. Families represent their own interests at inquests, but they also often play a vital role in representing the interests of communities and the wider public. The High Court acknowledged this in *R (Main) v Minister for Legal Aid*, indicating that this latter feature should be taken into account in public funding decisions. In particular, Owen J observed that “it is only through representation of the family that the wider public interest will be represented” at the inquest.⁷²

Normally Legal Help is the only form of public funding available to relatives at inquests. Since November 2014 this is only available to those with a disposable income of less than £733 a month and savings of less than £8,000.⁷³ This cut-off point for eligibility bears little relationship to the ability of someone to afford private legal representation. The financial eligibility requirements may be waived by the Director of the Legal Aid Agency (LAA) in special circumstances: in particular having regard to Article 2 ECHR.⁷⁴ Legal Help pays for initial legal advice about inquests, any written submissions to the coroner, and help preparing for inquests. It does not cover representation during inquests. However, provided the financial eligibility test is met (or is waived), exceptional funding may be available for legal representation where the deceased died in prison or police custody, or otherwise at the hands of the police.⁷⁵

The first of two exceptional scenarios where the LAA may authorise funding for representation, relate specifically to Article 2 inquests. The *Lord Chancellor's Exceptional Funding Guidance (Inquests)* describes a two-fold test.⁷⁶ The LAA must be satisfied that a

⁷² *Main* (ch 1, n 15) 49. While the decision in that case to order the public funding of the family was overturned in the Court of Appeal, it did not take issue with this point.

⁷³ Legal Aid Agency, ‘Controlled Work: Guide to Determining Financial Eligibility for Controlled Work and Family Mediation’ (April 2014) 7.

⁷⁴ The Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013, SI 2013/480, reg 10.

⁷⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA 2012), s 10(3).

⁷⁶ Legal Aid Agency (n 73) para 7.

death involved an arguable breach of Article 2's substantive negative obligation, *and* that representation is required for the inquest to fulfil Article 2's procedural obligation.⁷⁷ This can be problematic, because an arguable breach of the negative obligation under Article 2 may only become apparent relatively late in proceedings. In the Tomlinson case, for example, police, media, IPCC and the coroner, all initially assumed the death was a natural one. That the case engaged Article 2 only became apparent when video footage later emerged showing that Mr Tomlinson had been struck by a policeman.⁷⁸

Once an Article 2 death is identified, the LAA must then consider whether representation is necessary to fulfil the procedural obligation. The Guidance explains the requirements set out in *Jordan*,⁷⁹ emphasising the requirement that the family of the deceased be involved to the extent necessary to safeguard their legitimate interests.⁸⁰ There is an argument that the family being represented aids the fulfilment of *all* of the Article 2 requirements, and that this should also be taken into account by the LAA. State institutions will always be legally represented at public expense. Individual state actors who may come in for criticism will also invariably be legally represented, sometimes at public expense, but otherwise normally through their union/federation. Opening up truth discovery processes to diverse interests is a vital safeguard against insulated narrative formation processes. Without professional advocates representing the family, the inquest does not lend itself to addressing outside concerns or appreciating non-state perspectives of intersubjective interaction between state actors and the public.⁸¹ Thomas *et al* make the crucial point that:

[...] the family will often be the only party working towards satisfying the crucial public interests of assuaging public anxiety, ascertaining the circumstances of death, highlighting failures and learning lessons to prevent similar deaths from

⁷⁷ *ibid*, para 7. The Guidance states "it is likely that there will be an arguable breach of the substantive obligation where State actors have killed the individual", or "where the individual has died in State custody other than from natural causes: for example, killings or suicides in prison." (Legal Aid Agency (n 73) para 12). This is in keeping with the burden on the State to explain deaths in custody under *Salman* (ch 2, n 62) 69.

⁷⁸ Paul Lewis, 'Video Reveals G20 Police Assault on Man Who Died' *The Guardian* (7 April 2009) <<http://tinyurl.com/ktxactm>> (accessed 20 November 2014). See also *Humberstone* (ch 1, n 22) where it was only the emergence of late evidence that saw the inquest having to be Article 2 compliant.

⁷⁹ Legal Aid Agency (n 73) 18; *Jordan* (ch 1, n 10).

⁸⁰ Legal Aid Agency (n 73) 18.

⁸¹ Sam McIntosh, *Fulfilling Their Purpose: Inquests, Article 2 and Next of Kin* [2012] PL 407.

occurring in the future. The coroner, who had limited resources, and in certain respects may be inclined to be less exacting than bereaved relatives, cannot always be expected fully to satisfy these purposes. A lack of funding for families does not only mean that often the inquiry will not be as full as otherwise—perhaps more importantly, it leads to an inequality of arms [...] Further, in practice [those representing the authorities] often work against the central public interests involved in the inquest, of preventing further death in similar circumstances.⁸²

This is because, whatever the inquest's purposes, lawyers for state actors and public authorities would not be doing their jobs if they did not do what they could to represent the best interests of their clients: whether or not this is in the public interest. It will take a particularly confident unrepresented family member to hold their own whilst facing other interested persons, each of whom may be represented by two or three lawyers and who will often have the shared aim of securing a state-exculpatory verdict/conclusion.

The Guidance stresses that in most cases the coroner will be able to conduct an effective investigation, and the family play a sufficient role, without the family needing legal representation.⁸³ It quotes the case of *Khan* where the court found that this would be true in the “overwhelming majority of cases”.⁸⁴ This is despite the Court of Appeal in *Humberstone* criticising the phraseology in *Khan*.⁸⁵ Three considerations must be taken into account by the LAA: “(i) the nature and seriousness of the allegations against the state actors; (ii) previous investigations into the death; and (iii) the particular circumstances of the family.”⁸⁶ Point (i) implies that at times there may be a broader public interest in the family being represented that should be taken into account.

The Guidance effectively interprets Article 2 as applying in all of the scenarios that are the subject of this thesis. However its interpretation of when public funding is required in these cases may conflict with case-law on the issue. The Guidance does not appear to take

⁸² Thomas *et al* (ch 1, n 18) 178-179.

⁸³ Legal Aid Agency (n 73) 19.

⁸⁴ *ibid*; *R (Khan) v Secretary of State for Health* [2004] 1 WLR 971 (CA).

⁸⁵ *Humberstone* (ch 1, n 22); *Khan* (n 84).

⁸⁶ Legal Aid Agency (n 73) 20.

into account *Humberstone*, which emphasised that public funding decisions should concentrate on the needs of the family, rather than the coroner. In fact, both are important, and the ‘effectiveness’ of the inquest should take into account the need to engage with public concerns which can be very effectively represented by a legally represented family. It also fails to take into account the sentiment expressed *obiter* by Owen J in *Main* above, or evidence that legally-represented families can have a significant impact on the effectiveness of inquests.⁸⁷

As well as under s 10(3) LASPOA 2012, funding can also be awarded where the Director of the LAA determines that it is in the wider public interest.⁸⁸ Interestingly this possibility is raised independently of the more specific Article 2 exception. The test is that “the provision of advocacy for the individual [...] is likely to produce significant benefits for a class or person, other than the applicant and members of the applicant’s family”.⁸⁹ Given that this is about benefiting those other than the applicant, it seems inappropriate that the means test still applies: but it does.

The Guidance states that funding under this heading may be appropriate where inquests are likely to uncover dangerous practices, systemic failings or other significant risks to life and health.⁹⁰ The inquest must be *likely* to bring *actual* public benefits for a significant number of people.⁹¹ It is implied that what constitutes a ‘benefit’ will normally be some tangible improvement in practice and procedure. The LAA must consider whether there are likely to be improvements to systems as a result of the inquest *and* the family’s legal representation in it. The benefit of basic democratic and public accountability does not appear to be sufficient. And it is unclear where the need to foresee *actual* improvements in practice leaves inquests into prison deaths, where systemic problems that are amenable to improvement are arguably revealed relatively often, but a lack of funding and political will means that improvements are not always made.⁹² There is also some slightly fuzzy logic in the Guidance requiring LAA caseworkers to peer into the future

⁸⁷ See also the example of Sean Rigg discussed at 3.3.1 above and Casale (ch 3, n 89).

⁸⁸ Legal Aid Agency (n 73) 28.

⁸⁹ *ibid.* Although this *may* be waived (37–38).

⁹⁰ *ibid.*, 29.

⁹¹ The Guidance states that this will not normally be less than 100 (*ibid.*, 30).

⁹² e.g. problems caused by overcrowding and understaffing etc.

and predict an inquest's results. They will be attempting to arrive at judgments on 'significant' likelihoods regarding an inquest's outcome long before the inquest has even started to hear evidence. Generally, it is those cases where things are not black and white or predictable that the coroner would benefit from a professional advocate testing and challenging state narratives.

In the recent case of *R (Letts) v Lord Chancellor*, the High Court held that the Guidance was unlawful for laying down a test for legal aid that required there to be an "arguable breach" of the substantive obligation under Article 2.⁹³ Significantly, Green J pointed out that the investigative duty under Article 2 arose automatically in deaths in custody, whether or not there was an arguable breach of the substantive duty.⁹⁴

5.1.6 Public interest immunity

Before comparing the ability of inquiry chairmen and coroners to exclude individuals from the hearings, it is important to point out that ministers can always apply to coroners to exclude evidence from inquests under PII. The same basic rules on PII apply in inquests as they do in all courts.⁹⁵ A minister can issue a PII certificate, stating she believes it is not in the public interest to disclose material which would normally be disclosable.⁹⁶ There should be a real risk that public disclosure would harm the national interest.⁹⁷ Normally, it is for a judge to weigh the public interest that evidence be withheld, against the public interest in courts having the fullest possible access to relevant material when overseeing the administration of justice.⁹⁸ In inquests, it is up to the coroner: "who will need to balance the public interest in non-disclosure with the requirement of the inquest to discover how a person died."⁹⁹ In order to do this, a coroner will normally need to have sight of the relevant material and hear arguments on behalf of the minister.¹⁰⁰ This will take place in the absence of the jury, and will usually be *ex parte*. PII is looked at in more

⁹³ [2015] EWHC 402 (Admin).

⁹⁴ *ibid*, 56.

⁹⁵ Now under CJA 2009, s 82.

⁹⁶ *Duncan v Cammell Laird & Co Ltd* [1942] AC 624 (HL).

⁹⁷ *ibid*.

⁹⁸ *R v Chief Constable of West Midlands Police, ex p Wiley* [1995] 1 AC 274 (HL).

⁹⁹ *Thomas et al* (ch 3, n 47) 150.

¹⁰⁰ *Conway v Rimmer* [1968] AC 910 (HL).

detail in Chapter 9 as the practice brings to the fore the unique relationship between openness and the inquest's purposes, which in turn is significant to the analysis of the link between openness and justice in inquests.¹⁰¹ But it can be seen in the case of Azelle Rodney, that PII can have a significant impact on the possible scope of inquests.

5.2 Azelle Rodney, secret evidence and the Inquiries Act 2005

A police firearms officer shot and killed Azelle Rodney on 29 April 2005. A pre-inquest hearing was not held until August 2007, when Deputy Coroner, Andrew Walker, outlined the basic circumstances of Azelle's death:

[P]olice officers, with the benefit of intelligence, began a search for some individuals as part of a police operation. As part of that operation a group of men, including Azelle Rodney were followed in their car. At some point it was decided that the vehicle should be stopped and the officers carried out a 'hard stop' in Hale Lane in Edgware. During the course of this 'hard stop' Azelle Rodney was shot by police officers and died at the scene. A post-mortem examination confirmed that Mr Rodney died from gunshot wounds to head, neck and back.¹⁰²

At that hearing, Walker ruled that he was unable to fulfil his statutory duty to conduct an inquest into Azelle's death, and was compelled to suspend the inquest indefinitely.¹⁰³

The problem he faced was a classic conflict of laws. We have seen previously that where someone has died an unnatural or violent death, the coroner has a statutory duty to hold an inquest.¹⁰⁴ What is more, in cases such as Azelle's, inquests must be held with a jury.¹⁰⁵ We have also seen that inquests must investigate who the deceased was, and when, where and how she came by her death.¹⁰⁶ Next-of-kin must be designated as interested

¹⁰¹ See 9.2.1.6 below. Regarding PII in civil cases, see also the consideration of *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65, at 9.3.1 below.

¹⁰² Walker (ch 3, n 114) para 1.

¹⁰³ *ibid.*

¹⁰⁴ CJA 2009, s 1

¹⁰⁵ *ibid*, s 7. As the death had "resulted from an injury caused by a police officer in the purported execution of his duty". Coroners Act 1887, s 8.

¹⁰⁶ CJA 2009, s 5

persons, and have a right to question witnesses.¹⁰⁷ Finally, inquests must be held in public, except where it is in the interest of national security to exclude the public from all or part of it.¹⁰⁸

As well as these domestic law requirements, we have seen that the coroner had to presume the inquest was to fulfil the procedural obligation under Article 2. He would, therefore, have to investigate by what means, *and* in what circumstances Azelle had come by his death.¹⁰⁹ He would also have to ensure that: the inquest was effective (i.e. capable of determining who was responsible for the death and “whether the force used was justified”); there was sufficient public scrutiny to secure accountability; and Azelle’s next-of-kin were “involved to the extent necessary to safeguard his or her own interests.”¹¹⁰

All of this is uncontroversial. However, the problem, according to the deputy coroner, was that he was prevented from fulfilling these requirements because—“he had been persuaded”—neither the police, nor IPCC could lawfully make available to him or a jury certain evidence which was core to the circumstances of Azelle’s death.¹¹¹ In the absence of this evidence, the inquest would be unable to fulfil the requirement that it be an effective and open investigation.

In his ruling, the deputy coroner was careful to avoid revealing the nature or source of this sensitive evidence. However, it is widely believed that it must have included “intercept evidence” i.e. intelligence obtained using powers under the RIPA 2000, through the interception of emails or telephone calls to or from targeted individuals.¹¹² The press has frequently referred to this likelihood, and the case has been mentioned in parliamentary debates on intercept evidence on more than one occasion.¹¹³ It also explains why the

¹⁰⁷ *ibid*, s 47

¹⁰⁸ C(1)R 2013, r 11.

¹⁰⁹ *Middleton* (n 10).

¹¹⁰ *Jordan* (ch 1, n 10).

¹¹¹ *Walker* (ch 3, n 114).

¹¹² RIPA 2000, Part 1, ch 1.

¹¹³ e.g. Clare Dyer, ‘Plan to allow inquest juries to hear phone tap evidence’ *The Guardian* (London 4 December 2007) <<http://tinyurl.com/hwfzf9b>> accessed 27 January 2016; Jamie Doward, ‘Inquests into Troubles deaths to be kept secret: A change in the law angers human rights groups and opposition parties’ *The Observer* (London, 25 January 2009) <<http://tinyurl.com/j5ckfb3>> accessed 27 January 2016; Robert Verkaik, ‘Bereaved families have the right to know the truth’ *The Independent* (London, 22 October 2009)

deputy coroner accepted, without revealing why, that the police and the IPCC could not *lawfully* make the evidence available to him or a jury.

Under s 17 RIPA 2000, the existence or content of intercept evidence cannot be referred to in court proceedings. Under s 19 RIPA 2000, it is also a criminal offence for certain individuals, including the police and anyone holding office under the Crown, to disclose the existence or content of material obtained through warranted interceptions. Sections 17 and 19 RIPA 2000 are obviously concerned with keeping secret all aspects of telephone and email interception, and the intelligence that might be garnered from them. But the inquest would not be effective as a fact-finding exercise, if it were prevented from considering core evidence as to why heavily-armed police targeted Azelle, with a ‘hard stop’ on a busy public street.

Two potential solutions to this impasse were considered by the government. First, it could simply amend RIPA 2000 to make intercept evidence admissible at inquests. Alternatively, it could *also* introduce legislation that would empower ministers to require certain inquests: to dispense with juries; to be held *in camera* and in the absence of anyone without security clearance—including the next-of-kin and their chosen legal representatives. While both of these options would solve the basic conflict between RIPA 2000 and the CA 1988, it is difficult to see how the latter option would square with Article 2’s requirement that an investigation be *effective* and *public*, and that the deceased’s family be involved in a meaningful way.

For a long time the government did nothing. Eventually it indicated it would change the law to allow coroners and juries to have access to sensitive evidence in a narrow range of circumstances. This appeared to many commentators to be eminently sensible.¹¹⁴ The Guardian Newspaper quoted Susan Alexander, Azelle’s mother:

<<http://tinyurl.com/gtmgfns>> accessed 28 January 2016; and HC Deb 23 March 2009, vol 490, col 72; HC Deb 21 October 2009, vol 713, col 722.

¹¹⁴ The public is aware of police capability and power (with appropriate authorisation) to listen in on telephone conversations, and, unlike in criminal proceedings, there would be little or no prejudice if admissibility were restricted to *content* and not techniques or technology (*ibid*).

Now that the government agrees that this evidence shouldn't be withheld from bereaved families like ours, I hope all concerned can act quickly so the evidence is disclosed with minimum delay. Azelle has not had justice and without justice there can be no accountability.¹¹⁵

In the end, however, the government took a very different approach when it introduced the Counter-Terrorism Bill into Parliament in 2007. In the Bill, (as first introduced) clauses 64-65 would have given the Home Secretary broad powers to issue certificates requiring inquests to be held in private and without a jury whenever it was deemed to be in the public interest.¹¹⁶ Clause 65 would have allowed the appointment, by the Home Secretary, of a “special coroner”, from an approved list, to conduct the inquest.¹¹⁷ Clause 67 would have allowed (and also restricted) the disclosure of sensitive evidence to the specially-appointed coroner and a “person appointed as counsel to the inquest” (again from a government-approved list).¹¹⁸

Some observers quickly appreciated the significance of the proposed legislation.¹¹⁹ The charitable organisation INQUEST expressed “extreme concern” that the provisions had been introduced without consultation, and noted that the proposals gave “unprecedented powers to the Secretary of State to intervene in death in custody inquests where issues of state intelligence are involved.”¹²⁰ The Parliamentary Joint Committee on Human Rights (JCHR) also expressed barely concealed anger at the lack of consultation, and noted:

[...]the prospect that under these provisions inquests into the death of Jean Charles de Menezes, or British servicemen killed by US forces in Iraq, could be held by a Coroner appointed by the Secretary of State, sitting without a jury.¹²¹

¹¹⁵ Dyer (n 113).

¹¹⁶ Counter-Terrorism Bill 2007-8, cl 64–65.

¹¹⁷ *ibid*, cl 65.

¹¹⁸ *ibid*.

¹¹⁹ David Banks, ‘Dispatches: legal openness and the reporting of deaths’ *The Guardian* (London, 18 February 2008) <<http://tinyurl.com/ha9q3g4>> accessed 27 January 2016; Mary Riddell, ‘The Diana inquest may be a travesty, but at least it's in public’, *The Telegraph* (London, 21 February 2008) 22; Frances Gibb and Sam Coats, ‘Uproar at plan to hold inquests in secret’ *The Times* (12 August 2008).

¹²⁰ INQUEST, ‘Press Release: INQUEST condemns Government proposals for “secret” death in custody inquests’ (25 January 2008) <<http://tinyurl.com/jznldq>> accessed 28 January 2016.

¹²¹ Joint Committee on Human Rights (JCHR), ‘Counter-Terrorism Policy and Human Rights’ (Eighth Report): Counter-Terrorism Bill; Ninth Report of Session 2007-08’ (2008), para 7.

It argued that:

On first inspection we find this an astonishing provision with the most serious implications for the UK's ability to comply with the positive obligation in Article 2 ECHR to provide an adequate and effective investigation where an individual has been killed as a result of the use of force, particularly where the death is the result of the use of force by state actors.¹²²

Daniel Machover, Susan Alexander's solicitor, observed:

These proposals mean that Ministers and those responsible for intelligence gathering will never be held properly to account for the validity of their tactics. It is a fiasco, bearing no resemblance to a fair system of justice. Presented with the problem of what to do with sensitive material that is relevant to the circumstances of how and why a person was killed by a state agent, the government proposes to remove the vital democratic accountable layer of a jury and hide away from the bereaved family crucial evidence about the death.¹²³

When the government was defeated on the provisions in the Lords, they were dropped from the Bill. In 2009, it tried again, with similar provisions in the Coroners and Justice Bill.¹²⁴ Once again, significant opposition meant that the provisions were dropped. However, it became apparent to the government that an alternative route might be found.

Ten years previously, the Access to Justice Act 1999 inserted a provision into the CA 1988, allowing the Lord Chancellor to direct a coroner to adjourn an inquest where a public inquiry was being, or was about to be held, which would itself "adequately" investigate a death.¹²⁵ The provision was ostensibly to save families the emotional burden (and the public the expense) of inquests duplicating proceedings where inquiries had already

¹²² *ibid*, para 6.

¹²³ INQUEST (n 120).

¹²⁴ Coroners and Justice Bill 2009, cl 9.

¹²⁵ Access to Justice Act 1999, s 71 (CA 1988, s 17A). The CJA 2009, which repealed the Coroners Act 1988, contains a similar provision (s 11 and sch 1(3)). The ultimate decision on suspending an inquest remains with the coroner who can ignore a request if there is exceptional reason to so. He can also resume a suspended inquest if he believes there is "*sufficient reason*" (sch 1, para 9(1)). This is unlikely to occur unless "*compelling fresh evidence*" is discovered (Thomas *at al* (ch 1, n 18) 652).

investigated major disasters.¹²⁶ Inquiries do not have juries, and the IA 2005 includes broad provisions allowing evidence to be heard in private—including in the absence of “core participants” (the equivalent of “interested persons” in inquests). Meanwhile, s 74(1) of the Counter Terrorism Act 2008, quietly inserted into RIPA 2000 a provision which in “exceptional circumstances” allowed:

a disclosure [of the existence and/or content of intercept evidence] to the panel of an inquiry held under the Inquiries Act 2005 or to a person appointed as counsel to such an inquiry where, in the course of the inquiry, the panel has ordered the disclosure to be made to the panel alone or to the panel and the person appointed as counsel to the inquiry¹²⁷

5.2.1 Comparing inquiries to inquests

Before returning to Azelle Rodney, it is helpful to look at how the legislation and rules governing inquiries under the IA 2005 differ to those governing inquests. We have already noted two negative differences: an inquiry will not have a jury; and a minister, or an inquiry chairman, can require evidence to be considered in closed session—including to the exclusion of the family of the deceased.¹²⁸ This feature is considered last. It is important to bear in mind that while the primary and secondary legislation concerning inquiries are very different to those governing inquests, they have to be read in the light of Article 2 ECHR and the HRA 1998.

5.2.1.1 The scope of inquiries

The first big difference is that an inquiry’s terms of reference are at the discretion of the minister who establishes it, although since 2013 they must include the aims set out in s 5 CJA 2009.¹²⁹ Article 2 should restrict any practical difference this makes where the inquiry is investigating a death at the hands of the state, and a minister will, in theory, have no

¹²⁶ Such as the Kings Cross fire, the Zeebrugge Disaster, the Piper Alpha Disaster and the Marchioness Disaster (HC Deb 14 April 1999, vol 329, col 304; HC Deb 22 Jun 1999, col 1073).

¹²⁷ RIPA 2000, ss 18(7)(c) and 18(8).

¹²⁸ Inquiries Act (IA) 2005, s 19.

¹²⁹ *ibid*, s 5; and CJA 2009, sch 1(4)(2): i.e. who the deceased was and when, where and how they died.

discretion to narrow the scope of the inquiry to anything less than would be required in an inquest.¹³⁰

The second difference is one where the IA 2005 arguably takes a more sensible approach than the CA 1988 or the CJA 2009, regarding an inquiry's implications for criminal or civil liability. Section 2 IA 2005 simply states:

- 1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.
- 2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.¹³¹

5.2.1.2 Openness of inquiries to the participation of the family of deceased

The chairman of an inquiry can designate as “core participants” those with “a significant interest in an important aspect of the matter to which the inquiry relates.”¹³² This empowers—and Article 2 ECHR will require—the chairman to designate close family members of the deceased as core participants.¹³³

A major concern regarding openness is the restrictions on core participants being able to participate meaningfully in questioning witnesses. In inquests this is subject only to the coroner agreeing that questions posed are indeed questions, and that they are relevant. However, with inquiries, the questioning of witnesses begins with the presumption that “only counsel to the inquiry [...] and the inquiry panel may ask questions of that witness.”¹³⁴ The chairman can even refuse legal representatives the opportunity of asking their own

¹³⁰ i.e. “how” someone died, must be given the meaning “by what means and in what circumstances” (CJA 2009, s 5(4)(2)); *Middleton* (n 10).

¹³¹ IA 2005.

¹³² Inquiry Rules 2006, SI 2006/1838, (IR 2006), r 5.

¹³³ Rule 6 IR 2006 provides that core participants may be legally represented. However, where the chairman believes that core participants have similar interests and are likely to rely on similar facts, he may direct that they share legal representation (*ibid*, rr 6 and 7).

¹³⁴ *ibid*.

clients questions when they give evidence.¹³⁵ Otherwise, if a core participant wishes to ask witnesses questions, their legal representative must apply for permission, and set out:

- a) the issues in respect of which a witness is to be questioned; and
- b) whether the questioning will raise new issues or, if not, why questioning should be permitted.¹³⁶

There is no *specific* guidance as to what the chairman should consider when deciding whether the presumption against core participants questioning witnesses should be rebutted. Rather there is only the general guidance that:

- (3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost [...]¹³⁷

Again, Article 2 ECHR comes into play here, and, in particular, the requirement that next-of-kin be involved in the investigation to the extent necessary to protect their own interests.¹³⁸

5.2.1.3 The openness of inquiries to the public and press observing proceedings

Unlike in inquests, neither the IA 2005, nor the Inquiry Rules 2006 (IR 2006) create an explicit presumption that inquiries will be public. Section 18 (Public access to inquiry proceedings and information) really only requires the chairman to take reasonable steps to ensure that the parts of the inquiry that *are* public are accessible, as are associated evidence or documents.¹³⁹ In contrast, s 19 provides both ministers (by restriction notice) and the inquiry chairman (by restriction order) a broad power to restrict attendance at an

¹³⁵ *ibid*, r 10(2).

¹³⁶ *ibid*, r 10(4)–(5).

¹³⁷ IA 2005, s 17.

¹³⁸ These rules were partly to address fears (fuelled by the Bloody Sunday Inquiry) that inquiries become drawn out and expensive. See, Select Committee on the Inquiries Act 2005, 'Written and Corrected Oral Evidence, Michael Collins, Judi Kemish and Ashley Underwood QC – Oral Evidence', Evidence Session No.11, Questions 248-271, 20 November 2013.

¹³⁹ IA 2005.

inquiry, or any part of it, and to restrict disclosure or publication of related evidence or documents.¹⁴⁰ The broad nature of the power, is illustrated by the Act's Explanatory Notes:

Restrictions that could be imposed on attendance under subsection (1)(a) of section 19 might range from the exclusion of the press or general public (allowing those with an interest in the inquiry to attend [...]) to the exclusion of everyone except the panel, the witness and, if appropriate, their legal representatives [...]. They might be imposed on all hearings, or only where a particular witness was giving evidence or where evidence was heard on a specific topic [...] Similarly, a range of different restrictions might be imposed on the disclosure or publication of evidence or documents.¹⁴¹

The power of ministers and chairmen to restrict access is not completely unfettered, however. They can only make restrictions as required by law, or such as they consider "conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest."¹⁴² In determining this, the section gives a non-exhaustive list of issues to be considered:

- (a) the extent to which a restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
- (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
- (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
- (d) the extent to which not imposing any particular restriction would be likely —
 - (i) to cause delay or impair the efficiency or effectiveness of the inquiry,
 - or(ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).

¹⁴⁰ *ibid*, s 19.

¹⁴¹ Explanatory Notes to Inquiries Act 2005, para 43.

¹⁴² IA 2005, s 19(4).

(5) In subsection (4)(b) “harm or damage” includes in particular—

(a) death or injury;

(b) damage to national security or international relations;

(c) damage to the economic interests of the UK or any part of the UK;

(d) damage caused by disclosure of commercially sensitive information.¹⁴³

5.2.1.4 The manner in which inquiries conclude

The final significant difference between 2005 Act inquiries and inquests into use-of-force deaths at the hands of the state, is the manner in which they conclude. Inquests conclude with a verdict (now referred to as a conclusion). The coroner will instruct the jury as to which verdicts are open to them on the evidence heard. The ‘Inquisition’ (as it was known under the 1988 Act) or the ‘Record of an Inquest’, may describe how the deceased died in a number of ways. It may give a short-form verdict such as: accident, misadventure, lawful killing, unlawful killing, natural causes, open, neglect or suicide etc.. Those verdicts which *in the past* indicated that a death was caused by a criminal act (suicide, unlawful killing), require the criminal standard of proof of ‘beyond reasonable doubt’. All other verdicts must be reached on the balance of probabilities.

Short-form verdicts may, however, be insufficient to meet the procedural obligation under Article 2. This requires conclusions to be reached on the major factual issues surrounding the circumstances of the death, including whether there were any individual failures or wrongdoing by state actors, or systemic failings within a state institution. Bingham suggested in *Middleton* that in addition, or as an alternative, to a short-form verdict, narrative verdicts (at the time, relatively rare) should be encouraged.¹⁴⁴ A narrative verdict may take the form of a brief description of the circumstances of a death, or a series of answers to questions posed by the coroner on the main issues. Where a

¹⁴³ *ibid*, s 19(4)–(5).

¹⁴⁴ *Middleton* (n 10) 45.

narrative verdict is appropriate, Bingham observed that the coroner should decide how best to elicit the jury's conclusions on the central issues:

If the coroner invited either a narrative verdict or answers to questions, he may find it helpful to direct the jury with reference to [...]: where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death.¹⁴⁵

As well as the verdict, coroners can also make Prevention of Future Death Reports (PFD Reports) (previously Rule 43 Reports under the CR 1984: replaced by para 7, Schedule 5 CJA 2009, and regs 28-29 of the C(I)Regs 2013).

7 (1) Where—

- a senior coroner has been conducting an investigation under this Part into a person's death,
- anything revealed by the investigation gives rise to a concern that circumstances creating a risk of other deaths will occur, or will continue to exist, in the future, and
- in the coroner's opinion, action should be taken to prevent the occurrence or continuation of such circumstances, or to eliminate or reduce the risk of death created by such circumstances,

the coroner must report the matter to a person who the coroner believes may have power to take such action.¹⁴⁶

Under the Regulations, the Chief Coroner, rather than the Lord Chancellor,¹⁴⁷ decides how much of the report, and the response, is published.¹⁴⁸ Thomas *et al* make the important point that:

¹⁴⁵ *ibid*, 36.

¹⁴⁶ CJA 2009; See also C(I)Regs 2013, regs 28–29.

¹⁴⁷ As it was under the CR 1984.

¹⁴⁸ C(I)Regs 2013. The Chief Coroner has also produced guidance: Peter Thornton HHJ, 'Guidance No. 5: Reports to Prevent Future Deaths' (4 September 2013) <<http://tinyurl.com/jrdyr9l>> accessed 28 January

The function of preventing deaths in the future has gained increasing importance over recent years. This is obviously something to be applauded. It gives an inquest, among legal proceedings, a uniquely constructive aspect. This is a function which need not imply criticism, offers solace to families, and, if effective, is highly important.¹⁴⁹

With inquiries under the IA 2005, the chairman must produce a report under s 24(1) IA 2005. This must contain “the facts determined by the inquiry panel” and recommendations where required by the terms of reference.¹⁵⁰ It may also contain anything else that the panel considers relevant including recommendations where these were not required by the terms of reference. The chairman or the minister has “a duty” to arrange for the inquiry report to be published.¹⁵¹ There is a presumption that the report will be published in full, but material can be withheld where necessary under statute, EU law or in the public interest. When deciding upon the latter, account must be taken of:

- (a) the extent to which withholding material might inhibit the allaying of public concern;
- (b) any risk of harm or damage that could be avoided or reduced by withholding any material;
- (c) any conditions as to confidentiality subject to which a person acquired information that he has given to the inquiry.¹⁵²

“Harm or damage” includes:

- (a) death or injury;
- (b) damage to national security or international relations;
- (c) damage to the economic interests of the UK or of any part of the UK;

2016; and ‘Guidance No. 5A: Practical Guidance: Prevention of Future Deaths Reports’ (21 November 2013) <<http://tinyurl.com/hejt3q9>> accessed 28 January 2016.

¹⁴⁹ Thomas *et al* (ch 1, n 18) 369.

¹⁵⁰ IA 2005, s 24.

¹⁵¹ *ibid*, s 25.

¹⁵² *ibid*, s 25(4)–(6).

(d) damage caused by disclosure of commercially sensitive information.¹⁵³

5.2.2 The Azelle Rodney Inquiry

On 30 March 2010, the government finally announced a 2005 Act inquiry into Azelle's death. Its Terms of Reference were: "[t]o ascertain by inquiring how, where and in what circumstances Azelle Rodney came by his death on 30 April 2005 and then to make any such recommendations as may seem appropriate."¹⁵⁴ Sir Christopher Holland, a retired High Court Judge, was appointed as chairman. The inquiry formally opened on 6 October 2010.

At the opening, the issue of the sensitive evidence was again alluded to in the vaguest of terms. Sir Christopher Holland referred to it as "the problem", elucidating only to say that it "bears upon the potential for public hearing of this matter."¹⁵⁵ The substantive hearing of evidence began another two years later on 3 September 2012. This additional delay was partly because of further investigations being carried out by the inquiry team, and partly due to negotiations regarding the redaction or gisting of evidence to make the inquiry as open as possible. At the 4 November hearing, Ashley Underwood, counsel for the inquiry, predicted that it may not be necessary for any evidence to be heard in closed session.

When the inquiry proper finally got underway, the most contentious issue was the extent to which counsel for the core participants—and Azelle's family in particular—should be permitted to question witnesses. The chairman acknowledged the restrictive nature of r 10 IR 2006 in his Directions of the 30 April 2012:

This markedly restrictive provision is no doubt aimed at curtailing prolixity and thus the length and cost of inquiries. For my part if the barrister appearing for a core participant wishes to cross-examine a witness he or she will have to make an application to me. If permission is granted, it will not serve to permit

¹⁵³ *ibid.*

¹⁵⁴ Commons Hansard, Ministerial Statements, The Lord Chancellor and Secretary of State for Justice (Mr Kenneth Clarke), 10 June 2010, col 32WS.

¹⁵⁵ Azelle Rodney Inquiry, 'Transcript of Formal Opening - 6 October 2010', 2-3 <<http://tinyurl.com/n68td4j>> accessed 23 November 2014.

revisiting matters already covered by Counsel to the Inquiry—there must be compliance with Rule 10(5). Leave aside prolixity, I am not a jury—once a point is made then I can be taken as heeding it. That said, I do anticipate giving permission.¹⁵⁶

The problem is that cross-examination is not just about raising points with witnesses just to flag them up for the arbiter of fact. It is also about putting points to witnesses and seeing how they respond; and assisting the arbiter of fact to judge whether a point is supported by evidence. Does the witness provide a convincing explanation as to why something happened or why a certain choice was made? Do they seem to be giving a more honest or reliable account of the facts than any witness giving a contradictory account? As counsel for the family pointed out, the chairman would have to judge the reliability of individual accounts:

I am sorry, sir, again [...] you are sitting not only as a chairman with a judge or judicial type hat on, but you're also sitting there in the capacity of a jury in a sense, because you're going to have to determine these factual issues, and one of the factual issues that you, with your jury type hat on, would have to determine is not only the fact that there's a conflict but why officers may well have given an account which [...] may be [...] an untrue account, and that not only informs you, sir, in relation to that particular issue, but it may inform you in relation to other parts of their evidence later on, and that's why these questions [...] are important.¹⁵⁷

Second, while the chairman may “get the point”, it would be unfair not to allow a witness who may be implicated by that point to try and answer it and address any evidence

¹⁵⁶ Sir Christopher Holland, ‘The Azelle Rodney Inquiry: Directions Made 30 April 2012’ <<http://tinyurl.com/lvzxthz>> accessed 25 November 2014; Azelle Rodney Inquiry ‘Transcript of the Oral Hearings of 6 September 2012’ <<http://tinyurl.com/mom7jdr>> accessed 23 November 2014:

“I am rather keen, in this matter, to have a light touch. That said, there are rules and I can't ignore them altogether; [...] I have to be satisfied there are issues [...], and those issues have to be new or at least there has to be some good reason for questioning. That is what the rules indicate. Now, I don't want to stop anybody, but I would like people just to have that in mind, so that I don't need to keep policing it. [...] I am just putting my marker down, rather less forcefully than I am expected to do by the Rules.”(41)

¹⁵⁷ Azelle Rodney Inquiry, ‘Transcript of the Oral Hearings of 12 September 2012’, 53–54 <<http://tinyurl.com/na7w2yr>> accessed 23 November 2014.

that appears to support it. Finally, it was important to bear in mind that the inquiry was a *public* inquiry:

MR THOMAS: But sir, it is not a question of moving on because we are under time constraints. ... [T]his is not just an Inquiry where you have to understand. The public have a right to understand what is going on; and that is the reason why we have got all these live links, these feeds and everything, because this is meant to be a public Inquiry. And if we are prevented from exploring these issues, then it is not a public Inquiry.¹⁵⁸

To an extent, the chairman's hands were tied by the Rules. He was almost certainly more generous in allowing questions than a strict reading of the Rules permitted. It could be argued, and often was by counsel for the family, that the chairman had to allow them to question witnesses in order to adequately involve them in the investigation as required by Article 2 ECHR. But the Chairman was often impatient with certain lines of questioning, and could appear particularly uncomfortable when accusatory questions were put to police witnesses. Counsel for the family suffered constant interruptions by the chairman on some days, often with the exclamation "I've got the point". This got so bad that one exchange ended in counsel for the family exclaiming "This is ridiculous!" and storming out of the room.¹⁵⁹

5.2.2.1 Restrictions on the openness of the Azelle Rodney Inquiry

As well as restrictions on questioning witnesses, there were several ways in which the openness of the proceedings was explicitly restricted. First various witnesses were granted anonymity. Some were referred to either by a cypher or by their command code.¹⁶⁰ Some, including the shooter, were also hidden from public view while giving evidence. 'The public' here, did not include Azelle's mother or her lawyers, who could see the witnesses give evidence. When they gave evidence, the rest of the public and press were moved to an annex where they watched proceedings via video link with the witnesses

¹⁵⁸ Azelle Rodney Inquiry, 'Transcript of the Oral Hearings of 13 September 2012', 7-8 <<http://tinyurl.com/oqjnwoz>> accessed 23 November 2014.

¹⁵⁹ Azelle Rodney Inquiry (n 155) 2-3.

¹⁶⁰ "E1", "S1" etc. or "Bronze Command" and "Silver Command".

obscured from view. Finally, evidence that might identify anonymised witnesses was either gisted, omitted completely, or considered in closed session.

The inquiry was widely praised for ensuring that the *overwhelming* majority of the evidence was heard in public. Through lengthy negotiations, the relevant “sensitive” evidence was redacted and gisted so that the substance of the intelligence could be revealed, without intelligence-gathering techniques or technologies also being revealed. In this respect, the inquiry appears to have been extremely successful. The intelligence-gathering community got to keep their practices secret, and the family and public saw the substance of relevant intelligence if not its source.

There is a potential problem with this, however, beyond the fact that substantive evidence may also have been redacted to avoid revealing sources. The nature of the intelligence source (whether human or technological) may have important implications for the reliability of the intelligence it produces. Human sources or informants are the most obvious example of this. If you do not know who an informer is, you cannot take steps to assess her reliability. There can be analogous problems with technology. Voice recognition software may, for example, be used to identify one of the parties to a telephone call. The inquiry might be told “intelligence revealed X received a phone call from Y”. However, if this intelligence comes from technology, core participants will have no idea how reliable it is. The family of the deceased was completely reliant on the inquiry’s legal team to make any appropriate inquiries and reach conclusions on this.

There were four occasions when the gisting and redaction of evidence was insufficient, and the inquiry went into closed session to hear evidence.¹⁶¹ The first arose when counsel for the family wished to question a senior firearms officer about a training video in which E7 (the shooter) appeared.¹⁶² The second and fourth occasions occurred when the same

¹⁶¹ There were a number of occasions when the public were excluded from the inquiry when legal issues were discussed—i.e. PII; restriction orders; and the Attorney General’s undertaking. Similar *ex parte* applications would also have occurred in an inquest.

¹⁶² 25 October 2012, 9.45am–10.41am (Azelle Rodney Inquiry, ‘Transcript of the Oral Hearings of 25 October 2012’, lines 1-4 <<http://tinyurl.com/z68hpya>> accessed 28 January 2016; and Azelle Rodney Inquiry Team, ‘The Azelle Rodney Inquiry: Summary of Content of Closed Sessions’ <<http://tinyurl.com/psgk4jp>> accessed 23 November 2014).

witness was asked to view and comment upon video footage taken by an “aerial asset”, which risked revealing the nature of that ‘asset’.¹⁶³ The answers provided by the witness were summarised by counsel for the family, with the witness’s help, in open court.¹⁶⁴ The third closed session occurred when counsel for the family wished to question the same officer about the professional history of E7.¹⁶⁵ To do this in public would have risked revealing E7’s identity. The reasons for going into closed session were clearly explained and follow-up questions took place in open court. On each occasion the family’s lawyers were present in the closed sessions. Finally, there was one occasion when a witness was questioned in open court about training and tactics, after which the Metropolitan Police Service (MPS) indicated they would apply for a restriction order to prevent the publication of the evidence. The application was not heard until June 2013, and the transcript of the day’s proceedings was removed from the website.¹⁶⁶

Otherwise the inquiry followed the procedure of the Ian Tomlinson inquest where transcripts of proceedings were uploaded onto the website, along with documentary, photographic and video evidence. Additionally, the inquiry website broadcast a live audio stream of the proceedings. These efforts appeared to be part of a concerted effort at best practice, promoting the openness of proceedings with modern technology,¹⁶⁷ and recognised the wide public interest in the proceedings.

The final way in which the public scrutiny of proceedings was restricted concerned the core participants’ closing submissions. Core participants were allowed to make written

Following the inquiry, E7 was charged with Azelle’s murder, and subsequently identified as Anthony Long. Azelle was the third suspect Long had killed in his career. He was acquitted by a jury on 3 July 2015.

¹⁶³ *ibid*; Transcript of the Oral Hearing, 14.18-14.36, 31 October 2012, page 97, lines 10-12; and Transcript of the Oral Hearings of 25 October 2012, lines 1-4; and Azelle Rodney Inquiry Team, ‘The Azelle Rodney Inquiry: Summary of Content of Closed Sessions’ <<http://tinyurl.com/psgk4jp>>.

¹⁶⁴ Transcript of the Oral Hearing, 15 October 2012, pp. 1-20 and Transcript of the Oral Hearing, 31 October 2012, pp. 97-103.

¹⁶⁵ Azelle Rodney Inquiry (n 162) 66, lines 2-4; and Azelle Rodney Inquiry Team (n 162).

¹⁶⁶ A restriction was eventually granted requiring extracts from the National Police Firearms Training Curriculum and a Police Firearms Manual be redacted. When last checked on 27 November 2014, the entire transcript of this day’s evidence was still missing from the website.

¹⁶⁷ Things were not completely problem free in this regard. Several times, the live web-feed did not appear to work and the visual feed to the annex was of bad quality often making it impossible to read documents shown on the monitor. The preference for removing public to an annex to watch on video feed, over putting a screen around an anonymous witness is to be lamented.

submissions on specific issues the chairman wanted to consider in his final report.¹⁶⁸ This is not permitted at inquests. Controversially, the MPS raised evidence in their submissions which was not considered during the actual formal hearing of evidence. They claimed this evidence was sensitive, and it is redacted from the copy that was made available on the inquiry website.¹⁶⁹ The chairman originally directed that he would not consider this evidence, but left it open to the MPS to make an application, until which time it would remain redacted.¹⁷⁰ After indicating they would make an application on 17 December 2012, there appears to be no further reference to the submissions in any subsequent orders or directions.¹⁷¹

Given the limited amount of evidence heard in closed sessions, it is worth asking whether the investigation into Azelle's death could have been performed by an inquest with a jury. Ostensibly, it appears it could have been; but in practice it is unlikely. A lot of evidence appears to have been gisted and redacted. The problem is that when evidence is gisted so as not to reveal the source of intelligence, witnesses will still be asked about that evidence. The chairman may instruct barristers not to question witnesses about the source, and this will not normally cause any problems. However, there may be times when a witness wants to clarify things to protect her own position. The MPS, might agree to gisting evidence for use in open court only because if questioning threatens to embarrass a witness, they can go into closed session, where a witness can explain herself more fully. In the absence of this possibility witnesses might back themselves into a corner through no fault of their own. This risk was illustrated during the inquiry.

The family of Azelle were provided with a shortened version of aerial video footage of the moments before the shooting. Counsel asked a surveillance officer if he was aware of helicopter surveillance being carried out. The officer said he was not, at which point counsel for the MPS intervened:

¹⁶⁸ Azelle Rodney Inquiry Core Participants, 'Written Closings with Submissions' (undated) <<http://tinyurl.com/pcvgs3m>> accessed 23 November 2014.

¹⁶⁹ *ibid.*, 1.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

Mr Thomas is putting a particular question. He is going to get a negative answer to that question, but the officer is not going to be able to answer it in a different way.

The issue was complicated by the fact that it was agreed to make the footage available to the family in an *ex parte* hearing, which they were unaware of. An order also prohibited questions about the technology behind the footage. This led to the following exchange with the Chairman trying to help out:

SIR CHISTOPHER HOLLAND [Chairman]: [... W]ere you in any communication with those who were conducting aerial surveillance?

MS STUDD [Counsel for the MPS]: Sir, I'm sorry. This has been the subject of application to you previously.

MR THOMAS [Counsel for the family]: What application?

[...]

MS STUDD: I want to be very clear: this officer is going to be extremely cagey about the responses that he gives, for the reasons that you are aware of.

[...]

MR THOMAS: What application?

SIR CHISTOPHER HOLLAND: I don't know whether he was in communication or not. That's all I'm asking.

MS STUDD: Very well.

SIR CHISTOPHER HOLLAND: I haven't asked any more and I shall keep a very -- were you in communication with anybody conducting aerial surveillance or not?

A. Yes I was, sir.

SIR CHISTOPHER HOLLAND: You were.

MR THOMAS: Right. Sir, I'm extremely troubled. This is meant to be an open public inquiry, Ms Studd has said there's been an application. What application?

SIR CHRISTOPHER HOLLAND: I am conducting it. All right? I'm just going to rise for a minute or two and I would like to have Mr Underwood [Counsel for the Inquiry] advise me.¹⁷²

Initially, it appears as if the witness contradicted himself. When Mr Thomas asked him about helicopter surveillance, he said he was unaware of any; but when the chairman asked him about aerial surveillance he agreed that he was in communication with those operating it. But the witness did not contradict himself if the footage was not from a helicopter but from another source; and the exchange revealed the *existence* of a surveillance technology, if not what that technology was, which the MPS did not want made public. The MPS could argue that this confusion, and the witness's potential embarrassment, could have been avoided had the inquiry gone into closed session.

The inquiry was full of contradictions. It represented the first use of the Attorney General's power to suspend an inquest and set up an inquiry in its place, so that sensitive evidence could be heard behind closed doors. In fact, very little evidence was heard in closed session. It is possible that the sensitive evidence may have been successfully dealt with in other ways had there not been the option of going into closed session. And it is impossible to say whether the exclusion of this evidence completely under PII, would have had any substantial bearing on the investigation or its outcome.

Following progress with the effectiveness of inquests since the New Cross fire, Blair Peach and Hillsborough, the Azelle Rodney Inquiry set a very worrying precedent. There was no jury, a wide potential to go into closed session, and the family of the deceased was significantly disadvantaged by the rules in terms of their ability to effectively question witnesses. While progress has been made in recent years to make inquests less dependent on the personalities of coroners (particularly with the advent of the Chief Coroner), the use of inquiries risks taking things in the opposite direction. The Azelle Rodney inquiry arguably illustrated how much the character of inquiries can depend upon the personalities of the chairman and the inquiry team. Despite some of the issues highlighted above, it

¹⁷² Azelle Rodney Inquiry, "Transcript of Oral Hearings of 11 September 2012" 127-8 <<http://tinyurl.com/ztscm26>> accessed 26 January 2016.

appears that in this case this was to the considerable advantage of open justice. But there are few guarantees that future inquiries will always be as open.

Finally, the inquiry report and recommendations were much more effective in publicly and meaningfully detailing the various conclusions reached by the chairman than an inquest verdict could be. Even with the potential for narrative verdicts and PFD Reports in inquests, this is a real benefit of inquiries as far as openness is concerned.

The Inquiry Report concluded that Azelle had been unlawfully killed. The CPS revisited its decision not to prosecute E7 and decided that there was now sufficient evidence to charge him with murder. His anonymity was removed and he has been named as Anthony Long. He was acquitted by a jury on 3 July 2015.

5.3 Conclusions

Chapters 3, 4 and 5 have described the practice of openness in England and Wales in the aftermath of a death at the hands of the police, or in police or prison custody. The first part of this practice consists of the procedural manifestation of openness: when the main types of investigations will take place; what the scope of those investigations will be; and the manner and extent to which they are open to the public. The second part of the practice consists of the rationales that have been, and are given for opening up the circumstances of these deaths to scrutiny.

This account was preceded by an analysis of the procedural obligation under Article 2 ECHR in Chapter 2. As we have seen in Chapters 3 and 5, this obligation has significantly influenced modern domestic practice. It was appropriate to consider ECtHR jurisprudence separately, because despite its influence, the domestic requirements and the international obligation do not cover exactly the same parameters, pursue exactly the same purposes, or have exactly the same priorities. Of course domestic practice has had to meet the requirements laid down by ECtHR jurisprudence, but there is arguably more to domestic practice than this.

The two aspects of practice described—the procedural manifestation of openness and the rationales behind it—form two components of a context-specific conception of open justice in the aftermath of deaths at the hands of the police or in police or prison custody. Part 2 of the thesis examines the possible non-retributive, non-compensatory justice needs that might arise in the aftermath of deaths at the hands of the police or in police or prison custody. Part 3 returns to summarise the main tenets of the practice described in this Part, and use this to suggest a basic procedural principle that might form the core of a context-specific conception of open justice. Using the theory developed in Part 2, Part 3 suggests a normative theory as to the link between openness and justice in these circumstances—the fourth and final element of this context-specific conception of open justice.

PART 2

Theory

Chapter 6

Harm in the Aftermath of Deaths at the Hands of the State

6.1 Introduction

This chapter begins by taking something akin to a negative morality approach in order to arrive at any normative justice ends that should underpin the inquisitorial processes that are the focus of the thesis. It begins with a brief description of the nature of negative morality and why it may provide a useful tool in the current context. It then identifies the predictable harms that may arise in the aftermath of deaths at the hands of the state, and inadequate institutional responses to such deaths. The chapter concludes by identifying areas of justice theory which appear to be particularly concerned with the justice that resides in procedures and action that tend to counter these and analogous types of harm. These are then explored in more detail in Chapter 7.

6.2 Justice

6.2.1 Justice in inquests and related processes

We might presume that because inquests take place in a court, they must be concerned with justice. But is this really the case? Most people associate criminal courts with retributive or punitive justice, and if someone is convicted of a criminal offence they normally receive some form of punishment.¹ In contrast, our civil courts are generally associated with compensatory justice.² But what sort of justice, if any, are our coroners' courts concerned with when conducting inquests into use-of-force deaths at the hands of the state? We have seen that their rules of procedure specifically exclude the possibility of attributing individual criminal or civil liability.³

If coroners' inquests *are* concerned with a particular type or types of justice, does this mean that so too are processes that pursue similar aims through quasi-judicial or non-

¹ Of course, criminal justice outcomes are often more complex than this, and restorative justice, compensatory justice and efforts at rehabilitation have important roles in criminal justice systems.

² Again, it is recognised that this is a significant generalisation. Claimants may seek punitive/exemplary damages (only rarely available in England and Wales – see *Rookes v Barnard* [1964] AC 1129 (HL); and, *Thompson & Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 (CA)). Or they may want to, e.g., enforce a right, seek an injunction, or obtain declaratory judgment.

³ Coroners' Society of England and Wales 'Memorandum to Joint Committee on Human Rights' in Joint Committee on Human Rights, *Deaths in Custody: Third Report of Session 2004-05, Vol. 2: Oral and Written Evidence* (The Stationery Office 2004) 137.

judicial means?⁴ The task of reframing a context-specific conception of open justice requires an interpretive or normative understanding of the actual or potential justice aims that reside within these processes, and the role of openness and participatory rights in furthering those aims.

6.2.2 Rectificatory versus primary justice

It is first necessary to address the general question of what is meant by justice here? A basic distinction is often made between distributive justice and rectificatory justice. Following Aristotle, distributive justice is generally regarded as being concerned with the just distribution of goods (including intangible goods such as honours) according to 'merit'. In Plato's *Republic*, for example, Socrates and Polemarchus discuss Simonides' saying that justice is "giving to each what is owed."⁵ Different cultures, societies and individuals will have different ideas about what constitutes merit and how to reward it.⁶ In what follows, the term 'primary justice' is preferred over 'distributive justice', because the term distributive justice is often associated specifically with the just distribution of economic goods, and the meaning intended below is broader than this.

Rectificatory justice, in contrast, is effectively a sub-concern of primary justice. It is concerned with remedying what are considered wrongs, by asking: What amounts to giving to *X* and *Y* that which is owed, when *X* has been the victim of a wrong committed by *Y*? The way in which most societies based on the rule of law generally attempt to achieve rectificatory justice, is by having judicial or quasi-judicial processes that attempt to establish whether an alleged wrong in fact occurred, and (if so) to provide an appropriate remedy.

The investigations analysed in this study are not in theory concerned with retributive, punitive or compensatory justice. While taking this at face value, and making it our starting

⁴ This is really no great leap, as the non-judicial disposal of certain minor crimes—through on the spot fines or criminal cautions—is obviously concerned with criminal justice.

⁵ Ryan K Balot, *Greek Political Thought* (John Wiley & Sons 2008) 24.

⁶ As well as what values should be attributed to different goods.

point, it must first be acknowledged that the practical and psychological realities are more complicated than this.

The preliminary investigations examined in Chapter 3 all have, as part of their explicit purposes, the identification of potential wrongdoing that might merit criminal proceedings (police and IPCC investigations), and/or disciplinary proceedings (IPCC and PPO investigations). The rules and procedures governing inquests and inquiries attempt to disassociate them from criminal and civil justice. Safeguards can also be put in place on an *ad hoc* basis.⁷ Examples include the prohibition of verdicts that indicate individual criminal or civil liability in inquests and inquiries, or the Attorney General undertaking not to use evidence given by witnesses in inquiries against them in any future criminal proceedings.⁸ However, inquests and inquiries can (albeit rarely) influence whether criminal proceedings are brought against anyone in relation to a death.⁹ The outcome of an inquest or inquiry can also affect a potential claimant's decision on whether to bring civil proceedings, and the evidence that comes to light during an inquest or inquiry may affect the outcome of civil proceedings. The potential for criminal, civil or disciplinary proceedings, may therefore significantly inform the motives and conduct of participants in inquests and inquiries. Family members may push for an unlawful killing verdict, hoping the CPS might revisit a decision not to prosecute. Witnesses may be cagey or uncooperative for fear of incriminating themselves or colleagues in criminal or disciplinary proceedings. And the fact that state actors and institutions are typically very well legally represented at inquests is at least partly motivated by the ramifications they can have for any civil proceedings. These issues are further complicated by the fact that the motivations of interested persons will invariably be mixed, and can change over time.¹⁰ Justice is a multifaceted concept that can be pursued on different levels with varying priorities. Families may value the justice implications of an inquest's relatively wide scope and detail, and the opportunity to

⁷ Not only to safeguard due process for those accused of criminal or civil wrongs but also to try and encourage full and honest accounts from witnesses who may fear criminal or disciplinary action.

⁸ See Kevin McGinty (Attorney General), 'Attorney General's Undertaking as to the Use of Evidence to Witnesses to the Azelle Rodney Inquiry', 4 April 2011 <<http://bit.ly/1l3tvMA>> accessed 3 June 2014.

⁹ e.g. the prosecution of PC Harwood after the Ian Tomlinson inquest verdict of unlawful killing; and the prosecution of Anthony Long for the murder of Azelle Rodney following the Azelle Rodney Inquiry.

¹⁰ e.g. a relative may not originally be interested in wrongdoers being punished, but may change her mind if an inquest reveals malicious or racist behaviour.

confront and question witnesses personally or through *their own* lawyers. But they may also want individuals prosecuted and punished for their part in a death.

While the significance of these overlaps of purpose and motive should not be overstated, an attempt to identify any normative, non-punitive/retributive and non-compensatory justice purposes within inquests and inquiries, needs to acknowledge this reality. Finally, it is also not the purpose of this Part to dictate what families, communities and the public should feel as a result of a death, or as a result of any injustice that accompanies the death or the state's response to it. Similarly, it is not the purpose to prescribe what types of justice different interest groups should prioritise.

6.3 Negative morality

6.3.1 Defining 'moral harm'

Before outlining negative morality, it is necessary to define how the term 'moral harm' is applied below. Crucially, it differs significantly to Ronald Dworkin's use of the term in *A Matter of Principle*.¹¹ Dworkin posits that all empirically experienced harm is bare harm. This includes additional emotional or psychological harm stemming from a subjective perception that, for example, a physical injury was unjustly caused.¹² Dworkin associates moral harm with the objective notion of what he calls "the injustice factor".¹³ Where one can point to an objective injustice (critically sustainable as such in light of a normative conception of justice), 'moral harm' is a "moral fact".¹⁴ The victim's perception or non-perception of having suffered an injustice is immaterial to whether there is moral harm—indeed they may not have suffered *any* actual harm at all as a result of the wrongful act.

Dworkin's conception, therefore, detaches moral harm from the subjective experience of victims. It is effectively a transcendental type of harm. While this thesis is concerned with elucidating objectively sustainable normative justice values, it is argued below that

¹¹ Ronald Dworkin, *A Matter of Principle* (OUP 1986) 80–84.

¹² Whether or not such a perception is objectively justified.

¹³ Dworkin (n 11) 80.

¹⁴ *ibid.*

the subjective experience of injustice is a powerful initial indicator of what those normative justice values should be.

The conception of moral harm used below relates to psychological harm that comes from a subject's perception that she is the victim of an injustice. It is a real harm that *is experienced* by the victim. For example: people normally experience a deep sense of sorrow and psychological pain at the loss of a loved one. While this may amount to harm, it does not amount to moral harm. But where someone believes that a loved one has been *wrongfully* killed, they can suffer moral harm—the psychological impact caused by the wrongful (or unjust) elements of the circumstances as they are perceived.¹⁵ Frank Haldemann employs a similar notion for the term 'moral injury' and associates it with misrecognition:

A physical injury, for instance, becomes a moral injury only if it is accompanied by forms of disrespect or humiliation that deny recognition.¹⁶

A similar distinction between different types of harm was made by the Court of Appeal in *Thompson and Hsu v Commission of Police of the Metropolis*.¹⁷ The appeal concerned claims for compensation against the Metropolitan Police for assault, battery, false imprisonment, and malicious prosecution. Of interest is how the court distinguished between basic damages and aggravated damages in a way that reflects the above distinction between bare harm and moral harm.

Both types of damages are compensatory. They must be pleaded and are awarded as compensation for *actual* harm suffered. In a case involving assault, battery, false imprisonment and malicious prosecution, basic damages are, in theory, not concerned with moral harm. They are concerned with the physical and psychological impact or injury respectively resulting from: a threat of physical assault, actual physical assault, physical confinement, and the fear, stresses and inconveniences of being prosecuted. They are not

¹⁵ People may experience a sense of injustice where they, for example, blame God or an unjust universe. Nevertheless, it is felt that this example is a valid one to distinguish between 'bare-harm' and the harm that comes from being wronged by another person.

¹⁶ Frank Haldemann, 'Another Kind of Justice: Transitional Justice as Recognition' (2008) 41 Cornell Int'l LJ 675, 685.

¹⁷ *Thompson* (n 2).

concerned with any additional harm deriving from a sense of injustice that the claimant has been *deliberately* and *unjustly* subjected to these bare harms by the defendant: i.e. the insult added to the injury.

Aggravated damages, however, *are* concerned with compensating something akin to moral harm (as defined above). Again, it is significant that they must be pleaded, and quantum will depend on the circumstances *as experienced by the claimant*. They will only be awarded “where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation *for the injury suffered* if the award were restricted to a basic award”.¹⁸ Aggravating features can include “humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner [...]”¹⁹

6.3.2 What is a negative morality approach?

Jonathan Allen characterises negative morality approaches as being interested in the normative significance of negative moral concepts and experiences (e.g. injury, humiliation), and drawing connections between these and the elucidation of normative moral and political values.²⁰ He describes negative morality as a sensibility rather than a doctrine or free standing moral system or political theory,²¹ and identifies the work of Judith Shklar and Avishai Margalit as exemplifying negative morality approaches.²² While taking issue with some aspects of Axel Honneth’s approach to moral and critical theory, Allen nevertheless praises him for the connections he draws between negative human experiences and positive ideals.²³

¹⁸ Thompson (n 2) (*emphasis added*).

¹⁹ *ibid*.

²⁰ Jonathan Allen, ‘The Place of Negative Morality in Political Theory’ (2001) 29 Pol Theory 337, 339–340.

²¹ *ibid*, 342 and 349.

²² *ibid*, 340–341.

²³ Allen (1998) (ch 1, n 25) 449. Haldemann also draws a straight line between Judith Shklar’s take on negative morality and the “Liberalism of Fear”, and Honneth’s theory of recognition (Haldemann (n 16) 682–3).

Allen acknowledges that positive moral theories, and theories of rights, do not necessarily ignore social evils and their negative consequences for individuals. He points to Rawls and Voltaire as two examples of thinkers who elucidate positive moral ideals but who are very conscious of “the prevalence and power of social evils.”²⁴ But while Allen concedes there is a tradition amongst moral and political theorists of reflecting on negative experiences—particularly as a rhetorical device to advocate for change—he argues they generally fail to draw *integral* connections between negative experiences and positive principles.²⁵ By insisting on deriving and shaping positive ideals from their real life negative antitheses, Allen argues we avoid the trap of *a priori* ideological justifications for action.²⁶

A negative morality approach or sensibility is, therefore, primarily educative.²⁷ As Allen maintains, “sustained normative reflection” on negative experiences ensures that we “examine explicitly the significance of experiences of domination, cruelty, suffering, and so forth”, and “relate the sense of the significance of these experiences to the formation of political ideals.”²⁸

It is true that we should not rely exclusively on victims’ claims of injustice to shape strategies. These claims may lack objective validity. First, an assessment of the facts *as perceived* by a subject may not objectively support a claim of injustice. Second, where *perceived* or suspected facts *are* capable of sustaining a claim of injustice, events may not in fact have transpired as the subject perceives or suspects them to have transpired. We also need to guard against the fact that the physical or vocal expression of moral harm, when compared to physical harm, is more susceptible to manipulation. But Allen argues:

Saying that political theorists need to take the perspective of victims into account does not amount to a call to accept their perspective at face value but is simply a reminder that victims’ claims that they are being subjected to evils

²⁴ Allen (2001) (n 20) 338.

²⁵ *ibid*, 340.

²⁶ *ibid*, 359.

²⁷ *ibid*, 348.

²⁸ *ibid*, 340. Allen argues that an “examination of victims’ perceptions provides access to potentially challenging and transforming views of society and morality that we would not otherwise encounter” (*ibid*, 353).

must be given explicit attention. This is a necessary, but not a sufficient, condition for the construction of an adequate normative theory of politics.²⁹

Judith Shklar makes a similar point:

The voices of the [putative] victims must always be heard first, not only to find out whether officially recognised social expectations have been denied, but also to attend to their interpretations of the situation. Are changes in the order of publicly accepted claims called for?³⁰

This last question is particularly important. Shklar continues:

If one regards the sense of injustice as Rousseau did, as innate and naturally accurate, then one must, at least initially, credit the voice of the victim [...] The claim may be unfounded on the available evidence and might be rejected, but the putative victim must be heard.³¹

An approach that attempts to deconstruct the causes of moral harm that contribute to what Honneth (borrowing from Barrington Moore) terms the “consciousness of injustice”, is a useful exercise.³² It not only ensures that negative experiences inform the character of positive ideals, but also that they continue to shape the particularisation and practical pursuit of those ideals. Rather than simply taking it for granted that openness and participation are good things, this chapter explores the harms that might arise in their absence. Only then can we make judgments about its most appropriate prioritisation and manifestation.

6.4 Potential harms in the aftermath of a death

This section sets out the potential causes of a subjective sense of injustice in the aftermath of a use-of-force death at the hands of the state. According to Axel Honneth it is important to pay attention to the consciousness of injustice (whether or not it is

²⁹ *ibid*, 348–349.

³⁰ Judith N Shklar, *The Faces of Injustice* (YUP 1990) 81.

³¹ *ibid*, p.90.

³² Axel Honneth, *Disrespect: The Normative Foundations of Critical Theory* (Wiley 2007) 84.

articulated) as it will always be at the heart of social conflicts.³³ With any conception of justice, the normative can never be wholly separated from the psychological. Indeed, it is generally a concern for the subjectively-experienced suffering of individuals and groups that inspires political and moral theorists to either shape theories of justice, or validate or criticise those of others. Once a normative conception of justice has been elucidated that is one step removed from the intuitions that may have inspired it, the relative weight attributed to competing justice claims is never completely detached from subjective intuitions or experiences.

There are limits to the scope of the current project. A myriad of potential harms and injustices may also be experienced by state actors who may have caused, failed to prevent, or are otherwise associated with a death. These potential injustices include all those that may befall any ‘accused’: they may be wrongly accused; they may be unfairly attacked in the media or scapegoated; where they have committed wrongdoing, this may be exaggerated in the public narrative; an investigation into the death may be unjustifiably protracted; they may suffer other procedural injustices while fighting to give their side of the story; they may be in their position because of the incompetence of superiors or colleagues, or the reckless actions of others (including, potentially, the deceased). Or a death may be the inevitable result of deeper societal pathologies over which low-ranking state actors have little or no control.³⁴

All of these potential harms and injustices deserve attention—not least because they often receive even less than the cursory acknowledgment that they have been given here. However, issues of length and scope mean that the current project, while alert to these issues, focuses on those moral harms experienced by individuals or groups falling on the other side of the state/public divide.

In what follows, I make a chronological (rather than hierarchical) distinction between what I term ‘first-order harms’ and ‘second-order harms’. By first-order harms I wish to describe those harms which are rooted in a death itself and, in terms of first-order *moral*

³³ *ibid.*

³⁴ e.g. a practice of imprisoning the vulnerable in overcrowded and understaffed prisons.

harms, the sense of injustice which can arise out of any suspicion that it was wrongfully caused.³⁵ By second-order harms, I wish to describe those harms which may be associated with the way in which the state and others respond to a death.

It is impossible to describe the precise cognitive ingredients of a sense of injustice that arises out of particular circumstances, and that is not what is attempted here. One potential cause of a sense of injustice will also invariably influence, reinforce and merge with others. The following is merely an outline of what might *predictably* cause, or contribute to a sense of injustice for variously affected non-state actors in the aftermath of a use-of-force death at the hands of the state.

6.4.1 First-order harms

6.4.1.1 Family associated first-order bare harms

The first-order bare harms that predictably arise out of a death at the hands of the state are straightforward. First, there is the bare harm that has been inflicted on the primary victim which is the death itself, as well as any physical or psychological harm that she may have suffered immediately prior to her death. The victim may also experience moral harm or a sense of injustice at being subjected to the action or circumstances that, in the end, contribute to or cause the death. Then there are the associated bare harms suffered by those close to the deceased. They may, for example, experience psychological harm from the shock of finding out about or witnessing the death itself. The death may also have deprived them of the deceased's love, friendship, companionship, knowledge, guidance, emotional, physical and/or economic support. These losses may cause long-term, and potentially significant, psychological harms—particularly if the deceased was what psychologists call a 'significant other': i.e. an influential figure in the psychological development of the person who survives them.³⁶

³⁵ While our main concern is second-order harms, it is important to recognise the first-order harms that can be associated with a death, as second-order harms often result from a failure by the state to address first-order harms.

³⁶ Honneth, (1996) (ch 1, n 23) 96.

6.4.1.2 First-order moral harms

With regard to first-order *moral* harms, a sense of injustice will typically involve a suspicion that a death was wrongfully caused or that insufficient steps were taken to prevent it. First, this may occasion a sense of injustice felt on behalf of the deceased. It is natural to witness someone suffering a perceived injustice and feel a potentially strong sense of injustice on the victim's behalf. The degree of moral harm experienced will invariably be stronger the closer an individual was to the deceased in life. Where an individual was close to the deceased, this will often combine with a sense of injustice at being unjustly deprived of a loved one (a provider of emotional and, potentially, economic support etc.). Those particularly close to the deceased (usually family members) are sometimes referred to as 'secondary victims'.³⁷ The special position of these individuals is often formally recognised in some way by the civil law.³⁸

The sense of injustice felt on behalf of the deceased will normally focus on the death itself. However, it may be aggravated by various known or suspected circumstances surrounding the death: for example, that the action or inaction that caused or contributed to the death was negatively influenced by the victim's ethnicity or other particularly condemnable behaviour on the part of state actors. The sense of injustice may be stronger where the deceased is perceived as having been particularly innocent or vulnerable: e.g. a child, or someone with learning difficulties or mental health problems.

Whether an individual was close to the deceased or not, the degree of moral harm experienced may depend on how much they normally identify with those state actors implicated in a death. Those not close to the deceased personally may also be affected more or less, depending on how closely they identify with the deceased. The influence of a subject's personal traits and characteristics may not be easily predictable. Someone who instinctively trusts the police, and is sympathetic to the difficulties of their work, may be more forgiving of wrongful behaviour on their part, or may feel a deeper sense of injustice

³⁷ James M Jaranson and Michael K Popkin, *Caring for Victims of Torture* (American Psychiatric Pub 1998) p.xxxii.

³⁸ e.g. Fatal Accidents Act 1976, s 1; and Law Reform (Miscellaneous Provisions) Act 1934, s 1.

if they believe their and others' trust has been betrayed by such behaviour.³⁹ The different ways in which a death is perceived to have been wrongfully caused may also be significant: i.e. whether it was deliberate, accidental or the result of broader societal failures.

The two final potential first-order harms (one bare the other moral), are closely linked. A type of bare harm may be felt by individuals or groups who identify with the deceased, where the cause of death is such that it negatively affects their sense of security within their intersubjective relationships with what they identify as "the state" and/or particular categories of state actors. A death may make them feel that they, as members of the same group, are also at risk, or are even being specifically targeted. A group may identify with the deceased on the basis of class, race, lifestyle, sex, politics, citizenship or non-citizenship or simply because, like the deceased, they are not part of the coercively empowered institution deemed responsible for the death. The associated moral harm is the sense of injustice that accompanies such a perception of being targeted, discriminated against or otherwise misrecognised as a group by the state. Again, the intensity of the personal sense of injustice at one's group being targeted or misrecognised in some way, will likely diminish as the size of the group increases and the individual concerned becomes further removed from the deceased.

6.4.1.3 Conclusions on first-order harms

These first-order harms are intuitively familiar. For example, it is common to experience a sense of injustice when hearing in the news about any death that was apparently at someone else's hands. We may also naturally empathise with the sense of injustice suffered by those closer to the deceased even if we have personal doubts about the narrative surrounding the death to which they may subscribe.

We typically think of these first-order harms as demanding rectificatory justice (at least when they have *in fact* been caused by wrongdoing), and therefore falling to be dealt with

³⁹ See, for example, the personal struggle of white settler Aubrey Aggett, the father of Peter Aggett, an anti-apartheid activist who died in detention in South Africa in 1982, in Beverley Naidoo, *Death of an Idealist* (Central Books 2013) 297: Naidoo describes the shift in Aubrey's attitude towards the State as "seismic", following the death of his son.

by criminal and/or civil justice systems. The focus of this thesis does not include punitive, retributive or compensatory justice forms, but it is important to acknowledge that, putting aside the potential for inquests and inquiries to influence future criminal or civil proceedings,⁴⁰ they may *themselves* give some small measure of quasi-punitive satisfaction for any wrongs which contributed to a death. This may be through the appreciable discomfort a perceived wrong-doer may go through when publicly accounting for her actions, or the public condemnation of state actors or institutions that a negative inquest verdict or inquiry report can bring.⁴¹ Regarding truth commissions in transitional scenarios, Popkin and Roht-Arriaza acknowledge the reality that:

While public identification is neither a criminal sanction nor a civil one, it can have negative effects on the reputation, career and political prospects of individuals.⁴²

Nevertheless, even at their strongest, these potential side-effects may be little consolation for those who believe that the circumstances of a death demand serious criminal sanction.

6.4.2 Second-order harms

Second-order moral harms relate to those harms caused in the aftermath of a death at the hands of state, rather than by the death itself. It may not just be 'the state' or state actors who contribute to this type of moral harm. Other intermediaries, particularly the media, can play a significant role in creating such harms.

⁴⁰ e.g., the prosecution of PC Simon Harwood over the death of Ian Tomlinson, and the prosecution of Anthony Long over the death of Azelle Rodney.

⁴¹ See also, Allen's reference to the similar punitive affect of perpetrators' being required to appear before truth commissions (Jonathan Allen, 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission' (1999) 49 UTLJ 315, 328).

⁴² Margaret Popkin and Naomi Roht-Arriaza, 'Truth as Justice: Investigatory Commissions in Latin America' (1995) 20 L & Soc Inquiry 79, 105.

6.4.2.1 Injustice surrounding perceived failures of the criminal and/or civil justice systems

The first potential second-order moral harm that can arise in these circumstances is a sense of injustice where the state fails to provide criminal or civil remedies for the first-order harms described above, and/or is perceived to have provided an inadequate explanation as to why no-one has been prosecuted or why a civil action has failed.⁴³ This sense of injustice will, again, likely be felt most strongly by those who were personally close to the deceased. But, any community that identifies with the deceased, or even the wider public, may feel a sense of injustice where a death was caused by apparent wrongdoing that will go unpunished.⁴⁴

6.4.2.2 Moral harms related to the narrative surrounding a death

The second category of second-order moral harms relate to the narratives that may surround a death, and how they are compiled and communicated. First, there may be a sense of injustice at a perceived lack of a reliable explanation as to how and why someone died. Again, this will usually be most strongly felt by those close to the deceased in life, but may also be felt by any community that identifies with the deceased and concerned members of the wider general public. While those close to the deceased may feel a very basic emotional need for answers about how and why their loved one died, the demand for an explanation may also have a quasi-political element. It may be motivated by a normative intuition about intersubjective relationships between the state and its citizens. While the sense of injustice may be articulated, the normative intuition may not be, and certainly need not be derived from a knowledge or understanding of formally held legal rights.

The perceived reason for a lack of an explanation may be significant. In practice, it may be due to a refusal by state actors to provide answers within their knowledge; or because the state actors tasked with providing an explanation are unable to do so—temporarily or permanently—because of their own lack of knowledge. The release of information may

⁴³ See *Jordan* (ch 1, n 10), discussed at 2.8.3.3 above.

⁴⁴ See 6.4.2.3 below.

also be delayed where it is thought inappropriate to release it, for example before the full investigation has concluded.⁴⁵

The associated sense of injustice may contribute to a wider sense of injustice at the manner in which relevant state institutions and actors engage with the family, community and wider public following a death. There may be good faith reasons why a particular state body cannot provide immediate answers about how and why someone died. But there may also be a legitimate expectation on the part of the family, community and public that the state will explain the reasons for this and give them general information about how matters will proceed.⁴⁶

A related sense of injustice may derive from the perceived inadequacy of an official investigation into death. Again, the perceived reason for this will be significant in the same way as the perceived reasons for the failure to explain a death at all. It may be interpreted as a sign that 1) the state does not consider the issue important enough to warrant proper investigation; or 2) the death is being covered up, and with it any associated wrong-doing.

The manner in which an investigation is deemed inadequate is also significant. The investigator or investigators may be perceived to be biased. It may be deemed to be lacking in scope. It may be perceived as rushed or sloppy. There may be an unjustifiable delay in the investigation starting or in it reaching its conclusions. The investigation may not be open to scrutiny from the family or the public, or may fail to adequately address the issues and questions that most concern interested persons.

A perceived lack of openness to the scrutiny and/or participation of variously interested individuals or groups can be a cause of a sense of injustice whether or not in all other material respects the investigation is perceived as adequate and its conclusions trustworthy. Insufficient openness during the conduct of an investigation may lead to

⁴⁵ Shiv Malik, and Sandra Laville, 'Mark Duggan Death: IPCC Says Hands Are Tied over Release of Evidence' *The Guardian* (29 March 2012) <<http://tinyurl.com/l3w9k5x>> accessed 1 June 2014. The problem with this—as exemplified in the aftermath of the death of Jean Charles de Menezes is that information may be manipulated through unofficial leaks to the media (Alan Cowell, 'London Inquiry Refutes Police in Their Killing of a Suspect' *The New York Times* (17 August 2005) <<http://tinyurl.com/jmuzahh>> accessed 12 January 2016).

⁴⁶ For an example of an expression of the sense of injustice that might be caused where such engagement was held to be inadequate (once again purely illustrative), see 6.4.2.3 below.

distrust in its conclusions; but these two sources of a sense of injustice are different. Individuals or groups can be actively or passively engaged in the investigatory process in different ways and on different levels (as was observed in Part 1). What is appropriate will depend on the circumstances, including the value placed in the justice ends associated with openness or participatory rights, and the degree to which competing public interests might be prejudiced by openness.

Finally, the family of the deceased may feel a sense of injustice if they are denied an opportunity to place on public record their experiences of the deceased in life, and the personal impact of the death and its aftermath. This is particularly likely, if there are prevailing narratives that are critical of the deceased.

Where the perceived failures described above occur, they are rarely the extent of the potential causes of moral harm in the aftermath of a death. In the absence of a reliable and tested narrative, false or unreliable narratives can fill the vacuum or gain prominence. These may have as their sources untested claims by state actors which reach the media through official briefings or unofficial leaks.⁴⁷ In 'Demystifying Deaths in Police Custody', Simon Pemberton discusses how these accounts are often "faithfully replicated in the media."⁴⁸ And more empirical studies in the United States (US) show that:

[...] newspaper accounts of deadly force [by police] typically lend primacy and authority to official versions of events neatly circumscribed by laws governing deadly force. This is not due merely to the relative infrequency and inaccessibility of contravening unofficial accounts. When counter-claims appear in 'crime incident' articles, they are generally subjectified or otherwise devalued. The reliance upon official sources translates into a majority of news accounts that rationalize and normalize police violence by associating it with the performance of a legitimate institutional role.⁴⁹

⁴⁷ Simon Hattenstone, 'We Cannot Take Them at Their Word' *The Guardian* (18 August 2005) <<http://tinyurl.com/nogwx2w>> accessed 28 January 2016.

⁴⁸ Simon Pemberton, 'Demystifying Deaths in Police Custody: Challenging State Talk' (2008) 17 S & LS 237, 247.

⁴⁹ Paul J Hirschfield and Daniella Simon, 'Legitimizing Police Violence: Newspaper Narratives of Deadly Force' (2010) 14 *Theo Crim* 155, 175; See also Regina G Lawrence, *The Politics of Force: Media and the*

Some media narratives do, of course, draw from non-state sources such as the families of the deceased, public eye-witnesses, family support groups, community groups and, occasionally, whistle-blowers, to challenge state versions of events. But while there may be a plurality of public narratives addressing instances of state violence, the most prevalent and widely circulated tend to be over-reliant on official and unofficial state sources.⁵⁰ In the US, Hirschfield and Simon have found that “news coverage can, however unintentionally, legitimize instances of deadly force [...] through the cultivation of shared valuations of objects, phenomena, actions, and actors in everyday life.”⁵¹ In particular, they describe an apparent bias in news articles that tend to automatically “construct deadly force victims as physical or social threats and frame police actions as a normal and reasonable response.”⁵² These narratives may focus on the circumstances surrounding the death, descriptions of the character of the deceased, and/or the character of any group or community to which the deceased is perceived to belong.⁵³

This is not to say that one-sided and misleading narratives do not appear in the media when there is a tested official narrative from which the media can draw. Tested and reliable narratives can also be selectively presented to give a distorted impression of the evidence and their conclusions. But in the absence of such narratives, other narratives can gain particular prominence and are more likely to be accepted.⁵⁴ These can cause a very real sense of injustice, particularly if it later turns out that state actors knew, or could have found out through diligent inquiry, that they were inaccurate.

Construction of Police Brutality (University of California Press 2000), Chapter 3 ‘Normalizing Coercion: Competing Claims about Police Use of Force’, 33-62.

⁵⁰ Pemberton (n 48); Scraton and Chadwick (ch 4, n 156); Hirschfield and Simon (n 49) 160; Stanley Cohen, ‘Human Rights and Crimes of the State: The Culture of Denial’ (1993) 26 ANZJ Crim 97; Lawrence (n 49).

⁵¹ Hirschfield and Simon (n 49) 159.

⁵² *ibid*, 160.

⁵³ Pemberton (n 48) 147–253; Scraton and Chadwick (ch 4, n 156); Cohen (1993) (n 50); Lawrence (n 49).

⁵⁴ See Pemberton (n 48).

6.4.2.3 *Some illustrative examples of the expression of these types of moral harm*

In summary, then, the failure to fulfil normative expectations regarding how the state responds to a death and engages with interested persons may lead to a sense of injustice for families and concerned members of the public. As indicated above and in the section on methodology in Chapter 1, it is accepted that a significant amount of caution is necessary with the description given above, and the following examples are purely for illustrative purposes.

In the following example, the speaker, Stafford Scott, a community activist, expresses his and others' sense of anger at the police failing to engage with the family and the community in the aftermath of Mark Duggan's death at the hands of the police, and the belief that, had this happened, the unrest that followed may have been avoided:

If a senior police officer had come to speak to us, we would have left [Tottenham Police Station, where some protestors gathered ...] We were there until 9pm. Police were absolutely culpable. Had they been more responsive when we arrived at the police station, asking for a senior officer to talk with the family, we would have left the vicinity before the unrest started.

It is unforgivable police refused dialogue. We know the history here – how can Tottenham have a guy killed by police on Thursday, and resist requests for dialogue from the community 48 hours later?⁵⁵

Recent inquiries and inquests into historical contentious deaths have given rare public platforms to some victims of second-order moral harms. Following publication of the Hillsborough Independent Panel's report in September 2012, David Cameron recognised the second-order moral harms suffered by the families of those who died in the disaster, in an address to Parliament:

Mr Speaker, with the weight of the new evidence in this report, it is right for me today as Prime Minister to make a proper apology to the families of the 96 for all they have suffered over the past 23 years. Indeed, the new evidence that we

⁵⁵ Sandra Laville, Paul Lewis, Vikram Dodd and Caroline Davis, 'Doubts Emerge over Duggan Shooting as London Burns' *The Guardian* (8 August 2011) <<http://tinyurl.com/m7au36c>> (accessed 1 June 2014).

are presented with today makes clear that these families have suffered a double injustice. The injustice of the appalling events – the failure of the state to protect their loved ones and the indefensible wait to get to the truth. And the injustice of the denigration of the deceased – that they were somehow at fault for their own deaths.⁵⁶

While describing a “double injustice”, Mr Cameron alludes to three *causes* of this injustice. First, he describes the cause of the first-order harms suffered at Hillsborough: the ‘failure to protect’. He then refers to two sources of second-order moral harms: the false narratives that were widely circulated after the disaster; and the unacceptable wait families had to endure to find out the real truth about how and why their loved ones died.⁵⁷

Becky Shah, who lost her mother, Inger, in the disaster, said after the publication of the report:

I have mixed feelings. I am really relieved that Liverpool fans, survivors and the dead have been exonerated, and the City of Liverpool too, which I feel is important and I am not from here. But I was a young woman of 17 who lost her only parent at Hillsborough and the fact it has taken more than half of my life to get to this point is absolutely outrageous in a democratic society.⁵⁸

A common theme in the comments of interested persons following long-delayed public investigations into contentious deaths, is a sense of vindication—often following years of official denials and the perpetuation of unreliable official and unofficial narratives surrounding deaths.

When the conclusions of the original internal police investigation into the death of Blair Peach were published in 2010 (31 years after Blair Peach’s death), his partner, Celia Stubbs wrote an article for the Guardian headlined ‘For Blair Peach, a little justice’:

I always knew the police killed my partner Blair Peach. Now all can see the scale of the lies told. [...] We have been vindicated. The report states what we

⁵⁶ HC Deb 12 September 2012, cols 285-286.

⁵⁷ The re-opened inquests are ongoing at the time of writing.

⁵⁸ Owen Gibson and David Conn, ‘Hillsborough: The Truth about the Causes of the Disaster’ *The Guardian* (12 September 2012) <<http://tinyurl.com/nqglhkt>> accessed 1 June 2014 (emphasis added).

always believed—the fatal blow was struck by a police officer [...] But, equally disturbing, in reading the report the deliberate untruths told by officers and their success in obstructing the police inquiry have been laid bare. The deceit and lies these officers told is a major factor as to why no policeman was prosecuted for Blair's death. [...] *Blair, we have fought for justice for you for 31 years, and I hope that we have, even if only partly, got it.*⁵⁹

The reactions of relatives to the Saville Report into Bloody Sunday also illustrates the sense of vindication and a level of justice that can derive from reliable public narratives. Tony Doherty, whose father was killed by British paratroopers said:

The great lie has been laid bare. The truth has been brought home at last.

It can now be proclaimed to the world that the dead and the wounded of Bloody Sunday, civil rights marchers, one and all, were innocent, one and all, gunned down on their own streets by soldiers who had been given to believe that they could kill with perfect impunity.⁶⁰

Kate Nash, whose 19-year-old brother William died, said:

My brother William. We know he was innocent, we've always known. *Now the world knows*[...] Thirty-eight years ago, a story went around the world, concocted by General Mike Jackson.

He said there was gunmen and bombers on our streets, and they were shot and killed. *Today, that lie has been uncovered.*⁶¹

John Kelly, whose 17-year-old brother Michael was killed, said:

Everything else fades into insignificance compared to the fact that those gunned down on Bloody Sunday were ordinary, decent Derry people. That was the verdict we wanted. That is what matters. *We have overcome.*⁶²

⁵⁹ Celia Stubbs, 'For Blair Peach, a Little Justice' *The Guardian* (London, 1 May 2010) <<http://tinyurl.com/pqynyht>> accessed 1 June 2014.

⁶⁰ 'Reaction to Bloody Sunday Report' *BBC* (15 June 2010) <<http://tinyurl.com/qfn96bx>> accessed 1 June 2014 (emphasis added).

⁶¹ *ibid* (emphasis added).

⁶² *ibid* (emphasis added).

Referring to the original investigation into the massacre by Lord Widgery, which was widely seen as a whitewash, John (Jackie) Duddy's brother, Gerry, said:

Widgery destroyed our loved ones' good name. *Today we cleared them.* I am delighted to say, 'Jackie was innocent'.⁶³

While the conclusions of the Saville Report were broadly welcomed, the inquiry continues to be dogged by criticism about its length and cost. But the scale of the Saville Inquiry, is to a certain extent a measure of the second-order moral harms that, prior to the inquiry, had been heaped onto the families and members of the community, by mistruths, obfuscation, and unreliable investigations surrounding the events of Bloody Sunday. Barrister Ashley Underwood QC alluded to this point before the Commons Select Committee on the IA 2005:

[T]here were so many factors [that influenced the length and cost of The Saville Inquiry]. The first was that it is the antidote to Widgery. You have heard arguments about whether a bad inquiry is better than no inquiry [...] A counter blast to that is Widgery was regarded as a whitewash and in order to stem what flowed from the perception, rightly or wrongly, that it was a whitewash, you have to have a dramatically long, highly detailed, very expensive inquiry. As Lord Morris said, one of the reasons for multiplicity of representation may have been the bitterness and divisiveness that attended that.⁶⁴

Adrienne Makenda Kambana responded to the unlawful killing verdict in the inquest into the death of her husband, Jimmy Mubenga who died whilst being forcibly deported:

Kambana said the inquest verdict was a huge relief for her and her family. "I feel like Jimmy can rest in peace now – everything was behind closed doors before, but now it has come out," she said.⁶⁵

⁶³ *ibid* (emphasis added).

⁶⁴ Select Committee on the Inquiries Act 2005 (ch 5, n 138).

⁶⁵ Matthew Taylor and Lewis, Paul, 'G4S Faces Damages Claim over Killing of Deportee' *The Guardian* (London, 10 July 2013).

And following an inquest jury's verdict that the unlawful use of force by staff at Hassockfield Secure Training Centre had contributed to 14-year-old, Adam Rickwood taking his own life, his mother, Carol Pounder, said:

I have waited over six years for truth and justice [...] Nothing can bring Adam back. All I have ever wanted is to find out the truth about what happened to my son and for those responsible for unlawful assaults to be held to account.⁶⁶

6.4.3 Justice discourses which appear to address analogous harms

The second-order moral harms described above, appear to have an affinity with the types of injustice that are the concern of discourses on procedural justice and theories of recognition. Narratives surrounding use-of-force deaths at the hands of the state, and the manner in which they are created, cause harm when they are one-sided and deny interested parties a voice, or trivialise or downplay their concerns about the circumstances of a death. In a judicial (or administrative decision-making) context, not taking seriously those with an interest in the subject matter under consideration, or denying them an appropriate opportunity to shape an outcome, is typically associated with failures in procedural justice. And both the denial of a reliable narrative to those with a legitimate interest, and the denial of voice in the production of that narrative, also appear to fit into categories of misrecognition that are described in recognition theories.

⁶⁶ Martin Wainwright, 'Unlawful Restraint "Contributed to Death of Boy in Custody"' *The Guardian* (27 January 2011) <<http://tinyurl.com/oydry5q>> accessed 27 June 2015.

Chapter 7

Procedural Justice, Legitimacy and Justice as Recognition

7.1 Introduction

It is necessary to consider whether the subjective senses of injustice that make up the moral harms described above are at least of a type that are capable of being objectively sustainable as injustices. Chapter 6 concluded by observing that there appears to be an affinity between the harms that may result from inadequate institutional responses to use-of-force deaths at the hands of the state, and those harms that preoccupy procedural justice theorists. The first part of this chapter discusses the nature of procedural justice and its relationship to conceptions of legitimacy. The second part briefly outlines recognition theory. It is suggested that recognition theory may provide a normative framework that can sustain claims of injustice where there is a failure to meet normative expectations for open and effective investigations into use-of-force deaths at the hands of the state. The discussion of procedural justice, legitimacy and recognition theory therefore provides the theoretical grounds for Part 3's discussion on the link between openness and justice in these circumstances.

7.2 Procedural justice

In discussing the relevance of procedural justice theories to the current project, we are faced with the problem that these theories are generally shaped by very different contexts to those with which we are concerned. In particular, discussion about the intrinsic justice value of certain procedures are influenced by the considerable practical consequences that the formal outcomes of civil and criminal justice proceedings (e.g. prison sentences, awards of compensation, injunctions etc.), or administrative decision-making processes (e.g. the granting or refusal of licences or planning permission, the award of legal aid etc.) can have for individuals. Inquests and inquiries are very different in this regard. The information uncovered, and the qualitative conclusions drawn, can have *indirect* practical consequences for those who participate in them.¹ But these are not formally the concern of the processes themselves.

¹ "Indirect" because the processes themselves do not determine what those consequences are (unlike civil and criminal justice processes). A minor exception to this is the power of Coroners to produce so-called

Most of the literature on procedural justice can therefore only take us so far when considering the intrinsic versus instrumental justice value of procedures in processes not formally concerned with rectificatory justice or administrative decision-making. This, combined with the limited scope of the thesis, means it is neither possible nor appropriate to provide an exhaustive analysis of the debate as it is framed in these very different contexts. However, by describing some of the main features of the discussion, it is possible to make certain useful observations.

7.2.1 The relationship between procedures and outcomes

Writing about procedural rules, Dworkin observes that, “nothing is more productive of deep and philosophical puzzles” than the question of what they should be.² A simple distinction is made by Wojciech Sauriski between substantive justice as “the justice of outcome” and procedural justice as “the justice of procedure.”³ Lawrence Solum gives a more nuanced definition of procedural justice, describing it as being “concerned with the means by which social groups (including governments, private institutions, and families) institutionalise the application of requirements of corrective and distributive justice to particular cases.”⁴

Rawls distinguishes between three main conceptions of procedural justice. The first is ‘perfect procedural justice’.⁵ This involves defining what a just outcome is, and then designing a process that is focused only on achieving that type of outcome. Some would describe a just outcome to civil justice processes as being an accurate determination of the legal status of the parties.⁶ In a system of perfect procedural justice, then, *every* procedure would be directed towards correctly establishing the facts, and then correctly applying the law to those facts. Within such a system, procedures are merely instrumental to helping

Schedule 5 Reports (previously known as Rule 43 Reports), which require the organisation with responsibility for the circumstances concerned to provide a response within 56 days.

² Dworkin (1986) (ch 6, n 11) 72.

³ Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (Springer 1985) 49.

⁴ Lawrence B Solum, ‘Procedural Justice’ (2005) 78 S Cal L Rev 181, 238.

⁵ John Rawls, *A Theory of Justice* (Rev Ed, HUP 1999) 74.

⁶ e.g. Dworkin (ch 6, n 11) 72–103 Although this so-called “outcome” is really only one step in judicial processes whose ultimate outcome is a corrective justice action: e.g. a prison term, or a payment of compensation.

achieve a just outcome. But the actual justness or otherwise of an outcome depends purely on whether it is in fact correct (according to pre-determined criteria), rather than on the way in which it was arrived at.

The second of Rawls's conceptions of procedural justice is 'imperfect procedural justice', as exemplified, according to Rawls, by typical criminal trials.⁷ Here procedures are "best calculated" to achieve a pre-defined just outcome, but at the same time take into account laws and justice aims which are external to that objective.⁸ Solum, for example, describes a "balancing model" for this type of system.⁹ The procedures followed are still concerned with achieving an accurate outcome based on an accurate application of the law to the facts, but the choice of procedures is also influenced by a concern to limit the cost of pursuing this primary objective. These costs may be financial or deontological. For example, Dworkin hypothesises that if having twenty-five rather than twelve jurors was slightly more likely to reach an accurate determination in a criminal trial, we may still decide it not worth the additional expense.¹⁰ As a deontological example: even if we suppose that torture can garner information that would be probative in a criminal trial, most people would consider this an unjustifiable cost in terms of a suspect's basic human rights.¹¹

Finally, Rawls defines 'pure procedural justice' as a system that has "no independent criterion for the right result".¹² Instead "there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided the procedure has been properly followed."¹³ Rawls uses the analogy of gambling to illustrate this conception. If, for example, everyone enters into a game of poker voluntarily and on equal terms, a fair outcome is whatever the outcome happens to be as long as everyone plays by the rules.¹⁴

⁷ Rawls (1999) (n 5) 74.

⁸ In particular, procedures are "consistent with the other ends of the law" (*ibid*, 75).

⁹ Solum (n 4) 252-259.

¹⁰ Dworkin (1986) (ch 6, n 11) 72-73.

¹¹ While Solum's particular "balancing model" envisages procedures that attempt to limit the potential moral or social costs associated with the blind pursuit of accurate outcomes, it does not admit the opportunity for procedures that embody other (non-outcome-related) positive justice aims.

¹² Rawls (1999) (n 5) 75.

¹³ *ibid*.

¹⁴ *ibid*.

These three conceptions raise different types of relationship that procedural rules may have with notions of justice. First, procedures can simply be instrumental in helping to achieve pre-defined justice outcomes. Second, procedures that blindly pursue a single, narrowly defined justice aim, may have effects which are, in fact, antithetical to broader societal justice aims. And lastly, and relatedly, some procedures can have intrinsic value, unrelated to a process's formal outcome.

7.2.2 Intrinsic *versus* instrumental values of procedures

The last chapter suggested that moral harm may arise where normative expectations are not met in terms of how individuals and groups are treated and engaged with in the aftermath of a death at the hands of the state. There is a question as to whether these harms are of a type that are in principle capable of being described as injustices.¹⁵ A similar question occupies many procedural justice theorists regarding whether procedures in judicial or administrative decision-making processes can have intrinsic *justice* value.

Most agree that procedures can have value that goes beyond their role in pursuing, for example, an accurate outcome to a legal dispute. T.R.S. Allan observes that even D.J. Galligan—for whom an instrumentalist approach to procedural justice is “robustly practical and in tune with common sense”¹⁶—acknowledges that “any complete and convincing analysis” of procedural justice recognises “the important part played by non-outcome values—independent of the accuracy or soundness of the substantive decision or verdict.”¹⁷ But Allan goes further than this, arguing that “the whole design or character of a hearing may well reflect non-instrumental values of no less importance than those which underlie our concern for accuracy and reliability.”¹⁸ But what is the normative basis for claims such as this?

While Galligan and Dworkin agree that procedures can have intrinsic value, they express uneasiness at some of the claims of so-called ‘dignitarians’. Dworkin worries that

¹⁵ Or whether they are something else: e.g. discourtesies.

¹⁶ TRS Allan, ‘Procedural Fairness and the Duty of Respect’ (1998) 18 OJLS 497, 498.

¹⁷ *ibid*, 498.

¹⁸ *ibid*, 499.

the further we move away from outcome-focused procedures the closer we get to “extravagant and [...] nihilistic claims about the rights people have to procedures in court.”¹⁹ Both Galligan and Dworkin intimate that the claim that procedures should reflect the inherent dignity of participants independently of a concern for accurate outcomes, lacks adequate normative explanation.²⁰ For Dworkin, this is seen in the failure of Laurence Tribe’s account to define, for example, “what moral harm, distinct from the risk of substantive injustice, lies in [...] *ex parte* determinations of guilt that offer no role to the individual condemned.”²¹ And Allan discusses Galligan’s concern that “the alleged link between respect for persons and fair procedures stands in need of explanation, which dignitarian theorists have hitherto failed to provide.”²² In particular, for Galligan, the instrumentalist approach to procedural justice, ensures that “procedures in the air, procedures good in themselves, and procedures edged with mystery are eliminated.”²³

Alternatively, Tribe suggests that rights to interchange between citizens and officials in administrative decision-making processes “express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one.”²⁴

For when government acts in a way that singles out identifiable individuals—in a way that is likely to be premised on suppositions about specific persons—it activates the special concern about being personally talked to about the decision rather than simply being dealt with.²⁵

Mashaw also sees value in such a Kantian analysis, reflecting as it does a requirement that each person be respected as an end in herself:

We do distinguish between losing and being treated unfairly. And, however fuzzy our articulation of the process characteristics that yield a sense of unfairness, it is commonplace for us to describe process affronts as somehow

¹⁹ Dworkin (1986) (ch 6, n 11) 78.

²⁰ Denis James Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press 1996) 73.

²¹ Dworkin (1986) (ch 6, n 11) 103.

²² Allan (1998) (n 16) 498.

²³ Galligan (n 20) 77. Again, these concerns derive from contexts in which the practical impact of processes’ outcomes can have a significant effect on the rights of parties.

²⁴ Laurence H Tribe, *American Constitutional Law* (Foundation Press 1978) 503–504.

²⁵ *ibid.*

related to disrespect for our individuality, to our not being taken seriously as persons.²⁶

Allan points to some of the negative ends pursued by judicial procedures as illustrative of a well-recognised need to ensure that people are treated with dignity:

The dignitarian approach may serve to remind us that non-outcome values (such as privacy and confidentiality) should not be overlooked; the rules protecting a suspect from being tricked or cajoled into confessing, for example, are based on values which are quite independent of any concern with the accuracy of outcome.²⁷

Allan also notes the important positive procedural norm that parties be given reasons for administrative or judicial decisions, as forming “an integral part of treating a disappointed applicant with the respect which his dignity as a citizen demands.”

Giving reasons expresses respect just as a refusal or failure to do so [...] expresses contempt. As Lucas explains the point, a requirement to give reasons ‘recognises a party’s right to be disappointed by an adverse decision, and the need to assuage it’.²⁸

Despite the intuitive resonance of these arguments, both Mashaw and Solum hesitate to provide a normative grounding for what are often intuitive feelings about the dignitarian value of procedures. Solum admits that the argument that justice depends on participatory rights in judicial processes “rests on uncertain and varying foundations.”²⁹ In particular, Solum, like Dworkin, is sceptical about dignitarian interpretations of procedural justice:

[I]t is not clear that the value of dignity provides reasons that are sufficiently weighty to counter the other values that bear on procedural justice. By itself, the value of dignity is closely related to the values that are served by proper

²⁶ Jerry L Mashaw, *Due Process in the Administrative State* (YUP 1985) 162–163.

²⁷ Allan (1998) (n 16) 498.

²⁸ *ibid*, 500.

²⁹ Solum (n 4) 260.

etiquette or good manners. Indignity or disrespect are not the sort of grave injuries that trump other values tout court[...].³⁰

Mashaw is also hesitant in this respect:

We all feel that process matters to us irrespective of result. [But t]his intuition may be a delusion. We may be so accustomed to rationalising demands for improvement in our personal prospects, in the purportedly neutral terms of process fairness, that we can no longer distinguish between outcome-oriented motives and process-oriented arguments.³¹

7.2.3 Procedural justice and legitimacy

Solum and Allan both suggest, in different ways, that the concept of legitimacy may be helpful in shaping a normative grounding for intrinsically just procedures within judicial and administrative decision-making processes. Allan, like Solum, focuses his attention on the intrinsic value of participatory rights. He side-lines the dubious Millsian claim that people are the best protectors of their own interests as an explanation for the value of such rights. Instead he suggests a link between the moral ‘quality’ of an outcome and the manner in which the debate that precedes it is conducted. He thus highlights the concept of *legitimacy* as an outcome-‘quality’ which deeply concerns us:

The quality of outcome of a legal or administrative procedure—and, in particular, its legitimacy—may be as much a reflection of preceding debate about the demands of justice, in the circumstances of the particular case, as of argument about the relevant facts.³²

He uses our preoccupation with bias in judicial proceedings as an example of the connection between procedural rules and legitimacy:

Why[...] does the adversarial nature of the trial, with its conception of a contest between the parties, render any hint of bias especially odious? Is it not because in such circumstances the legitimacy of the decision is dependent on faithful

³⁰ *ibid*, 264.

³¹ Mashaw (n 26) 162–163.

³² Allan (1998) (n 16) 498.

adherence by all involved to acceptable standards of procedural rectitude, such that whatever is decided must be accepted as a just outcome[...]?³³

The accurate application of the substantive law to the facts can also be contextualised as just one determining factor when assessing the justness of intersubjective interactions within the judicial context. Such interactions are invariably characterised by significant power imbalances amongst actors (between the parties themselves, and between parties and arbiters or decision-makers). These imbalances are such that interactions between these actors cannot avoid having primary justice implications (positive or negative) beyond the main justice purpose for which a process was created. This does not mean that procedures need not be concerned with achieving accurate outcomes. Indeed the legitimacy of both the decision-making process and the decisions arrived at will be partly, or even mainly, dependent on whether procedures manifest a genuine attempt to reach accurate outcomes. After all, a focus on accuracy of outcomes, rather than, for example, the social positions of the protagonists, recognises the parties as equal bearers of rights.

7.2.3.1 *What is legitimacy?*

According to Tom Tyler and Jason Sunshine, “legitimacy is a property of an authority or institution that leads people to feel that that authority or institution is entitled to be deferred to and obeyed”. Tyler observes that studies:

[...] consistently suggest that the legitimacy of authorities and institutions is linked to the fairness of the procedures by which they exercise their authority. Hence, the pursuit of public support requires institutions and authorities to adhere to lay principles of procedural justice.³⁴

The research of Tyler, Sunshine and others strongly supports the conclusion that people’s views of the police and the judiciary are determined less by traditionally conceived outcome-related criteria (judgment and cost, for example) and more by factors

³³ *ibid*, 505. There is an affinity here with Rawls’s conception of pure procedural justice.

³⁴ Tom R Tyler, ‘Psychological Perspectives on Legitimacy’ (2006) 57 *A Rev Psych* 375, 392 (*emphasis added*).

such as respect, fairness, non-discriminatory dealings and impartiality.³⁵ Whether an outcome is considered legitimate, therefore, will depend on whether these qualities are perceived to be present in the relevant processes.

There are therefore practical reasons why the perceived legitimacy of a process and its outcome are important. As Tyler argues, “legitimacy is a valuable attribute for any institution if it promotes acceptance of its decisions and the rules it promulgates, and stability and institutional effectiveness are virtues that benefit all members of society.”³⁶ And the effect of legitimacy is that people “feel obligated to defer to the decisions made by leaders with legitimacy and the policies and rules they create.”³⁷ He also references Beetham’s argument that the “subordinate [...] relate to the powerful as moral agents as well as self-interested actors; they are cooperative and obedient on grounds of legitimacy as well as reasons of prudence and advantage.”³⁸

Tyler and Sunshine argue that procedural justice—and fairness of dealings particularly—encourages groups to accept an institution’s authority as deriving from its representative function *vis-à-vis* that group’s moral values.³⁹ Where police behaviour encourages people to view them as “prototypical representatives of the group’s moral values” they are motivated to cooperate with them.⁴⁰ This in turn encourages institutions more generally to be responsive to citizens’ interests, and can empower them.⁴¹

But these benefits still describe the instrumental value of procedures. They also rely on *subjective* legitimacy. This is always vulnerable to manipulation, where it can become a merely ideological mechanism “for creating subjects who behave in conformity with a given social system.”⁴² This danger can be extrapolated from Max Weber’s interpretive

³⁵ Jason Sunshine and Tom Tyler, ‘Moral Solidarity, Identification with the Community, and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group’s Moral Values’ (2003) 66 Soc Psych Q 153, 153.

³⁶ Tyler (2006) (n 34) 391.

³⁷ *ibid*, 393.

³⁸ *ibid*, 377, citing David Beetham, *The Legitimation of Power*, (Macmillan 1991) 27.

³⁹ Sunshine and Tyler (2003a) (n 35). See also the discussion of Rawls below at 7.2.3.2.

⁴⁰ *ibid*.

⁴¹ Tyler (2006) (n 34) 392.

⁴² Honneth (2007) (ch 1, n 24) 324.

account of political legitimacy and, in particular, two of what he describes as its three main sources: tradition and charisma.⁴³

There remains a question, then, of what it means to talk of normative legitimacy: a “content independent obligation of political morality to obey [...] laws”.⁴⁴ Solum argues that “[p]articipation is essential for the normative legitimacy of adjudication processes”, and the absence of participatory rights at key stages renders judicial procedures “fundamentally illegitimate.”⁴⁵ But he still fails to provide a solid normative foundation for this claim.⁴⁶

As a starting point, the fact that the concept of legitimacy is so important to us, is itself significant. It testifies to the fact that our acceptance of an outcome is influenced by content independent factors, and, in particular, intrinsic values that lie within certain procedures. In other words, the *instrumental* value of procedures in, for example, promoting acceptance of unpopular outcomes, derives from their *intrinsic* value. People accept outcomes they do not agree with, because they value the procedures engaged in the processes that produced those outcomes. As Tyler and Sunshine point out:

Since the classic writing of Weber, social scientists have recognised that legitimacy is a property that is not simply instrumental, but reflects a social value orientation toward authority and institutions i.e. a normative, moral, or ethical feeling of responsibility to defer.⁴⁷

Normative legitimacy must then reflect or embody some shared understanding of what is valuable and just within social processes.

⁴³ But also potentially the third, trust in an authority’s legality, where that trust is blindly given (Max Weber and Talcott Parsons, *The Theory of Social and Economic Organization* (Free Press, 1964) 382).

⁴⁴ Solum (n 4) 278.

⁴⁵ *ibid*, 274.

⁴⁶ The closest he gets is in a footnote quoting Robert Bone: “A strong participation right can be justified only by a normative theory of process value that grounds the value of participation in the conditions of adjudicative legitimacy, such as respect for a party’s dignity or autonomy.” (*ibid*, 275, *referencing* Bone, ‘Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity’, (1993) 46 Vand L Rev 561, 625). However, Solum expresses scepticism about the strength of dignity as a normative grounding for procedures’ intrinsic value. See 7.2.2 above and Solum (n 4) 264.

⁴⁷ Jason Sunshine and Tom Tyler, ‘The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing’ (2003) L Soc Rev 513, 514 *citing* Tom Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (YUP 1990) 25.

7.2.3.2 Political legitimacy

In arriving at a view of normative legitimacy in judicial processes, Allan argues that an analogy may be made to political processes where there is a clearer link between the intrinsic value of procedures and primary justice aims.⁴⁸ With the decline of the notion of simple consent as a liberal explanation for the authority of democratic government, arguably more critically sustainable theories of political legitimacy have taken its place.⁴⁹ As before, these focus on the liberal political paradox of the government of supposedly universally free and equal citizens. As Buchanan puts it “[i]f we are all equal, what can justify some persons (the government) making, applying, and enforcing rules on us?” And secondly, “if liberty is our proper condition, how can the use of coercion, which government essentially involves, be justified?”⁵⁰ Most answers to these questions are concerned with notions of legitimacy.

For Rawls, the key to a liberal idea of political legitimacy is derived from the fact that “[i]f free and equal persons are to cooperate politically on a basis of mutual respect, we must justify our use of our corporate and coercive political power when [...] essential matters are at stake, in the light of public reason.”⁵¹ The notions of “public reason” and the need for “a public basis of justification” for the exercise of governmental power, underpin Rawls’s conception of political legitimacy.⁵²

One ground for introducing the idea of public reason is this: while political power is always coercive—backed by the government’s monopoly of legal force—in a democratic regime it is also the power of the public, that is, the power of free and equal citizens as a corporate body. But if each citizen has an equal share in political power, then, so far as possible, political power should be exercised, at least when constitutional essentials and questions of basic justice are at stake, in ways that all citizens can publicly endorse in the light of their

⁴⁸ Allan (1998) (n 16) 498.

⁴⁹ Allen Buchanan, ‘Political Legitimacy and Democracy’ (2002) 112 *Ethics* 689, 689.

⁵⁰ *ibid*, 698.

⁵¹ John Rawls, *Justice as Fairness: A Restatement* (HUP 2001) 91.

⁵² *ibid*, 186.

own reason. This is the principle of political legitimacy that justice as fairness is to satisfy.⁵³

For Rawls, the concept of public reason forms a crucial part of the broader political values derived from his conception of justice as fairness. Public reason must be based on “shared guidelines for inquiry and shared methods of reasoning.”⁵⁴ It must appeal to all citizens’ reason which in turn must be free and informed in conditions of freedom of speech and thought.⁵⁵

[...A]s a liberal political conception, justice as fairness is not reasonable in the first place unless it generates its own support in a suitable way by addressing each citizen’s reason, as explained within its own framework. Only so is it an account of political legitimacy as opposed to an account of how those who hold political power can satisfy themselves in light of their own convictions that they are acting properly. A liberal conception of political legitimacy aims for a public basis of justification and appeals to free public reason, and hence to citizens viewed as reasonable and rational.⁵⁶

If political morality dictates that government must reflect upon and appeal to all citizens’ reason, this can only be achieved through intersubjective interaction where the states’ partners to that interaction (and reasoning) are fully informed. If we refocus justice as fairness (as a conception of justice that reflects the autonomy and equal dignity of human beings) to the judicial sphere, “addressing citizens’ reason” should imply a particular concern for those citizens who have a special substantive interest in the subject matter of proceedings. For these specially interested persons, decisions need to be publicly justified and explained. Public justification can arguably only truly be achieved if two basic features are present in judicial processes. First, and most obviously, a decision and the reasons for it need to be publicly explained—something which is a common feature of judicial processes, and which Allan argues exemplifies the fact that a purely instrumentalist

⁵³ *ibid*, 90–91.

⁵⁴ *ibid*, 92.

⁵⁵ *ibid*, 91.

⁵⁶ *ibid*, 186.

interpretation of procedural justice is inadequate.⁵⁷ Second, the decision needs to be justified in such a way that actually *speaks to* the reason of those with a special substantive interest. Otherwise, as argued by Rawls above, the justification is a private one—an account of how arbiters “satisfy themselves in light of *their own* convictions that they are acting properly”. If decision-makers are to properly speak to the reason of those with an interest in proceedings, they must give them an opportunity to express their own claims, suspicions and concerns.

7.2.4 Conclusion

The scepticism of Dworkin and Galligan about so-called dignitarian approaches to procedural justice is understandable considering how much the outcomes of criminal and civil justice processes can impact upon the rights of parties. But, their dignitarian-sceptic arguments do not just express a belief that outcome-focused procedures should be prioritised over procedures with intrinsic justice value. They often question whether the latter are concerned with justice at all.

The discussion on legitimacy, and in particular Rawls’s take on the basic requirements of political legitimacy, suggest that primary justice values are given effect through fair procedures which mediate intersubjective interaction. There is a tendency to treat rectificatory justice processes as if they are hermetically sealed from broader intersubjective social interactions. But if we contextualise rectificatory justice processes within broader primary justice norms, we see that procedural rules naturally embody both rectificatory and primary justice purposes. This is true even of procedures instrumental to arriving at accurate outcomes. An accurate assessment of the law and the facts in judicial processes is always important. If we assume that our substantive laws are just, procedures that attempt to ensure that judicial processes arrive at accurate decisions are crucial for rectificatory justice. And as such, they are an integral part of a system of primary justice that aims to treat people fairly.

⁵⁷ Allan (1998) (n 16) 500.

The above has focused on the nature of procedures and the potential for them to have intrinsic and/or instrumental value. The analogy between judicial procedures and a liberal understanding of the normative function of political processes goes some way towards showing that, at least in theory, procedures can embody primary justice values where they ensure meaningful intersubjective interaction through openness and participatory rights. But as well as there being an important analogy to be drawn here, Rawls's conception of political legitimacy also points to the fact that state responses to use-of-force deaths at the hands of the state have a bearing on the legitimacy of the state's monopoly on the use of force more generally, and the way in which it exercises that use of force socially. The legitimacy of the state's monopoly on the use of force, and the social exercise of that force must be derived from its public justification through public reason. If this is to happen, the public must be properly informed about the realities of its social exercise, particularly where the results are fatal.

7.3 Recognition theory

Recognition theory may provide a framework for strengthening the claim that justice requires an open accounting for use-of-force deaths at the hands of the state.

7.3.1 Introduction to recognition theory

According to Axel Honneth "our notion of justice is [...] linked very closely to how, and as what, subjects mutually recognize each other."⁵⁸ Recognition theory—of which there are several different strands—can be complicated. But at its heart is the simple premise that "anticipations of recognition, and the demands and struggles that may follow when recognition is refused, are an abiding feature of the social world."⁵⁹ It is suggested below that one can treat all of the potential moral harms that may arise out of a death at the hands of the state, and the state's response to a death, as instances of misrecognition.

⁵⁸ Honneth (2007) (ch 6, n 32) 130.

⁵⁹ Smith's introduction to Shane O'Neill and Nicholas Smith, *'Recognition Theory as Social Research Investigating the Dynamics of Social Conflict'* (Palgrave Macmillan 2012) 1.

Much of what follows relates specifically to the conception of ethical life which Axel Honneth outlines in *The Struggle for Recognition*. Honneth draws upon Hegel's early Jena writings, and the empirically-backed child and development psychology of Donald Winnicott and George Herbert Mead, to develop his theory that:

The connection between the experience of recognition and one's relation-to-self stems from the intersubjective structure of personal identity. The only way in which individuals are constituted as persons is by learning to refer to themselves, from the perspective of an approving or encouraging other, as being with certain positive traits and abilities. The scope of such traits—and hence the extent of one's positive relation-to-self increases with each new form of recognition that individuals are able to apply to themselves as subjects. In this way, the prospect of basic self-confidence is inherent in the experience of love; the prospect of self-respect, in the experience of legal recognition; and finally the prospect of self-esteem, in the experience of solidarity.⁶⁰

While aspects of recognition theory can be traced back to Rousseau, Fichte and (particularly) Hegel,⁶¹ their rediscovery in political and moral philosophy is a relatively recent phenomenon. Over the past 25 years, recognition theory has been used increasingly in modern political and social discourse to frame theories of rights, authenticity, autonomy, difference, identity politics and social struggle. Bert van den Brink observes that “[t]he topic of recognition has come to occupy a central place in contemporary debates in social and political theory”.⁶² And for Nancy Fraser: “The demand for recognition is fast becoming the paradigmatic form of political conflict in the late twentieth century.”⁶³ While Honneth disputes some of the theoretical underpinnings relied upon by negative morality theorists, there appears to be a certain affinity between aspects of recognition theory and the negative morality approaches of Judith Shklar, Avishai Margalit.⁶⁴ Much of the focus of recognition theory is directed at what Majit Yar describes as the complexity of “manifold

⁶⁰ Honneth, (1996) (ch 1, n 23) 173.

⁶¹ *ibid* 12 and 185.

⁶² Bert Van den Brink and David Owen (eds), *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory* (CUP 2007) 1.

⁶³ Nancy Fraser, ‘From Redistribution to Recognition? Dilemmas of Justice in a “Post-Socialist” Age’ (1995) 212 *NL Rev* 68, 68.

⁶⁴ See Shklar (ch 6, n 30) and Avishai Margalit, *The Decent Society* (HUP 1996).

social actions, interactions and processes that generate harms for individuals and groups.”⁶⁵ According to Yar,:

Such harms span those located in the domain of the inter-personal, the sphere of institutionalised action, and also arise from the unintended consequences of macro-level processes. Recent critical social science has devoted significant attention towards developing a ‘social harms’ approach to understanding and explaining social problems [...] The theory of recognition can ground a theory of social harms because it seeks to establish at a fundamental anthropological level the ‘basic needs’ that comprise the conditions of human integrity and well-being.⁶⁶

Honneth himself points out that recognition theory “owes its entire critical impulse to its point of departure in social phenomena of lacking or insufficient recognition.”⁶⁷ For him, the moral task of recognition theory is “to draw attention to practices of humiliation or degradation that deprive subjects of a justified form of social recognition and thus of a decisive condition for the formation of their autonomy.”⁶⁸

7.3.2 The core content of theories of recognition

Axel Honneth acknowledges that some doubt the critical potential of recognition theory, and that there are disputes about the content of recognition as a phenomenon.⁶⁹ But while the periphery of recognition theory may be made up of numerous “auxiliary hypotheses”, Nicholas Smith argues most recognisable theories of recognition have at their heart a core of fundamentally consistent defining elements.⁷⁰ As such, “recognition theory” “provides a proven framework for undertaking social research with the broad theoretical ambitions and practical orientation of the Frankfurt School.”⁷¹ Smith provides a useful summary of

⁶⁵ Majid Yar, ‘Recognition as the Grounds of a General Theory of Crime as Social Harm?’ in, O’Neill and Smith (eds) (n 59) 109, 126.

⁶⁶ *ibid*, 113–114.

⁶⁷ Honneth (2007) (ch 1, n 24) 325.

⁶⁸ *ibid*, 324.

⁶⁹ *ibid*, 322–323.

⁷⁰ *ibid*, 1–21.

⁷¹ Introduction to *ibid*, 3.

the elements making up this conceptual core, which are briefly outlined below. In Part 3, these are used to frame the potential moral harms identified in the previous chapter.

7.3.2.1 The observational element of recognition theory

Mattia Iser describes recognition theory as having both a normative and psychological dimension: a dual-characteristic which will chime with anyone interested in the nature of justice.⁷² This dualism features heavily in what Smith identifies as the three fundamental claims that make up the core of any identifiable conception of recognition theory.⁷³ The first of these is observational and relatively straight forward: social conflicts or social struggles (“at least in many cases”) are the result of certain groups in society having their normative expectations of recognition violated in such a way as to give rise to feelings of disrespect and humiliation.⁷⁴ According to Smith, this is true both of modern struggles against, for example, racial or gender inequality, and what he terms as the “epoch-defining historical conflicts” of, for example, anti-colonial movements and class struggle.⁷⁵ Smith surmises that these struggles are driven by “the intolerable burden borne by some part of the population of the disrespect or contempt shown to them by others, often in a generalised form embodied in prevailing laws, customs, and social institutions.”⁷⁶

7.3.2.2 Intersubjective relationships and the development of relations-to-self

The second core feature concerns the explanation for this apparently pervasive psychological need for recognition. In its most concise terms, Honneth’s theory claims that the integrity of one’s relations-to-self—qualities such as self-confidence, self-respect and self-esteem—are dependent on mutually affirming intersubjective relationships.⁷⁷

Honneth’s theory of recognition draws initially from Hegel’s alternative to the Hobbesian doctrine of the state of nature, where “conflicts over the unilateral seizure of

⁷² Iser (ch 1, n 25).

⁷³ Introduction to O’Neill and Smith (n 59) 1–21.

⁷⁴ *ibid*, 5.

⁷⁵ *ibid*, 5.

⁷⁶ *ibid*, 5.

⁷⁷ *ibid*, 6.

possessions are interpreted not as 'struggles for self-assertion' but as 'struggles for recognition'.⁷⁸ These struggles, in conditions of hostile competition, "represent precisely the formative process in which individuals learn to see themselves as being fitted out with intersubjectively accepted rights."⁷⁹

Crucial to this opening image is the fact that Hegel derives the reaction-formation of excluded subjects from a motivational situation whose core is formed by the disappointment of positive expectations vis-à-vis the partner to interaction. Unlike in Hobbes's depiction, the individual here reacts to the seizure of property not with the fear of having his survival subsequently threatened, but rather with the feeling of being ignored by his social counterpart. Built into the structure of human interaction there is a normative expectation that one will meet with the recognition of others, or at least an implicit assumption that one will be given positive consideration in the plans of others.⁸⁰

Charles Taylor also links recognition to the formation and development of individuals' consciousness-of-self, pointing out that an individual's identity "crucially depends on dialogical relations with others."⁸¹ Again, recognition or its absence shapes "a person's understanding of who they are, [and] their fundamental defining characteristics as a human being."⁸² Noteworthy are the harms Taylor associates with misrecognition:

Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being [...M]isrecognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need.⁸³

For recognition theorists "[t]his dependence on the recognition of others for the positive self-relations that enable individuals to lead their own lives" explains the

⁷⁸ Honneth (1996) (ch 1, n 23) 43.

⁷⁹ *ibid.*

⁸⁰ *ibid.*, 43-44.

⁸¹ Charles Taylor, *Multiculturalism* (PUP 2011) 34.

⁸² *ibid.*, 25.

⁸³ *ibid.*, 25-26 (*emphasis added*).

traumatic implications of experiences of disrespect and humiliation, as well as the motivational force behind social struggles.⁸⁴ According to Honneth, in “post traditional” society, one can discern three levels of recognition which influence the development of three types of relations-to-self: self-confidence, self-respect and self-esteem.

Love and self-confidence

The first of these concerns the mutual reciprocation of basic physical and metaphysical needs, characteristic of relationships of love and affection.⁸⁵ This type of recognition is most crucial during early childhood—where a child is utterly dependant (typically) on his mother for his own basic needs. It continues, however, through familial and non-familial relationships (with ‘significant others’)⁸⁶ involving physical and emotional support, love and affection throughout an individual’s life. Through intersubjective recognition and the fulfilment of these basic needs, an individual develops a basic sense of trust in the world and self-confidence: “vital to becoming an autonomous and individuated person”.⁸⁷ The corresponding forms of disrespect that Honneth identifies with this level of recognition are those which threaten the individual’s physical integrity, particularly through physical abuse or rape.⁸⁸

David Owen criticises Honneth on this point, arguing that by limiting the category of misrecognition that can impact upon this level of relations-to-self to attacks on an individual’s physical integrity, Honneth excludes other types of misrecognition that similarly affect one’s trust in the world and self-confidence.⁸⁹ This is a valid point. Honneth must be correct when he states that, “situations in which a person is forcibly deprived of any opportunity to freely dispose over his or her body represent the *most fundamental* sort of personal degradation.”⁹⁰ However, the feeling of “being defencelessly

⁸⁴ Introduction to O’Neill and Smith (n 59) 6.

⁸⁵ Honneth (1996) (ch 1, n 23) 95–107.

⁸⁶ *ibid*, 98.

⁸⁷ Haldemann (ch 6, n 16), 685; Honneth (1996) (ch 1, n 23) 307–38.

⁸⁸ Honneth (1996) (ch 1, n 23) 129.

⁸⁹ David Owen ‘Self-Government and “Democracy as Reflexive Co-Operation”: Reflections on Honneth’s Social and Political Ideal’, in den Brink and Owen (eds) (n 62) 290, 307.

⁹⁰ Honneth, (1996) (ch 1, n 23) 132.

at the mercy of another subject” is not an experience unique to “physical injury, as exemplified by torture and rape.”⁹¹ If one’s child, partner or parent is wrongfully killed or allowed to die whilst in the supposed care of another, the psychological impact may not reach the severity of that caused by extreme physical abuse, but it is not difficult to imagine feeling that one’s reality is at the mercy of others. It is also credible that if co-members of a group to which the deceased belonged believe she was misrecognised (e.g. targeted or discriminated against) for being a member of that group, they may also suffer a similar category (although perhaps not severity) of harm. The cause of the death may be interpreted as manifesting an ongoing threat to group members’ security—again, impacting on their confidence and trust in the world and their intersubjective interactions with state actors within it.

Rights and self-respect

The second level of recognition identified by Honneth corresponds to the Kantian concern that all individuals be recognised as ends in themselves, as equal citizens and bearers of universal rights. Through this type of recognition individuals are confirmed as morally responsible agents “capable of acting autonomously based on reason”.⁹² According to Yar “‘rights’ mediate a demand for dignity and moral equality as an individual person amongst others.”⁹³ And for Honneth’s neo-Hegelian programme, recognition on this basis provides the conditions that favour development of self-respect. Conversely, denial of this type of recognition will generally take the form of denial of rights.⁹⁴ Honneth argues that there is a crucial link between self-respect and one’s status as an equal member of society: typically reflected in one’s status as a bearer of equal *legal* rights.

With regard to the moral harms identified in the previous chapter, we may associate this second tier of recognition with all those harms arising out of the failure to meet any normative expectations on the part of family, community or wider general public, that they have a right to a reliable investigation into a death, and to know how and why someone has

⁹¹ *ibid*, 132.

⁹² Haldemann (ch 6, n 16) 685.

⁹³ Yar (n 65) 115.

⁹⁴ Honneth, (1996) (ch 1, n 23) 129.

died. The lack of an investigation, or an investigation which is unduly limited in terms of its scope, effectiveness, or openness to scrutiny, are all suggestive of a form of misrecognition that denigrates the legitimate interests (and socio-political agency) of family, community and wider general public.

The object of respect (including self-respect) is an agent's capacity to raise and defend claims discursively or, more generally, an agent's status as responsible [an agent's *Zurechnungsfähigkeit*]. But this capacity can only become the basis for 'self-respect' if it can be exercised. [...] Hence the importance of rights in connection with self-respect lies in the fact that rights ensure the real opportunity to exercise the universal capacities constitutive of personhood. [...]he fullest form of self-respecting autonomous agency [can] only be realised when one is recognised as possessing the capacities of 'legal persons', that is, of morally responsible agents.⁹⁵

As discussed in the previous chapter, the failure to provide a reliable narrative surrounding a death may be motivated by a desire to cover-up and avoid responsibility for the truth. But equally, the closing down of investigatory *processes* to public scrutiny may also be motivated by a paternalistic attitude that seeks to confine responsibility for responding to a death to those who hold power.

Owen points out that at the heart of this tier of recognition is the self-respect that derives from "our reciprocal recognition of ourselves and others as morally responsible agents capable of raising and defending socially accepted claims" and that this "is instituted in our status as rights-bearers."⁹⁶ Providing the public (whether family members, community members, or the wider general public) with a tested and reliable narrative of what happened to cause a use-of-force death at the hands of the state is, in these terms, a positive act of recognition. It confirms the members of these groups as bearers of rights. By publishing a reliable truth about the circumstances of a death, the state also devolves a degree of control over any action that might be taken as a consequence of that truth—through the agency that comes with knowledge. With knowledge, the variously interested

⁹⁵ Anderson, J's introduction to English translation of Honneth (1996) (ch 1, n 23) p.xiv.

⁹⁶ Owen (n 89) 307.

public can make their own informed demands and, potentially, take their own positive action. Agency may be exercised through democratic processes (e.g. voting, campaigning, demonstrating, otherwise putting pressure on policy makers to take specific types of action, or participating in formal political processes in order to influence policy). Alternatively, it may be exercised through direct action (e.g. setting up police monitoring groups,⁹⁷ support groups,⁹⁸ educating and advising people of their rights, bringing civil actions, or challenging government policy or action by judicial review).

But the right to a reliable and public investigation and narrative surrounding a death is not just related to devolving agency to those who have an interest in the circumstances of a death. As far as the family of the deceased is concerned, it also typically reflects a recognition of the cathartic value that they may draw from being involved in the investigatory process and being provided with a reliable truth as to how a loved one died. Recognising the family's needs in this regard is an act that confirms their special status as intersubjective partners who have suffered a particular loss. Failing to do so properly can cause bitterness and hurt.⁹⁹

Solidarity and self-esteem

Honneth's third level concerns recognition of the positive qualities of individuals and groups.

[...T]o acquire an undistorted relations-to-self, human subjects always need—over and above the experience of affectionate care and legal recognition—a form of social esteem that allows them to relate positively to their concrete traits and abilities.¹⁰⁰

⁹⁷ See the Newham Monitoring Project (NMP) <<http://www.nmp.org.uk/>> accessed 14 November 2014.

⁹⁸ e.g., the charity INQUEST.

⁹⁹ "Sometimes it seemed to us that coroners or their officers might have made more of an effort to respond to a family who were clearly finding it difficult to understand. As it was, these families were effectively excluded from the inquiry [...] The only real criticism of coroners [from interviewees and respondents to a Home Office Research Study] came when family members felt that they had been treated as if they were of little account." Gwynn Davis, *Experiencing Inquests (Home Office research study)* (Home Office Communications and Development Unit 2002), 35–36 and 38.

¹⁰⁰ Honneth (1996) (ch 1, n 23) 121.

This type of recognition fulfils individuals' need to be recognised as valued members of a community, with the potential to make a positive contribution, through their *personal* qualities, to that community or society. According to Honneth, this type of recognition is a basic condition for the development of an individual's self-esteem:¹⁰¹ that is "a sense of one's value as a person [...]"¹⁰² The denial of this type of recognition may take the form of insult and denigration of ways of life.¹⁰³ Frank Haldemann explains:

Unlike self-respect, which is a matter of viewing oneself as bearer of equal rights, self-esteem involves resources for thinking about one's way of life as something that is meaningful and significant [...T]his sense of being socially worthwhile can be seriously damaged if a socio-cultural environment is openly hostile to considering one's lifestyle as a valuable contribution to the common good. [...] For Honneth, "solidarity" is the form of recognition that is committed to protecting individuals against such threats of disrespect. Solidarity, he claims, provides the basis for a cultural climate in which every member of society can build a sense of self-esteem by contributing to some shared concern, interest or value.¹⁰⁴

On the previous level of recognition, respect for the equal dignity and autonomy of individuals brings with it a *duty* to treat people with equal respect in judicial, bureaucratic and democratic processes (e.g. particularly by not placing the rights and interests of state actors above others). But this tier of recognition implies a positive valuing of the contributions that families, communities and representatives of the wider general public may bring to processes, as well as the wider democratic functioning of the state.

In the aftermath of use-of-force deaths at the hands of the state, the *causes* of the moral harms that correspond to Honneth's third tier of recognition, may be the same as those described in relation to the second: the denial of the opportunity to be engaged in investigatory processes and the denial of a reliable explanation as to how someone died. But as well as potentially misrecognising the rights and needs of the individuals concerned,

¹⁰¹ *ibid*, 121–129.

¹⁰² Yar (n 65) 115.

¹⁰³ Honneth (1996) (ch 1, n 23) 129.

¹⁰⁴ Haldemann (ch 6, n 16) 686.

these failures also misrecognise the value interested persons can bring to the investigatory processes, as well as the wider contribution that a properly informed citizenry can make to democratic processes.

7.3.2.3 The moral claims of recognition theories

Finally we arrive at what Smith identifies as the third core component of recognition theories: that it is a moral claim.

The general purpose of moral norms, for the recognition theorist, is to provide protection from the harms of disrespect and humiliation to which human beings are constitutively vulnerable [...]. This means that modern morality has its basis in its claim to provide the social infrastructure—in terms of recognition relationships—that enables all individuals, no matter what their particular identity or place in society, to lead their own lives well. The meaning of morality is thus bound up with its social, institutional expression.¹⁰⁵

As Yar points out, theories of recognition perform “the moral-evaluative work of assessing different social arrangements, actions, and institutionalised processes according to whether they succeed or fail in satisfying those needs whose realisation is essential for human flourishing.”¹⁰⁶ In terms of institutional processes engaged in the aftermath of past wrongdoing, Haldemann describes the moral imperative of recognition theory as being:

[...] a matter of appropriately responding to, acting in the light of, what we know or perceive of victims of past wrongs. It involves extending to victims the concern and respect due to them in virtue of what they are—wounded others, in our society—and of what they have suffered. If, as commonly thought, justice is a matter of giving what is due, then this kind of recognition can quite unproblematically be understood as an elaboration of this maxim, for it

¹⁰⁵ Introduction to O'Neill and Smith (n 59) 6.

¹⁰⁶ Yar (n 65) 116.

responds to the injustice of being denied rights and the consideration and the concern that is appropriate for a person to enjoy.¹⁰⁷

7.4 Conclusion to Part 2

Procedural justice debates within the context of criminal and civil justice systems, and administrative decision-making procedures, show that beliefs that procedures can and should reflect broad primary justice values, rather than just narrow rectificatory justice aims, are highly contested. We saw that Dworkin concedes that procedural rules, such as participatory rights, may hold some intrinsic value. However, if the denial of such rights does not prejudice the accuracy of a process's substantive outcome, Dworkin doubts that this can *in itself* amount to a substantive injustice.

Dworkin and Galligan's arguments are motivated by well-founded concerns. The outcomes to criminal and civil proceedings can have far-reaching implications for the rights of the parties. In criminal justice systems, wrongful convictions lead to innocent people being punished. In civil justice systems, wrong decisions may, for example, lead to a claimant losing out on life-changing compensation, or a defendant being wrongfully deprived of property. The procedures that make up these processes take into account these realities, and are inevitably focused on ensuring that, as far as possible, inaccurate and unjust outcomes (narrowly defined) are avoided.

Processes not concerned with rectificatory justice, or normal administrative decision-making, are very different in this respect. The outcomes of inquests and inquiries do not include enforceable practical consequences for individuals. At the outset, therefore, there may be less of a concern about diverting the focus of procedures away from the accuracy of formal outcomes (conclusions/verdicts), and towards procedures that are valued by participants for other reasons. But, even if this is the case, the question still remains, as it did in criminal and civil justice processes: are the *intrinsic* values which interested persons might attribute to certain procedures, and from which they may derive benefit, capable of being considered normative *justice* values, to which they should have access *as of right*?

¹⁰⁷ Haldemann (ch 6, n 16) 679.

Rawls's conception of political legitimacy has both direct and analogous relevance to this question. For Rawls, political legitimacy derives from "public reason" being at the centre of justifications for the use of corporate and coercive political power. Civil and criminal courts are part of the state infrastructure that manifests this "corporate and coercive political power" when they determine someone's guilt, innocence or their civil liability. Other processes are also arguably exercising this power when they give official sanction to particular narratives about the circumstances surrounding, for example, use-of-force deaths at the hands of the state—even if they have no formal power to dictate the practical consequences of that narrative. By analogy, therefore, provided the conditions of public justification are met, these institutions manifest the power of free and equal citizens as a corporate body.¹⁰⁸ If a normative theory of justice as fairness requires the political body to generate support by addressing citizens' reason, the legitimacy of judicial outcomes should arguably also depend on whether they address the reason of those specifically affected by them. To this extent, Allan observes that the legitimacy of a legal procedure's outcome "may be as much a reflection of preceding debate about the demands of justice [...] as of argument about the relevant facts."¹⁰⁹

It was argued that public justification through public reason should require a decision, and the reasons for it, to be publicly explained and justified in a way that actually *speaks to* the reason of those with a special substantive interest. To do this, decision-makers must give those with a special interest an opportunity to express their own claims, suspicions and concerns. If they fail to do so they risk merely exercising private power over subalterns.

The analogy with political legitimacy is a useful one, but it only takes us so far. In Part 3 it is argued that recognition theory may provide a tool for analysing the nature of the subjectively experienced second-order moral harms identified in the previous chapter, and to interpret them as resulting from failures by the state to meet normative expectations for recognition. It is argued that *justice* as recognition demands that these interests be recognised, and recognition theory suggests that where they are not, the resulting harms—

¹⁰⁸ Rawls (2001) (n 51) 90–91.

¹⁰⁹ Allan (1998) (n 16) 498.

concentrated in the case of the family of the deceased, diluted but multiplied in the case of members of a community, or the wider general public—have significant personal and social implications.

PART 3

Synthesis

Chapter 8

Truth Commissions

8.1 Introduction – The significance of ‘transitional justice’ debates to the thesis

There is an obvious analogy that can be drawn between inquests and inquiries into use-of-force deaths at the hands of the state, and truth commissions in states undergoing transitions. This final part of the thesis begins the synthesis of the practice in Part 1 with the theory in Part 2 by looking at ‘transitional justice’ and truth commissions. The intention is to draw from discussions that already combine theories of justice with an analysis of the normative value of (non-retributive justice-related) truth discovery processes and open narrative formation processes concerning, amongst other things, deaths at the hands of the state.

As argued previously, the literature on open justice and inquests lacks any real considered analysis of the link between openness and justice implicit in the term ‘open justice’.¹ Traditional conceptions of open justice are derived from adversarial procedures with parties whose legal rights are directly affected by the outcome of proceedings, and where principles of procedural fairness tend to be associated with the need to ensure just outcomes.² As we saw in Part 1, inquests themselves previously formed an important part of criminal justice processes, but have gradually been detached from the criminal justice process.

Unlike inquests and inquiries, truth commissions *have* been the subject of relatively intense scrutiny concerning their justice credentials. Like inquests and inquiries, they often seek to create a reliable and official narrative, or truth, about—amongst other things—the circumstances of deaths at the hands of a state or its agents. They are often open to the active participation of the relatives of those who may have died at the hands of the state. And, like inquests and inquiries, they are not generally concerned with retributive justice or compensatory justice aims—at least directly.³ But *unlike* inquests and inquiries, truth commissions are often effectively partial or complete *alternatives* to criminal and civil proceedings in states undergoing transitions. This means claims that they fulfil alternative justice forms is understandably subject to more urgent scrutiny than has been the case

¹ See 1.1 above.

² See 7.2.1 and 7.2.2 above.

³ If these are contemplated, they are usually of secondary importance and of limited potential.

with inquests and inquiries, which do not replace potential criminal and civil justice processes. The lack of opportunities for criminal or civil justice in many transitional scenarios means that writers are naturally concerned with whether truth commissions can fill the resulting 'justice gap'. This is all the more urgent given the scale of wrongdoing which transitioning societies can face. The result is an interesting contemplation of normative criteria that should inform priorities in situations including the aftermath of deaths at the hands of the state and in particular, the justice value of truth discovery processes not directly linked to retributive or compensatory justice processes. Discussion about the moral foundations of truth commissions therefore provides insight into the potential normative bases for claims that justice requires that: deaths at the hands of the police, or in police or prison custody, be opened up to public scrutiny; and that there is a reliable, official and public narrative about the circumstances of the death.

8.2 What is 'transitional justice'?

8.2.1 The different potential concerns of transitional justice

The circumstances in which the term 'transitional justice' is applied are becoming increasingly diverse. Most commonly, it is evoked where a society is undergoing a transition from one characterised by mass human rights abuses and possibly civil war, to a democracy based on respect for human rights and the rule of law. Most writers on justice during transitions focus on the manner in which past abuses and state crimes are dealt with by a new regime. According to Stanley Cohen, for example, the typical question asked by theorists is: "How do societies going through democratization confront the human rights violations committed by the previous regime?"⁴ In an article looking at justice as recognition and transitional justice, Haldemann introduces the topic in similar terms:

At any such time of massive transformation, one question takes on renewed urgency: how should societies deal with their evil past? In addressing this crucial and highly topical issue, the contemporary debate has focused on 'Transitional Justice,' a term increasingly employed to describe the process by

⁴ Stanley Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past' (1995) 20 L Soc Inq 7, 7.

which societies confront legacies of widespread or systematic human rights abuses as they move from repression or civil war to a more just, democratic or peaceful order.⁵

While this reflects the main concern of writing on the subject, there is more to justice during transitions than this focus on the past. Those actually tasked with overseeing a transition may be more concerned to ensure that a potentially unstable society does not slip back into the violence or abuse that characterised its recent past. Related to this, Nancy Fraser makes a distinction between affirmative remedies (providing redress for past wrongs), and transformative remedies (corrective measures that focus on *transforming* certain aspects of a society to ensure the non-recurrence of those wrongs).⁶

The one foot in the past/one foot in the future dichotomy is captured by Ní Aoláin, when she describes transitional justice as:

a conceptual mechanism which references the transition in societies previously experiencing entrenched conflict to co-existence and possible reconciliation. The key to the transitional justice context is reflection on the legal reforms to accommodate past human rights violations, as well as the creation and support for new institutions which are human rights compliant.⁷

By not confining them to human rights, Haldemann gets closer to the potential breadth of concerns shaping justice during transitions when he describes transitional justice as:

[...] some *forms* of justice on which countries undergoing intense political change may rely. It is justice informed by prior injustice and induced with transformative dimensions—justice caught between the past and the future, between the backward-looking and the forward-looking.⁸

Haldemann recognises that such a definition lacks normative content:

⁵ Haldemann (ch 6, n 16) 675–676.

⁶ Fraser (1995) (ch 7, n 63) 70.

⁷ Fionnuala Ní Aoláin, 'Truth Telling, Accountability, and the Right to Life in Northern Ireland' (2002) 5 EHRLR 572, 574.

⁸ Haldemann (ch 6, n 16) 676–677.

With this definition, however, it is still not clear what justice in transition might mean, or what the hope for justice should lead us to want in periods of radical political change. [...] What should be deemed just and fair as a state undergoes a major political transformation?⁹

The final question perhaps gets closest to evoking the breadth of what transitional justice is concerned with. In what follows, the term 'justice during transitions' is preferred over 'transitional justice'.¹⁰ The most persistent polemic amongst writers on justice during transitions tends to be the relative priority that should be accorded to retributive justice versus non-retributive and non-compensatory justice forms.

8.2.2 Important differences between truth commissions, and inquests and inquiries

There are important differences to be noted between truth commissions and the types of investigation analysed in this thesis. Most obviously, the focus is not on countries undergoing transitions from a period of mass human rights abuse or civil war. Justice during transitions often has to engage with complex interconnected atrocities carried out on a massive scale where the very notion of rectificatory justice can seem unfathomable. As Hannah Arendt famously described:

all we know is that we can neither punish nor forgive such offences and that they therefore transcend the realm of human affairs and the potentialities of human power, both of which they radically destroy wherever they appear.¹¹

Related to this is the scale of institutional reform which may be contemplated by transitioning societies which may include a top to bottom reorganisation of a state's constitution and institutions. In these circumstances, addressing deaths at the hands of the

⁹ *ibid*, 677.

¹⁰ I share Haldemann's difficulty with the phrase 'transitional justice' as it says nothing of the form of justice being contemplated. It appears to be more like a discipline in law, concerned with: a) assessing the most appropriate prioritisation of different justice forms in states undergoing transition; and b) determining the best way to achieve those justice forms in practice.

At the 2012 Dealing with the Past and Transitional Justice, keynote speaker, Carla Ferstman (Director of REDRESS) also argued that the term 'transitional justice' risks denoting justice as "an exceptional, temporary event" (Carla Ferstman, 'Key Note Address' at *Dealing with the Past and Transitional Justice*, University of Nottingham, 2012).

¹¹ Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1998) 241.

state may be just one aspect of a vast political, legal, economic and cultural project. These competing priorities, and broader societal circumstances, can create their own specific inhibitions on addressing past incidences of wrongdoing. As Haldemann points out “[i]n periods of transition, marked by radical transformations of the surrounding societies, there is always a strong impulse to put the past aside and move on.”¹² This inclination may be buoyed by any popular euphoria following the fall of a hated regime. Of course there are strong arguments that societies can never really move forward without first coming to terms with their pasts. But there may not necessarily be anything sinister behind the desire of many to try.

The third difference is the fact that there may also actually be just such sinister forces at work, pushing for the past to be forgotten. Still powerful groups may stand in the way of attempts to address the past and prosecute wrongdoers. In the circumstances that are the concern of this thesis there may be times when official and unofficial forces conspire against accountability for past wrongs committed by state actors—even in the face of permanent formal procedures tasked with securing such accountability.¹³ However, there is a categorical distinction to be made based on scale where the circumstances prevailing in transitioning states may be such that there is a real risk that reactionary groups threaten country-wide destabilisation and violence.

One of the most important differences between truth commissions and inquests and inquiries is that the very creation of a truth commission is usually in itself an acknowledgment of significant past wrongdoing.¹⁴ Their investigative function is generally to look into the nature, extent and detail of that wrongdoing. The investigations with which this thesis is concerned are engaged whether or not there is any suspicion that a death was wrongfully caused.

¹² Haldemann (ch 6, n 16) 693.

¹³ See for example: Hillsborough Independent Panel, *The Report of the Hillsborough Independent Panel* (The Stationery Office 2012) Ch. 11; Stalker (ch 2, n 84); and Cass, ‘First Report—Blair Peach’ (ch 4, n 173) and Cass, Second Report—Blair Peach (ch 4, n 173).

¹⁴ As Popkin and Roht-Arriaza describe, truth commissions are brought into being once there is already “considerable consensus on the need to break with the past.” ((ch 6, n 42) 115).

The final difference has already been mentioned above. Truth commissions are often set up as partial or complete alternatives to prosecutions.¹⁵ As seen above, inquests and inquiries operate independently from, and in addition to, separate criminal and civil justice systems.¹⁶

Despite the above, it should be borne in mind that transitional and non-transitional-type scenarios cannot always be neatly separated. The political situation in England and Wales would, in most people's eyes, qualify as a stable democracy with a relatively strong human rights tradition based on the rule of law. But Northern Ireland is going through an extended period of transition, the implications of which cannot be conveniently confined geographically to the North of Ireland.¹⁷ Two communities, along with the governments of the UK and Eire, are engaged in a slow and carefully-managed transition process.¹⁸ This has included difficult and painful choices about how past atrocities and wrongdoing are dealt with.¹⁹ There are also numerous transitional scenarios that do not have all the features usually associated with transitioning states, and truth commissions are increasingly being set up in the absence of a change of regime.²⁰

8.3 Truth commissions

Elizabeth Kiss describes truth commissions as being:

designed to provide societies in transition with a way to deal with their legacies of mass violence, abuse, and injustice. They are authoritative bodies given a

¹⁵ Although, Elizabeth Kiss argues that in the context of the South African TRC, "the public and private opprobrium experienced by many perpetrators amounted to a powerful form of accountability and even punishment" where "public hearings and extensive coverage in the media ensured that perpetrators could not hide behind the wall of silence and anonymity." ('Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice' in Thompson and Rothberg (eds), *Truth v Justice: The morality of Truth Commissions* (PUP 2000) 77).

¹⁶ See Chapters 4 and 5.

¹⁷ Victims suffered and perpetrators operated throughout the UK, Ireland and further afield.

¹⁸ See Ní Aoláin (n 7); and Bell and Keenan (ch 2, n 195).

¹⁹ See, for example, the family of Bobby Moffett challenge to Secretary of State to disclose evidence held by the International Monitoring Commission to the inquest into his death in *Re Owens' Application for Judicial Review* [2015] NIQB 29 (Transcript).

²⁰ See recent inquiries looking into the treatment of aboriginal populations in Australia and Canada (Damien Short, 'Australian "Aboriginal" Reconciliation: The Latest Phase in the Colonial Project' (2003) 7 *Cit Stud* 291; and Rosemary L Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission' [2012] *IJTJ* 52).

mandate to develop an official account of past brutalities, in the hope that doing so will help prevent a recurrence of such violations.²¹

Different truth commissions can have very different rules of procedure. For example, early commissions set up in Uganda, Bolivia, Argentina, Zimbabwe, Uruguay, the Philippines and Chile all heard testimony in private. In contrast, the South African TRC not only heard most testimony in public (with much being broadcast live on television), but some victims were themselves able to question perpetrators.²²

Truth commissions generally conclude their work with a report. These state factual and moral conclusions and usually recommend future action. Some may publicly name individual perpetrators, while others do not.²³ While aspects of proceedings and reports may be withheld from the public, the extent to which they are open, and, in particular, the manner in which they actively engage victims, may be considered important markers of their justice credentials.

8.3.1 The quantitative aims of truth commissions

Popkin and Roht-Arriaza describe the four “major and overlapping goals” of truth commissions as:

[...] creating an authoritative record of what happened; providing a platform for the victims to tell their stories and obtain some form of redress; recommending legislative, structural, or other changes to avoid repetition of past abuses; and establishing who was responsible and providing a measure of accountability for the perpetrators.²⁴

²¹ Kiss (n 15) 69.

²² Modern truth commissions tend to lean closer to the South African model in terms of their openness to the public.

²³ e.g., Commission on the Truth for El Salvador named perpetrators; but the Guatemalan Commission for Historical Clarification did not (see The Report of the Commission on the Truth for El Salvador, 'From Madness to Hope: The 12-Year War in El Salvador' (UN DPI/1208, 1992); and Informe de La Comisión Para El Esclarecimiento Histórico, *Guatemala: Memoria Del Silencio* (CEH 1999)).

²⁴ Popkin and Roht-Arriaza (ch 6, n 42) 80. They also list basic requirements for effective truth commissions: independence; that they be broad enough to cover the principal harms and the relevant time period, detailed enough for concluding narratives to be convincing; and have procedures that are clear and beyond challenge (93–96).

Elizabeth Kiss describes their aims as:

[To] generate authoritative historical accounts, issue recommendations for institutional change, and direct a national morality play that places victims of injustice on centre stage. They combine investigative, judicial, political, educational, therapeutic, and even spiritual functions. [...T]ruth commissioners have affirmed the value of 'narrative' as well as of 'forensic' forms of truth, and have come to speak of justice as reconciliation, national healing, and moral reconstruction.²⁵

Truth commissions will, then, generally include all or some of the following overlapping quantitative aims: truth discovery; creating an official public record of that truth; engaging victims in the narrative formation process; allowing victims to confront perpetrators; making perpetrators account for their actions; confronting perpetrators with the human and moral consequences of their actions; and making recommendations.

8.3.1.1 Truth discovery – factual judgments

As Kiss emphasises, "truth commissions are created, first and foremost, to establish the truth about past injustices."²⁶ While discussing the Salvadorian, Guatemalan and Chilean truth commissions, Popkin and Roht-Arriaza similarly observe that:

The first goal that all the commissions set for themselves is to compile and present a historical record of the scope, means, and victims of the prior human rights violations. Presentation of a full and unbiased record was important both to counter the deceptions and justifications of the military and to move fairly recent and still-potent events into the more distant category of 'history,' establishing a line between past and present.²⁷

Crucial to this process is answering the question of who factually did what, and who suffered as a result.²⁸ But truth commissions can go beyond the basic factual culpability of

²⁵ Kiss (n 15) 70.

²⁶ *ibid*, 71.

²⁷ Popkin and Roht-Arriaza (ch 6, n 42) 93.

²⁸ Kiss (n 15) 71.

individual perpetrators, and look into deeper social pathologies that may have been at work. They are often held out as being better-equipped to produce more comprehensive and deeper truths than, say, criminal prosecutions, which “lack the narrative scope of truth commissions”.²⁹ Andre de Toit points out in particular that with prosecutions, the search for “the truth” is “confined to what may be relevant to the criminal guilt or innocence of the perpetrator.”³⁰

What about the victim’s truth, or the many other complex and multifaceted aspects of the truth relevant to a particular case? So far as the practice of criminal justice is concerned, victims may indeed be presumed to have a basic interest in seeing retributive justice done to perpetrators, but otherwise they cannot expect any special consideration.³¹

He argues that “[c]ompared to the adversarial structure of the criminal justice system and its focus on the accused, truth commissions represent an alternative way of linking truth and justice that puts victims first.”³² What is interesting here is not only a move away from the presumption that justice can *only* be served by retributive justice processes, but these arguments suggest that truth commissions are actually *better* equipped to meet certain important justice forms when dealing with wrongdoing perpetrated by states against their citizens.

8.3.1.2 An officially endorsed account

Kiss makes the important point that “even when most of the facts about a crime or atrocity are well known, it is vital to a society’s prospects for justice that they be *publicly and officially acknowledged*.”³³ The reports of truth commissions should aim to give a

²⁹ *ibid*, 73–74.

³⁰ André du Toit, ‘The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition’ in Thompson and Rothberg (n 15) 122, 136.

³¹ *ibid*.

³² *ibid*. There will usually be no public examination of the facts if the prosecuting authority decides no crime was committed. Even successful prosecutions are limited in the scope of the narrative pursued: they are perpetrator focused, only concerned with the guilt or innocence of particular defendants, and victims usually have little input.

³³ Kiss (n 15) 71 (*emphasis added*).

public *and authoritative* historical account of what actually happened during the relevant period. As Popkin and Roht-Arriaza argue:

[...P]erhaps the greatest achievement of the [Salvadorian, Guatemalan and Chilean truth] commissions has been the official presentation of an authoritative history, which counters the former regime's account. Although contested by members of the former regime or the armed forces, an authoritative description and analysis prepared by respected national figures [...] will eventually be widely accepted and form the basis of the historical record.³⁴

For Elizabeth Stanley, truth commissions "have significant value as they present a unique opportunity for transitional states [...] to provide *authoritative* acknowledgment of state crime."³⁵ She underlines the importance of this "as a means to challenge denials of repressive regimes and expose the myths on which state crime comes to be distorted."³⁶ This process begins with the actual setting up of the truth commission: an act which officially acknowledges serious wrongdoing was committed in the past and is symbolic of the new regime "making a decisive break with the official sponsorship of human rights violations that characterised the past."³⁷

The importance of establishing the truth publicly and officially in these circumstances is such that for some time several international and national forums have expressed it as a basic right.³⁸ In parallel with ECHR jurisprudence on Article 2, an obligation was read into

³⁴ Popkin and Roht-Arriaza (ch 6, n 42).

³⁵ Elizabeth Stanley, 'Truth Commissions and the Recognition of State Crime' (2005) 45 Brit J Criminol 582, 582 (*emphasis added*).

³⁶ *ibid.* The relative value of truth discovery and official recognition of a truth will depend on the circumstances. As Popkin and Roht-Arriaza point out:

"In the Salvadorian case, every family had either lost a family member or knew someone who had. In contrast, in Chile, while torture and imprisonment were widespread during the days immediately after the 1973 coup, the total number of victims was at most 5000 in a larger population. It was possible for large parts of the population, especially the middle and upper classes, to have no contact with victims of human rights violations, to find plausible the military's denials that any such violations were taking place and to shun those who had presumably "done something" to deserve their fate."((ch 6, n 42) 99-100).

³⁷ Allen (1999) (ch 6, n 41) 319.

³⁸ e.g. Articles 32 and 33 of Protocol 1 of the Geneva Conventions, 8 June 1977; the Human Rights Committee Country Report on Guatemala (CCPR/C/79/Add.63, 3 April 1996); The report by The Working Group on Enforced or Involuntary Disappearances (E/CN.4/1999/62, 28 December 1998); Office of the High Commissioner for Human Rights, 'Human Rights Resolution 2005/66: The Right to the Truth' (2005); Human

the American Convention on Human Rights (ACHR) by the Inter-American Court for the Protection of Human Rights in 1988, requiring states to investigate serious human rights violations. This was independent from, and in addition to, member states' obligation to prosecute serious violations of human rights:

The duty to investigate facts of this type [disappearances] continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.³⁹

In this context Sévana Garibian describes how in Argentina,

[a]longside the legal statement of the principles that made it possible to interpret and apply the ACHR more effectively, case law [...] affirmed the central importance of clarifying the facts and seeking the truth. This position would be repeatedly confirmed in cases involving violent death, such as executions or homicides; enforced disappearances in which the victims' remains could not be found; and disappearances without presumption of death.⁴⁰

In Argentina a "*derecho a la verdad*" (right to the truth) developed, guaranteeing a right to judicial investigations into the fate of disappeared during the *Guerra Sucia*. According to Garibian, this required a "mobilisation of all available means that might contribute to the clarification of the fate of disappeared persons."⁴¹ These investigations took the form of "*Juicios por la verdad*" (trials for the truth), which Garibian describes as *sui generes* judicial procedures.⁴² Their purpose "was not [...] to judge the guilty, but to conduct an

Rights Council, 'Resolution 9/11: The Right to the Truth' (A/HRC/9/L.12 2009); Denuncia Querellante: Hairabadian, Gregorio (Case No. 2.610/2001) (The Hairabadian/Armenian Genocide Case) Decision rendered by the Buenos Aires Federal Court, 1 April 2011; *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Interamerican Court of Human Rights, 29 July 1988 (Ser. C) No. 4.

³⁹ *Velásquez Rodríguez* (*ibid*), 181.

⁴⁰ Sévane Garibian, 'Ghosts Also Die: Resisting Disappearance through the "Right to the Truth" and Juicios Por La Verdad in Argentina' (2014) 12 JICJ 515, 521.

⁴¹ *ibid*, 523.

⁴² *ibid*, 517.

investigation for the purpose of establishing the truth—not as a necessary preliminary to determining proper punishment, but, rather, as an end in itself.”⁴³

These *juicios por la verdad*, appear quite similar in nature to inquests. They were judicial processes and, while overseen by criminal judges, were, in theory, unconnected to criminal justice:

The strictly declarative mission of the criminal law judge at the centre of the mechanism of the trial for the truth with no punitive function is indeed a (re)cognition of the facts by means of a judicial narrative. Just as the historian does, the judge constructs the ‘narrative of true events’ that gave rise to the facts of the case before him [...] Unlike the historian, however, his interpretation here aims to produce a qualification [...] that transforms a historical fact into a legal fact, the judicial truth of which is presumed from then on [...]. This activity acquires a special dimension with the *juicios por la verdad*, the sole purpose of which is to shed light on, authenticate, and designate what happened, outside the binary dialectic of guilty/not guilty.⁴⁴

8.3.1.3 Narrative formation and listening to victims

The narrative formation processes found in truth commissions can also embody aims beyond the discovery of the truth. Popkin and Roht-Arriaza note, for example, that “[i]t may be that from the point of view of redress, the process of compiling the commission’s report was as important as the final product.”⁴⁵ They emphasise the value of giving victims a voice as being of both intrinsic and instrumental value. It lends the narrative the quality of a “decentralised production of history”, but also recognises and gives effect to the special interests and needs of victims.⁴⁶ And Kiss argues that providing a platform for victims is crucial not “merely as a way of obtaining information, but also from the standpoint of justice.”⁴⁷

⁴³ *ibid*, 522.

⁴⁴ *ibid*, 532.

⁴⁵ Popkin and Roht-Arriaza (ch 6, n 42) 114.

⁴⁶ *ibid*.

⁴⁷ Kiss (n 15) 73.

Inquests produce a concluding narrative in the form of a verdict, and inquiries produce a concluding narrative in the form of a report.⁴⁸ But every piece of evidence heard during an inquest or inquiry is a potential revelation—an outcome of the process in its own right. Even the questions asked by an interested person (or their legal representative) is an outcome of sorts, as it places on record that person's views or suspicions. In the Azelle Rodney Inquiry core participants had the opportunity to give closing submissions.⁴⁹ This, for example, allowed the family to explicitly place on public record their view that: Azelle's killing "bears a great resemblance, we say, to an execution and no resemblance to a lawful, competent policing operation"; and that following the shooting "there was a botched attempt to plant evidence on the backseat of the Golf after Azelle had been shot dead."⁵⁰

The concluding narratives (verdicts/reports) have a particular quality that distinguishes them from the evidential narratives that precede them. They may repeat and place particular weight on parts of that preceding narrative. And, most importantly, they draw certain conclusions based on the evidence. But the preceding narrative and the concluding narrative, are both arguably part of one broader narrative structure. The Home Office Research Study, *Experiencing Inquests*, for example, observed in relation to one of its case-studies "that the 'narrative' of Gavin's life mattered more than the verdict", "The formal verdict [...] mattered less than the story".⁵¹

8.3.1.4 Reaching moral judgments

The reports of truth commissions also contain qualitative moral judgments regarding the events investigated. For example, the human subjects of truth commissions are not just described objectively as individuals who either carried out or were subjected to certain forms of action. They are identified as victims/survivors of serious wrongdoing on the one hand, and perpetrators who carried out serious wrongdoing on the other. As the South

⁴⁸ See 5.2.1.4 above.

⁴⁹ This is not possible in inquests.

⁵⁰ Azelle Rodney Inquiry, 'Transcript of Oral Hearings on 17 December 2012', 115-116 <<http://tinyurl.com/j4yj46x>> accessed 28 January 2016.

⁵¹ Davis *et al* (ch, 7, n 99) 58.

African TRC Commissioner, Pumla Gobodo-Madikizela points out, the commissions must say to victims “you are right, you were damaged, and it was wrong.”⁵²

8.3.1.5 Making recommendations

Finally truth commissions will usually make recommendations. These can be for both transformative and affirmative action. For example, they may recommend that victims are compensated, or that named individuals are prosecuted;⁵³ or they may recommend institutional reforms.⁵⁴

8.3.2 The qualitative goals of truth commissions

Truth commissions examine documents and hear evidence from witnesses about the nature and detail of past abuses. Victims often get the opportunity to describe their experiences and the impact that abuses have had on them. They may also get the opportunity to question alleged perpetrators. As indicated above, the setting up of a truth commission itself functions as recognition that past wrongdoing was committed on a significant scale. Their reports particularise the nature and extent of the wrongdoing, and set out factual and moral conclusions in an authoritative historical record.

The following considers some of the writing on the normative value of these processes.

8.3.2.1 Are truth commissions just political compromises?

Elizabeth Kiss argues that transitioning societies must return to basic questions about “what justice requires in relation to survivors, perpetrators, and entire nations scarred by a brutal past.”⁵⁵ But truth commissions can struggle to generate support if perceived as “merely political compromises, institutions spawned by an unprincipled negotiation of a

⁵² Quoted by Kiss at (n 15) 73.

⁵³ See Comisión de la Verdad para Impedir la Impunidad, ‘Sin Verdad No Hay Justicia’ (Comisión de la Verdad 2010), Título V Medidas para la investigación y judicialización.

⁵⁴ See Comisión para el Esclarecimiento Histórico, (n 23) *in particular*, Capítulo 5, Part V *Medidas Para Fortalecer el Proceso Democrático*, at pp. 72-80.

⁵⁵ Kiss (n 15) 70.

transfer of power [in which j]ustice becomes the casualty of a political calculation.”⁵⁶ Any attempt to analyse the normative foundations that underpin the aims of truth commissions must address this suspicion.

Jonathan Allen suggests that even if we take a sceptical view, “the fact that an institution is the product of a political negotiation in which the parties were intent on self-interested goals, narrowly conceived, does not demonstrate that the institution does not also and in spite of the participants’ goals, express morally defensible values.”⁵⁷ Du Toit also argues that while the mechanisms used to pursue justice in these contexts may not be the same as those used in “consolidated liberal democracies”, this is an insufficient basis for concluding they are only political compromises that create a justice deficit.⁵⁸ As he points out, the question of whether truth commissions express and reflect moral aims and values should be tested “with reference to appropriate moral principles and criteria”,⁵⁹ rather than merely on the basis of their political origins.

Some of these criticisms focus on the fact that victims are forced to play by the state’s rules and that acts of recognition through, for example, truth commissions, may be tokenistic and designed merely to appease populations and consolidate the position of those now in power. This is arguably particularly the case where truth commissions are set up in the absence of a change of regime or at least significant institutional reforms. In the context of the Canadian Truth and Reconciliation Commission, Petoukhov discusses Glen Coulthard’s and others’ argument that:

[T]he coloniser often grants concessions, such as recognition of cultural identities, to the oppressed groups as surface remedies for injustice, while leaving colonial structures undisturbed. [...]

[Coulthard] argues that without struggle, recognition is imposed on ‘subjects’ who are passive in accepting it from the dominant society. As a result these ‘subjects’ do not challenge the power of entities, such as the state. In

⁵⁶ Allen (1999) (ch 6, n 41) 315.

⁵⁷ *ibid*, 322.

⁵⁸ du Toit (n 30) 137–8.

⁵⁹ *ibid*, 123.

Coulthard's view, drawing on the work of Franz Fanon, it is necessary for the 'subjects' to win recognition on their own terms.⁶⁰

The concern expressed here should arguably be a constant concern for those who seek justice for wrongs perpetrated by the state. The context of Coulthard's criticism is significant: the Canadian TRC was not preceded by a change of regime. While his concerns may be valid in many respects, they do not tell the whole story. Rather they risk approaching truth commissions as if they exist in a bubble, ignoring the fact that they often arise out of, and continue as part of, long-standing struggles for recognition by subaltern groups. Those involved in negotiating the political compromises that aid transitions are often themselves survivors of serious wrongdoing and may have fought at great personal cost for the changes they are overseeing.

Like truth commissions, inquests can also be a forum for the struggle for wider recognition. Families can significantly influence the progress of inquests, often in the face of considerable resistance by state institutions. But truth commissions (and inquests) should not be viewed as a one-off opportunity for recognition that will heal all of the scars of past misrecognition. Recognition through inclusive narrative formation processes that give victims a voice, and acknowledge the truth publicly, is vital, but alone it is unlikely to be enough. According to Elizabeth Stanley, for example, the authenticity of truth commissions' efforts "to upwardly revalue the disrespected identities of those who were victimised by a previous regime", should be partly measured by their recommendations. These "highlight what victims need to gain justice", thus "priming transitional states for deeper change." But still this deeper change must actually be carried forward.

A particular process may be appropriate for a particular level of recognition, in a particular sphere. Other reforms—structural reorganisations of the state and institutional and individual concessions—may also be necessary for truly meaningful and ongoing recognition. Radical changes may be catalysed by truth commissions and their formal and informal outcomes in unpredictable ways. They may inspire further struggle for affirmative and transformative action on the part of the state to address past and persistent

⁶⁰ Konstantin Petoukhov 'Locating a Theoretical Framework for the Canadian Truth and Reconciliation Commission: Charles Taylor or Nancy Fraser' (2012) 3 Intl Indig Pol J 1, 3.

misrecognition. Similarly, the inquest will often be seen by the family (and any community that has an interest in a death) as part of a wider struggle for justice on different levels. This struggle may continue after the inquest, with demands for a prosecution, or changes in the law or in procedure, including in investigatory processes themselves.⁶¹ After a state-exculpatory inquest verdict, a family and/or community may campaign for a re-calibration of what is considered morally acceptable in the way the state and its agents interact with individuals and communities—a common feature in the aftermath of inquests into the deaths of vulnerable adults or children in custody.⁶² In short, recognition and the struggle for recognition does not begin, and is unlikely to end with a truth commission's report or an inquest's verdict.

8.3.2.2 Restorative justice and ubuntu

In pursuing an alternative form of justice, the South African TRC justified its approach by relying on the traditional Xhosa concept of 'ubuntu' and by linking this to restorative justice. Haldemann translates ubuntu as literally meaning "I am because you are", from the Xhosa saying that "a person is a person through persons."⁶³ This is evocative of Charles Taylor's and Axel Honneth's theories about the place of intersubjective recognition in the development of self.⁶⁴ Referencing Archbishop Desmond Tutu, Haldemann describes ubuntu as referring "to a philosophy of humanism, placing a premium on harmony, friendliness and community."⁶⁵ Archbishop Tutu played an important role in promoting the concept and connecting it to notions of restorative justice. In particular, he convinced many South Africans that the structure and purpose of the TRC did not sacrifice justice, but was grounded in moral principle. He explained:

⁶¹ Such as police being allowed to confer with each other when writing their statements about the circumstances of a death.

⁶² e.g., the efforts to amend the Secure Training Centre Rules, following inquests into the deaths of Alan Rickwood and Gareth Myatt. See JCHR, 'Eleventh Report' (Session 2007-8, House of Commons and House of Lords, February 2008), Chapter 2 'Physical Control in Care'.

⁶³ Frank Haldemann, 'Another Kind of Justice: Transitional Justice as Recognition', *Selected Works of Frank Haldemann* (Selected Works 2008) 4 <<http://tinyurl.com/zfkuodt>> accessed 7 September 2013.

⁶⁴ See 7.3.2.2 above.

⁶⁵ Haldemann (n 63) 4.

We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment, but, in the spirit of Ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence.⁶⁶

Haldemann gives his definition of restorative justice as “an interpersonal, community-oriented way for solving conflicts, seeking to restore the dignity of both victims and offender by reintegrating them into respectful and healthy communities.”⁶⁷ In this way restorative justice “comports closely with a notion of reconciliation and social harmony.”⁶⁸ Unfortunately ‘restorative justice’ tends to be evoked in this context as a catch-all term to describe all non-retributive or non-compensatory justice aims. However, the relationship between restorative goals and retributive, punitive and compensatory justice is arguably more subtle than this.⁶⁹

Kiss cautiously supports so-called restorative justice approaches to justice during transitions—albeit with certain important caveats.⁷⁰ As a concept, however, restorative justice can be hard to pin down. Kiss, for example, asks:

[I]s restorative justice truly a distinctive type or dimension of justice, one that is different from, and in some cases, more important than, retributive justice? If so can restorative justice be promoted through a truth commission? Or, as some critics charge, is restorative justice both conceptually muddled and politically illegitimate?⁷¹

⁶⁶ Quoted in Haldemann (ch 6, n 16) 677.

⁶⁷ Haldemann (ch 6, n 16) 677.

⁶⁸ *ibid.*

⁶⁹ This more amorphous relationship between punitive/retributive and non-retributive/non-punitive justice forms can be seen in restorative justice practices within the criminal justice system in England and Wales. See Adam Crawford and Tim Newburn, ‘Recent Developments in Restorative Justice for Young People in England and Wales: Community Participation and Representation’ (2002) 42 *Brit J Criminol* 476; Allison Morris, ‘Critiquing the Critics: A Brief Response to Critics of Restorative Justice’ (2002) 42 *Brit J Criminol* 596.

⁷⁰ For example, she argues that restorative justice does not, and cannot, “refute the legitimacy of retributive justice.” (Kiss (n 15) 71)

⁷¹ *ibid.*, 70.

Restorative justice is perhaps better understood as an approach to rectificatory justice where affirmative justice forms are shaped by a broader external transformative justice *telos*. In states undergoing transitions, the *telos* is typically the creation of the conditions necessary for peace, reconciliation and the restoration of healthy and just intersubjective relationships. The manner and/or degree to which retributive or punitive justice forms are pursued may either help or hinder the furtherance of these transformative goals. Where a restorative justice approach is contemplated, punitive justice usually takes a milder form than may otherwise have been contemplated, but is not necessarily absent altogether. Offenders may still be punished enough to satisfy victims that: a) their suffering is taken seriously by the state (solidarity); and b) the seriousness of the wrong (and society's condemnation of it) will be impressed upon the perpetrator. But there is usually a more conscious effort to ensure that any punishment is not so severe that it misrecognises the humanity of offenders and risks also making them victims, or that it compromises conciliatory efforts and/or efforts to rehabilitate the offender. Such approaches tend to include other ways of recognising victims' suffering, additional to, or as an alternative to punitive/retributive remedies. Victims may, for example, be placed more firmly at the centre of proceedings or mediated exchanges between victims and perpetrators may be used to impress upon the latter the personal and human consequences of their actions.

In states undergoing transitions, we have seen that the retributive/punitive element may be removed from justice approaches entirely for political and pragmatic reasons. This heightens the need to find alternative methods for addressing past wrongs and recognising affected individuals and communities.

8.3.2.3 Truth as justice

Aside from the often problematic use of 'restorative justice' as a catch-all term to describe any approach that does not include retributive justice, the literature that explores the normative value of truth commissions can present other terminological difficulties. One is the exclusive association by some authors of 'justice' with retributive or punitive justice—to the extent that even the prospect of compensatory justice is sometimes ignored. As Allen points out, "when it is argued or conceded [...] that justice has been sacrificed to

some other goal, the assumption seems to be that justice must be understood in terms of retribution.”⁷²

This can create conceptual difficulties when treating with the work of some authors. Stanley Cohen, for example, makes some important observations about truth commissions and restorative justice processes, including the nature of the relationship between truth discovery, accountability and justice.⁷³ But while he defines his terms loosely, he appears to exclusively associate accountability and justice with retributive justice. In so doing, he divides justice during transitions into “the truth phase”, and the “accountability” or “justice phase”.⁷⁴

Despite this, Cohen is obviously aware that truth has intrinsic as well as instrumental value:

For the survivors of the old regime, whether active agents in bringing about its collapse or mere historical observers, the primary drive behind truth-telling [...] lies in the value of truth itself. After generations of denials, lies, cover-ups, and evasions, many people have a powerful, almost obsessive desire to know exactly what happened.⁷⁵

He notes that “People do not necessarily want their former torturers to go to jail, but they do want to see the truth *established*”,⁷⁶ and, referencing Weschler, that “the demand for truth is often more urgently felt than the demand for justice.”⁷⁷ The assumption that truth and justice are only instrumentally linked leads Cohen (again referencing Weschler) to conclude that truth is “a mysterious, powerful, almost magical notion.”⁷⁸ Below it is argued that recognition theory can provide the basis for a relatively straightforward

⁷² Allen (1999) (ch 6, n 41) 326.

⁷³ In particular, he emphasises the significance of truth for the “special sensitivity of victims”, and the fact that its public acknowledgment is as important as its discovery: particularly when victims may have previously been branded liars, or faced narratives that attempt to justify what happened to them (Cohen (1993) (ch 6, n 50) 19).

⁷⁴ *ibid*, 11.

⁷⁵ *ibid*.

⁷⁶ *ibid*, 13.

⁷⁷ *ibid*, 18.

⁷⁸ *ibid*.

explanation that demystifies the strength of demands for truth, and its official and public acknowledgement.⁷⁹

‘Restorative justice’ is a convenient label for the benefits associated with truth discovery, and processes where victims are given a voice. But, as argued above, it is wrong to view restorative justice as a mutually exclusive alternative to punitive (if not retributive) justice. Relying on restorative justice as an explanation for the normative justice values fulfilled by truth commissions arguably only provides a limited and thin understanding of the intrinsic value of participatory rights in narrative formation processes, and a reliable official and public truth about past wrongdoing.⁸⁰

Other writers on justice during transitions recognise the relationship between truth and justice can be multifaceted. Like Cohen, they recognise that truth is instrumental to certain justice forms—and not just in the sense that it identifies perpetrators who can then be punished, or victims who can then be compensated. Kiss, for example, suggests that truth also “serves justice by overcoming fear and distrust and by breaking the cycles of violence and oppression that characterise profoundly unjust societies.”⁸¹ And Allen argues that the value of truth in the South African TRC is both “related to compensatory justice *and* to the creation of a political culture, in which reflection on justice and, in particular on injustice, figures much more predominantly.”⁸² For Kiss, by establishing and officially acknowledging “as concrete a picture as possible” of the injustice of the past, the South African TRC aimed to build a bridge between a “deeply divided past of untold suffering and injustice”, and “a future founded on the recognition of human rights.”⁸³ But more than this, Kiss argues that truth can itself effectively constitute a form of justice. Her explanation for what Cohen considers so mysterious—the subjective intrinsic value of truth and acknowledgement—is very simple:

⁷⁹ See 8.3.2.4 and 9.5 below.

⁸⁰ This appears to be the thrust of Haldemann’s criticism of restorative justice, which he sees as focusing on the instrumental value of processes for achieving peace (see 8.3.2.4 below) .

⁸¹ Kiss (n 15) 71.

⁸² Allen (1999) (ch 6, n 41) 332 (*emphasis added*).

⁸³ Elizabeth Kiss quoting the South African TRC *Final Report*, I, chap 5, para 89, in Kiss (n 15).

Truth and justice are intrinsically and not just instrumentally connected. Those whose lives were shattered are entitled to have their suffering acknowledged and their dignity affirmed, to know that their “pain is real and worthy of attention.”⁸⁴

This can be achieved when victims are listened to, their experience deferred to, and their truth acknowledged by an official body that represents wider society, such as a truth commission. And while Allen concedes that punitive justice may have been limited by the South African TRC, justice was nevertheless “embodied [...] in the form of symbolic acknowledgment”.⁸⁵

The public and official acknowledgment of the victims’ truth is also an act whereby the state and its agents place themselves at the level of, and in solidarity with victims: be those primary or secondary victims, or all those who were part of a community brutalised and threatened by a regime. Kiss explains:

[...W]e have an obligation to listen to give [victims] the opportunity to relate their own accounts of the violations of which they are the victim. Justice requires that we treat people as ends in themselves. We affirm the dignity and agency of those who have been brutalised by attending to their voices and making their stories a part of the historical record.⁸⁶

Kiss develops this Kantian basis for the intrinsic value of truth and acknowledgment centring on the needs of victims, by invoking Nancy Fraser’s approach to justice as recognition, where “the practices of a victim-centred justice seek to recognise the dignity and voice of those who have suffered.”⁸⁷

Justice as recognition entails acknowledging the distinctive identity of the other, striving to repair damage done to him or her through violence, stigmatisation, and disrespect, and including his or her stories in our collective histories. The practices developed by the [South African] TRC offer important insights into what justice as recognition requires. Thus the theory and practice of truth

⁸⁴ *ibid*, 73.

⁸⁵ Allen (1999) (ch 6, n 41) 332.

⁸⁶ Kiss (n 15) 73.

⁸⁷ *ibid*.

commissions has led to a nuanced idea of victim-centred justice, and to a new repertoire of practices by which to honour the dignity of former victims of oppression.⁸⁸

8.3.2.4 Justice as recognition as a normative basis for justice strategies found in truth commissions

Elizabeth Kiss is not alone in invoking justice as recognition as the normative basis for the aims pursued by truth commissions.⁸⁹ Andre du Toit, for example, argues that the South African TRC's "constitutive moral conceptions of 'truth and reconciliation' may be explicated [...] in terms of truth as acknowledgment and justice as recognition".⁹⁰ Allen also outlines the non-retributory "justice elements" within the South African TRC as including justice as recognition.⁹¹ And Konstantin Petoukhov explores "the potential of the [Canadian] TRC to remedy the injustice associated with misrecognition."⁹² In doing so, he argues that the "incorporation of the theory of recognition in the evaluation of Canada's TRC allows for a more advanced understanding about what needs to be done in order to restore the cultural identities of survivors."⁹³

Frank Haldemann takes a victim-centred approach to justice as recognition.⁹⁴ His starting point is Honneth's argument that the measure of the justice of a society is "the degree of its ability to secure conditions of mutual recognition in which personal identity formation, and hence individual self-realisation, can proceed sufficiently well."⁹⁵ He recognises that recognition theory is, first and foremost, a theory of social (or primary) justice, but evokes its rectificatory justice implications for transitional contexts.

[Recognition c]ertainly requires the just redistribution of resources and rights.

This, however, is not the whole story. [...] transitional politics of recognition

⁸⁸ *ibid*, 73.

⁸⁹ For example, du Toit (n 30); Kiss (n 15); Taylor (2011) (ch 7, n 81); Allen (1999) (ch 6, n 41); Haldemann (ch 6, n 16), Fraser (1995) (ch 7, n 63); Petoukhov (n 60).

⁹⁰ du Toit (n 30) 123.

⁹¹ Allen's account is a relatively early introduction of justice as recognition into the transitional justice discussion. Allen (1999) (ch 6, n 41) 338.

⁹² Petoukhov (n 60) 2.

⁹³ *ibid*, 7.

⁹⁴ Haldemann (ch 6, n 16).

⁹⁵ *ibid*, 687.

must reach beyond distributive systems of goods in the society to investigate the full dimension of injustice and the sense of victimization it arouses. The salient point is that we cannot measure the harm of social and political evils simply by considering the tangible deprivation of social goods (liberty, opportunity, income, etc.). Evil doing, such as torture or rape, does not only cause the victim physical suffering, but it betokens a profound lack of concern—a kind of symbolic devaluation that is not reducible to the absence of goods. From this perspective, “it is not only unjust to deprive people of their social rights but it is also unjust to make them feel the fury and resentment of being humiliated.”⁹⁶

Haldemann focuses on the danger of victims of a previous regime suffering further harms during transitions, as a result of further misrecognition:⁹⁷ harms reminiscent of the second-order moral harms described in Chapter 6 above. He argues that “in the aftermath of a mass atrocity” the potential for victims of the previous regime to be misrecognised⁹⁸ “is *the* crucial issue for transitional justice.”⁹⁹ As such, the biggest threat to justice in these circumstances is any attempt to ignore or forget past atrocities in order to rush a society towards a contrived normality. The vital point for Haldemann is that failing to address the past is not just wrong-footed because—as many argue—it impedes a society’s ability to genuinely move forward.¹⁰⁰ Rather, it is intrinsically immoral because it causes victims further (second-order moral) harm: “the victims of injustice are subjected to the symbolic injury of being ignored—of being rendered passive, powerless, voiceless, or simply invisible in matters that deeply affect them as human beings.”¹⁰¹

⁹⁶ *ibid*, 679, quoting Shklar (1990) (ch 6, n 30) 49.

⁹⁷ Although Haldemann does adopt a relatively broad definition of victimhood (see 9.5.1.2 below). Haldemann (ch 6, n 16) 680.

⁹⁸ by “treating victims as though they are not what they actually *are*” (*ibid*, 693 (*original emphasis*)).

⁹⁹ *ibid*.

¹⁰⁰ Allen argues that this danger is not just due to the anger that might remain in those whose demands for justice have been ignored. Rather, confronting the past is also “necessary to overcome the moral impoverishment and narrowness of public discourse in South Africa and in other countries emerging from a past of repression and confrontation [...]. Without such an attempt, the institutions of representative democracy may exist, but the ethos or disposition that they require will be weak or absent altogether.” Allen (1999) (ch 6, n 41) 338.

¹⁰¹ Haldemann (ch 6, n 16) 694.

[F]ailing to recognize past wrongs exacerbates the trauma [...]. It couples the pain of those experiences with the disbelief of the wider community. In cases of outright denial or partial acknowledgment, the initial wound of insult and humiliation develops into a “second wound of silence”—a deep sense of hurt stemming from the feeling that “people condone the wrongs and do not care about the painful results.”¹⁰²

Haldemann’s approach can be characterised as a negative morality one, in which recognition focuses on “the reduction of humiliation and moral cruelty”.¹⁰³ It is informed by Margalit’s exploration of the human capacity for non-physical suffering.

It seems to me the best way of construing this claim is to advance a negative justification for recognition based on Margalit’s argument that prevention of cruelty, including mental cruelty, is at the very heart of morality. As Margalit holds, and surely correctly, human beings are susceptible to symbolic suffering that involves no physical pain, and there is nothing metaphorical about the mental pain that certain acts of symbolic meaning can inflict.¹⁰⁴

One of the difficulties with Haldemann’s take on recognition is that he presents it as an approach that effectively competes with restorative justice and retributive justice. In particular, he distinguishes his (justice as recognition) concern for the needs of victims, from that of restorative justice, by arguing that the latter prioritises victims only in so far as it advances the wider project of restoring social harmony to a community. In contrast, justice as recognition requires victims to be placed at the centre of processes for their own sake:

Recognition [...] is essentially individual-centred. Unlike restorative approaches to justice, which emphasize the restoration of communal bonds, recognition focuses primarily on the individual’s sense of injustice and threatened self-

¹⁰² *ibid*, 693, quoting Trudy Govier, ‘What Is Acknowledgement and Why Is It Important?’ in Prager, Carol and Govier (eds), *Dilemmas of Reconciliation: Cases and Concepts* (Wilfred Laurier University Press 2003) 83.

¹⁰³ Haldemann (ch 6, n 16) 692.

¹⁰⁴ *ibid*, 693–4.

respect, drawing a clear line between such matters of justice and other moral concerns (including democracy, peace, or reconciliation).¹⁰⁵

Despite Haldemann's claim at the outset—that recognition “manifests itself at different levels”, and “[c]ertainly requires the just redistribution of resources and rights”—¹⁰⁶ the exclusion of democracy, peace and reconciliation from the remit of recognition arguably misunderstands the scope of recognition theory.

Other writers take a broader view of the significance of recognition theory in this context. Elizabeth Stanley in particular argues that the individual crimes committed by previous regimes need to be understood in their broader social contexts. This is not to invoke an apologist attitude to past crimes, but to better understand the true depth, character and pervasiveness of harms committed. In this sense, “recognition that acknowledges cultural devaluation alongside a lack of parity” is also important.¹⁰⁷ Stanley explains:

“i) cultural representations are central to how state crimes come to be legitimised and how those involved (as perpetrators or victims) come to be viewed and responded to”; and

“ii) victims of state crime are also likely to face wider disadvantages within their own societies [...] and if these arrangements remain unaddressed, victims will be more likely to face continued injustice.”¹⁰⁸

This suggests that recognition theory can provide a moral basis for transformative, rather than just affirmative-focused approaches, to justice during transitions.

Addressing the South African TRC, Allen's account, like Haldemann's, often understandably focuses on the justice needs of apartheid's main victims. But unlike Haldemann, he also creates a broader space for recognition regarding its relevance to addressing tertiary harms, such as the wider denial of citizens' “responsible agency” by the apartheid regime. Part of the significance of the South African TRC for Allen, was that it

¹⁰⁵ *ibid*, 678.

¹⁰⁶ *ibid*, 679.

¹⁰⁷ Stanley (n 35) 584.

¹⁰⁸ *ibid*.

symbolically acknowledged the responsibility of “apartheid’s framers” and the broader injustice of apartheid legislation, rather than just individual acts of abuse or violence. In particular, he refers to the importance of the sectoral hearings, which addressed the pervasive nature of injustice under apartheid.¹⁰⁹

Allen also arguably shows a better understanding of the wider symbolic significance of victims being adequately recognised during transitions. Here, by attending to those who have suffered harm at the hands of the state, we recognise a broader equality between citizens and state actors, thus generally “expressing a public commitment to respect the basic rights of all citizens and to make the grievances of citizens known rather than suppressing them.”¹¹⁰ Allen emphasises that:

[...] rights can be claimed in order to protect others and that even when we claim them for ourselves, we are, in a sense, vindicating them for all. As Shklar observes, “I have a right” speaks not only for “me” but for all who would protest and enjoin.

[...B]y drawing attention to the evil consequences resulting from the distortions of the legal framework of apartheid and the officially sanctioned transgressions of law, the TRC acknowledges and calls attention to the importance of justice and the rule of law.¹¹¹

Truth commissions recognising victims/survivors *as* victims/survivors, is an act of solidarity between a newly-styled state apparatus and individuals and communities that suffered under the previous regime. A crucial element of this form of recognition is the public nature of the narrative, where, as Petoukhov observes, “the public sphere serves as a site where recognition amongst equals may take place.”¹¹²

¹⁰⁹ Allen (1999) (ch 6, n 41) 330–1.

¹¹⁰ *ibid*, 331.

¹¹¹ *ibid*, 329–1. Similar dynamics are arguably at work in inquests. The fact that there is an enhanced permanent forum (i.e. the “Middleton” inquest with a jury) investigating all use-of-force deaths at the hands of the state recognises the seriousness with which we view such deaths.

¹¹² Petoukhov is here discussing Charles Taylor’s conception of recognition (Petoukhov (n 60)).

Allen observes that this takes place “in a context where law’s equal recognition of all responsible agents has been grossly distorted” by the previous regime (Allen (1999) (ch 6, n 41) 330–331).

There are times when Allen, like Haldemann, describes justice as recognition as if it is just one in an arsenal of different, potentially competing (in Allen's words) 'elements' of justice, that include retributive justice, compensatory justice and even restorative justice.¹¹³ But he also seems to intuit that there is something slightly more amorphous and pervasive to justice as recognition, that permeates, and to a certain extent defines, other 'elements' of justice.¹¹⁴ In particular, he acknowledges the connection between recognition and punitive justice.¹¹⁵

Allen does this by describing two type of recognition addressed by the TRC. The first was "legal recognition", which is the recognition "expressed in legal procedures and in the notion of rights".¹¹⁶ "Legal *justice*"—by which Allen appears to mean criminal prosecutions—normally "captures" this type of recognition. On the other hand, while the TRC, did *not* provide "legal *justice*", Allen argues that it nevertheless provided a degree of "legal *recognition*" that constituted a "partial alternative" to it. By demonstrating and condemning the "consequences of a lack of public commitment to justice and the rule of law", the TRC underlined "the importance of such a commitment."¹¹⁷

There is an obvious paradox here. How can we demonstrate a commitment to justice when we replace the standard method for achieving rectificatory justice (criminal prosecutions) with a "*partial* alternative"? Allen admits that "aspects of justice are indeed sacrificed in the process," but insists that it is not "simply discarded."¹¹⁸ Other justice elements were also at work in the TRC, including the second form of recognition described by Allen. This is neither captured by, nor auxiliary to "legal justice", but is separate from it. It was provided for by the TRC through its focus on victims and their experiences.¹¹⁹

¹¹³ Rather it could be argued that punitive, retributive, restorative, compensatory and procedural justice, are all different ways of giving due recognition to interested parties.

¹¹⁴ The terminology in Allen's account is not always clear: in particular the relationship between "justice" and "legal justice", and exactly what for him defines "justice as recognition" as a concept.

¹¹⁵ See 7.3.2.2 above.

¹¹⁶ This appears to bear a close relationship to the second of Honneth's tripartite theory of recognition, which is concerned with the development of individuals' self-respect through equal rights.

¹¹⁷ Specifically in the form of the hearings held by the Human Rights Violations Committee. Allen (1999) (ch 6, n 41) 330.

¹¹⁸ *ibid*, 338.

¹¹⁹ In contrast to many criminal justice systems which focus on the offender.

[G]iving victims an opportunity to tell their stories demonstrates that they are now admitted to the category of responsible agency from which the predecessor regime attempted to exclude them. It is a form of recognition that acknowledged the historical fact of exclusion from legal recognition and seeks to reverse the imposition of passive status, by encouraging victims to act in public by telling their stories.

Allen points out that the “central significance” given to this type of recognition in the TRC does not happen in courts of law.¹²⁰ Therefore, while truth commissions may fail to fulfil certain justice forms as fully as other processes, the implication here is that they can fulfil other justice forms which prosecutions cannot.

8.4 Conclusion

While a degree of caution is necessary regarding the strength of any analogy drawn, we saw that truth commissions in states undergoing transitions, share certain quantitative aims with processes engaged in the aftermath of use-of-force deaths at the hands of the state in non-transitional contexts. They seek to create an official and reliable public truth, typically about circumstances that include the coercive use of force by state actors against citizens. They do so generally as an end in itself, rather than as an instrumental step towards retributive, punitive or compensatory justice forms.¹²¹ And they often seek to involve those affected by state action in the formation of such narratives. However, unlike inquests and inquiries, truth commissions have received relatively intense scrutiny in terms of the degree to which they fulfil actual justice functions. Given the overlap in both their subject matter (usually coercive interaction between state and citizen), and their quantitative aims, these analyses and interpretations of the normative justice ends of truth commissions are informative for our purposes.

Most commonly, the justice function performed by truth commissions is identified by writers on the subject with so-called restorative justice. We saw that under this mantle, the

¹²⁰ Allen (1999) (ch 6, n 41) 331. It is presumed that by “courts of law”, Allen means criminal courts.

¹²¹ Although Kiss argues that there is some punitive aspect to publicly condemning perpetrators or subjecting them to questioning in a public forum (Kiss (n 15) 77).

benefits of social truth discovery processes and giving victims a voice, have been described and particularised. In Part 1, we saw that the depth of explanations for the normative purposes of inquests and inquiries tends to be limited to the notion of “accountability”. In contrast, interpretations of the normative function of truth commissions go relatively deep, particularising their role in addressing many harms that correspond to those identified at 6.4 above, as well as addressing issues of legitimacy that we raised at 7.2.3 above.

While a contemplation of the particularised benefits of inclusive truth discovery processes and providing victims with a voice are useful, it was argued that their identification with restorative justice does not always capture the moral imperatives that arise following deaths at the hands of the state. As such, relying on often quite vague notions of restorative justice as a way of understanding the normative function of truth commissions can be restrictive. Some authors have turned to recognition theory, and justice as recognition, to provide a thicker understanding of the moral imperatives partially fulfilled by victim-centred truth discovery processes. In particular, the language of recognition seems to fit well with the state/citizen intersubjective paradigm that envelopes and permeates aspects of transitional scenarios. And it appears well-suited for interpreting and articulating justice strategies that might be fulfilled by inclusive narrative formation processes.

The most effective way of characterising the function of justice as recognition in transitional scenarios is not uncontroversial, however. We saw that Haldemann presents a limited idea of justice as recognition that focuses on the needs of individual and particular victims of wrongdoing, but does not speak to “other moral concerns” such as peace-building, reconciliation or democracy.¹²² However, a need to recognise the interests of the particular victims of previous regimes is not inconsistent with recognition theory also providing a moral imperative for ends associated with democracy and peace-building and reconciliation. Indeed, these ends are arguably crucial aspects of justice as recognition in these circumstances. Without functioning democratic institutions, a state’s relationship with its citizens is characterised by misrecognition in several ways. Also, if the moral

¹²² Haldemann (ch 6, n 16) 678.

imperative of recognition theory is “to secure conditions of mutual recognition in which personal identity formation, and hence individual self-realisation, can proceed sufficiently well”,¹²³ then sustainable and healthy intersubjective relationships based on mutual recognition cannot be achieved in the absence of reconciliation and peace.¹²⁴

A critical theoretical approach based on recognition theory is therefore preferred over one based on restorative justice, and it is through this lens that the processes that are the focus of the thesis are considered in the following chapter. In particular, it is felt that the characteristics and normative values of restorative justice described above can be expressed and explained as effectively, if not more effectively, in the language of recognition theory.

¹²³ *ibid*, 687.

¹²⁴ du Toit (n 30) 123.

Chapter 9

A Context-Specific Conception of Open Justice

9.1 Introduction

Throughout the thesis, the focus has been on deaths at the hands of the police, or in police or prison custody. It has been argued that these types of deaths have particular constitutional significance given that “what is at stake [...] is nothing less than popular confidence in the state’s monopoly on the use of force.”¹ The practice—in terms of the procedural manifestation of openness in the aftermath of a death, and the rationales given for openness—suggests that open justice in this context is best understood very differently from how it has traditionally been understood in criminal and civil justice contexts. Openness is obviously considered very important in the aftermath of use-of-force deaths at the hands of the state. All of the investigating bodies that were examined (Police, PPO, IPCC, coroners’ courts and inquiries under the IA 2005) appear to self-consciously underline their openness and justify any limits they may place on it.² In preliminary investigations, the commitment to openness, and the justifications for any limitations, can be seen in the various policy documents, reports, terms of reference, statutory guidance and memoranda of understanding.³ In modern inquests and inquiries any limits placed on openness (where permitted by legislation), tend to be justified on a case-by-case basis by the coroner or inquiry chairman whilst underlining commitments to keep closure to a minimum.⁴

¹ *Ramsahai* (ch 1, n 21) 325. See above at 2.15, 4.5.2 and 7.2.3

² See Chapters 3, 4 and 5.

³ See Chapter 3.

⁴ See Chapter 5 above.

Sir Christopher Holland opened the Azelle Rodney inquiry acknowledging the existence of a “problem” that bore upon “the potential for public hearing of this matter”, but underlined that his ‘Terms of Reference’ specified the inquiry be “public”, and his “intention to conduct as much of the inquiry as possible in public” (*Azelle Rodney Inquiry* (ch 5, n 155) 3-4).

Neither the Litvinenko inquiry nor the 7/7 bombings inquests involved deaths at the hands of the state, but they are illustrative of this attitude. In opening the Litvinenko inquiry, Sir Robert Owen admitted some evidence would have to be heard in closed hearings. However, he emphasised that “such hearings are highly exceptional and rightly so.” He was at pains to explain the PII process, and that the evidence concerned was exceptionally sensitive (*Litvinenko Inquiry, ‘Transcript of Suspension of Inquest and Opening of the Inquiry’*, 31 July 2014 <<http://tinyurl.com/z96d4gj>> accessed 28 January 2016, 15-16).

And in opening the inquest into the deaths caused by the 7/7 bombings, Lady Justice Hallett stated:

“The approach that I have taken [with disclosure] is that all relevant material received by the inquest team should be made available to those interested persons who have requested it. I have asked my team to interpret what is relevant broadly [...] It’s in the interests of everyone that these inquests are conducted in as open a manner as possible [...]” (*Inquest into London Bombings of 7 July 2005, Transcript of Hearing 11 October 2010, Morning session* <<http://tinyurl.com/h2n755q>> accessed 28 January 2016, 5).

Conceptions of open justice in the criminal and civil justice contexts are generally made up of three elements: a general principle; the rationales behind that principle; and an account of how it is manifested in practice, including any exceptions to it.⁵ Such conceptions are based around a basic procedural principle that court proceedings and outcomes should be accessible to the public and the press.⁶ They generally differ only on questions of how this principle should be balanced against other interests⁷ and which rationales for the principle are the most important—including whether some of the more peripheral potential rationales for openness are, in practice, really motivating factors at all.⁸

As far as inquests are concerned, there is nothing inherently problematic about such a procedural principle of open justice—quite the opposite in fact. Inquests are court proceedings, and the practice in inquests certainly appears to bear the principle out.⁹ Indeed, theoretically, coroners’ courts arguably do so much more consistently than the criminal and civil courts.¹⁰ As for inquiries under the IA 2005, the principle needs to be modified slightly because inquiries are not court proceedings. But again, the limited practice in this area—so far at least—generally seems to bear out the fact that where inquiries perform an analogous function to inquests into use-of-force deaths at the hands of the state, they broadly conform to the general principle that the proceedings and their results be open to public scrutiny.¹¹

⁵ Neuberger (ch 1, n 1); Jaconelli (ch 1, n 7).

⁶ It was seen that Lord Neuberger described the procedural principle simply as being “that which goes on in court and what the courts decide is open to scrutiny” (ch 1, n 1).

⁷ See, e.g., JCHR, ‘The Justice and Security Green Paper: Twenty-Fourth Report of Session 2010-12’ (House of Commons 2012) HL Paper 286; HC 1777.

⁸ See Sharon Rodrick on free speech rationales for open justice (ch 1, n 6); and Jaconelli (ch 1, n 7) 29-69.

⁹ A recent exception being the (now quashed) inquest into the death of Poppi Worthington. *Cumbria County Council v M (Application for Rehearing) (No 5)* [2015] EWFC 35.

¹⁰ As seen above, the public can only be excluded from attending inquests on national security grounds (C(I)R 2013, r 11). There should be increased consistency with practice (practice in coroners courts in the past varied significantly depending on the coroner), since the appointment of a Chief Coroner in September 2012 (currently HHJ Peter Thornton QC). He produces “Guidance” and “Law Sheets” to help standardise best practice across England and Wales (‘Courts and Tribunals Judiciary | Office of the Chief Coroner’ <<http://tinyurl.com/z74ebwv>> accessed 18 November 2015).

¹¹ Even the inquiry into the death of Alexander Litvinenko has heard a lot of the evidence in public (see <<https://www.litvinenkoinquiry.org/>> accessed on 7 December 2015).

The real difficulty with applying traditional conceptions of open justice in this context is that—even if we confine our analysis to inquests—there are fundamental conceptual differences in the meaning and function of openness in these circumstances when compared to the civil and criminal justice contexts. First, the manner in which inquests are open to the active participation of members of the public means that the procedural manifestation of the principle does not just differ by a question of degree, but in important substantive respects. But perhaps even more significantly, the primary rationales for openness in investigations into deaths at the hands of the police, or in police or prison custody, appear very different to those typically given for openness in the criminal and civil justice contexts. These rationales appear to reflect an intuition that there are important normative reasons for openness and accountability in these circumstances unrelated to the instrumental value of helping secure retributive or compensatory justice. We saw in the last chapter that the same intuition also appears in the literature and practice regarding justice during transitions. This literature has gone some way towards identifying potential normative bases for claims that truth discovery processes that look into (amongst other things) deaths at the hands of the state, but are not concerned with retributive justice, may still fulfil important justice needs. It was argued that the most convincing of these normative explanations focuses on recognition theory and justice as recognition.¹²

This chapter outlines the elements of a context-specific conception of open justice beginning with a summary of the findings from Part 1, in terms of the general form that openness takes in the aftermath of a use-of-force death at the hands of the state, and the rationales given for such openness. This practice reveals a level of consistency regarding openness which, it is argued, reflects three potential procedural principles that vary in reach and breadth. It is further argued that one of these can appropriately form the basis for a context-specific conception of open justice. We will have, then, in reverse: a basic procedural principle of open justice; a summary of the main rationales given in practice for that principle; and a description of how the principle is manifested in practice, including any exceptions to the general rule. These three elements make up an interpretive, context-

¹² Although it was also argued that some of this literature tends to take an unnecessarily narrow view of the implications of recognition theory for transitional justice approaches (see 8.3.2.4 above).

specific account of open justice in the aftermath of a death at the hands of the police, or in police or prison custody. However, such an account is still missing an explication of the link between openness and justice: a link implicit in the term ‘open justice’. The chapter therefore concludes by drawing upon the justice theory discussed in Part 2 of the thesis, to argue that there is a very real link between openness and justice in these circumstances¹³—albeit one that is very different in nature to that which underpins open justice in the criminal and civil contexts.

9.2 The procedural manifestation of openness

Part 1 of the thesis gave an overview of the practice of openness in the aftermath of a death at the hands of the police or in police or prison custody, including the manner in which the circumstances of such deaths are opened up to public scrutiny and the rationales that are given for doing this. Chapter 3 looked at police and PPO investigations into deaths in prisons,¹⁴ and IPCC investigations into deaths at the hands of the police.¹⁵ Chapters 4 and 5 looked at inquests, and inquiries under the IA 2005¹⁶ (where these perform a function analogous to Article 2 compliant inquests). In examining the procedural manifestation of openness, the thesis set out the practice of openness as manifested *through* these various investigations, rather than just the narrower question of the practice of openness *within* those investigations. This took in three aspects of openness in the aftermath of these types of death. The first is when investigations will actually be held in these circumstances.¹⁷ The second is the scope of the investigations.¹⁸ As argued above, what is not investigated—because there is no investigation, or because something falls outside of the scope of the investigation—is not opened up to scrutiny. The third aspect of openness concerns the various procedures within these investigatory processes, which either allow or restrict public participation in the scrutiny of both the circumstances under

¹³ Drawing in particular on recognition theory and Rawls’s conception of political legitimacy.

¹⁴ See 3.2.1 and 3.2.2 above.

¹⁵ See 3.3 above.

¹⁶ See 5.2 above.

¹⁷ See 3.2 (police and PPO), 3.3 (IPCC), 5.1 (inquests) and 5.2 (inquiries) above.

¹⁸ See 3.2.1 (police investigations), 3.2.2 (PPO investigations), 3.3.2 (IPCC investigations), 5.1.2.2 (*Middleton inquests*) and 5.2.1.3 (Inquiries under the IA 2005).

investigation and the investigatory processes themselves.¹⁹ The most interesting aspect of the procedural manifestation of openness in this context is that in all of the different categories of investigation considered there is a participatory component to openness. Effectively, therefore, ‘publicly investigated’ includes a requirement that members of the public (invariably the family of the deceased and, in the case of inquests, also the jury), have the opportunity to actively participate in the investigatory process to some degree.²⁰

9.2.1 When investigations are held

9.2.1.1 When preliminary investigations are held

Part 1 showed that there is a lot more to the opening up of the circumstances of a death than just the inquest or inquiry.²¹ We saw in Chapter 3 that all prison deaths are treated as potential homicides by the police and are investigated accordingly.²² If and when the police and CPS conclude that the death was not the result of criminal wrongdoing or that there is insufficient evidence to prosecute anyone, the police may continue to investigate the death on behalf of the coroner. All prison deaths are also investigated by the PPO, and in most cases the relevant primary health care trust will, in co-ordination with the PPO, conduct a Clinical Review of the prisoner’s healthcare whilst in prison.²³ Finally, the prison itself will often carry out a relatively limited investigation to determine whether there are any immediate and continuing risks to other prisoners and staff. Normally, coroners rely on these preliminary investigations to collect evidence and identify lines of inquiry, but coroners may also direct their own officers to gather evidence and take witness statements in preparation for the inquest.

Chapter 3 recounted how where a death has occurred at the hands of the police or in police custody, the IPCC will carry out an independent investigation into the death.²⁴ Again, a coroner or inquiry chairman may instruct an officer, or a team employed specifically for

¹⁹ See 3.2.1.1 (police), 3.2.2.1 (PPO), 3.3.3 (IPCC), 5.2.1 (inquests and inquiries under IA 2005)

²⁰ In inquests and inquiries, specifically in the eliciting of and testing of evidence.

²¹ See Chapter 3 above.

²² See 3.2.1 above.

²³ See 3.2.2 above.

²⁴ See 3.3 above.

an individual case, to supplement any IPCC investigation with their own inquiries and collecting evidence.²⁵

9.2.1.2 *When inquests are held*

For centuries in England and Wales, inquests have been required where a coroner has reason to suspect that: the deceased died a violent or unnatural death, the cause of death is unknown, or the deceased died whilst in prison custody.²⁶ We also saw that in practice, inquests have long been held into deaths in police custody.²⁷ Recently, the CJA 2009 formally extended the statutory requirement that inquests be held into prison deaths, to all unnatural deaths “in custody or otherwise in state detention”.²⁸ Deaths that occurred during or as a result of arrest or restraint by the police generally required inquests due to falling within the definition of “a violent or unnatural death”.²⁹ But recently the cases of *Keenan* and *Middleton* have also confirmed that Article 2 ECHR requires that inquests be held into all deaths at the hands of the police.³⁰ More broadly, Article 2 requires an effective, independent and public investigation to be held into all deaths at the hands of the state.³¹ We saw that *Middleton* determined that, in the absence of full criminal proceedings, the normal forum for fulfilling this obligation should be the inquest.³² However, as observed in Chapter 5, there are (so far) rare cases where an inquiry under the IA 2005 may been held instead.³³

9.2.1.3 *When inquiries under the Inquiries Act 2005 are held*

Under s 1(1) IA 2005, a minister may set up an inquiry where events have caused, or are capable of causing public concern, or where there is public concern that particular

²⁵ For example, this happened in the case of Azelle Rodney.

²⁶ *Thomas et al* (ch 1, n 18) 13–18; *Sim and Ward* (ch 4, n 17); *Burney* (ch 4, n 18); *Scruton and Chadwick* (1987) (ch 4, n 3) 22–34; *Dorries* (ch 1, n 18) 1–5.

²⁷ At least since 1969 (HC Deb (1982) (ch 4, n 187)).

²⁸ CJA 2009, s 1.

²⁹ Now CJA 2009, s 1(2).

³⁰ *Keenan* (ch 2, n 54); *Middleton* (ch 5, n 7).

³¹ *McCann* (ch 2, n 10). See 2.2 above.

³² See 5.1.1 above. *Middleton* (n 469) 47.

³³ CJA 2009, sch 1. e.g. the Azelle Rodney inquiry (5.2 above).

events may have occurred.³⁴ Under sch 1(3)(1) CJA 2009, a senior coroner must suspend an inquest if requested to do so by the Lord Chancellor where: the cause of death is likely to be adequately investigated by an inquiry under the IA 2005; a senior judge has been appointed under that Act as chairman of the inquiry; and the Lord Chief Justice has indicated approval to the Lord Chancellor of that appointment. The setting-up of inquiries in this way is adopted to get around the openness of inquests in cases where the government deems some evidence too sensitive to be heard in open court.³⁵ While some inquiries under the IA 2005 have been held in order to fulfil purposes analogous to inquests, there has, so far, only been one example of an inquiry under the Act being held into a death in England and Wales at the hands of the police, or in police or prison custody due to the perceived sensitivity of core evidence—The Azelle Rodney Inquiry.³⁶

9.2.1.4 *The scope of preliminary investigations*

In Chapter 3 we saw that the different types of preliminary investigations vary significantly in scope. Police investigations into deaths in prison are generally restricted to establishing whether any criminal charges should be brought.³⁷ We saw that, in theory, PPO investigations are relatively broad.³⁸ They are not confined to investigating the role public institutions or public servants may have played in causing or contributing to a death, but extend to looking into services that may have been provided outside of the public sector.³⁹ Their aims include: establishing the circumstances and events surrounding the death “especially regarding the management of the individual by the relevant authority or authorities within remit, but including relevant outside factors”;⁴⁰ examining relevant health issues and assessing clinical care;⁴¹ and—in a nod to Bingham’s judgment in *Amin*—assisting the coroner to fulfil the Article 2 requirement by “ensuring as far as possible that

³⁴ See 5.2 above.

³⁵ See 5.2 above.

³⁶ See Select Committee on the Inquiries Act 2005 *The Inquiries Act 2005: Post-Legislative Scrutiny* – HL 143 (The Stationery Office 2014), Appendix 4, Table of Inquiries Established Under the Inquiries Act 2005.

³⁷ See 3.2.1 above.

³⁸ See 3.2.2.

³⁹ PPO ‘Terms of Reference’ (ch 3, n 12) 30.

⁴⁰ *ibid*, para 31.

⁴¹ *ibid*.

the full facts are brought to light and any relevant failing is exposed, any commendable action or practice is identified, and any lessons from the death are learned.”⁴² The PPO states on its website that investigators will “find out as much as possible about what was happening to the person before their death.”⁴³ Finally, the PPO investigation may include consideration of other deaths where there appear to be common factors.⁴⁴

Regarding deaths at the hands of the police, the IPCC is slightly more circumspect about its role in ensuring that the state fulfils the procedural obligation under Article 2.⁴⁵ It has indicated that its investigations will seek to determine how and why a person died and whether any individuals are at fault.⁴⁶ It states that Article 2 “shapes” the way in which it investigates deaths, and acknowledges that “Article 2 investigations should be [...] broad in scope [...] drawing conclusions beyond misconduct and criminal behaviour such as systemic problems or poor practice”, and “how a death could be prevented in the future.”⁴⁷ It was observed that the scope of an IPCC investigation is limited by its remit to only investigate the role of the police and any sub-contractors or their employees in causing or contributing to a death.⁴⁸ Depending on the circumstances, therefore, there may be other agencies or institutions which may also have been involved in the circumstances of a death which fall outside the IPCC’s investigative remit.

9.2.1.5 *The scope of inquests*

The ECtHR has emphasised that the scope of Article 2 compliant investigations should be sufficient for an investigation to fulfil its purposes.⁴⁹ Those purposes are returned to below, but in *Middleton* the House of Lords held that as long as the question of how the deceased came by her death was interpreted broadly, the inquest’s scope would generally

⁴² *ibid.*

⁴³ PPO, ‘How We Investigate’ (ch 3, n 50).

⁴⁴ PPO ‘Terms of Reference’ (ch 3, n 12) 32.

⁴⁵ See 3.3.2 above.

⁴⁶ IPCC, ‘Review Report’ (ch 3, n 76).

⁴⁷ *ibid.*, 27–28.

⁴⁸ PRA 2002, s 12(7); Anti-social Crime and Policing Act 2014, s 135.

⁴⁹ *Jordan* (ch 1, n 10) 109.

be sufficient for the purposes of Article 2.⁵⁰ This means that the scope of an Article 2 compliant inquest must be sufficient to determine who the deceased was and when, where and “by what means *and* in what circumstances” they died.⁵¹ The CJA 2009, has now made this a statutory requirement.⁵²

9.2.1.6 Public interest immunity in inquests

PII was touched upon briefly in Chapter 5 above.⁵³ It can significantly affect the scope of inquests. Chapter 5 recounted how the Azelle Rodney Inquest had to be abandoned because statutory restrictions prevented the inquest investigating core aspects of the circumstances of Azelle’s death.⁵⁴ Similarly, the coroner in the Alexander Litvinenko Inquest, Sir Robert Owen, was adamant that the scope of the inquest into Litvinenko’s death would be so reduced by PII as to be ineffective.⁵⁵ In both cases, inquiries were eventually set up to replace the inquests so that sensitive evidence could be considered behind closed doors if necessary.

The issue of PII in inquests is interesting because it illustrates how the distinct relationship between openness and the inquest’s purposes creates a very practical need to modify the approach taken in the civil and criminal courts. CJA 2009, sch 5(2)(2) states that:

The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an investigation or inquest under this Part as they apply in relation to civil proceedings in a court in England and Wales.

But while the rules of law regarding PII in the civil courts must be applied in inquests, the manner in which they are applied has to be adapted to fit the circumstances. It was observed in Chapter 5 that in the civil and criminal justice contexts, the counterpoint to any

⁵⁰ See 5.1.2.2 above. *Middleton* (ch 5, n 10).

⁵¹ *ibid*, 202.

⁵² CJA 2009, s 5(2).

⁵³ See 5.1.6 above.

⁵⁴ See 5.2 above.

⁵⁵ *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin).

public interest in keeping evidence out of proceedings through PII, is the public interest in justice being carried out between the parties.⁵⁶ The certification process for PII was helpfully described in *Al Rawi v Security Services*:

Lawyers consider material to see if it passes the threshold test for disclosure under CPR Part 31. In so far as it is prima facie disclosable, officials review material for potential to cause harm to the public interest. If harm to the public interest is identified, the department carries out a balance between harm caused by the disclosure on the one hand and injustice in the litigation on the other. It also considers whether it is possible to redact or gist the information or to make admissions of fact. Officials consider whether and to what extent the balance falls against disclosure in order to give advice to the minister as to whether to certify. If the minister, having considered the advice, decides that a certificate should be given, a PII certificate is prepared which includes a disclosable certificate or schedule describing the types of harm that might be caused to the public interest and a sensitive schedule as to why it is believed that disclosure of documents would cause real damage or harm to the public interest.⁵⁷

As we saw in Chapter 5, there are no parties in inquests. They are formally inquisitorial processes, engaged to determine who the deceased was and when, where and how she died. The counterpoint to whatever public interest is advanced in favour of non-disclosure in inquests is described as “the public interest in the due administration of justice” or “the public interest in the *open* administration of justice.”⁵⁸ In either case the public interest in justice must depend on what form justice is perceived to take in Article 2 compliant inquests.

If the purposes of Article 2 compliant inquests can be described as a form of justice, it is of a very different form to that normally pursued in criminal and civil proceedings.⁵⁹

⁵⁶ See 5.1.6 above.

⁵⁷ *Al Rawi v The Security Services* [2011] UKSC 34, 148.

⁵⁸ Sir Robert Owen, ‘In the Matter of an Inquest Touching the Death of Alexander Litvinenko: Ruling on PII Application’ (17 May 2013), para 9; Thomas *et al* (ch 1, n 18) 171 (emphasis added).

Sir Robert Owen also described the interest simply as “the public interest in disclosure” (*ibid*, paras 20-22).

⁵⁹ See 5.1.2 above.

Logically, therefore, the nature and extent of the public interest in the fulfilment of that form of justice may also be different. This is arguably what counsel to the Litvinenko Inquest meant when pointing out that “The content of the public interest in the due administration of justice will vary according to the context [...]”.⁶⁰ In the case of inquests, counsel argued this interest coincided with Lord Bingham’s interpretation of the very purposes of an Article 2 compliant investigation in *Amin*, and the coroner agreed.⁶¹ But while this means that the public interest in non-disclosure must be balanced against the public interest in the full facts being brought to light, etc., it does not discern any reliable points of reference for deciding the relative priority to be accorded to these aims.⁶² This ambiguity may be in the executive’s favour in PII applications, as the courts are loath to second guess the government’s assessment of the damage that disclosure might have for things like national security or the prevention and detection of crime.⁶³ Nevertheless, by associating the purposes described by Bingham with *justice*, Sir Robert Owen also associates openness with justice. Indeed, as openness is intrinsic to the main purposes of Article 2 compliant inquests described by Bingham, on the coroner’s reasoning, it must also be *intrinsic* to justice in these circumstances.⁶⁴

In civil and criminal proceedings, open justice—in terms of what goes on in courts, and what the courts decide being open to public scrutiny—is normally not technically the issue when the courts consider PII applications. The real issue is whether one party risks being denied justice if evidence is excluded from proceedings under PII. Therefore, when PII applications are rejected, it is normally because non-disclosure will deny a party the opportunity of relying on probative evidence to the extent that it jeopardises their chance of a fair trial. It is not because the court believes evidence should be made public via the openness of the court proceedings. Very occasionally, there may be exceptions to this

⁶⁰ Robin Tam, Hugh Davies and Andrew O’Connor (Counsel to the Inquest), ‘Inquest Touching Upon the Death of Alexander Litvinenko: Written Submissions on Public Interest Immunity by Counsel to the Inquest’ (19 February 2013) <<http://tinyurl.com/zsayfev>> accessed 28 January 2016, para 3.2.

⁶¹ *ibid*; Owen (n 58) paras 5–6.

⁶² Discerning any points of reference on the basis of successful PII applications is therefore next to impossible because one cannot know the content (and therefore the extent of the sensitivity) of the excluded evidence.

⁶³ See *Binyam Mohamed (No 2)* (CA) (ch 5, n 101), 44 and 147.

⁶⁴ See 5.1.2 above and *Amin* (ch 1, n 11).

general rule, however, and the case of *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* will be considered in this respect below.⁶⁵

These observations suggest a very close relationship between PII and issues of open justice in Article 2 compliant inquests. PII does not, in theory, risk denying justice for one of the parties—again, because there are no “parties” in inquests—but it can risk defeating the main object and purpose of inquests by closing the circumstances of a death to scrutiny.

9.2.1.7 *The scope of inquiries under the Inquiries Act 2005*⁶⁶

The scope of inquiries under the IA 2005 will depend on their terms of reference, but if an inquest is to be suspended, or remain suspended, an inquiry must now investigate who the deceased was and when, where and how they died.⁶⁷ Given that in these circumstances the inquiry will be replacing the normal forum for fulfilling the procedural obligation under Article 2, this should mean that the question of how the deceased came by their death will be interpreted broadly. Again, this must now anyway be the case if an inquest into the death is to remain suspended.⁶⁸

9.2.1.8 *The openness of preliminary investigations*

It has been argued that it is neither necessary nor appropriate to confine the meaning of openness in this context to the ability of the public and the press to observe or report on proceedings.⁶⁹ Rather, a description of openness in investigations should include their openness to the *active* participation of members of the public: either personally or through those who might symbolically and/or actually represent their interests.⁷⁰

⁶⁵ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin); *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] EWHC 2549 (Admin); *Binyam Mohamed (No.2)* (CA) (ch 5, n 101). See 9.3.1 below.

⁶⁶ See 5.2.1.1 above.

⁶⁷ See 5.2.1.1 above. CJA 2009, sch 1(4).

⁶⁸ See 5.2.2 and *ibid*.

⁶⁹ See 1.1 above.

⁷⁰ See the argument at 5.1.3.2 and 5.1.5 above; and *Main* (ch 1, n 15) 49.

Police investigations into prison deaths should be carried out with an attitude of openness and communication with the family and the community.⁷¹ In reality unless criminal charges are brought, family liaison and attempts to communicate findings to the public will normally be left to the PPO and the coroner (through the inquest). PPO investigations are generally relatively open to liaison with the family.⁷² Indeed the PPO considers one of the primary purposes of its investigations to be to “provide explanations and insight for the bereaved relatives.”⁷³ The PPO emphasises a presumption in favour of disclosure, which should be “as fully and as early as [the Ombudsman’s] terms of reference, and the law allows.”⁷⁴ PPO reports are published in full on its website—albeit in anonymised form.⁷⁵

As soon as the IPCC decides to investigate a death, it undertakes to contact the family and offer meetings “to explain our role and what we will be doing”.⁷⁶ Unfortunately, there is no mention of this also being an opportunity to listen to the families’ concerns. As a minimum, the IPCC must update the family on the progress of its investigation every four weeks.⁷⁷ Its Statutory Guidance states that “Communication with complainants and interested persons should be based on a presumption of openness”, and that, “[m]aking the investigation report available to the complainant and/or interested persons is the most transparent way of showing what the investigation has found.”⁷⁸

While policy documents and guidance emphasise the importance of openness and active engagement with families, preliminary investigations, including those carried out by the IPCC, are often wary of making lines of inquiry public before an investigation has concluded.⁷⁹ This appears to be both due to a reluctance to prejudice potential criminal proceedings or the inquest, but also because of uneasiness that mere lines of inquiry may

⁷¹ Stoddart ‘ACPO Protocol’ (ch 3, n 3) 17. See 3.2.1 above.

⁷² See 3.2.2.1 above.

⁷³ PPO ‘Terms of Reference’ (ch 3, n 12) 31; Also see PPO ‘Disclosure Policy’ (ch 3, n 42).

⁷⁴ PPO ‘Disclosure Policy’ (ch 3, n 42) para 2.

⁷⁵ <<http://www.ppo.gov.uk/document/fii-report/>> accessed 18 November 2014.

⁷⁶ IPCC, ‘Review Report’ (ch 3, n 76) 58. See 3.3.1 above.

⁷⁷ P(CM)R 2012 reg 12.

⁷⁸ IPCC, ‘Statutory Guidance’ (ch 3, n 79) 12.5.

⁷⁹ See 3.3.3.2 above.

be seized upon as evidence of wrongdoing.⁸⁰ Generally IPCC reports are published after the inquest and any criminal or disciplinary proceedings. An IPCC investigation will usually significantly inform the inquest, and the information uncovered should reach the public through that forum. Even where investigators are reluctant to disclose information to the family or the general public, they should disclose all relevant material to the coroner.⁸¹ And all material relevant to the cause of death should, then, be made available to interested persons in pre-inquest disclosure and to the public during the inquest.

*9.2.1.9 The openness of inquests*⁸²

There are two issues that arise here: the inquest's openness to members of the public and the press, in terms of their ability to attend proceedings or receive information through the reporting of proceedings; and the extent to which they are open to the active participation of members of the public, whether personally (family) or through those who might represent their interests (the public via the family and jury).

ECtHR jurisprudence requires there to "be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."⁸³ Again, the emphasis of the Strasbourg Court is that investigations be sufficiently open to fulfil their purposes.⁸⁴

Inquests, and any pre-inquest hearings, must be held in public unless:

1. in the case of a pre-inquest hearing, the coroner believes it is in the interests of national security *or* the interests of justice to hold the hearing in private;

⁸⁰ See 3.3.3.2 above.

⁸¹ See 3.3.1.2.

⁸² See 5.1.3 above.

⁸³ *Jordan* (ch 1, n 10) 109.

⁸⁴ See *Ramsahai* (ch 1, n 21).

2. in the case of an inquest hearing or any part of an inquest hearing, the coroner believes it is in the interests of national security to exclude the public.⁸⁵

It was noted that this very limited discretion contrasts starkly with the wide discretions coroners have traditionally enjoyed on other questions of procedure. And, in the limited circumstances where the public can be excluded from inquests, “the public” does not include the jury, or interested persons (i.e. the deceased’s family, amongst others).⁸⁶

While coroners’ discretion is very limited here, they do have the power to protect the identity of witnesses through special measures, including the use of cyphers and screens.⁸⁷ They also have the same powers as civil judges to impose reporting restrictions to prevent the risk of prejudice to the administration of justice. Such reporting restrictions should only normally arise in jury inquests in relation to applications made in their absence.

Not only are the public and the press entitled to attend proceedings, but a representative number of the public (in the jury), is effectively compelled to attend throughout the inquests with which this thesis is concerned.⁸⁸ It was observed that, whether or not anyone from the press or the public watch proceedings voluntarily, this ensures between 7 and 11 members of the public will be present throughout.⁸⁹

In terms of the public actively participating in inquests, the jury can put questions to witnesses and must come to a verdict/conclusion as to how the deceased died.⁹⁰ It was argued that while inquest juries have been significantly tamed over the centuries, their role remains significant.⁹¹

The practical limits on the jury in performing its probative and evaluative roles include it being prevented from expressing an opinion on matters *the coroner* believes are not

⁸⁵ C(I)R 2013.

⁸⁶ See 5.1.3.3 above. *Coroner for Inner West London* (ch 5, n 53).

⁸⁷ C(I)R 2013.

⁸⁸ See 5.1.3.1 above.

⁸⁹ CJA 2009, s 8.

⁹⁰ See 5.1.3.2 above.

⁹¹ *ibid.*

relevant to who the deceased was and when, where and how they came by their death.⁹² It also cannot frame a verdict that appears to determine criminal liability on the part of a named person, or civil liability, and it can only give a short-form verdict the coroner believes is available on the evidence.⁹³ A coroner will also disallow any questions she deems irrelevant.⁹⁴

It was argued that where the deceased's family is represented at the inquest, the jury's role (in representing the public when exercising a right to elicit and test evidence by questioning witnesses) may be more symbolic than practical.⁹⁵ There will likely be few lines of questioning not examined by a determined and legally-represented family. However, if the deceased's family have little or no interest in the inquest, or are unable or unwilling to pursue concerns not shared by the coroner, the opportunity for jury members to put questions may be particularly important.

It was argued that there is another level of public participation in the inquest through the representative role that can be played by the deceased's family.⁹⁶ In most inquests into use-of-force deaths at the hands of the state, the deceased's family will benefit from public funding in order to be legally represented.⁹⁷ In contrast to the jury, they also now routinely have the benefit of pre-inquest disclosure of witness statements, reports and other evidence, from which they can prepare lines of questioning.⁹⁸ They may also make representations to the coroner about which witnesses should be called, and what verdicts should be left to the jury.⁹⁹ While the family will primarily be concerned with representing their own interests in inquests, these will often coincide with the interests of any community that identifies with the deceased, or the general public, to find out what

⁹² *ibid.* Middleton (ch 5, n 10) 36 and 45; CJA 2009, s 5(3).

⁹³ CJA 2009, s 10(2).

⁹⁴ C(I)R 2013, r 19(2).

⁹⁵ See 5.1.3.2 above.

⁹⁶ *ibid.* This includes spouses, civil partners, partners, parents, children, siblings, grandparents, grandchildren, children of siblings, step-parents, half-brothers and sisters or "any other person who the senior coroner thinks has a sufficient interest" (CJA 2009, s 47); and C(I)R 2013, r 19.

Although the family are not "the public" for the purposes of r 11 of C(I)R 2013 (*Coroner for Inner West London* (ch 5, n 53))

⁹⁷ See 5.1.5 above and *Letts* (ch 5, n 93).

⁹⁸ See 5.1.4 above. Most recently provided for by C(I)R 2013, r 13.

⁹⁹ C(I)R 2013, r 27; *R v HM Coroner for East Berkshire Ex p Buckley* (1993) 157 JP 425 (QB).

happened to cause a death, to ensure that there is accountability for wrongdoing and to try and ensure that lessons are learned and others do not suffer the same fate as the deceased.¹⁰⁰

9.2.1.10 The openness of inquiries under the Inquiries Act 2005¹⁰¹

Chapter 5 described some significant differences between the openness of inquests and the openness of inquiries under the IA 2005.¹⁰² It was seen that inquiries can go into closed sessions at the direction of a minister or the inquiry chairman—to the exclusion of the press, public and even interested persons, including the family of the deceased.¹⁰³ And with the loss of the jury, inquiries lose both the minimum level of passive public scrutiny that it brings, and the active participatory role it can play in questioning witnesses. But the presence of the jury also affects the whole atmosphere in an inquisition. Where an inquest is held with a jury the coroner is constantly reminded of the public interest in the proceedings before her. Even if a jury does not ask witnesses questions, its presence will encourage coroners to anticipate its concerns and question witnesses accordingly. The presence of the jury also reminds coroners that the public are one step behind them in not having seen pre-inquest disclosure etc.. It forces coroners to ensure that the evidence is presented methodically and clearly; which is also in the interests of members of the wider public following proceedings. In this respect it was noted that Leslie Thomas, counsel for Azelle's Rodney's family, made the important argument during the inquiry, that while the chairman may anticipate or quickly understand points and arguments (helped by his experience and prior knowledge of the case), the inquiry was a public one. It was, therefore, important that the evidence was presented methodically and clearly for the interested public to follow.¹⁰⁴

¹⁰⁰ As seen in *Main*, Owen J agreed that in cases of public interest "it is only through representation of the family that the wider public interest will be represented." (*Main* (ch 1, n 15) 49). See 5.1.5 above and See 9.5.1.5 below.

¹⁰¹ See 5.2 above.

¹⁰² See 5.2.1 above.

¹⁰³ IA 2005, s 19. See 5.2.1.3 above.

¹⁰⁴ See 5.2.2 above, and Azelle Rodney Inquiry (ch 5, n 158) 7–8.

Article 2 will require the chairman of an inquiry to designate the family of the deceased as core participants, but their right to question witnesses is significantly restricted by the IR 2006.¹⁰⁵ It was observed that there is a presumption that only counsel for the inquiry and the inquiry panel may question witnesses.¹⁰⁶ Where core participants wish to ask questions they must apply for permission.¹⁰⁷ The Azelle Rodney Inquiry suggests that Article 2 will affect the application of these rules.¹⁰⁸ But while counsel for Azelle’s family were allowed to question witnesses in a manner that appeared to go beyond the spirit of the Rules, they were still arguably restricted more than they would have been had it been an inquest. This led to the inquiry being beset by arguments between the chairman and counsel for the family about their right to question witnesses.¹⁰⁹

Finally, in the inquiry’s favour is that it concludes with a report that will set out the chairman’s findings of fact and other conclusions much more comprehensively than any inquest verdict.¹¹⁰ There is a statutory presumption that the report will be published in full, but the IA 2005 does provide for material to be withheld “in the public interest”.¹¹¹

9.2.1.11 A note on Article 2¹¹²

While there is a consensus amongst courts and other institutions that the inquest is the designated forum for fulfilling the investigative obligation under Article 2 ECHR, all of the investigatory bodies addressed in Part 1 undertake to contribute to the fulfilment of the obligation in one form or another. Article 2 requires the state to initiate an independent, effective and public investigation, which involves the family of the deceased to the extent necessary to protect their own interests, into the types of death that are the focus of this thesis. We saw that this requirement has had a significant impact on the way inquests are now conducted—particularly, in terms of their scope, pre-inquest disclosure to the family,

¹⁰⁵ IR 2006, r 10.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*, r 10(4)–(5).

¹⁰⁸ See 5.2.2 above.

¹⁰⁹ See 5.2.2 above.

¹¹⁰ See 5.2.1.4.

¹¹¹ IA 2005, s 25(4).

¹¹² See Chapter 2 above.

and public funding for the family.¹¹³ While it is early days in terms of any settled practice in inquiries, where these take on the role and purposes of inquests, it is likely that Article 2 will have an even greater role in how their rules of procedure are interpreted. This is because the use of an inquiry to replace an inquest will usually arise out of a desire to avoid the inquest's normal requirements of openness and public scrutiny. Where the procedural obligation under Article 2 is engaged, the broad power of inquiries to go into closed session must be fettered by the Article 2 requirement that investigations be public and involve the family of the deceased to the extent necessary to protect their own interests.¹¹⁴

9.3 The rationales behind open justice

9.3.1 The rationales behind open justice in civil and criminal courts

It was noted that the primary rationale for open justice in criminal and civil justice systems is generally considered to be that it helps ensure a fair trial.¹¹⁵ Throughout the thesis, it has been maintained that one reason for a need to develop a context-specific conception of open justice in the case of deaths at the hands of the police, or in police or prison custody, is that the rationales behind openness are fundamentally different in nature to those in civil and criminal proceedings. This is not to say that considerations such as democratic accountability and having an informed citizenry are irrelevant when it comes to open justice in the criminal and civil justice contexts. The courts are an important source of public accountability for the behaviour and actions of individuals or institutions that may be the subject of a criminal or civil proceedings.

It is, however, questionable whether such rationales are anything more than peripheral concerns, or even whether they truly play any practical role when openness is balanced against competing public interests—such as fairness between the parties, the prevention and detection of crime, national security or the maintenance of good relations with other states. Rodrick observes that in Australia:

¹¹³ See 5.1.2.1, 5.1.2.2, 5.1.4 and 5.1.5 above.

¹¹⁴ See 2.8.2 above.

¹¹⁵ See 1.1 above, and, e.g., *Leveller Magazine* (ch 1, n 2) at 449–450; *Scott* (ch 1, n 3).

Whilst Australian judges have readily embraced the traditional purposes of open justice, most have tended to shy away from regarding open justice as an aspect of free speech *simpliciter*. For example, the New South Wales Court of Appeal has declared that the purposes of the principle are tied to the operation of the legal system, and ‘do not extend to encompass issues of freedom of speech and freedom of the press’.¹¹⁶

However, in England and Wales, *Binyam Mohamed* indicates that rationales such as ensuring democratic accountability and maintaining an informed citizenry (rationales unrelated to fairness between the parties) may be given *some* weight in the civil courts where appropriate.¹¹⁷ The issue before the High Court and, eventually, the Court of Appeal in *Binyam Mohamed* and *Binyam Mohamed (No. 2)*, was whether the High Court should restore to an earlier proceeding’s open judgment seven paragraphs redacted for reasons of national security and to protect the intelligence relationship between the UK and the US.¹¹⁸ The High Court described the nature of the information contained in the paragraphs as:

a summary of reports by the United States Government to the SyS [the Security Service] and the Secret Intelligence Service (SIS) on the circumstances of [Binyam Mohamed’s] incommunicado and unlawful detention in Pakistan and of the treatment accorded to him by or on behalf of the United States Government [...].¹¹⁹

With the original matter before the Divisional Court having been decided in favour of the party being denied full disclosure, the usual primary rationale for openness—to help ensure justice is done between the parties—did not apply (at least not in the usual way). Thomas LJ observed:

The issue which arises here is not the balance between the public interest in fairness to a litigant by making material available to him to enable a fair trial to

¹¹⁶ Rodrick (ch 1, n 6) at 94–95, referencing: *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 525. Rodrick also notes that “Similar sentiments were expressed in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 (HL), 303 and *The Herald & Weekly Times Ltd v The Magistrates’ Court of Victoria* [1999] 3 VR 231, 248.” (*ibid*, 94, fn. 25)

¹¹⁷ *Binyam Mohamed* (n 65); *Binyam Mohamed (No.2)* (HC) (n 65); *Binyam Mohamed (No.2)* (CA) (ch 5, n 101).

¹¹⁸ *Binyam Mohamed (No.2)* (HC) (n 65); *Binyam Mohamed (No.2)* (CA) (ch 5, n 101).

¹¹⁹ *Binyam Mohamed* (n 65) 14.

take place (as has been the position in most cases [...]). It is a novel issue which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability.¹²⁰

In the end the High Court ruled that the paragraphs should be published and the Court of Appeal agreed.¹²¹ The important outcome of the case is that democratic accountability and maintaining an informed citizenry were held to be real motivating factors behind the principle of open justice.¹²² Both courts underlined that “open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the redacted paragraphs public”.¹²³ The evidence in question not only suggested that Binyam Mohamed was unlawfully detained and tortured at the behest of the US, but it also bore upon the question of whether the UK government had misled the public about what it knew about his mistreatment, and whether it had been complicit in it.¹²⁴ However, Lord Neuberger MR and Lord Judge were very clear that they would not have ruled in favour of publication had the substance of the paragraphs not already been made public as a result of judicial proceedings in the US.¹²⁵ Lord Neuberger MR also stressed that:

¹²⁰ *ibid*, 18.

¹²¹ *Binyam Mohamed (No.2)* (HC) (n 65); *Binyam Mohamed (No.2)* (CA) (ch 5, n 101).

¹²² *Binyam Mohamed* (n 65) 54.

¹²³ *ibid*.

¹²⁴ “The court made findings as to what UK Government officials were told about serious and sustained mistreatment (conceivably amounting to torture) by a foreign government [...] it seems to me little short of absurd to say that the court cannot take into account the public importance of, and the obviously justified public interest in, such findings, when deciding whether it is, on balance, in the public interest in publishing those findings.” ((Per Lord Neuberger MR) *Binyam Mohamed (No.2)* (CA) (ch 5, n 101) 180).

¹²⁵ *Binyam Mohamed (No.2)* (CA) (ch 5, n 101) 48-58 and 192-203. See Memorandum Opinion by Judge Kessler in *Farhi Saeed Bin Mohammed v Barack Obama* (2009) (Civil Action No 05-1347 (GK)) (US District Court for the District of Columbia) 64-70; *Binyam Mohamed (No.2)* (CA) (ch 5, n 101).

At page 64 of Judge Kessler’s opinion she observes that:

“[Binyam Mohamed’s] trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans.”

She continued that: “no question that throughout his ordeal [he] was being held at the behest of the [US]” that he “was shuttled from country to country, and interrogated and beaten without having access to counsel”

It is of course, elementary that the courts do not function in order to provide the media with copy [...]. They function to enable justice to be done between the parties.¹²⁶

Article 10 ECHR (which includes a right to receive opinions, information and ideas) also now needs to be taken into account when considering openness in the civil and criminal courts. Until recently, the ECtHR had confined this right to “information others wish or may be willing to impart.”¹²⁷ However, the right has been broadened by recent ECtHR and domestic jurisprudence. For example, in *Tarsasag a Szabadsagjogokert v Hungary*, the ECtHR observed it had moved towards “a right of access to information” in certain cases.¹²⁸ In that case, the Hungarian Constitutional Court had refused a domestic human rights organisation access to a complaint made by a Member of Parliament. The Court held that the refusal to grant access to the complaint was an unjustifiable interference with Article 10:

[The Court] considers that the present case essentially concerns an interference—by virtue of the censorial power of an information monopoly—with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents. [...] Moreover, the State’s obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because an information monopoly is held by the authorities.¹²⁹

In *A v Independent News and Media Ltd*, the Court of Appeal held that where the issue was access to court *proceedings*, the case for Article 10 being engaged would be even stronger than in *Tarsasag*.¹³⁰ An important consideration was the fact that the applicants sought the information for public rather than private purposes.¹³¹ In *Binyam Mohamed*,

¹²⁶ *Binyam Mohamed (No.2)* (CA) (ch 5, n 101) 41.

¹²⁷ See *Leander v Sweden* [1987] 9 EHRR 433; *Gaskin v UK* [1989] ECHR 13.

¹²⁸ (2009) ECHR 618, 35.

¹²⁹ *ibid*, 36.

¹³⁰ [2009] EWHC 2858 (Fam), 43.

¹³¹ *ibid*, 44.

Lord Neuberger MR observed that the courts, “like any public body, have a concomitant obligation to make information available.”¹³²

[w]here the publication at issue concerns the contents of a judgment of the court, it seems to me that article 10 is plainly engaged: the public’s right to know is a very important feature.¹³³

There are three important points to note here, therefore. First, free speech-related rationales, including the need for democratic accountability and an informed citizenry, are real rationales that may be considered by courts when balancing the public’s interest in openness against other conflicting interests. Secondly, even where the material concerned is of significant public interest, this rationale is still peripheral to the rationales of ensuring fairness between the parties and maintaining public confidence in the judicial system. The primary purpose of the civil and criminal courts is always to ensure justice between the parties in individual cases, not to proactively educate the public on issues of public interest or concern. Finally, it should be noted that if open justice were to require a court to publish a judgment for no other reason than to inform the public about an issue of public concern, unlike in inquests, this would be an additional task to achieving the justice ends for which the criminal and civil justice systems essentially exist.

9.3.2 The rationales behind openness in the aftermath of deaths at the hands of the police, or in police or prison custody

With inquests into use-of-force deaths at the hands of the state there is a much more basic association of openness and public participation with a need for accountability regarding the subject-matter under investigation (rather than ensuring the fair and/or proficient conduct of the investigation itself). Openness is inextricably rolled up with the primary function of the process itself. Of course openness in inquests also ensures that the coroner whilst conducting an inquest is also on trial,¹³⁴ and this has long been an important

¹³² *Binyam Mohamed (No.2)* (CA) (ch 5, n 101) 180.

¹³³ *ibid.*

¹³⁴ Paraphrasing Lord Shaw’s quote of Bentham in *Scott* (ch 1, n 3) 477.

concern.¹³⁵ But in a reversal of the typical prioritisation of the rationales for open justice, this rationale appears subsidiary to the justice that lies in ensuring public scrutiny of, and public accountability for, the subject-matter under investigation.¹³⁶

9.3.2.1 *The purposes behind Article 2's procedural obligation*

Chapter 4 noted that one problem with discerning the purposes behind inquests prior to *Amin* and *Middleton* is that the domestic courts tended to take a literal rather than a purposive approach when interpreting an inquest's quantitative aims.¹³⁷ In the absence of well-defined purposes in the decades preceding the HRA 1998, there was little to push back on the ever-narrowing scope of inquests prompted by a belief that they should not appear to determine criminal or civil liability.¹³⁸ Their quantitative aims—to find out who the deceased was and when, where and how she died—rather than their qualitative purposes, were generally what concerned the courts. However when *Middleton* reached the House of Lords, the ECtHR's purposive approach was adopted into domestic practice.¹³⁹

We saw in *McCann* that the ECmHR defined the purpose behind the procedural obligation as being to ensure that the “circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny.”¹⁴⁰ It emphasised that it was “essential both for the relatives and for public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state is subject to some form of open and objective oversight.”¹⁴¹ The *Court* in *McCann* confined itself to underlining the practical need for an investigation where “a general legal prohibition of arbitrary killing by the agents of the state would be ineffective, in practice, if

¹³⁵ See 4.6 above: Mr Warburton MP: “What security was there that the Coroner’s inquiry would lead to a full and fair investigation, if the inquest could be held in secret? In all such cases, the only protection which the people could have was by the free admission of the reporters of the public.”((ch 4, n 111) 926).

¹³⁶ See 5.1.2.1 above.

¹³⁷ See 5.1.2 above. *Amin* (ch 1, n 11); *Middleton* (ch 5, n 10).

¹³⁸ See 4.9.3 above.

¹³⁹ See 5.1.2.2 above. *Middleton* (ch 5, n 10) 8.

¹⁴⁰ *McCann* (ch 2, n 19) 192–193.

¹⁴¹ *ibid.*

there existed no procedure for reviewing the lawfulness of the use of lethal force by state authorities.”¹⁴²

It was observed that since *McCann* the ECtHR has also described the purpose behind the investigative obligation as being to “secure[...] the accountability of agents of the state for their use of lethal force”;¹⁴³ “to allay rumours and suspicions of how a death came about”;¹⁴⁴ and “in those cases involving State agents or bodies to ensure their accountability for deaths occurring under their responsibility.”¹⁴⁵

We have to be a little wary of the rationales given for the procedural obligation under Article 2 and this is one reason why ECHR jurisprudence was discussed separately in Chapter 2. It was observed that it is not really a single obligation at all, but contains overlapping duties with overlapping rationales. There is a duty to open up the circumstances of a death to public scrutiny which is clearly an end in itself;¹⁴⁶ but it also serves the purpose of, where appropriate, leading to accountability through criminal and/or civil liability.¹⁴⁷ Therefore, when the ECtHR underlines the importance of Article 2 compliant investigations, and the opening up of the circumstances of deaths to scrutiny, it is sometimes difficult to separate the relative intrinsic importance attributed to such a process by the ECtHR, from the instrumental role it can play in criminal and civil justice processes.

9.3.2.2 *The evolving purposes behind domestic inquests*¹⁴⁸

In Chapter 4 it was observed that the primary function of early inquests was to protect the revenue interests of the Crown.¹⁴⁹ In particular, coroners would determine whether the property of the deceased, or anyone deemed responsible for a death, should be forfeited to the Crown, or whether communities or individuals should be fined, e.g. for

¹⁴² *McCann* (ch 2, n 10) 161.

¹⁴³ *Kaya* (ch 2, n 22) 87. This links to the purposes of an investigation, set out by Bingham in *Amin*.

¹⁴⁴ *Jordan* (ch 1, n 10) 128.

¹⁴⁵ *ibid.*

¹⁴⁶ As expressed by the Commission in *McCann* (ch 2, n 10) 192–193.

¹⁴⁷ See, *Oneryildiz* (ch 2, n 160) and 2.14 above.

¹⁴⁸ See 4.2, 4.4 and 5.1.2 above.

¹⁴⁹ *Upshaw Downs* (ch 4, n 4) 107.

being unable to account for a death or for allowing an accused to flee.¹⁵⁰ Financial considerations also appear to have been behind the requirement that inquests be held into all deaths in prisons.¹⁵¹ However, over the centuries, the motivational sentiment behind a need to investigate unexplained, unnatural or violent deaths gradually began to be associated with the wider interests of society. In the nineteenth century we saw inquests increasingly being characterised as a source of public accountability for deaths at the hands of state actors or institutions.¹⁵²

It was argued that, in the mid-twentieth century the inquest seems to have lost its way as its scope was gradually reduced and effect was given to the belief that inquests should, above all, *not* appear to pre-empt criminal or civil justice processes.¹⁵³ But with the HRA 1998 and *Amin* and *Middleton*, the qualitative purposes of inquests into deaths at the hands of the state were finally set out in positive and substantial terms.¹⁵⁴ With *Middleton* (CA), the inquest was identified as the procedure which should normally fulfil Article 2's procedural obligation, and in his lead judgment in *Amin*, Lord Bingham outlined that the purposes of such an obligation were:

to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.¹⁵⁵

¹⁵⁰ Thomas *et al* (ch 1, n 18) 13–18; Sim and Ward (ch 4, n 17); Burney (ch 4, n 18); Scraton and Chadwick (ch 4, n 3) 22–34; Dorries (ch 1, n 18) 1–5.

¹⁵¹ Burney (ch 4, n 18) 25.

¹⁵² See 4.5 and 4.5.2 above and, for example, *The Times* reports on the John Lees' inquest (from: *The Times* (London, England) 11 Sep 1819, Issue 10722; to *The Times* (London, England) 4 Jan 1820, Issue 10819); Thomas Wakley's inquest into the death of James Lisney (Poor Law Commission (ch 4, n 67) 265); and Charles Dickens's account of the inquest into the death of two of the 180 children to die at Tooting Child Farm in the winter of 1849–50 (Sim & Ward (ch 4, n 17) 252); Burney (ch 4, n 18) 29; and Sim & Ward (ch 4, n 17) 263.

¹⁵³ See 4.7–4.9 above

¹⁵⁴ See 4.9 and 5.1.2 above.

¹⁵⁵ *Amin* (ch 1, n 11) 31.

It was argued that as far as the first three of these aims are concerned, openness is absolutely intrinsic to bringing the facts to light, exposing culpable and discreditable conduct to public notice, and ensuring “that suspicion of deliberate wrongdoing (if unjustified) is allayed.”¹⁵⁶ A degree of openness is also almost certainly going to be needed if the deceased’s family are to be satisfied that, where possible, lessons have been learnt that may save the lives of others. The penultimate of Lord Bingham’s purposes, fulfils a role more similar in nature to that normally ascribed to openness in civil and criminal justice proceedings: publicity will exert pressure on those responsible to act in good faith. But it was also noted that, the participation of the deceased’s family also has a track record of leading to issues being uncovered that may not otherwise have been.¹⁵⁷

While these rationales do point to some instrumental functions of openness, they focus on purposes—public scrutiny and public accountability—for which openness is a fundamental and intrinsic requirement. Of course, for the ECtHR, accountability also plays an instrumental role in ensuring that the substantive right to life is protected. But in *Jordan*, for example, it lists accountability as a purpose additional to this end, again suggesting a basic intrinsic value.¹⁵⁸

Other than Article 3, none of the other rights contained in the ECHR require specific procedural mechanisms to ensure public scrutiny and accountability where a substantive right is merely engaged but not necessarily breached by state action (as opposed to the requirement under Article 13 to provide a remedy for those injured by breaches of Article rights). We saw that in *Ramsahai*, the ECtHR found against the Netherlands in terms of the adequacy of a public investigation into a death at the hands of the police, despite being satisfied that there had been no breach of the substantive duty.¹⁵⁹

¹⁵⁶ See 5.1.2.1 above; *ibid.*

¹⁵⁷ Casale (ch 3, n 89).

¹⁵⁸ *Jordan* (ch 1, n 10) 105.

¹⁵⁹ *Ramsahai* (ch 1, n 21).

9.4 A procedural principle of open justice in the aftermath of deaths at the hands of the police, or in police or prison custody

Modern practice suggests three potential procedural principles of open justice at play which have varying breadths of focus. The first of these is that, where there has been a death at the hands of the police, or in police or prison custody, the state must initiate an open, independent and effective investigation into the circumstances of the death. This procedural principle is analogous to the broader procedural obligation under Article 2 ECHR that applies to a wider category of deaths. However, as Lord Bingham observed in *Amin*, such a procedural principle has effectively existed independently in England and Wales for centuries in the form of the inquest. These have always, in theory, been: independent;¹⁶⁰ open to the participation of the family of the deceased; and, during their long history, almost always open to the scrutiny of, and (where there is a jury) the participation of the public.¹⁶¹ The manifestation of this principle has not always been consistent in its detail in England and Wales, but the general principle that such deaths will be opened up to independent and public scrutiny, has for the most part long held true. The effect of Article 2 has arguably been simply to make processes that embody the principle more effectively geared towards fulfilling revived purposes.¹⁶²

Unlike Lord Neuberger's procedural principle of open justice which specifically concerns judicial proceedings, this procedural principle is obviously much wider.¹⁶³ However, if we confine our analysis to inquests, there is a second potential procedural principle at work that falls neatly within this more traditional procedural principle of open justice. We can state this principle as being "that what goes on in coroners' courts and what they conclude should be open to public scrutiny." This principle has no bearing on

¹⁶⁰ This independence (which historically even gave coroners a power of arrest over sheriffs) was at times a major source of contention, particularly between coroners and magistrates.

¹⁶¹ See 4.6 above, the account of *Garnett* (ch 4, n 102), and nineteenth century debates about whether inquests had to be open to the public. "Theoretically" because there are examples of inquests being of questionable independence (e.g. Blair Peach and Hillsborough) and of coroners trying to exclude members of the press and the public from inquest proceedings e.g. Judith Townend, 'NUJ General Secretary Calls on Coroner to Allow Blogger into Court' (Journalism.co.uk, 25 February 2010) <<http://tinyurl.com/72fvmfg>> accessed 24 July 2015.

¹⁶² In 5.1.2 it was observed that this was largely because Strasbourg has ensured a mischief or teleological approach when interpreting the procedural principle.

¹⁶³ Although the procedural obligation under Article 2 does include an obligation to have effective judicial systems in place.

the *scope* of inquests, and it is as true for Article 2 compliant inquests as it is for non-Article 2 compliant inquests. The principle also has nothing to say about preliminary investigations and inquiries under the IA 2005. But given that the distinctive meaning and function of openness in inquests seems to be shared with the other main investigatory procedures engaged in this context, this would arguably be an arbitrary restriction.

A third procedural principle that is consistent with practice would simply extend Neuberger’s principle into the non-judicial sphere when deaths at the hands of the police, or in police or prison custody are concerned. So, for example, given the practice described in Part 1, we could simply state a procedural principle that: “investigations into deaths at the hands of the police or in police or prison custody, must be open to public scrutiny”. The detailed practical manifestation of the principle obviously differs from one type of investigation to another. But there are arguably sufficient requirements for openness in current legislation, guidance, statements of intention, and policy documents, to identify a basic procedural principle (albeit one with exceptions) that these investigations will generally be open to public scrutiny.

The practice is sufficiently consistent for any of these principles to be the starting point for a context-specific conception of open justice. The question is which of them is the most suitable to adopt as the core of a meaningful, context-specific conception of open justice? The primary rationales for openness in inquests, and all of the other types of investigation we have looked at, have been defined as bringing the facts about the circumstances of a death to light and ensuring public accountability for those circumstances. This being the case, it would be arbitrary to confine a context-specific conception of open justice to Lord Neuberger’s principle, which only applies to judicial bodies (i.e. in this context, inquests). It is also the case that the primary rationales for the openness of investigations coincide with the primary rationales for holding the investigations in the first place. Again, even if we broaden our procedural principle of open justice to apply to non-judicial investigations, this will confine our discussion to how the processes themselves are open, and arbitrarily exclude from the analysis the broader but relevant issues of when the investigations will be held in the first place and what their scope will be. Again, *Middleton* illustrated how an inquest can be completely open, but if its scope is insufficiently broad it will fail to fulfil its

purposes; purposes which relate to the opening up of the circumstances of a death to public scrutiny and public accountability.

The rest of this chapter therefore proceeds on the basis that the general procedural principle at the heart of our context-specific conception of open justice is: “Deaths at the hands of the police, or in police or prison custody must be opened up to effective public scrutiny.” Preliminary investigations, inquests and inquiries are therefore themselves part of the procedural manifestation of a basic principle of open justice in this context.¹⁶⁴ In this way, a context-specific conception of open justice, and the procedural principle at its heart, can be expressed in a way that more fully corresponds to how openness and justice are linked in these circumstances. This link is the focus of the remainder of this chapter.

9.5 Recognition theory and the link between openness and justice in the aftermath of deaths at the hands of the state

A normative understanding of openness in these circumstances and, in particular, any link between openness and non-retributive and non-compensatory justice ends, should help guide the level of prioritisation given to openness as against competing interests.¹⁶⁵ It will also help to better focus the manner in which openness is procedurally manifested in the investigative processes concerned, so that these justice ends may be more effectively fulfilled in practice. An analogy may be drawn between the importance of such a project, and Konstantin Petoukhov’s explanation of the importance of providing a normative framework for the aims of truth commissions:

¹⁶⁴ Traditional conceptions of open justice are naturally framed in relation to processes (criminal and civil justice systems) rather than the circumstances with which those processes are concerned. This is because the prime rationales for openness are subsidiary to the rationales behind the processes themselves. In contrast, it has been argued above that the *prime* (although, not all) rationales behind Article 2 compliant investigations coincide with the rationales behind their openness.

¹⁶⁵ e.g., keeping intelligence gathering techniques secret or maintaining good relations with other states. See respectively the circumstances surrounding the inquiry into the death of Azelle Rodney (including Walker (ch 3, n 114)); and the inquest into the death of Matty Hull from “friendly fire” from American pilots (Gaby Hinsliff, ‘Families Fight Plan for Secret Inquests in Friendly-Fire Deaths’ (6 April 2008) *The Guardian* <<http://tinyurl.com/hqdvbtbm>> accessed 25 June 2015).

A theory of justice may help to strengthen truth commissions' mandates by clearly conceptualising their goals and objectives in concrete terms... and identifying the potential strategies to attain them¹⁶⁶

In criminal and civil justice contexts the fundamental link between openness and justice, and therefore the normative function of openness, is clear. The prime rationale for openness in these contexts is to help ensure a fair trial. This is instrumental to helping to ensure that the purposes of the trials themselves are met. The ultimate purpose of openness, therefore, is to help secure the retributive, punitive, restorative or compensatory justice forms pursued by criminal and civil justice processes. The relative normative value of the remedies pursued is not without controversy. Undergraduate students of law are introduced to their vicissitudes and discuss their relative merits in tutorials and seminars from a relatively early stage in their legal studies. But even if we dispute the relative value of these justice forms, the function of openness in helping to achieve them is at least clear.

There has, however, been very little considered analysis of the normative foundations for the ends pursued in non-criminal and non-civil justice related investigations into use-of-force deaths at the hands of the state, other than in the transitional justice context. While the normative basis for a need for public accountability in the aftermath of deaths at the hands of the police, or in police or prison custody, has never been explained explicitly by the courts, there are several expressions of the importance of investigations which hint at their relationship to justice. The ECtHR has underlined the particular importance of Article 2 amongst the other Convention rights, noting that it “ranks as one of the most fundamental provisions in the Convention [... and, together with Article 3] enshrines one of the basic values of the democratic societies making up the Council of Europe”.¹⁶⁷ When it comes to the procedural obligation, it has been noted that in *Ramsahai*, the ECHR emphasised that “what is at stake [...] is nothing less than public confidence in the state’s monopoly on the use of force”¹⁶⁸—the normative significance of which is apparently assumed to be self-evident.

¹⁶⁶ Petoukhov (ch 8, n 60) 13.

¹⁶⁷ *Jordan* (ch 1, n 10) 102.

¹⁶⁸ *Ramsahai* (ch 1, n 21) 325.

It is often taken for granted that the deceased's family and the public have legitimate and important interests in learning about the circumstances behind use-of-force deaths at the hands of the state. But it is a mistake to rely on arguments that merely assert the self-evident importance of public accountability for the fatal use of force by the state, when there may be other, very important and competing principles at play: for example, the need to protect national security; the need to safeguard methods for preventing and detecting crime; and the need for procedural safeguards in matters that may cause reputational harm or may impact upon the fairness of criminal proceedings. Prioritising one principle, or moral claim over another requires an understanding of what the normative foundations for such claims are.

It is argued that recognition theory may provide the moral foundation for such a claim, and thus the link between openness and justice that is implicit in the term "open justice".

9.5.1 Applying recognition theory to the aftermath of use-of-force deaths at the hands of the state

The following draws from the discussion of recognition theory and Rawls's conception of political legitimacy in Part 2, to identify the sources of legitimate interests that demand recognition in institutional responses to deaths, and outline what these might require in terms of Honneth's second and third levels of recognition.¹⁶⁹

9.5.1.1 The source of the rights that accrue after a death

Chapter 7 described how the second level of Honneth's tripartite scheme of recognition theory is concerned with the need to recognise individuals as equal bearers of rights.¹⁷⁰ Generally speaking, one's vulnerability to misrecognition on this level arises out of the potential to be denied a right that others ordinarily enjoy. In England and Wales, it is the practice, if not also the law, for the cause of a loved one's death to be explained to families by a doctor, the police or, in certain circumstances, through an ordinary inquest. To deny

¹⁶⁹ For the different levels of recognition identified by Honneth, see 7.3.2.2 above.

¹⁷⁰ See 7.3.2.2 above.

this right in cases where a death occurs at the hands of the state would be to misrecognise the generally accepted rights of families. Such a right to the truth itself recognises a very basic metaphysical need to know how and why a loved one died. Far from there being objective reasons for a negative differentiation in cases where loved ones have been lost in circumstances involving the use-of-force by state actors, a right to a reliable explanation is arguably more pressing in these circumstances because: a) the state must assume some responsibility for those its agents subject to the coercive use of force; and b) the details of what happened to cause a death will often be exclusively known to state actors.¹⁷¹

The second originating source of a legitimate demand to “be given positive consideration in the plans of others” in these circumstances is more complex.¹⁷² If Honneth’s second level of recognition requires the equal treatment of individuals as bearers of equal rights, why should the deceased’s family, any group that identifies with the deceased, or the wider public, be afforded additional rights to those that accrue where a death occurred in circumstances not involving the use of force by the state? The answer is that here there *are* objective reasons that justify a *positive* differentiation to be made in the aftermath of these types of death. These stem from the fact that the deaths occur in circumstances that feature very basic inequalities in the rights held by those involved.

A death that occurs in circumstances involving the coercive use of force by the state brings into sharp focus the inevitable inequality that exists in having coercively empowered institutions and individuals who exercise the state’s monopoly on the lawful use of force over others.¹⁷³ We saw in Chapter 7 that Buchanan asks the questions “[i]f we are all equal, what can justify some persons (the government) making, applying, and enforcing rules on us?”; and, “if liberty is our proper condition, how can the use of coercion, which government essentially involves, be justified?”¹⁷⁴ We saw that for Rawls this apparent inequality (which must include and be underpinned by the state’s monopoly of

¹⁷¹ See Bingham’s third principle of the Rule of Law: “The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation” (Tom Bingham, *The Rule of Law* (Penguin Books 2011) ch 5).

¹⁷² Honneth (1996) (ch 1, n 23) 44.

¹⁷³ This is not, of course, an absolute monopoly. Everyone has the power to exercise reasonable force against others in certain exceptional circumstances: self-defence being the most obvious example.

¹⁷⁴ Buchanan (ch 7, n 49) 698. See 7.2.3.2 above.

the use of force) can in theory be reconciled if certain democratic conditions are met.¹⁷⁵ Where they are, Rawls argues that the coercive powers of the executive can be described as “the power of the public, that is, the power of free and equal citizens as a corporate body.”¹⁷⁶ According to Rawls, “[i]f free and equal persons are to cooperate politically on a basis of mutual respect, we must justify our use of our corporate and coercive political power when [...] essential matters are at stake, in the light of public reason.”¹⁷⁷ Again, it was argued that essential matters must surely include the exercise of the coercive use of force by the state.¹⁷⁸ Certainly the ECtHR seems to have appreciated this in *Ramsahai*.¹⁷⁹ Political legitimacy is achieved, then, when the justification for state power and its exercise appeals to all citizens’ reason, which in turn is free and informed in conditions of freedom of speech and thought.¹⁸⁰

Of course, the interests of members of the public in a death are not uniformly spread. Some may have enhanced interests and be more vulnerable to harm when those interests are misrecognised.

9.5.1.2 The source of the enhanced interests of the deceased’s family and those who identify with the deceased

This differentiation derives from fact that the deceased’s family and any community that identifies with the deceased are particularly vulnerable to the first-order moral harms identified in Chapter 6 where deaths may have been caused or contributed to by wrongdoing.¹⁸¹ Again, this thesis is concerned with the misrecognition and second-order moral harms that can occur where a state fails to adequately respond to a death, rather than any misrecognition that may have caused or contributed to the first-order harms associated with the death itself.¹⁸² But if a state’s response to a death fails to recognise the first-order harms suffered by those with a connection to the deceased, this itself amounts

¹⁷⁵ See 7.2.3.2 above.

¹⁷⁶ Rawls (2001) (ch 7, n 51) 90.

¹⁷⁷ *ibid*, 91.

¹⁷⁸ See 7.2.3.2 above.

¹⁷⁹ *Ramsahai* (ch 1, n 21).

¹⁸⁰ Rawls (2001) (ch 7, n 51) 91.

¹⁸¹ See 6.4.1.2 above.

¹⁸² See 6.4 above.

to an act of misrecognition that can cause second-order moral harm.¹⁸³ It was seen in the previous chapter, that similar concerns are expressed by writers on justice during transitions.¹⁸⁴

It should be recalled that the types of misrecognition that Honneth identifies as having a negative impact on the first level of relations-to-self (self-confidence and trust in the world) are those associated with physical abuse and rape.¹⁸⁵ However, it was argued in Chapter 6 that the victims of misrecognition on this tier should not necessarily be confined to those who are the primary victims of physical abuse.¹⁸⁶ Where a close intersubjective partner is misrecognised with fatal results, the surviving partner may suffer a loss of self-confidence and trust in the world. And where the death is at the hands of a state institution or someone associated with a body as powerful as the state, it is not difficult to imagine a particularly strong feeling that one's reality is at the mercy of others.

In the aftermath of a use-of-force death at the hands of the state, the bare harm that comes with the loss of a loved one will often combine with moral harm arising from a subjective belief or suspicion that the death was caused or contributed to by wrongdoing (or misrecognition) on the part of the state or its agents.¹⁸⁷ This may derive from a personal identification with the deceased as a primary victim of a perceived injustice, as well as a sense of *personally* being the victim of an injustice by being unjustly deprived of a loved one. Aside from those who were personally close to the deceased, this sense of injustice may extend to any group or community that identifies with the deceased, where they believe or suspect the deceased may have suffered this level of misrecognition because she was a member of that group or community. Here the attendant moral harm will again likely derive from an identification with the deceased, but will often also derive from one's identification with a group that one perceives as being unjustly threatened, attacked or discriminated against. These associations are the basis for recognising certain individuals or groups as secondary or tertiary victims of wrongdoing: secondary victims

¹⁸³ See 6.4.2 above.

¹⁸⁴ See 8.3.2.4 above.

¹⁸⁵ Honneth (ch 1, n 23) 132. See 7.3.2.2 above.

¹⁸⁶ Owen (ch 7, n 89) 307. See 7.3.2.2 above.

¹⁸⁷ See 6.4.1.2 above.

being “those family members and friends who grieve the injuries or loss of a loved one”; and tertiary victims being “individual members of a specific community affected by structural violence and systemic injustice”.¹⁸⁸

Until the circumstances of a death are uncovered, it will normally not be possible to ascertain whether these first-order moral harms have an objective foundation. However, whether or not they do, the vulnerability of the family and any group that identifies with the deceased to these harms arguably sustains a need for mechanisms that recognise their special interest.

9.5.1.3 *What must due recognition involve for the general public?*

It is first appropriate to address the general public interest in the circumstances of deaths at the hands of the state that derives from the liberal political paradox of the government of supposedly free and equal individuals by coercively empowered institutions and actors.¹⁸⁹

When applying Rawls’s conception of political legitimacy to the specific context of the coercive use of force by state institutions and actors, it could be argued that the special interest the public have in the way in which this power is exercised requires that: conclusions about the appropriateness of the exercise of the use-of-force need to be ‘publicly justified’; and the scrutiny of use-of-force deaths at the hands of state needs to ‘address citizens’ reason’.¹⁹⁰ It was argued that public justification that addresses citizens’ reason can only truly be achieved if two features are present.¹⁹¹ First, the conclusions of investigations and the reasoning behind them need to be publicly explained. Second, these conclusions must actually *speak to* the reason of those with a substantive interest in the

¹⁸⁸ Haldemann (ch 6, n 16), 680. According to Haldemann “This view of victimhood is fairly standard in the transitional justice literature.” citing: Trudy Govier, *Taking Wrongs Seriously: Acknowledgement, Reconciliation, and the Politics of Sustainable Peace* (Humanity Books, 2006) 30; and the UN Declaration of Basic Principles of justice for Victims of Crime and Abuse of Power, (G.A. Res. 40/34, U.N. Doc. A/Res/40/34/Annex) (Nov 1985). (Haldemann (ch 6, n 16) f/n 21 at p. 680).

¹⁸⁹ The argument here contrasts with Haldemann’s tendency to exclude democracy from the concern of justice as recognition; Haldemann (ch 6, n 16) 678.

¹⁹⁰ See 7.2.3.2 above. Rawls (ch 7, n 51) 186.

¹⁹¹ See 7.2.3.2 above

subject matter of the investigation—which in these circumstances extends as far as the general public. Otherwise, even if the reasons are publicised, they remain accounts of how arbiters “satisfy themselves in light of *their own* convictions”.¹⁹² Mowbray, in particular, warns against “the dangers of introspective investigations” into deaths at the hands of the state.¹⁹³ As a minimum, those with a legitimate interest in the circumstances of a death, or their representatives, should have an opportunity to raise suspicions and concerns, and for these to be addressed.

This account of legitimacy fits with a theory of recognition which requires that in intersubjective interaction, citizens are treated as rational and reasonable beings, and equal partners in the management, control and scrutiny of state power. The fact that the types of inquest examined in this thesis require a jury, acknowledges the need for investigations to speak to the concerns of the general public. It recognises the fact that these investigations touch upon fundamental questions concerning the nature of the relationship between state and citizen. Where the public are not treated as equal partners in the management, control and scrutiny of state power, the legitimacy of the state’s monopoly on the use of force, and its exercise, are brought into question. Only accountability through investigatory processes that address public concerns can ensure that the social exercise of the state’s monopoly on the use of force is an exercise of “public power through the corporate body”¹⁹⁴, rather than an exercise of unaccountable, private power by a privileged group over subalterns. This accords with political proceduralism whereby “basic rights represent a kind of guarantee for the continued existence of the interplay of the democratic public sphere and the society’s political administration.”¹⁹⁵

Recognition here operates on two levels. First, it recognises the public’s right to scrutinise the exercise of the use of force by state institutions or actors where a death has occurred. Second, it recognises the right of the public to the agency that comes with knowledge and, in particular, the right to participate as an informed citizenry in wider debates about the use of force by the state. Government and policing by consent, must

¹⁹² Rawls (ch 7, n 51) 186.

¹⁹³ Mowbray (ch 2, n 90) 442.

¹⁹⁴ Rawls (ch 7, n 51) 90-91.

¹⁹⁵ Honneth (2007) (ch 6, n 32) 219.

involve *informed* consent. If we are to reflect upon and engage with related questions—about how, for example, we recruit, train and oversee our police forces; about the implications of routinely arming the police with tasers or firearms; about the conditions and staffing levels in our prisons; and about the realities of how the criminal justice system manages the vulnerable, the mentally ill and those with drug dependencies—we need to be properly informed about them. It was argued in the conclusion to Chapter 7 that justice as recognition demands that these interests be recognised, and recognition theory suggests that where they are not, the resulting harms—concentrated in the case of the family of the deceased, diluted but multiplied in the case of members of a community, or the wider general public—have significant personal and social implications.

9.5.1.4 What must due recognition involve for those particularly vulnerable to moral harm?

In most normal cases where a family member dies, the circumstances of the death are not such as to lead to mistrust about the reliability of the explanations provided by the institutions concerned. However, where a death has occurred in circumstances involving the coercive use of force by state actors over the deceased, official narratives may be suspected of a bias towards narratives that will favour state-exonerating accounts. The particular circumstances of these types of death mean that normal practices where deaths are investigated and explained, which are generally accepted as reliable in non-state-use-of-force scenarios, cannot be relied upon in the absence of special safeguards to produce similarly trusted narratives about deaths occurring in state-use-of-force scenarios. Again this suggests an objective reason for a positive differentiation in favour of the rights of family members in these types of investigations. The absence of such a positive differentiation denies a legitimate expectation that the special circumstances of the death will be taken into account in the manifestation of a general right to a reliable explanation of how a loved one died.

In the last chapter, it was observed that some writers have used recognition theory as a normative basis for the justice strategies embodied in truth commissions.¹⁹⁶ It was

¹⁹⁶ See 8.3.2.4 above.

cautioned that an important difference between truth commissions and, for example, inquests, is that the very setting up of a truth commission generally constitutes an acknowledgment that significant wrongdoing was inflicted (usually by a previous regime) on many victims. Bearing this in mind, we saw that Frank Haldemann argues that “[d]ue recognition is something we owe the *victims of injustice*, and when it is lacking the victims have moral reasons for feeling insulted or humiliated.”¹⁹⁷ He describes the harm caused by—amongst other things—denying secondary victims a reliable, official and public truth about a death or disappearance, as “not merely a psychological or factual observation” but laying “a moral claim”.¹⁹⁸ An important question arises as to whether this is also true for those who suffer harm that comes from a subjective perception or suspicion that they have been the victim of an injustice? If not, Haldemann’s approach would appear to ignore the needs of anyone other than those immediately identifiable as a victim of wrongdoing. Judith Shklar argued persuasively that it is the moral duty of a just society to attend to subjectively experienced harm wherever it occurs, and that there is a particular moral imperative to do so where claims made by putative victims are against society’s official agents.¹⁹⁹ Given the particular vulnerability of families and communities in the aftermath of use-of-force deaths at the hands of the state, it is arguable that they should be treated as presumed secondary and tertiary victims until the exact circumstances of a death have been established.

Chapter 6 suggested that the holding of an investigation and the creation of an official and public narrative to afford due recognition to the relatives of those who have died at the hands of the state, may not be enough.²⁰⁰ It is perfectly possible for an investigation and resulting narrative to misrecognise interested persons or groups by ignoring or failing to adequately engage with their concerns.²⁰¹ The most effective way of avoiding this is to involve these individuals or groups in the investigatory process, allowing them to raise and

¹⁹⁷ Haldemann (ch 6, n 16) 693. Although, of course, “due recognition” is something that we owe everyone, on account of it being “due”.

¹⁹⁸ *ibid.*

¹⁹⁹ Shklar (1990) (ch 6, n 30) 90. Even if claims turn out to be unfounded on the available evidence. See above at 6.3.2.

²⁰⁰ See 6.4.2.2 above.

²⁰¹ See 4.9 above, the original Hillsborough Disaster inquests and the Widgery Inquiry into Bloody Sunday.

pursue their concerns. But as well as the instrumental good that this does for ensuring that the end narrative (verdict/conclusion) addresses the concerns and suspicions of those with a special interest in the narrative, it is also an act of recognition that marks the “agent’s status as responsible”.²⁰² Their agency is consolidated through the “capacity to raise and defend claims discursively” in a matter which affects them.²⁰³ In this respect, Anderson explains, “the importance of rights in connection with self-respect lies in the fact that rights ensure the real opportunity to exercise the universal capacities constitutive of personhood.”²⁰⁴

The exclusion of those with a legitimate interest in the narrative formation process, and the failure to provide a reliable account of what happened to cause a death, are usually not the only types of misrecognition that can occur in these circumstances. It was argued in Chapter 6 that there is also the real harm that can derive from false, inaccurate and one-sided narratives that can arise in the absence of a reliable, official and public one.²⁰⁵ These narratives can give loaded descriptions of the circumstances that led to the death, or the perceived deviancy of the deceased and/or any group or community with which the deceased is identified: at times using language that plays on racial and other stereotypes.²⁰⁶

A number of illustrative examples were observed in Chapter 6, that appeared to express the sense of injustice that can be experienced by those who are denied, or suffer a delay in reliable, public and official narratives as to how loved ones died, and the sense of *justice* that can come with reliable, official and public narratives.²⁰⁷

9.5.1.5 Recognition on the third tier of Honneth’s tripartite schema²⁰⁸

Finally, it is appropriate to briefly consider the relevance of Honneth’s third level of recognition. Chapter 7 described how this relates to the recognition of individuals’

²⁰² Anderson in Honneth 1996 (ch 1, n 23) p.xic.

²⁰³ *ibid.*

²⁰⁴ *ibid.*

²⁰⁵ See 6.4.2.2 above.

²⁰⁶ Pemberton (2008) (ch 6, n 48); Scraton and Chadwick (1986) (ch 4, n 156); Cohen (1993) (ch 6, n 50); Lawrence (ch 6, n 49).

²⁰⁷ See 6.4.2.3 above.

²⁰⁸ See 7.3.2.2 above.

particular traits and abilities.²⁰⁹ Openness and participatory rights may not only exist in order to bestow their value upon those claiming them. They may also be understood as progressive acts that recognise the positive contribution that different participants can bring to investigatory processes, and the positive role that a properly informed citizenry can play in the public sphere.

The deceased's family can bring a sense of responsibility and determination to ensure that all the facts are brought to light and lessons are learnt. For example, Adrienne Mubenga commented in the aftermath of her husband's death:

I can't stand by and watch this happen to another family. I have to do that for Jimmy.²¹⁰

What this level of determination can achieve in practice was recognised by Dr Silvia Casale in her review of the IPCC investigation into the death of Sean Rigg:

The Review considers that the family are fellow travellers in the search for the truth; the perspective of the family must be recognised as important. The Rigg family were determined to see that a thorough investigation took place. Their considerable and sustained efforts resulted in the emergence of information that might otherwise not have seen the light of day. The Rigg family are to be commended for their tenacity and commitment in this regard."²¹¹

The attitude of the Rigg family can be compared to Casale's conclusions about the attitude of the IPCC investigators:

The interviewers did not pursue failures on the part of the police with sufficient rigour [...]. Most of the interviewers appeared ready to accept the police officers' view of events without following up potential lines of questioning.²¹²

The participation of representatives of the family, community and wider public can be a vital safeguard against processes which can otherwise tend towards limited, internalised

²⁰⁹ See 7.3.2.2 above.

²¹⁰ Matthew Taylor, 'Jimmy Mubenga's Widow: I Can't Watch This Happen to Another Family' *The Guardian* (London, 26 December 2014) <<http://tinyurl.com/qburjtj>> accessed 27 June 2015.

²¹¹ Casale (ch 3, n 89) 12–13.

²¹² *ibid*, 95.

discourses amongst professional classes who may be out of touch with the realities of 'ordinary' people's experiences in the social sphere. In inquests, coroners are either lawyers or doctors (occasionally both). Coroners' officers are typically seconded or retired police officers. The state institutions and the individual state actors who were involved in a death are always well-represented during proceedings. Even where an inquest is held with a jury, and the family of the deceased take an active part, the Charity INQUEST observed that its research into the experiences of families shows that "the common experience in [inquests] involving institutions [...] is that there is a perception of professional closing of ranks and institutional bias from coroners in favour of professionals."²¹³

The deceased's family and their legal representatives, as well as representatives of the wider public, can bring their particular knowledge and experience to an investigation. This can contribute to the pool of forensic skills that a diversity of participants naturally brings: whether when probing (family and jury) or evaluating (jury) evidence. Any group that identifies particularly with the deceased may also bring valuable experience and perspectives of the day-to-day realities of intersubjective interaction with state actors, to which the deceased may have been exposed.

Misrecognition of these qualities can be particularly frustrating and painful for those concerned. Here Haldemann describes the harm that misrecognition on both the second and third level of Honneth's scheme can cause:

Humiliation, as Honneth defines it for us, is a matter of being denied a certain status in communication with others. It evokes painful feelings of being ignored, of not being taken seriously, of being denied a voice, of being refused an ear, of being cut out of the conversation with your fellows. When a person is denied the possibility of ever being recognised as a valuable contributor to some shared project, and when that person is treated as though his presence counts for nothing, it is natural for him to experience this as a serious lack of respect or decency.²¹⁴

²¹³ INQUEST (2002) (ch 3, n 69) 25.

²¹⁴ Haldemann (ch 6, n 16) 691–2.

Chapter 10

Conclusion

This thesis has argued that the prime rationales for openness in inquests into use-of-force deaths at the hands of the state are clearly distinct from those behind traditional conceptions of open justice in criminal and civil justice contexts. As the analysis has shown, openness is a fundamental and intrinsic requirement—rather than merely an instrumental aid—for the fulfilment of the main purposes behind the investigatory processes engaged following deaths at the hands of the police, and in police and prison custody.

The thesis framed a context-specific conception of open justice based on the principle that deaths at the hands of the police, or in police or prison custody will be opened up to public scrutiny. Recognition theory was introduced to the analysis as a way of providing a normative understanding of the significance of openness and the link between openness and justice in these circumstances. In particular, it provides a moral argument for the importance of participatory rights and accountability, where their absence can cause significant harms for those with an interest in a death. As discussed in the previous chapter, recognition theory suggests that the harms that may predictably arise as a result of misrecognition, through inappropriate state responses to a death, may be significant. As Smith argues, the meaning of morality is bound up with recognition's social and institutional expression. The moral duty of the state, therefore, is to help provide "the social infrastructure—in terms of recognition relationships—that enables all individuals [...] to live their lives well."²

The modern procedural manifestation of openness and the purposes behind it are largely sympathetic to what have been argued to be the requirements of justice as recognition in these circumstances.

First, these deaths are normally investigated by either the police and the PPO, or the IPCC. These preliminary investigations are then usually followed by an inquest. We saw in Part 1 that all of the investigating bodies that carry out preliminary investigations commit

¹ Kiss (ch 8, n 15) 73.

² Introduction to O'Neill and Smith (ch 7, n 59) 6.

to at least a degree of openness to the public and to engaging with the family of the deceased. We saw that the degree of such a commitment varies but that generally the information and evidence gathered, and the conclusions drawn, should eventually be shared with either the coroner or an inquiry chairman/panel. Any relevant evidence that has not already been shared with the family by preliminary investigations, should then be shared with them through pre-inquest disclosure. Relevant evidence that bears upon the question of who the deceased was and when, where and by what means and in what circumstance they died, should then also become accessible to the public through the inquest or inquiry.

It was observed that the inquest is the primary way in which the state ensures that the circumstances of a death are opened up to public scrutiny. Inquests are open to the public, relatively broad in scope, and create an official and public narrative (albeit the formal conclusions of which may be very brief) about how the deceased came by their death. The family of the deceased can attend and participate in the inquest. They can make representations to the coroner regarding, for example, lines of inquiry and which witnesses should be called. And they can either personally or through their legal representatives question witnesses. While primarily representing their own interests and concerns, it was argued that they will often effectively represent the interests of any group or community that identifies with the deceased, as well as any concerns that might be held by the wider public.

In inquests into deaths at the hands of the police, or in police or prison custody, the public interest in the inquest will also normally be represented by the presence of a jury—unless a death in custody was clearly by natural causes.³ These members of the public effectively ensure that there is a degree of public scrutiny throughout the hearing of evidence. We also saw that they can put their own questions to witnesses, and that it is their task to reach conclusions as to how the deceased came by her death.

Chapter 5 described how in some cases an inquiry under the IA 2005 will be held instead of an inquest. These are generally less open to the public than inquests, as they do

³ CJA, s 7.

not have juries, and there are significant formal restrictions on the ability of core participants to question witnesses. In addition to these general limits on the openness of inquiries, we also saw that they can go into closed sessions, whereby any or all of the public, press and the family of the deceased can be excluded from the hearing of evidence. Nevertheless, it was argued that the pervasiveness of the procedural obligation under Article 2 ECHR, should ensure that the circumstances of use-of-force deaths at the hands of the state are always substantially open to public scrutiny, and that investigations effectively engage with the family of the deceased. In Chapter 5 it was argued that this appears to have been borne out by the Azelle Rodney Inquiry.

Despite this generally positive view of modern practice in England and Wales there are concerns. In particular, the distinctive normative understanding that recognition theory provides us, in terms of the role of openness in securing non-retributive and non-compensatory justice forms, has potentially transformative implications for investigations in these circumstances. The application of recognition theory prompts questions about whether some of the interests outlined in Chapter 6 are adequately recognised given the stakes at play and the harms that can be associated with misrecognition.

The implications of this analysis for most inquests into use-of-force deaths, may be subtle: for example, it may strengthen the argument for a rebalancing of priorities in decisions on public funding in favour of families always having their legal representation publicly funded in these types of inquest; it may motivate renewed efforts to tackle the delays that plague these types of inquests; or it may prompt more consistent best practice in terms of making transcripts and evidence available to the public on the internet as was done in the Azelle Rodney Inquiry and the Mark Duggan inquest. The normative understanding of the significance of openness in these circumstances may also argue for a change in the law so that inquest proceedings in these circumstances can be broadcast live.⁴ But the normative understanding of openness in the context provided above may also justify more radical reform. For example, taking a cue from judicial review proceedings, it may be appropriate to allow civil society organisations such as community

⁴ The audio of the Azelle Rodney Inquiry was broadcast live over the internet.

organisations or organisations like the Howard League, the Equality and Human Rights Commission or the Mental Health Foundation, to intervene in certain inquests. They may be able to raise concerns on behalf of particular groups or communities who may identify with the deceased. They will also have particular knowledge of patterns of risk, institutional failings and other concerns in their areas, which a coroner, and certainly an unrepresented family, may lack. This may be particularly important where the deceased's family are unable or unwilling to participate in an inquest.

Finally, and perhaps most importantly in the current climate, the implications of this analysis may be most significant when the case for openness needs to be justified against encroaching interests that push for a deviation from the normal procedures of openness as embodied in modern inquests. In particular, decisions about the use of exceptional procedures that close down openness—for example, public interest immunity, and the replacement of certain inquests with inquiries—may benefit from a rebalancing of priorities that pays better attention to the potential consequences of misrecognition through closure in these circumstances.

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