

# DEATH — IN — CUSTODY

Inquests, Family Participation and State Accountability

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JO EASTON



# **Death in Custody**

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# **Death in Custody: Inquests, Family Participation and State Accountability**

**JO EASTON**



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INVESTOR IN PEOPLE

I dedicate this book to my Gran, who was always incredibly proud of everything I did; and although she is not here to see me get to the end of this long process, I know she never doubted I would get here.

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## Preface

This book considers the participation of bereaved families following a death in custody in the inquest system, which is often the only independent and open process which looks into the causes and wider circumstances of a death. It looks at the legal frameworks in place governing participation, which is set out in the first main part of this book. Relevant theories of justice, participation, procedural fairness and grief theory are all referenced throughout this book. Interviews were carried out with people with personal experience of complex inquests, grouped as coroners, State officials, representatives of the two relevant investigative bodies, bereaved family members and lawyers who represent families. Analysis of the interviews has been used to create a narrative covering three main parts of this book: firstly, how participation benefits families themselves, secondly, how participation of families benefits the wider system and, thirdly, what important aspects are required to achieve effective participation for families. Each part brings together the evidence collected from the interviews and links them to the legal and theoretical frameworks; identifying key benefits of effective family participation and recommendations on how to achieve said benefits.

Family participation can provide families with redress, allows them to represent the deceased as well as being an important part of their grief process. But it is also important in relation to ensuring a fair process, which subsequently impacts positively on accountability and legitimacy. Family participation can improve accountability by maximising the right outcome (via scrutiny) which identifies any failures, they can bring balance and information to the process and they can assist in dissemination of outcomes (preventing future deaths) via media as well as bring Judicial Reviews which reform custodial institutions in terms of preventing deaths in custody and the inquest system itself. Fair and effective participation can impact on perceptions of how transparent, independent and fair the process is – increasing trust, confidence and therefore legitimacy of the system (and sometimes State parties). Fair participation depends upon families being provided with advice and support about the investigation process and their rights, as well as funding for specialist legal representation. Decision-makers who can influence a families' participation should understand the importance of treating families with respect, and openly guaranteeing their rights.

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To my mum, thank you for everything but especially for reading an early draft and telling me it was perfect, when it was far from it!

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# Introduction

This book looks at the participation of bereaved families in the investigations following a death in custody. The focus is the inquest system, as this is the primary route by which deaths in custody are investigated, and where there is an established legal right for families to be able to participate. However, in practice, bereaved families are either finding it is very challenging to be able to participate or (where they are able to do so) reporting negative perceptions of whether they found the process fair. This leads to families having little confidence or trust in the process, as well as in State agencies or institutions involved. The author argues that decision-makers are failing to take a process value approach; therefore, they do not sufficiently enable participation by limiting families' access to information, support and respectful treatment. This impacts negatively on the perceived legitimacy of the process, and as the process is the method by which State failings are identified, the legitimacy of the process impacts on the overall legitimacy of the State agencies.

Effective and fair participation for bereaved families can benefit families themselves, as well as improving the accountability of State actions relating to detaining and restraining individuals. Family participation can improve accountability in two ways: firstly by maximising the chance that a fair outcome will be reached, and secondly by increasing the legitimacy of the process. The author believes if decision-makers better understood the wide-ranging benefits provided by family participation, they will be encouraged to take a process value approach, and support families to participate. This book provides evidence showing all the benefits that come from family participation being optimised, and also sets out factors that should be in place to help families participate – including recommendations for different stakeholders. This book is led by the experiences of those interviewed, so focuses on those aspects deemed most relevant or raised most often during the empirical research. The author identifies relevant issues that were not necessarily introduced through the interviews, and uses them to provide context where appropriate. However the aim in this book is to empower those with lived experience, especially those family members who gave their time, and prioritise their voice to influence change.

Human rights are universal and inalienable; they are linked to the inherent dignity of all human beings, regardless of who they are or where they live. And yet we can see that in practice not everyone has equal access to the legal protections



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that internationally agreed documents set out. You only have to look at countries where political prisoners are held without charge or certain groups are disenfranchised and unable to vote. If they are to be truly universal, people must be able to access human rights. But what if they are not able to access them? This is where one of the most important legal rights comes into play – the right to redress if you suffer a human rights violation. Access to redress not only tries to set right the impact of a violation, or give compensation where this is not possible, but it is also a way to hold State's responsible for violations to account.

Where a violation has resulted in the death of the individual, no system can offer redress to that individual, so it requires looking to the bereaved family and seeing what redress means to them. It can be finding out the truth behind the death, getting compensation or seeing anyone responsible for the death punished. But is that sufficient? If human rights are to be more than merely aspirations, if they are to provide tangible protections, then redress must involve accountability. Not just for an individual violation but to force structural change to prevent ongoing systemic violations. There must be a mechanism for forcing change in State practice to prevent further violations.

Accountability is also key to maintaining public confidence in the visibility and accessibility of human rights. The public must see any State violations identified and addressed in order to be able to trust that their rights are protected. So where a death has occurred as a result of State failings, redress requires a process by which those failings are addressed and future violations prevented. This book looks at the role of the inquest system to provide redress for bereaved families following a death in custody and whether the current law, policy and practice mean access to redress for families is more than just aspirational.

The inquest system is the default process where deaths occurring in State custody are investigated to identify any possible failings. It is vital that a democratic society ensures a system that can hold the State to account for any failings that may have resulted in a death in custody. The inquest system is a very niche area of law in England and Wales that relies on archaic common law processes to devolve Article 2, right to life requirements. Fair participation of victims in a process which is scrutinising possible violations of the right to life goes beyond ensuring the right for the victims to participate but also impacts on the legitimacy of the process. However, numerous case studies, media, enquiries and the organisation INQUEST have all shown that bereaved families are struggling to participate in inquests following deaths in custody. Where there are legal rights, they are not fully implemented; policy decisions undermine participation and there are gaps in both law and policy that mean family participation is restricted. To ensure participation in practice, all decision-makers within a system that leaves large scope for discretion should understand the benefits of family participation, so they can fully support it.

A key part of this book is looking at the legitimacy of the system, which is under siege post Hillsborough. Important lessons for enquiries into tragedies like Grenfell can also be learnt, as the same legal and policy frameworks are used for such enquiries and participation of bereaved families will be similarly restricted. This research also provides insight into the wider concept of access to justice via

participation in a process, not just in relation to possible human rights violations but any proceeding where rights are involved. This book is based on empirical research, used to create the author's narrative about why participation for families is so important, and how to achieve it.

The first part includes two chapters describing the overall human rights legal framework as well as the domestic law governing inquests following a death in custody. This part covers the positive legal protections currently in place in relation to families' participating in such inquests, as well as gaps where families cannot rely on the law to ensure participation. Chapter 1 sets out the legal framework governing Article 2 investigations into cases where the State might be held culpable for an individual's death, which covers deaths in custody where the State had control of an individual. It covers the evolution of Article 2, developed through case law, setting out distinct obligations on States to ensure any investigations are compliant. This chapter looks at European as well as domestic (UK) law about what is required for any investigation into a death in custody to be compliant with human rights requirements. Chapter 2 provides a brief summary of the inquest system as a unique process that is now the primary way that Article 2 obligations involving deaths in custody are devolved in England and Wales. The author explains what current legal protections are in place in relation to ensuring families are able to participate in the inquest system, as well as setting out potential gaps in the law where protections are not in place. This chapter looks at the specific domestic legal framework relating to the inquest system, especially for deaths that occur in custody. It also considers relevant legal requirements which relate to the purpose of an inquest, the role of bereaved families and specific rights that exist to allow their effective participation.

The next part introduces the methodology used by the author to carry out the empirical research which forms the basis of this book. Detailed, qualitative interviews were carried out with various people who all had experience of the inquest system following a death in custody. The author followed an Interpretative Phenomenological Analysis approach, which is a relatively new approach for this type of legal research, so the methodology is set out in some detail.

The next part of this book involves three separate chapters which all relate to how the participation of families in an inquest following a death in custody can benefit the families themselves. It includes reference to how participation protects the rights of families' as well as allowing them access to certain forms of redress. Chapter 4 looks at what are considered as the key legitimate interests for families who participate in an inquest. Domestic law allows family participation in order to protect their legitimate interests which are defined as finding out the truth, identification of State culpability and knowing further deaths will be prevented.<sup>1</sup> This chapter looks at theoretical frameworks setting out the overall right for affected individuals to participate in a process investigating potential human rights violations, and what that should look like in practice. The empirical

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<sup>1</sup>*R (Joanna Letts) v Lord Chancellor* (2015) EWHC 402 (Admin) (England and Wales High Court (Administrative Court)).

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evidence is used to create a narrative setting out how this relates to families' participating in an inquest, including what interviewees considered relevant aspects of the right to participate and redress. Chapter 5 introduces other potential benefits for families' participating in the inquest identified through empirical evidence, focusing on the impact on an individuals' bereavement. The research indicates that participants felt participation could have a positive impact on families' grief process and that families represented the deceased through the process. This chapter introduces complicated grief theory, then uses empirical evidence to show how participating in the inquest process can impact on a families' grief process. Positive aspects of participating include learning the truth about a death, and being able to ensure the voice of the deceased is heard through an inquest. Chapter 6 brings the empirical evidence into the wider context with the author identifying how the existing legal framework allows certain benefits to families to be considered in relation to participation as well as benefits that are not currently considered. It not only underlines how the empirical research reinforced the existing definition of families' legitimate interests but also highlights that additional aspects such as the impact of participating on the grief process are not reflected in the law. It concludes this part by explaining how the legitimate interests as set out in law address some benefits to family participation but coroners and other decision-makers need to better understand other benefits to families if they are able to participate in the inquest.

The next part includes three separate chapters which all relate to how family participation can benefit the wider principles of accountability following deaths in custody by ensuring State agents or agencies are held to account for any actions that might have either caused or not prevented a death where there was an established duty of care on the State. Chapter 7 introduces the instrumental effect that family participation can have on the outcome of an inquest. The author uses the empirical evidence to explain how families' involvement can ensure a fair and accurate outcome. The key themes identified are families' participation could have a positive impact on the likelihood of a fair outcome and disseminating those outcomes; and ensuring the process was procedurally fair. Families can optimise a fair and accurate outcome by scrutinising the evidence, bringing balance to the process and providing information that can be useful in understanding what happened. They also instigate change in a number of ways: examples are given of how families have directly impacted on improving the effectiveness of the inquest process in holding the State to account following deaths in custody. Chapter 8 looks at the importance of the inquest system as a process that holds the State to account being perceived as legitimate and therefore retaining the confidence of the public. Procedural Justice Theory is introduced as it identifies how fair and effective participation impacts on the legitimacy of certain processes. The empirical evidence is used to show that this theory translates to the inquest process. It shows that effective and fair participation can lead to families perceiving the process as fair, independent and transparent which increases their trust and confidence in the outcome; all of which increase perceptions about the legitimacy of the system. Chapter 9 introduces the author's views on how family participation benefits accountability: referencing how the empirical evidence

affirms established theories. It sets out how ensuring families' participation can have an instrumental benefit to both the outcome and the wider legitimacy of the system. Accountability through ensuring State agents are not above the law and that their use of powers to restrain or detain individuals are scrutinised is a vital part of our democracy. Increasing the legitimacy of the system that carries out that scrutiny is therefore incredibly important. This chapter also identifies gaps in accountability that are not addressed through family participation, linked to scrutiny of change following inquests and public dissemination of outcomes.

The final part looks at the practical implications of this research, focusing on how the benefits set out in the previous two parts of this book can be achieved. It includes two chapters that set out the challenges that families' face in relation to being able to participate fairly and effectively, relying on the evidence gathered through the interviews, and identify proposed solutions. The final conclusion summarises the findings of the research. Chapter 10 sets out the challenges identified through the empirical evidence in relation to families participating. Some of the main issues include having restricted access to the process in a practical sense, with little information about the process and difficulties physically attending a hearing; limitations on families being able to influence the outcome; examples where families are not given access to the evidence in a timely manner, so they cannot scrutinise it; and lastly the importance of being represented by a lawyer with the necessary specialist knowledge. Chapter 11 brings together all the empirical research to identify all the benefits linked to ensuring the participation of bereaved families in an inquest following a death in custody, as well as setting out recommendations proposing how this can be achieved in practice.

The conclusion summarises the research, and puts it into the context of previous work, while also giving the authors hopes on how lessons can be learnt to improve the fair and effective participation of families following a death in custody, to the benefit of the families themselves, as well as increasing the legitimacy of the system, State actors and helping to hold those actors to account.

It is important to note that interviews were carried out before new legislation was passed in the Coroners and Justice Act 2009: it is clearly stated in the book where this has resulted in a relevant change in law, which might have changed families' experiences.<sup>2</sup> However, although the interviews reflect experiences before this change, most of the issues reflect challenges in accessing rights already set out in law, so this new law alone will not have changed this. The Act did bring in a Chief Coroner, and it is likely that this role has improved the system and provided greater consistency in practice. Similarly, the Independent Police Complaints Commission (IPCC) was replaced by the Independent Office for Police Conduct in 2018, and it is as yet too soon to tell whether problems identified by this research will be resolved by this change.

In this book, the phrase Article 2 inquest is used to describe proceedings following deaths in custody where enhanced procedural duties are engaged. This is a phrase used to distinguish inquests where additional requirements (such as

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<sup>2</sup>Coroners and Justice Act 2009.

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juries being present) are in place from the majority of more straightforward inquests. The descriptor is used to simplify the text but should not be taken literally to infer specific inquests are Article 2 compliant. This book discusses these enhanced or complex inquests; but it should be remembered that the distinction between 'straightforward' and 'complex' inquests is not always clear. Some inquests that do not engage Article 2 can be very complex in nature and vice versa. And similarly, it is not always clear when Article 2 is engaged, the decision can be complicated and may even change during the process. Enhanced inquests may be held even where Article 2 is not engaged, if the coroner deems it appropriate. Use of this term does not make any judgement on whether any inquests that involve more enhanced requirements are actually compliant with Article 2 for any individual case. The issue of whether any specific inquests are Article 2 compliant is complex, partly as compliance with Article 2 can involve other processes, outside of an inquest, and partly because compliance with Article 2 must be assessed against the individual circumstances of a case. So any judgement about whether a death in custody has been investigated in a manner that is compliant with Article 2 must consider all aspects of investigation and State actions. The author uses a definition of deaths in custody that includes those who have died while being detained by the State (such as in custody, immigration centres or secure mental health institutions) as well as deaths that take place while the individual is in contact with police, whether or not they have been arrested or that happen shortly after that contact.

# Part 1

## The Law

The first part of this book sets out the relevant law in respect of both the overarching European Court of Human Rights (ECtHR) and domestic legislation for England and Wales. It includes two chapters describing the overall human rights legal framework as well as the domestic law governing inquests following a death in custody. This part sets out the positive legal protections currently in place in relation to families participating in such inquests, as well as gaps where families cannot rely on the law to ensure participation.

Article 2(1) of the European Convention on Human Rights (ECHR) emphasises that a person's right to life *shall be protected by law*. In 1978, the ECtHR found that Article 2 of the ECHR not only prohibits the State from taking life but also places on it a positive duty to protect life.<sup>1</sup> This protective aspect to the right to life has been re-affirmed and expanded upon through numerous decisions of the ECtHR: elucidating on when and what steps must be taken by a State to protect life. In 1995, the ECtHR found in *McCann* that in order to protect life, the State is required to ensure there is a proper investigation into any deaths caused by the use of force by State agents.<sup>2</sup> Any investigation must be 'independent, prompt, contain a sufficient element of public scrutiny, and be capable of leading to a determination of whether State agents are liable'.<sup>3</sup> The investigation must consider not just the actions of agents of the State but also the planning and organisation of the operation governing those actions. European case law has since clarified that situations where a death may have resulted due to a failure on behalf of the State to protect life should also be investigated; this includes deaths in State custody. The ECtHR has also laid out certain minimum requirements which are necessary for an investigation to be seen as compliant with Article 2; including the fact that there must be an opportunity for a bereaved family to participate in the process.

In domestic law, the inquest system is the process which investigates deaths in custody, unless criminal proceedings have fully looked into all relevant factors. Therefore an inquest is the legal process that ensures Article 2 requirements are met. The inquest system is an ancient system; the law which governs the system has evolved over hundreds of years, but in relation to deaths in custody, it is clear

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<sup>1</sup>*Association X v United Kingdom* (1978) DR 14 (European Commission (Plenary)).

<sup>2</sup>*McCann v United Kingdom* (1996) 21 EHRR 97 (European Court of Human Rights).

<sup>3</sup>*McCann v United Kingdom* (1996) 21 EHRR 97 (European Court of Human Rights), para 201.

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that domestic protections should meet ECtHR standards. It is therefore necessary to set out both ECtHR and domestic law, as well as highlight any diversions between the different jurisdictions that might illustrate potential challenges to ensuring compliance with Article 2 requirements.

Chapter 1 sets out how Article 2 has evolved from protecting life to requiring an investigation in certain situations where there is possible State involvement either in causing a death or failing to take adequate steps to protect life. Chapter 2 then looks at the specific domestic legal framework relating to the inquest system, especially for deaths that occur in custody. It also considers relevant legal requirements which relate to the purpose of an inquest, the role of bereaved families and specific rights that exist to allow their effective participation. But before that, the development of both European and domestic law in relation to Article 2 and the legal requirements around investigations into deaths in custody are discussed in the next chapter.