



**Does the state really care about your rights when it kills you?**

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*"The worst form of injustice is pretended justice"*  
Plato

Let me ask you how you felt, when you saw the footage of a black man begging for his life as a white police officer pressed his knee into his neck and slowly squeezed the life out of him.

Did you shed tears?

How did you feel when you heard him crying out for his 'dead momma'?

Yes, George Floyd was killed by a state agent who looked down on him despite the protests from bystanders. All caught on camera.

Without a care in the world.

This officer simply didn't care when he squeezed the life out of George Floyd.

Rightminded people probably felt the same way as I did namely sick to my stomach.

In fact, I have not watched all the footage in George Floyd's death. I cannot bring myself to watch it all.

Because I see death every day in my day job as a barrister.

I deal with horrible tragic preventable deaths. This leads me to ask the question.

Does the state actually care when it kills us?

When a person is killed by the state, their loved ones and the wider public naturally want to know the truth.

By whom were they killed?

Why were they killed?

Was it justified?

Whose fault was it?

What can be done to keep it from happening to someone else?

This matters for many reasons. It matters on an emotional level, because anyone who has lost a loved one, a friend or a member of their community wants to know why. But it also matters on a practical level. If the death was the fault of state agents, we might expect the state to prosecute them, or at least to take disciplinary action against them.

We might expect the family of the deceased to be compensated. And if the death was the result of a systemic failure by the state, we might expect the systems that contributed to the death to be changed.

We might expect accountability not just for the state agents directly responsible for a needless death, but for the people in power whose decisions created the environment in which needless deaths occur.

If deaths are not investigated, then the authorities cannot be held to account, and we do not live in a democratic society.

And if deaths are not investigated, we are not a society that values human life. If we want to know what that looks like, we only need to look to the worst abuses of repressive regimes, from the “disappearances” under Argentina’s military dictatorship, investigative journalists on the streets of Europe being murdered, opposition leaders who are poisoned in Russia, to the murder and dismembering of Jamal Khashoggi in the Saudi Embassy in Turkey.

It should be obvious why the investigation of deaths is central to a democratic and free political system.

So, with all this in mind, what would we expect a caring state, a state that valued human life, to do when a state agent kills someone?

- First, we would expect it to carry out a timely investigation. We would expect the death to be investigated without delay. So that evidence is not lost, memories do not fade. Families can have answers without having to wait for years, with the pain of not knowing what happened and why their loved one died.
- Second, we would expect it to carry out a full and proper investigation. We would expect it to question witnesses, examine documents and collect evidence. We would expect it to pursue all reasonable lines of enquiry and leave no stone unturned. We would expect it to find out who is responsible for the killing, whether the killing was justified or unjustified, and what could and should have been done differently.
- Third, we would expect equality of arms. We would expect the family of the deceased to be represented by lawyers, who are independent of the state, competent and properly funded. We would expect those lawyers to have fair and equal access to the documents, materials and the evidence and to have an opportunity to question witnesses and make submissions.
- Fourth, we would expect the state to prevent collaboration among its agents. We would not expect that state agents involved in a death to collude with each other to as it were get their stories straight.
- Fifth, we would expect the investigation to be carried out by someone who is completely independent from the state agency that caused the death. We would expect them to question witnesses separately and try to ensure that they can’t collaborate to tell a false story. We would expect them to actively look for documents, carry out proper forensic testing, search computer phone/records, video footage and root out other corroborating evidence rather than simply accepting what the state agents say.

- Sixth, we would expect the state to provide adequate disclosure. We would expect all state agencies involved in the death to disclose the relevant evidence in their possession and to search their records. We would not expect them to hold back evidence that might paint them in a bad light.
- Seventh, we would expect openness and honesty. We would expect state agencies and especially public bodies, and those at the top of organisations to tell the truth, and to volunteer relevant information.
- Eighth, we would expect the state not to hide. We would expect the state agents responsible for the death to take responsibility and face the consequences. We would not expect them to seek anonymity, unless it was truly necessary to protect their safety or that of their family.
- Ninth, we would expect fair treatment. We would expect the state to seek to eradicate discrimination against marginalised groups. If there is a disproportionate pattern of killings of members of a marginalised group, we would expect the state to investigate it, to take responsibility, and to take steps to change it.
- Tenth, we would expect that the state would treat the dead with respect, and not seek to demonise the deceased, or seek to distract the fact that there may have been a state killing with character assassination of the deceased, his family, his friends, or his community.

So what in fact would the UK State say in its defence?

They would undoubtedly answer the question in the affirmative and say that the State does indeed care.

If the State were here defending itself, it would say that the UK is not at all like the repressive regimes I have mentioned above.

Why?

The state would say that we do investigate sudden deaths even where our agents are responsible. We ensure that there is transparency.

That there is no cover up.

We appoint an independent judicial officer who is tasked with looking at such deaths.

It would argue we have one of the best systems of death investigations in the world.

We provide legal aid for families where there are state related killings.

We provide disclosure and documents.

We here in the UK show we care because will have several independent investigations either from the Independent Office of Police Conduct, the Prison and Probation Ombudsman, Hospital investigations, Serious Untoward incident reports and also an independent Coroner.

We have an independent Crown Prosecution Service.

Good grief Leslie we even provide difficult lawyers like you who give our state agents and lawyers a hard time.

So yes, the State would argue that the title of my lecture is unnecessarily provocative and unfair. For the reality is it would argue is that we are living in a caring state and one that shines a spotlight on the sudden and unexpected death of its citizens.

But what is the reality?

Let's look at what our own state actually does.

First, we need some context. State violence affects everyone, because everyone is subject to the state's monopoly on violence. But it does not affect everyone equally.

According to figures compiled this year by the BBC, of the 164 people who died in or following police custody in England and Wales in the past 10 years, 8% were Black. Black people are only 3% of the population.

A Black person is twice as likely as a white person to die in police custody.

The disparities don't end there. Recent figures show that between April 2018 and March 2019, there were 38 stop and searches for every 1,000 Black people, compared with 4 stop and searches for every 1,000 White people.

The Lammy Review in 2017, which analysed the disproportionate treatment of Black and Minority Ethnic people in the criminal justice system, found that Black and Minority Ethnic defendants were 240% more likely to be given a prison sentence for a drug offence than white defendants. Black people make up 12% of prisoners and 21% of children in custody.

As the Black poet Langston Hughes said

*“That justice is a blind goddess  
Is a thing to which we blacks are wise  
Her bandage hides two festering sores  
That once were perhaps her eyes”*

Another key factor is mental health.

Many people having a mental health crisis have been killed by the police officers who were meant to be helping them – I mention Ibrahim Sey, Sean Rigg, Olaseni Lewis, Thomas Orchard, Mzee Mohammed and Kevin Clarke as high-profile examples.

Avoidable deaths of mentally ill people also happen on psychiatric wards and in prisons. A Guardian investigation in 2015 found that between 2010 and 2013 there had been 662 deaths of mentally ill detainees that could have been avoided.

More broadly, we know that police, courts and prisons take a disproportionate toll on the most marginalised people in society; homeless people, sex workers, irregular migrants, trafficking survivors, people with addictions and mental illnesses, people who grew up in foster care.

We can also see that the immigration system comes with its own death toll – from suicides in immigration detention centres, to the death of Jimmy Mubenga at the hands of guards while being deported and, further back, the death of Joy Gardner.

And we don't even know how many people have been killed after being wrongly refused asylum and returned to countries where their lives are at risk. We know that in previous years large numbers of asylum claims were processed on the former “Detained Fast Track” which has since been found to

have been systematically unfair and unjust, and that some people were removed following Detained Fast Track decisions. We don't know how many of them have died since removal.

But state killings aren't just about direct state violence. The state also kills people in other ways. What about when the state stops a person's benefits and they die alone, cold and hungry in an unheated flat?

In January of this year Errol Graham was found dead from starvation in his flat when bailiffs came to evict him for non-payment of rent. He weighed just four and a half stone or 29 kilograms.

What about those who die of poverty because they aren't allowed to work or claim benefits, like Mercy Baguma, an asylum-seeking woman recently found dead in her Glasgow home? Or Dexter Bristol, a Windrush victim who lost his job and his access to benefits after officials questioned his immigration status? What about when a homeless person freezes to death in the street, because successive governments since 1979 have sold off the majority of council housing and left people at the mercy of an unregulated housing market?

What about when savage cuts to mental health services lead to a person's preventable suicide? What about when social housing tenants burn to death in their homes? Then there are state related killings because of poor decisions which relating to housing refurbishment, lack of repairs, allowing families to live in damp mouldy flats.

The proportion of children and vulnerable adults with respiratory diseases such as asthma in premises which are full of condensation, black mould and damp and the differential mortality rates for children in poor housing tells its own story.

All of these are the result of political decisions. They are the result of decisions by the people in power, decisions about who matters and who doesn't.

So, what does the state actually do when it kills someone? How does it investigate the death?

800 years ago, the Magna Carta was signed. Which effectively said everyone is equal before the law.

The question is, is everyone treated equally before the law in death?

In England and Wales, since the early Middle Ages, (12th Century) coroners have been responsible for investigating suspicious deaths. They are the holders of the oldest judicial office in England.

We are going to look at the history and role of the coroner in Lecture 2. But I will say a few things about coroners today just to set the scene.

The coronial system has developed piecemeal over centuries. It was reformed significantly by the Coroners and Justice Act 2009, but it is still a very localised system. Coroners are funded by local authorities and operate from local courts, and we do not have a national coronial service as such.

The resources and facilities available to coroners are very variable across the country. Coroners are judges, and in principle have judicial independence, but inquests are very different from other court proceedings.

We will look at how inquests work in Lecture 2. An inquest is supposedly an inquisitorial, non-adversarial process – but the reality is often very different, as I will explore later.

Until relatively recently, the role of the coroner, or the coroner's jury where there was one, was a limited one. Their task was to say who the deceased was and how, when and where the deceased came by their death. In the 1995 case of

*Ex parte Jamieson*, the Court of Appeal took a narrow view of the task of the coroner or jury. They were to decide “by what means” the deceased came by their death, but not “in what circumstances”. It was not their function to apportion guilt or attribute blame. Their verdict was to be a brief, neutral, factual statement. So, their role was not really to hold the state to account.

But the picture was changed by the European Convention on Human Rights. In 2000, the Human Rights Act 1998 came into force, making the European Convention on Human Rights part of our domestic law. One of the rights it protects is Article 2, the right to life.

Article 2, as interpreted by the European Court, is not simply a right not to be killed. It also imposes positive obligations on the state. There are three main positive obligations:

- The first is the “systems duty”, the duty to have an adequate system to protect life, including criminal law provisions that prohibit and punish violent offences.
- The second is the “operational duty”. In some circumstances, where the state knows or ought to know that there is a “real and immediate risk” to someone's life, it may have a duty to take reasonable measures to protect them. This applies, for instance, where the state knows or ought to know that someone is at risk from the criminal acts of a third party. In some circumstances it also requires the state to take reasonable measures to prevent someone committing suicide, for instance if they are in prison or detention.
- The third, and the one which will be most important for this lecture series, is the “investigative duty”. This applies where a person dies at the hands of the state, or in other circumstances that engage the state's responsibility.

In the 2001 case of *Jordan v United Kingdom*, a case involving a fatal police shooting in Northern Ireland, the European Court found the UK to be in breach of the investigative duty. It explained the basic elements of the investigation that are required by Article 2. It said at [105]-[107]:

*“105. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They 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.*

*106. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.*

*107. The investigation must also be effective in the sense that it is 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. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia 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.”*

You can see that this standard incorporates many of the points I made at the outset of this lecture about what we would expect a caring state to do when someone dies at the hands of state agents.

On the facts, it found that an inquest in Northern Ireland – where the task of the coroner was even more restricted than in England and Wales – did not satisfy this obligation.

In 2004, the House of Lords, in the case of Middleton, accepted that in order to comply with Article 2, the role of coroners where a person had died at the hands of the state needed to change. They said that compliance with the investigative obligation “*must rank among the highest priorities of a modern democratic state governed by the rule of law*”. Middleton involved a death in prison. The House of Lords spoke of “*the need for an investigative regime which will not only expose any past violation of the state's substantive obligations already referred to but also, within the bounds of what is practicable, promote measures to prevent or minimise the risk of future violations. The death of any person involuntarily in the custody of the state, otherwise than from natural causes, can never be other than a ground for concern.*”

Today, therefore, an “Article 2 inquest” is more expansive than a normal inquest and is the primary means by which the state carries out its investigative obligation.

So, when does this obligation apply? It obviously applies where a person is killed by police, prison officers or other agents of the state. But it isn't limited to those cases. It applies, for instance, to cases where a person commits suicide while in custody. A number of cases have established both that the state has an operational duty to take reasonable steps to prevent people committing suicide while in custody, and that, if a person does commit suicide in custody, the investigative duty applies.

The Article 2 investigative duty can also apply more widely to deaths for which the state bears responsibility in a broader sense. In *Oneryildiz v Turkey* the European Court found a breach of Article 2 in respect of a disaster caused by a poorly maintained municipal rubbish dump, and in *Budayeva v Russia* it found a breach of Article 2 in respect of failure to protect people from a natural disaster.

So, too, in the Grenfell Tower inquiry it has been accepted that the Article 2 investigative obligation is engaged.

This is an area where we need to push the boundaries and press the state to take responsibility for killings which aren't directly the result of state violence, but which are caused directly or indirectly by state policy.

Over the course of this lecture series, we will be taking an in-depth look at how inquests work - their successes and their failures.

Throughout this lecture series, I want you to keep in mind what I said above about how we would expect a caring state to behave when agents of the state kill someone. I want you to keep those things in mind when we are talking about how our state actually behaves.

In theory, an inquest is an inquisitorial, non-adversarial process in which there are no “parties” as such. But in practice, Article 2 inquests are often battlegrounds in which state agencies, with their own publicly funded legal teams, fight tooth and nail to defend themselves.

In that regard, one of the long-running battles has been over the right of the bereaved family members to participate meaningfully and fully in the inquest.

The European Court has accepted in a string of cases that the next of kin of the deceased must have the right to participate in the inquest. But it has been a long and difficult battle.

Many of the victories have been down to the hard work of INQUEST, an organisation which works with the bereaved families of those who have died at the hands of the state.

In England, our legal aid system does not automatically pay for bereaved families to be represented at inquests. In some circumstances the Article 2 investigative obligation requires legal aid to be granted for the bereaved family to participate in an Article 2 inquest.

But there are major barriers – a family has to make an application for what is known as “exceptional case funding” and it is normally means-tested. It is a difficult process, and INQUEST has been campaigning for automatic legal aid for bereaved families in state-related deaths.

We will be talking in Lecture 3 about the inequality of arms that bereaved families face.

In lecture 4, I shall explore police violence. This lecture is entitled the police need to exercise more restraint when they restrain. We have seen a number of horrific cases in the states where in the main black people are killed at the hands of the police. This received worldwide attention this summer with the murder of George Floyd under a policeman’s knee.

But we have our own cases in the UK with people saying they can’t breathe and dying under restraint.

It may not have escaped your attention that one case is currently under way as I speak in London, the case of Kevin Clarke who was captured on body cam footage, saying these words, and he was restrained by police officers. He died shortly afterwards. This case is currently under consideration, so I won’t make any further comment on it.

What lessons can the police learn from these cases? How can we prevent these deaths? I will look at in detail.

Another long-running battle has been about secrecy. For instance, should the identities and faces of the police officers involved in a killing be shielded from the family and the wider public?

Should the state be allowed to defend its actions by relying on sensitive documents that it cannot or will not disclose to the family?

When should an inquest happen behind closed doors?

How should the need to safeguard sensitive information be balanced against the right of the family and the public to know the truth. We will be addressing this issue in Lecture 6.

How effective is the inquest process in holding the state to account? In this regard, we need to look not just at the inquest itself, but at what happens after the inquest.

According to INQUEST, there have been 1,755 deaths in or following police custody since 1990. In that time, no police officers have been convicted of murder or manslaughter in relation to deaths in police custody, although there have been 10 unsuccessful prosecutions.

In fact, I am not aware of any successful prosecution of a police officer for homicide in this context. Even when two police officers were convicted in 1969 for a brutal and degrading campaign of racist abuse against David Oluwale, a homeless man, they were acquitted of manslaughter and convicted only of assault.

While there have been a number of unlawful killing verdicts at inquests since 1990 – some of them in cases in which I have been involved – none of them has resulted in a successful prosecution for murder or manslaughter.

So, the long and the short of it is that even when an inquest returns a verdict of unlawful killing, the police officers involved are rarely held to account.

I accept that the Article 2 obligation is an obligation of means rather than result. But can we seriously believe that none of those 1,755 police killings since 1990 constituted murder or manslaughter? Can we really accept that the system is working?

Now we need to return to race, class and disability. As I outlined earlier, state violence affects everyone, but it does not affect everyone equally. Black people and people of colour; poor people; homeless people; and people with mental illnesses are all at particularly high risk from state violence.

This is something that features in the Article 2 case law. There is a string of cases in the European Court which involve racist killings of Roma people in continental Europe. In some of these cases, such as *Nachova v Bulgaria* and *Angelova v Bulgaria*, the European Court has looked at the relationship between Article 2 and Article 14. Article 14 provides that the human rights guaranteed by the European Convention have to be guaranteed without discrimination.

In those cases, the European Court has emphasised that where there is evidence of a racist motive for a killing, Article 2 and Article 14 require the state to investigate the racist motive. Non-discrimination doesn't always involve treating everyone the same; sometimes it requires different situations to be treated differently.

Where a person has been killed because of their race, the role of racism cannot be ignored.

But we need to push the boundaries of this principle. It's one thing to say that where there is evidence of an explicitly racist motive for a killing, the state should investigate it. Very few people should disagree with that. But we need to go further. We need to look at the patterns of discrimination in society as a whole, not just the motivations of individuals.

In this regard there is another relevant European Court case in a completely different context: *DH v Czech Republic*. This was about the education system in the Czech Republic, where statistics

showed that Roma children were overwhelmingly placed in special schools for the mentally disabled and that very few were placed in the mainstream school system.

That wasn't an Article 2 case, but it is an important case nonetheless because the Strasbourg Court looked at statistics to draw an inference that discrimination was taking place. The discrimination was not explicit; there wasn't an explicit policy of putting Roma children in special schools. But the discrimination was nonetheless very real and very visible.

This is an area that I see as a key legal battleground over the next few years. As the death of George Floyd and the Black Lives Matter protests in the US has seen renewed attention to the racism of the criminal justice system here in England and Wales, now is the time to talk about race, class and disability, to press the courts to pay attention to it, and to push the boundaries of the Article 2 investigative obligation.

I want to conclude by talking about the bereaved families. Over the course of my career I have worked with many people who have suffered the unimaginable pain of losing a loved one. Many of them have the added pain of knowing that their loved one was killed by the state.

As a lawyer, I know that the legal process is often brutally traumatic in its own right. But I also know that finding out the truth can bring closure.

Over the course of this lecture series we will be talking about how inquests impact the bereaved families, what barriers they face to meaningful participation, and what could be done to improve the process for them. So often, we as lawyers talk about law without centring the people who are most affected by it. I hope that throughout this lecture series the voices of bereaved families will be heard and centred.

I want to end this lecture with the words of Tum, a bereaved father who lost his baby son and was failed by the inquest process.

*“Society cannot give my son back his life but we can, in his death, give him the right to an honest and correct accounting of the way in which he died. It pains me to my core to know, every single day, that the public record of how he died is wrong. For untruths to be held on public record is nothing less than injustice. It dishonours the memory of my son.”*

Some suggested further reading:

- My own book, *Inquests: A Practitioner's Guide*. (Thomas, Straw, Machover and Friedman) LAG 3<sup>rd</sup> edition. This will also be very relevant to Lectures 2 and 3.
- The Lammy Review, produced in 2017 by David Lammy MP, a review of racial inequality in the criminal justice system.
- The Angiolini Review, also produced in 2017 by Dame Eilish Angiolini, a review of deaths in police custody.
- The “Statistics and monitoring” pages on the INQUEST website, <http://www.inquest.org.uk>, which is the most comprehensive source of data about deaths at the hands of police, prisons and the immigration system.
- The 2020 report by Justice, “When Things Go Wrong: The Response of the Justice System”.