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Law, secrecy and the "smothering blanket" of national security: how (not) to acknowledge past wrongs

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E.H.R.L.R. 132 Abstract

Drawing from the interdisciplinary literature on secrecy, colonialism and post-colonialism this paper examines the ways in which national security has been deployed regarding past wrongs by the British state in Northern Ireland. The first part of the paper traces the intersection between national security related discourses and the complex relationship between Britain and Northern Ireland including devolution and the long history of political violence. The second part of the paper traces the role of the "national security veto" in efforts to address the legacy of the conflict including through: investigations into conflict related events mandated by the European Court of Human Rights (ECtHR); three overarching political efforts to address the legacy of the conflict; and a series of legal contests in the United Kingdom (UK) domestic courts including the now leading Thompson judgement. The paper argues national security discourses reflect a "quasi-colonial" approach to the control of information by the metropolis and distrust of the local, as well as a determination to deny or obfuscate unlawful or embarrassing details about past state actions during the "dirty war". The authors conclude that unless efforts to address the past include a genuine openness to acknowledge past wrongs, and the political will to override the nation security reflex towards secrecy, victims' efforts to secure truth and justice about the worst aspects of the dirty war may continue be thwarted.

Introduction

"Secrecy, being an instrument of conspiracy, ought never to be a system of regular government." [1]

As Bok and others have contended, the notion that states' inevitably have secrets which must be protected has long been an axiom of both politics and governance. [2] Secrecy does not just have an instrumental utility—such as protecting the state or its citizens from harms—but it has a legitimating function, it is an expression of the arcana imperii (the mysteries of authority) which distinguishes the governor from the governed, from those who are "supposed to know" and those who are not. [3] Secrecy has both a practical ***E.H.R.L.R. 133*** and a symbolic relationship to power. [4] Determining which policies, practices or events are to be deemed secrets is a key function of state bureaucracies and one which speaks to "the superiority of the professionally informed" and "nothing is so fanatically defended by the bureaucracy as this attitude." [5] Making judgements about what does or does not remain secret concerning historical events is an important element of curating the past, promoting particular versions of history while simultaneously hiding others which may be embarrassing for those who keep the secrets. [6] As Morgan (drawing on Derrida) has argued, maintaining secrecy represents an exercise of political power concerning the past since "those who hold the archive, the collated information, hold authority." [7]

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We will argue that limiting access to information to victims and their lawyers about the past in Northern Ireland—including by using what one Irish Minister for Foreign Affairs termed the "smothering blanket of national security" [8] —has been central to the broader political and sociological forms of denial concerning some of the worst aspects of the "dirty war" involving republicans, loyalists *and* state actors. [9] In turn, acknowledgement as advocated here, is the opposite of denialism. Whether through prosecutions, investigations, information recovery, apologies or reparations, it requires a truthful "owning" of the past, an honest affirmation that a wrong was done (neither minimising nor rationalising the behaviour), both knowing "but admitting to knowing about past wrongs" and a commitment to address such past harms. [10]

While all states have their secrets, the former British Cabinet Minister Richard Crossman famously described the UK State's obsession with secrecy as a particular "British disease" [11] Secrecy is deeply embedded in British political culture—as Henessey has described, it is "built into the calcium of a British policy makers" bones'. [12] In reviewing the extensive literature on secrecy and the British State, a number of themes emerge which are of particular relevance for current purposes with regard to the Northern Ireland context. These include: a shared belief amongst politicians and policy makers that some State actions or policies must remain secret is a self-evident "regrettable necessity"; [13] an enduring reluctance to acknowledge the abuses of empire and colonialism; [14] a view that UK national security required "formidable secrecy laws" in order to ensure the regulation of information provision and the sanctioning of the unauthorised disclosure of secrets; [15] a distinction between ordinary policing/justice functions and the secretive elements of the state security infrastructure; [16] a perspective that in general terms those involved or politically responsible for the secrecy business are best placed to determine what should or should not be permitted into the public domain; [17] and a confidence (historically speaking) that the courts would not peer too ***E.H.R.L.R. 134*** rigorously behind the veil of national security once the latter was deployed by the State. [18] All of these variables have featured in the Northern Ireland context.

In the first part of the paper, we trace national security discourses across different phases of constitutional relations between Britain and Northern Ireland, framing them as a variant of "quasi-colonial" tensions between the metropolitan and the local, which demonstrated a desire to retain control in London over counter-terrorist policy and practice during the "Dirty War" and the (sometimes interrupted) return of devolution. In the second part of the paper, we focus on the ways that national security has been deployed by successive UK Governments, in shaping political and legislative efforts to address the past and in resisting investigative and legal efforts to uncover the truth about the role of the state during the conflict. We argue that such efforts reflect a complex interplay of metropolitan or imperial distrust of the *local*, as well as an implacable determination to deny and obfuscate past wrongs.

A "Quasi-Colonial" relationship: national security, devolution and the conflict

As discussed above, matters of secrecy and national security speak directly to the closely related themes of political power and the control of information. As former GCHQ Director David Omand has argued, "if knowledge can be regarded as power, then secret knowledge must be regarded as super-charged power." [19] For Northern Ireland, debates on national security have become a short-hand for political and legal contests between those who wish to minimise access to national security related information about the past and those (usually victims, survivors and their lawyers) who seek it. [20] While such tensions would be manifest in any contest between state and citizen in the UK, when the citizen is based in Northern Ireland the issues involved are inevitably complicated by the historical colonial relationship between Britain and Ireland, the legal and political contests linked to devolution (particularly regarding the control of security) and the long history of political violence in the region.

Within the colonial and post-colonial literature on the relationship between the metropolitan and the local—usually framed broadly as the ways in which the former sought to impose, retain and explain the exercise of power and control over the latter—both law and secrecy have important functions. [21] With regard to law, it is both an instrumental delivery mechanism for colonial domination but also a key political and sociological means of vindicating and rationalising colonial power differentials. [22] As Sally Engle Merry has argued, law "was used to make sense of colonial conquest and its drive to transform the culture of the colonised to that of the master." [23] Moreover, in the British context, while constitutional lawyers sometime write "as if empire never happened", in reality the evolution of British public law "is bound up with the constitutional discourse of empire." [24] Of course, as we detail below, law also sometimes offers a resistant forum for challenging both metropolitan and local power.

As for secrecy, the bureaucracy of British colonialism embedded clear distinctions between those who were permitted to know secrets—either those officials who were based in London or those who were sent from London to the colonies—and their less trustworthy locally recruited colonial officials. Particularly **E.H.R.L.R. 135* as the empire began to contract, British officials created dual filing systems (e.g. the Watch System in Kenya, the DG System in Uganda) with one set of the more sensitive files to be consulted by white officials only and "not be sighted by local eyes". [25] For example, the relevant regulations in Uganda stated that DG files could only be seen by "a civil service officer who is a British subject of European descent." [26] The Foreign and Commonwealth Office listed material not be passed to the newly independent Kenyan authorities to include those which: (a) "might embarrass HMG [Her Majesty's Government] or other governments, (b) might embarrass members of the police, military forces, public servants or others (such as police agents or informers) (c) might compromise sources of intelligence (d) might be used unethically by Ministers in the successor government." [27]

The relevance of colonial experiences elsewhere to Northern Ireland are often hotly disputed. There are fractious debates in politics, cultural studies, history and other disciplines about the precise nature of the colonial relationship between Britain and Ireland and its contemporary consequences. [28] Space does not permit examining the rich nuances of such arguments, but for current purposes we would agree with Richard English's suggestion that the relationship may be described as at least "quasi-colonial." [29] As has been detailed elsewhere, elements of the UK's counter-terrorist strategy and tactics including using particular torture techniques, operating "counter-gangs" to terrorise insurgent groups and the communities from which they emanated, placing agents within such groups and ensuing patterns of collusion to cover up their activities, the use of specialist military units including the Special Air Service (SAS)—these and other features were adapted from colonial conflicts and applied in Northern Ireland. [30] Similarly, in the sphere of national security, we would argue that the enduring significance of the colonial or imperial legacy is harder to contest.

For example, in a two year dispute from 2013–2015 the UK government refused to permit the release of archives to a historian relating to the activities of British paid informants active in colonial Ireland from 1886–1910 despite the fact that some of the records were 127 years old. [31] Over the course of two hearings by the Information Commission and an appeal, a senior Metropolitan police officer argued (in open and closed proceedings) that the releases could damage UK national security, undermine the ability of the Security services to recruit and retain current CHIS (Covert Human Intelligence Sources) and represented a risk to the descendants of informers. [32] In a similar vein, in his compelling account of what colonial officials termed "Operation Legacy"—the co-ordinated efforts noted above by successive UK governments to destroy or deny access to evidence of colonial abuses in a range of sites including Kenya, Malaysia, Uganda and Aden as the Empire contracted [33] —Cobain explicitly links some of the national security related **E.H.R.L.R. 136* strategies and tactics of obfuscation and destruction concerning abuses in Northern Ireland to that much longer historical imperial tradition of denialism. [34]

Moreover, a tradition developed within the Northern Ireland civil service after direct rule that from 1st November 1972 certain information was classified as "UK Eyes A" (sometimes referred to as UK eyes only) which stated that certain information should be confined to "…UK based members of the UK Armed Forces, Home Civil Service (excluding Northern Ireland Civil Service), the Police Forces (excluding the Royal Ulster Constabulary)." [35] A variant of this designation persisted throughout the conflict, much to the annoyance of local civil servants and police officers, many of whom were from a unionist background. [36] The contemporary national security tussles analysed below suggest the durability of a similar desire to keep sensitive information away from the "locals" and a related determination to avoid embarrassing details of past abuses coming to light.

The Government of Ireland Act 1920 which partitioned the island of Ireland and created Northern Ireland included provisions for a range of "reserved" or "excepted" matters which were not devolved to the Northern Ireland Government. These included the making of peace or war, control of the armed forces, treaties with foreign States, treason and other matters (s.4 (1), para.1-14). All of these were considered matters of "imperial concern". [37] Despite devolution, the "supreme authority" of Westminster remained "unaffected and undiminished over all persons, matters and things in Northern Ireland" (s.75). [38] That said, in addition to its powers to legislate over the economy, health, education etc, the devolved unionist dominated Parliament was also granted authority to legislate for "the peace order and good government" of Northern Ireland. In effect, the policing and security element of the state was thus largely delegated to the local authorities. In practice this meant the power to introduce emergency legislation and the creation of a police force (the Royal Ulster Constabulary, RUC) under direct control of the Stormont Minister for Home Affairs which saw its primary policing function as "the suppression of nationalist dissent." [39] Section 1 of this emergency legislation (the Civil Authorities Special Powers Act Northern Ireland 1922) gave the Minister the extraordinary power to "take

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all such steps and issue all such orders as may be necessary for the preservation of peace and maintaining order." Initially subject to annual review, the Special Powers Act morphed into permanent emergency legislation including internment without trial of republican suspects (introduced in the 1920s, 1930s, 1950s and in 1971), extensive powers of arrest search and seizure, the power to ban marches or demonstrations, a prohibition on statements or reports "intended or likely to cause disaffection to His Majesty" and a plethora of other repressive measures. [40]

While Westminster of course remained sovereign, a constitutional convention emerged which meant that Westminster did not interfere in the running of Northern Ireland—leaving the permanent unionist ***E.H.R.L.R. 137*** Government "a master in its own house" for almost half a century. [41] As the security and political circumstances in Northern Ireland deteriorated rapidly in the late 1960s, successive UK governments were extremely reluctant to become involved. [42] Indeed, the call for London to intervene to curb the sectarian and repressive excesses of the unionist government became a key demand of the civil rights campaign which had emerged in the 1960s. [43] The inability of the RUC to deal with the riots and public disorder of 1969 led to a request from the unionist government for the deployment of British troops to support the police in August 1969. [44]

With the army there in theory to support the RUC, but actually answerable to the Minister of Defence in London and MI5 (answerable to the Home Secretary) appointing its first Security Liaison Officer (SLO) in Belfast in July 1970, tensions over the control of security policy were inevitable. [45] In August 1971 the unionist Government finally persuaded the Conservative Government (elected in June 1970) led by Ted Heath to introduced the tried and tested strategy of internment. Based on poor RUC Special Branch intelligence, and directed almost exclusively against republicans and nationalists (i.e. the Catholic community), the latter proved an unmitigated political and security disaster. [46] In March 1972, following a dispute between London and Stormont over the control over security policy, the Heath Government prorogued Stormont, reintroduced Direct Rule and thus assumed unfettered sovereignty over security matters until policing and justice powers were devolved back to Northern Ireland in 2010. [47] As discussed below, this move was preceded in 2007 by the proviso that *national security* primacy remained a matter for MI5. [48] Throughout the conflict, it bears emphasising that London's over-arching constitutional authority over security was complicated at the local level by the fact that the RUC, army, military intelligence, MI5 and indeed MI6 were all involved in counter-terrorism work which was often plagued by deep interagency rivals and a reluctance to share intelligence. [49] As discussed below, such differences persist today including between MI5 and the Police Service of Northern Ireland (PSNI).

It is also worth noting at this stage that the term national security did not feature significantly until after Direct Rule was introduced to describe efforts to counter political violence. [50] The term had come into usage in Britain after Word War II, having been adopted from the USA and largely replacing law and policy linked to the Defence of the Realm Acts. [51] Indeed, as we have argued elsewhere, during the era of unionist rule 1921–1972 the State's focus on the "loyalty" of its Catholic employees in particular was not framed in national security terms. Catholics were largely excluded from the senior ranks of the civil service and there was no formal process designed to vet applicants on the basis of national security risks. [52] Such a formal vetting system was not introduced until the Direct Rule era (in 1978), [53] at the behest of one senior civil servant who argued it was fairer than the informal "guilt by association" assumptions that had operated ***E.H.R.L.R. 138*** against Catholics during the Stormont era. [54] However, this argument—that a more precise metropolitan system of national security vetting was more equitable than the naked sectarianism of the local elites during the Stormont period—was somewhat undermined by the fact the Fair Employment legislation introduced by Westminster to counter discrimination included provisions permitting Ministers to halt any Fair Employment Tribunal on the grounds of national security through the issuance of a "nation security certificate". [55] Only one legal challenge to a national security vetting exemption to Fair Employment succeeded between 1976–1993. [56] If there was a conflict, national security ultimately trumped any progressive impulses to address sectarianism.

To summarise for the sake of brevity, the conflict related national security matters discussed below refer to the actions of state actors during that conflict. We are of course all too aware of the violence and destruction of the paramilitaries during the conflict as well as their capacity to retain secrets and resist acknowledging their past harms. [57] However our focus here is upon the state. Many of violent and unlawful activities of the non-state actor republican and loyalist groups during the conflict are what Donald Rumsfeld might have termed "known-knowns". [58] The range of State-related activities discussed below—both "known unknowns" and "unknown unknowns" have included: the killing of civilians or unarmed members of paramilitary groups by the army which were not properly investigated at the time; [59] ambushes or "shoot to kill" operations by army special forces

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or specialist police units where an arrest may have feasible; [60] collusive activities including the involvement of state agents and their handlers in hundreds of paramilitary murders, bombings, torture and other illegal actions; [61] and sustained efforts by MI5, military intelligence and RUC Special Branch to impede investigations by fellow police officers, the Office of the Police Ombudsman for Northern Ireland (OPONI), and the work of judicial fora (including inquests and civil actions) and the work of investigative journalists into the illegal actions of State actors during the conflict. [62] Before considering efforts to uncover the truth about such activities, we will first reflect further on the relationship between national security and the "re-devolution" of policing and justice powers.

The "Re-Devolution" of justice: national security and metropolitan control reaffirmed

Following the ceasefires and the successful conclusion of the Good Friday Agreement (GFA) in 1998, a key aspect of the peace process was to devolve powers back to Stormont. [63] The consociational form of government in the Agreement meant that there would be a mandatory coalition, which would inevitably include Sinn Féin, the political wing of the IRA which had been engaged in its violent struggle against the British State since 1969. [64] It was also clear that former IRA leaders such as Martin McGuinness would ***E.H.R.L.R. 139*** become Ministers in the new Northern Ireland Executive. [65] Justice and policing powers were not fully devolved to Northern Ireland until 2010, and the Minister of Justice position has only been held by either the cross community Alliance party or an independent unionist.

In that context, as powers were devolved to Northern Ireland, the flexibility of the concept of "national security" became an important practical vehicle for UK Ministers to retain residual Executive power over their counterparts in the Northern Ireland Executive. [66] The GFA implementation legislation empowers the UK Secretary of State for Northern Ireland (SOSNI) to block "any action proposed to be taken by a Minister or Northern Ireland department" (including legislation) that he or she "considers" incompatible with the "interests" of national security. [67] Moreover, any "national security" matter was explicitly deemed as being outside the legislative competence of the NI Assembly. [68] In February 2005, with the devolution of justice firmly on the horizon, the SOSNI confirmed that M15 would have lead responsibility for Northern Ireland's national security intelligence work rather than the PSNI. [69] The devolution of justice powers statute in 2010 contains 45 references to "national security", ensuring power over "national security" elements of the justice system remained with the UK Government. [70] Although there was some political resistance from the two nationalist parties in Northern Ireland to these provisions related to national security and the devolution of justice, [71] the British desire to retain control paradoxically dovetailed with republican approaches to policing and security in the new era. As has been detailed elsewhere, Sinn Féin's ultimate endorsement of the new policing arrangements for the first time since the formation of the State was amongst the hardest "sells" to the republican political base. [72] One of the ways in which it framed this was to emphasise that the new reformed PSNI was supposed to focus largely on "community" or "civic" policing and build a new relationship with historically estranged republican communities. [73] From such a vantage point, the fact that "national security" remained largely the purview of MI5 and continued to be controlled by the British was politically quite useful for republicans.

Finally, from the British perspective, the formalisation of London's control over national security as part of the devolution arrangements represented something more ambitious than a set of instrumental "forward-looking" security arrangements. A UK policy paper on "handling arrangements" for "national security related matters" sought to designate that the period of Direct Rule *per se* was now a "national security" matter. Again, similar to the colonial contexts discusses above, it proclaimed that that "all" pre-devolution NIO records were beyond the reach of the Northern Ireland institutions. [74] While there was no actual legal basis for such a designation, it did speak to a broader intent as regard to official records, which has continued permeate and undermine legacy investigations. ***E.H.R.L.R. 140***

Legal activism, the "Package of Measures" and ministers losing control over legacy investigations

As noted above, law and legal activism has been a particularly important transitional justice tool for victims and survivors seeking truth and justice in Northern Ireland. [75] In the early 2000's a series of cases were taken to the European Court of Human Rights which found that the then justice system in Northern Ireland was incapable of carrying out investigations that were compliant with art.2 of the European Convention on Human Rights (ECHR) involving security force killings or killings involving loyalist paramilitaries with suspected security force collusion. [76] These decisions were widely regarded at the time as the European Court of Human Rights "most significant judgements to date on the right to life." [77] In response

to these adverse rulings the UK agreed a "Package of Measures" with the Council of Europe. This consisted of legislative and institutional changes to seek to ensure police, OPONI, prosecutorial and coronial processes could effectively investigate conflict-related cases to ECHR standards. [78] However, the "Package of Measures" mechanisms faced considerable obstruction from state agencies including the blocking of disclosure, deliberate under-resourcing and a lack of cooperation. [79] One former Police Ombudsman (tasked with investigating allegations of police involvement in human rights violations) discovered police intelligence documents which had been marked "Slow Waltz", a term he interpreted as connoting a deliberate strategy of delaying access to investigators on legacy related matters. [80] Despite tenacious efforts on the part of state agencies to delay, obfuscate, deny and otherwise undermine the work of the "package of measures" mechanisms, as argued below, these processes had increasingly begun to deliver results for victims and survivors, particularly in terms of truth recovery about past events. Indeed, it is precisely because of such legal and investigative successes, that there has been such a determination to impose a national security veto on legislative attempts to address the past in Northern Ireland.

The gradual success of these measures has, in large part, been because Ministers did not have, in law, a "final say" over their products. Ministers had no power to redact information on the grounds of national security in judicial judgements in inquests or legacy related civil actions, nor did that have an express "national security veto" over the content of reports from the OPONI or independent "called in" police investigations from police forces other than the PSNI such as "Operation Kenova". [81] As detailed further below, judges involved in inquests in Northern Ireland are require to balance competing public interests when assessing national security concerns including in response to requests by the state to withhold "sensitive information" through the issuance of Public Interest Immunity (PII) Certificate. However ultimately, "it is for courts, not the Government, to decide whether or not PII should prevent disclosure of a document or part of a document." [82] With regard to the OPONI, while the Ombudsman is required to bear in mind any guidance provided by the SOSNI on national security, it is ultimately the Ombudsman's ***E.H.R.L.R. 141*** decision whether or not to redact sensitive information from a report. [83] As detailed further below, with regard to the "call in police" investigations, while protocols were for example agreed between the Kenova investigative team and M15 regarding the sharing of information provided by M15, Jon Boutcher and his team were fiercely protective of their ability to determine their own national security obligations rather than have it done for them by the NIO or MI5. [84]

With regard to the courts, legacy inquests have long been a political battleground. In 2012, following lobbying by senior retired RUC officers, the Democratic Unionist Party argued that legacy inquests represented a "threat" to "national security" and could expose the modus operandi of the security forces. [85] The same party also blocked funding for such inquests arguing that State-facing cases did not address the needs of "innocent" victims. [86] The Courts ultimately found such blocking to be unlawful, [87] and a five year plan of legacy inquests, drawn up by the then Lord Chief Justice proceeded in 2019. Whilst some inquests focused on non-State actors, [88] many legacy inquests focused on state actions. Prominent inquests such as that into the British Army killing of 10 civilians in Belfast in 1971 concluded that all of those killed were entirely innocent, that the force use was unjustified, that previous investigations had been inadequate and that Army claims that those killed were "republican gunmen" were not true. [89] As discussed further below, other inquests that involved "sensitive" national security information and allegations of collusion, however faced litigation by the SOSNI to seek to block coroners releasing information.

As noted, similar to inquests, Ministers of course have no power to redact judgements in civil legal proceedings. Civil actions have also been an important vehicle for truth recovery and undermining past official narratives about the role of state agencies in human rights violations. [90] For example, in one case the applicant successfully sued the police regarding a loyalist paramilitary who was also a police informant who had twice attempted to murder him. [91] In another, the High Court awarded compensation to a man (who as a child had witnessed the sectarian killing of his grandfather by loyalists) where again the killing involved a police informant and where the police had actively covered up the involvement of their agent. [92] Civil actions have also been complimentary to other "Package of Measures" processes including uncovering efforts by the PSNI to prevent information going to the Ombudsman on the extent of past state collusion with loyalist paramilitaries in the killing of five civilians at the Ormeau Road Bookmakers in 1992. [93]

In addition to such court proceedings, patterns of police collusion with loyalist paramilitaries have also been exposed in OPONI investigations. For example in a 2007 report the OPONI uncovered practices of, inter alia, failures to arrest informants for crimes to which those informants had allegedly confessed; lengthy sham interviews with agents involved in murders and then releasing them without charge and ***E.H.R.L.R. 142*** falsifying or failing to keep records and interview notes. [94] In 2016 the OPONI

found that collusion was a significant feature in the loyalist murders of six Catholic civilians in a pub in Loughinisland, including that weapons had been imported by State agents for use by loyalist paramilitaries. [95] The police response to further revelations contained in an investigative documentary (which revealed a suspected state agent was among the paramilitary unit responsible) was to subject the journalists to arrest, raids and covert surveillance, actions the courts later found to be unlawful. [96] More recent Ombudsman reports in 2022 covered 30 murders, again identifying significant patterns of concern regarding collusive behaviours between the then police service, RUC, and loyalist paramilitaries. [97]

As discussed above, a further part of the Package of Measures was the ability of the PSNI to "call in" an external independent policing team to undertake a legacy investigation. As noted above, the most prominent of these has been Operation Kenova which focused on State agents within the IRA and their involvement in kidnap, torture and murder. [98] The Kenova Interim Report found that State agents were involved in human rights violations including murder and torture and were shielded from the criminal justice system. [99] After he became Chief Constable of the PSNI, lead investigator Jon Boutcher told a UK Parliamentary Committee that whilst covert policing was essential to the rule of law:

"Information about Northern Ireland legacy cases has too often been withheld and suppressed because of concerns about where it might lead. On becoming Chief Constable I met lawyers and counsel for the PSNI who sought to persuade me that once an inquest had opened the police could not conduct investigations into that death and that information that an agent had committed a murder could not be investigated as to do so would be breach national security provisions. Both positions are manifestly wrong but for me the fact that they were advanced was even more worrying." [100]

In sum, in the context of the gradual success of the package of measures, Ministers sought to reassert control over legacy investigations. [101] What has followed particularly in the last decade has been a concerted effort to codify an express ministerial 'national security veto' over the outputs of all Northern Ireland legacy investigations.

Formalising the "National Security Veto" in legislation

In 2014 the UK and Irish Governments, together with four of the five local political parties in Northern Ireland reached agreement on new transitional justice bodies to replace Police and OPONI legacy investigations, whilst also retaining inquests into conflict related-deaths and civil court proceedings. [102] The 2014 Stormont House Agreement (SHA) provided for a new proposed Historical Investigations Unit (HIU) to conduct independent ECHR compatible investigations and produce information-recovery reports for families as well as cross border-information retrieval mechanism. [103] However, implementing the SHA ***E.H.R.L.R. 143*** was derailed when the UK Government insisted on inserting a "national security veto" into the draft implementation legislation—codifying a power of Ministers to redact information going to families on the grounds of national security. [104] As noted, the Irish Government vehemently opposed the veto, as did the nationalist political parties in Northern Ireland and international stakeholders. [105] The then UN Special Rapporteur on Transitional Justice, raised concerns about the "over-use of national security exemptions to avoid disclosure" by the UK Government regarding in Northern Ireland, noting that "the ambiguous concept of national security invoked as a blanket term becoming a means to shield individuals or practices against open scrutiny, fuel mistrust and suspicion". [106] As detailed elsewhere, the UK government failed to implement the SHA over the following six years. [107] In early 2020 a fresh UK-Ireland Agreement to implement SHA was quickly and unilaterally abandoned by the populist Government of Boris Johnson, following claims the Package of Measures investigations constituted a "witch-hunt" against the security forces which were "rewriting history". [108] In contrast, a Report issued by the International Expert Panel into State Impunity and the Northern Ireland Conflict concluded after a year long analysis that the UK had in reality "operated a widespread, systematic, and systemic practice of impunity, protecting security forces from sanction" and "not only engaged in collusion but also blocked proper police investigations into conflict-related killings to protect implicated security force members and agents." [109]

In the context of the putative "witch-hunt" against veterans the then UK Government pursued what became the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 as a new framework for NI legacy cases (hereafter the Legacy Act). As well as a conditional amnesty scheme (which was subsequently found to be unlawful and never applied) [110] the main purpose of the Legacy Act was to close down and ban any further investigations by the Package of Measures on the 1 May 2024 and also ban civil litigation, and instead replace them with a new body, the Independent Commission for Reconciliation and Information Recovery (ICRIR) with sole competence for "reviews" of legacy cases. The legislation also embedded the Ministerial "national

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security veto" over legacy reports (s.60). The ICRIR is prohibited from providing any "sensitive information" which would risk prejudicing UK "national security interests" in its reports to victims and their families without the consent of the Secretary of State. [111] In addition, there was also a general prohibition in the Legacy Act on onward disclosure by the ICRIR if it contravenes a statutory duty not to do "anything" which would risk prejudicing the UK's "national security interests." [112]

The Legacy Act faced a raft of domestic legal challenges and an Inter-State case taken by the Irish Government (*Ireland v the UK No.3*). [113] A subsequent ruling in the Northern Ireland Court of Appeal in the lead domestic case of *Dillon and others* declassified a policy paper which set out the rationale for banning civil proceedings in legacy cases. It noted that civil litigation was undermining "public confidence ***E.H.R.L.R. 144*** in the state" and "affecting public perception of the police and armed forces". [114] In effect, judicially adjudicated findings of fact regarding state conduct were causing reputational damage and needed to be stopped.

In the context of the Legacy Act shutting down legacy inquests the ICRIR itself came up with a model whereby it argued it could emulate inquests through what it termed an "Enhanced Inquisitorial Proceedings" process. [115] Essentially the ICRIR would hold pseudo-inquest style hearings with its officials acting as advocates and decision makers. The model however lacked an independent judge, a court, families could not have their own lawyers, or rights to receive disclosure and any "judgement" produced would again have been subject to the national security veto. [116] The Northern Ireland Court of Appeal (NICA) in *Dillon* subsequently ruled that this model was incompatible with the ECHR, by virtue of not meeting standards of next of kin participation and because of the Ministerial "national security veto" which it said struck at the heart of concerns regarding the ICRIR's independence. [117] The NICA consequently found the Legacy Act prohibition on further NI legacy inquests unlawful. Rather that remedying the incompatibility and simply reopening all legacy inquests the now Labour Government has appealed the ruling to the UK Supreme Court, including the finding on the national security veto. [118] As discussed below, a variant of this "pseudo inquest" model has been retained for the proposed replacement mechanism for the ICRIR announced in September 2025.

State litigation to "Read In" a national security veto over inquests

The Legacy Act closed down and precluded further NI legacy inquests on the 1 May 2024, the same day the ICRIR became functional. In total 38 legacy inquests, covering over 70 deaths, were shut down on the 1 May 2024, 14 of which had not reached findings stage and 24 that had not been assigned to a coroner. [119] The curtailing of five of these inquests, which involved "sensitive information", saw British Government Ministers litigating against coronial judges to prevent them from revealing gists of intelligence information. In essence, the courts were being asked to read in a Ministerial national security veto over the judiciary, whereby Ministers, and not judges, would decide what information they could reveal. As argued above with regard politicians, the distrust of the local (in this case judges) was manifest.

In one high profile inquest into the death of Sean Brown—a Gaelic sports official abducted and murdered by loyalist paramilitaries in 1997—counsel to the inquest confirmed that "a number of the twenty five people linked by intelligence to the murder were agents of the state." [120] The Coroner was heavily critical of lengthy delays in disclosure from state agencies as "deplorable and frankly inexcusable" noting also that such "failings resonate with failings identified in other inquests in recent times." [121] The Coroner also stated that "Agencies of the State, for longstanding reasons of national security in relation to source protection, have asserted Public Interest Immunity (PII) in respect of material that substantially bears on the issues that would otherwise be investigated by the Coroner". Given the importance of the excluded information, he felt that the inquest could not be properly conducted and recommended that a Public ***E.H.R.L.R. 145*** Inquiry be established rather than the UK Governments preferred mechanism, the ICRIR. [122] A public inquiry was refused leading to judicial review proceedings led by Bridie Brown, the 87-year-old widow of Sean Brown. They were successful in the High Court which issued an order of mandamus compelling the SOSNI to open the public inquiry. [123] An appeal from the Government to the NICA was rejected by a majority. [124] The SOSNI has subsequently appealed to the Supreme Court. [125] The NICA ruling revealed that Government agencies, and in particular the Ministry of Defence (MoD) and MI5 "all made clear their preference for an ICRIR investigation" which had formed part of the internal advice to the SOSNI. In a strongly worded judgement, the NICA found such advice "ought not to have been tainted or influenced in this manner" given the "risk that such advice will be skewed in order to protect the various interests in play" and that the MI5/MoD concerns regarding "costs" did "not add up" and "made little sense". [126] In essence, the NICA found that too much weight had been given by the SOSNI to agencies whose covert actions could well fall within the scope of the investigation itself.

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Shortly after the *Brown* "gist" had been released revealing the presence of State agents among those linked by intelligence to Mr Brown's murder, the Coroner in another legacy inquest, into the sectarian murder of Paul Thompson in 1994, was pre-emptively judicially reviewed by the SOSNI to prevent her from issuing a similar PII "gist" in that inquest. The SOSNI also then launched a retrospective judicial review against the coroner in the Sean Brown case for having revealed state agents were linked to the murder. [127]

The sensitivity of these matters—and the broader relevance of secrecy related to the legacy of the Northern Ireland conflict—is further illustrated by the now leading case of Thomspon which is worth examining in some detail.

Paul "Topper" Thompson was a 25-year-old civilian who was shot dead on 27 April 1994 in Belfast, by a loyalist paramilitary group, with suspected State collusion. [128] The case concerned the facilitation of loyalist attacks through a "hole in the peace line" that had not been secured despite repeated reports to the authorities. An inquest, originally opened in 1995, has never been completed with repeated and egregious delays for almost two decades. Finally, after a review of legacy inquest cases by a High Court Judge, it was rescheduled for 2023. Whilst PII hearings were listed in February 2024 to consider ministerial PII certificates at the behest of the MoD and PSNI on six folders, an adjournment was caused by the late appearance of sensitive information in "Folder 7". In 2024 the Coroner concluded PII hearings, upheld the PII application to exclude information in Folders 1-6 but considered material in Folder 7 be "highly relevant" and of "central importance" to the Inquest proceedings and announced her intention to release a gist.

The SOSNI and at the time PSNI, issued judicial review proceedings to block the gist. These applications were dismissed in the High Court, in particular in relation to the contention that the Government's "Neither Confirm Nor Deny" (NCND) policy on intelligence matters (including the use of State agents) should be considered to have legal force. Humphries J, quoted with approval Maurice Kay LJ that "it is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it". [129] He also noted that NCND: ***E.H.R.L.R. 146***

"enjoys no special status. It is a government policy not a legal principle. Its use and application in any given case is subject to the same judicial scrutiny as any other claim to withhold disclosure on the grounds of PII." [130]

This ruling was accepted by the PSNI Chief Constable, who then worked with the Coroner to produce a revised second gist. In contrast, the SOSNI launched judicial review proceedings to block the publication of the second gist which were also dismissed, just a week before the Legacy Act guillotined NI legacy inquests. [131]

The SOSNI appealed to the NICA, which, by a 2-1 majority, again dismissed the SOSNI's appeal on all grounds. [132] Like Humphreys J, the NICA's sensitivity to secrecy and delays being used in to block family's access to the gist of sensitive information being provided—and of the judiciary's right to make that determination—was apparent. The NICA noted that the Coroner was "cognisant of her duties under art.2, not least to be open and transparent and involve the next of kin in the decision making", noted the "major delays" in the inquest and concluded that the Coroner's approach "represents an important reassurance to the family of the deceased and maintains public confidence in the investigative process" and that to suggest otherwise would "seriously undermine the administration of justice and perpetuate mistrust…" [133] The NICA also stated that they were "bolstered in our conclusion and influenced by the strong support of the Chief Constable for dissemination of the second gist" and also noted that it would be retrograde step if gists were not to be used in families seeking information on the death of their loved ones. [134]

The publication of the gist however remained stayed as the SOSNI appealed to the UK Supreme Court, in a case heard in June 2025. The NIO were supported in the Supreme Court proceedings by the Ministries of Defence, Home Department and Foreign Affairs who respectively oversee military intelligence, MI5 and MI6. The respondents, supporting the release of the gist, were the Coroner, Next of Kin Eugene Thompson and the PSNI Chief Constable. In effect, the security ministers and the relevant Britain-based agencies were all pitted against not just the family, but the local police and, indeed the decisions of the Northern Ireland-based judiciary.

At the UK Supreme Court hearing (11–12 June 2025) the UK Government again pressed the position of SOSNI's primacy over the final say over disclosure to families in legacy cases on "national security grounds. [135] In addition to the 2017 Cabinet Office "Guidance note on NCND principle" [136] reference was also made by counsel for the PSNI to a Home Secretary "Statement on the

NCND policy" shortly after the release of the Brown gist, that which appeared premised NCND policy was under "considerable pressure" from NI legacy inquests. The Home Secretary's Statement notably included provision that NCND would preclude disclosure of "the fact that agents were involved at all". ***E.H.R.L.R. 147*** [137]

The UK Supreme Court issued its unanimous judgement on the 17 December 2025, delivered by Lord Sales and Lord Stephens. [138] It is a complex judgement but summarising for current purposes, it concluded that the Coroner, High Court and NICA were all wrong in law. It held that, as a rule of evidence, the Coroner did not have discretion in relation to a PII and that both the High Court and NICA were wrong to assess whether the Coroner's decision was Wednesbury unreasonable rather than whether she been right or wrong on the rules of evidence. It also held that in coming to a different view from the SOSNI and the related public authorities, both the Coroner (and the Chief Constable) had not sufficiently consulted with or been suitably deferential to the views of the SOSNI. It stated that, the courts role in the assessing of national security is not to substitute its own assessment on the risk to national security but rather to apply normal public law principles, "including in particular that the assessment (by a minister) is not Wednesbury irrational and as part of that, checking that there is some evidence capable of supporting it." [139] Whilst describing the gist as doing no more than setting out "a summary at a very high level of abstraction and in a very indeterminate manner", [140] it nonetheless held that the gist should not be released.

There is a marked lack of curiosity in the judgment as to whether affording the SOSNI such primacy might constitute a conflict of interest concerning the involvement of State agents in serious crimes including murder. [141] The Supreme Court noted that an MI5 officer (who had not seen the papers in folder 7) had given closed evidence in support of the SOSNI's request not to disclose the gist regarding that folder in "theoretical and general terms". [142] In contrast, in a speech delivered the week before the judgment, the PSNI Chief Constable noted that MI5 had "made representations to me that a promise of secrecy forever is crucial to its agents operations and the performance of its statutory functions." He disagreed, arguing that "I do not think that security forever can ever be guaranteed". [143] He also noted:

"…it seems that successive governments choose to listen to those that have traditionally adopted a position of intransigence that has driven deep division and mistrust in society by entrenching what legacy families and many commentators judge to be the state covering up wrongdoing." [144]

Again, clear dividing lines have become evident from both the present and previous UK Governments positions (clearly influenced by MI5), contrasted to those of families seeking information and the police and judiciary in Northern Ireland. The State is "digging in" to a position whereby, despite clear procedural duties for effective investigations under ECHR arts 2 and 3, it seeks to avoid disclosing the involvement of agents in conflict related murders and other human rights violations. In addition, there is determination that decisions on what gets given to families should rest with Ministers themselves.

On the 19 September 2025 after months of negotiations the British and Irish Governments published a new "Joint Framework" on legacy. This committed to "fundamental reform" to replace the ICRIR with a new Legacy Commission, and to removing the ban on conflict-related civil court proceedings and some ***E.H.R.L.R. 148*** inquests. [145] On the 14 October 2025 the Northern Ireland Troubles Bill was introduced into the UK Parliament to implement the Joint Framework. Whilst the Framework and legislation in other aspects represents a step change in a return to a rule of law framework, the UK's determination to retain the national security veto over the Legacy Commissions reports remains undimmed. Moreover, the level of judicial deference to the government now to be expected on matters of national security as a result of Thompson arguably renders the relevant provisions in the Framework Agreement fairly academic. [146]

Furthermore, as noted, not all stalled legacy inquests will be allowed to proceed, with those centring on "sensitive" information instead being placed in a new "Inquisitorial Mechanism" within the Legacy Commission designed to emulate inquests, but with the key proviso that it will also be subject to a codified national security veto. The British State's attachment to national security as a means of preventing information coming into the public domain regarding the events of the Northern Ireland conflict appears undimmed. Resonating our own concerns articulated above, three UN Special Rapporteurs noted recently the veto powers contained in the framework document and now the legislation "could lead to concealing the involvement of state agents in extrajudicial killings, torture and other violations." [147]

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Conclusion

"To live with secrecy day in and day out, to be aware of a threat to one's nation and to oneself from a diminution of secrecy, and to be trained to give up on ordinary moral restraints in dealing with enemies is an experience that isolates and transforms the participants." [148]

As argued above, national security discourses related to Northern Ireland can only be understood by reference to the complex constitutional and political history between Britain and Ireland, and from 1921 onwards, Britain and Northern Ireland. Largely absent during the era of unionist domination when the Catholic community per se was regarded as suspect, it turned into short-hand during the conflict era for the messy reality of counter-terrorism work. In the post conflict devolution era, national security has become a byword for efforts on the part of the UK State to maintain control not only over contemporary and future-facing policy and practice but also to obscure embarrassing details concerning the State's role during the conflict. [149] Of course, through the determination and perseverance of victims, the advocacy of their lawyers and the attitudes of the judiciary, some of these wrongs have been exposed through public inquiries, inquests, investigations, civil actions and so forth. Apologies were issued and compensation paid. [150] However, the lines in the sand keep being redrawn, the institutional reflex in the security services in particular towards denialism and obfuscation regroups and national security remains the "go to" place to avoid truth and accountability. ***E.H.R.L.R. 149***

As discussed above, there is an official view that "holding the line" on national security contests in the courts may have instrumental benefits for the future recruitment of informers. [151] However, it is also part of a broader ideological contest about what happened and why. Legal contests in the aftermath of the conflict have become a version of what Osiel has termed making public memory publicly. [152] It is the publicness of such history making that is particularly problematic. Secrecy is also a deeply sociological process, it is as EP Thompson argued "a whole code of conduct, almost a mode of consciousness." [153] In order to understand the dogged determination to resist disclosure of national security secrets from the Northern Ireland conflict, it is necessary to "see like a state" [154] or rather to see like the national security State. [155]

Those who were "in the know" about the dirtier aspects of the dirty war in Northern Ireland were what Simmel refers to as "bonded" by their shared secrets and the need to protect it from the enemy (Irish republicans). [156] The idea that either judges or independent investigators including a Chief Constable could make even the gist of such information publicly available remains anathema. As explored above, there has long been a determination on the part of elements of the British State to resist efforts to acknowledge the realities of the "legalised lawlessness" associated with colonialism and imperialism in Africa, India and elsewhere. [157] Such resolve is arguably even more pronounced with regard to Northern Ireland, a part of the United Kingdom. Acknowledging that what Zizek termed the "nightly law" was a reality on home soil for almost a quarter of a century is quite an ask. [158] Little wonder that individuals and institutions who are the keepers of such secrets prefer to keep them hidden beneath the smothering blanket of national security.

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Footnotes

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2 *S. Bok, Secrets: On the Ethics of Concealment and Revelation (Oxford: Oxford University Press, 1984) p.172.*

3 A. Kantorowicz "Mysteries of State: An Absolutist Concept and its Late Medieval Origins" (1955) 48 Harvard Theological Review 65.

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4 S. Schweitzer, R. L. Ruttan, and A. Waytz,"The Relationship Between Power and Secrecy" (2022) 100 Journal of Experimental Social Psychology 1.

5 *M. Weber, "Bureaucracy" in H. Gerth and C. Mills (eds) From Max Weber: Essays in Sociology (London: Routledge, 2009, [1921–22]), pp.233–234*.

6 D. Morgan-Owen, A. Fox and H. Bennett, "A Haunting Past: British Defence, Historical Narratives, and the Politics of Presentism" (2024) 37 Cambridge Review of International Affairs 520.

7 L. Morgan, "Reconceptualising State Secrecy" (2018) 69 Northern Ireland Law Quarterly 59, 61. See also J. Derrida, "Archive Fever: A Freudian Impression" (1995) 25 Diacritics 9, 11, fns 1, 12, 17.

8 J. Manley, "Charlie Flanagan Critical of National Security Smothering Blanket" (27 November 2015), *Irish News*.

9 In this article we use the term denial as outlined by S. Cohen, *States of Denial*, (Cambridge: Polity Press, 2001). Denial involves how disturbing information is "repressed, disavowed, pushed aside or reinterpreted' because that information is 'too disturbing, threatening or anomalous to be fully absorbed or openly acknowledged", p.1.For a discussion on the evolution of the term Dirty War see e.g. *M. Dillon, Dirty War: Covert Strategies and Tactics Used in Political Conflicts (London: Routledge, 1990)*; *N. Davies, Dead Men Talking: Collusion, Cover-up and Murder in Northern Ireland's Dirty War (London: Random House, 2011)*.

10 *See Cohen, States of Denial (Cambridge: Polity Press, 2001), pp.227–240*; *T. Govier, Taking Wrongs Seriously: Acknowledgement, Reconciliation and the Politics of Sustainable Peace (London: Humanity Books, 2006)*.

11 *R. Crossman, The Diaries of a Cabinet Minister Volume 3 (London: BCA, 1975)* See also *J. Michael, The Politics of Secrecy (London, Harmondsworth, 1982)*.

12 *P. Hennessey, "Introduction" in C. Bennett and P. Hennessey (eds), A Consumer's Guide to Open Government (1980), p.1*.

13 *D. Ormond, Securing the State (Oxford: Oxford University Press, 2010), pp.277–278*.

14 *I. Cobain, The History Thieves: Lies and the Shaping of a Modern Nation (London: Portobello Books, 2016)*; *H. Bennett, Fighting the Mau Mau: The British Army and Counterinsurgency in the Kenya Emergency (Cambridge: Cambrige University Press, 2012)*.

15 *C. Ponting, Secrecy in Britain (London: Wiley, 1990), p.1*; see also *D. Vincent, The Culture of Secrecy in Britain: 1832–1998 (Oxford: Oxford University Press, 1998), p.12*.

16 *R. Martin, Policing Human Rights: Law, Narratives and Practice (Oxford: Oxford University Press, 2021).*

17 *C. Moran, Classified: Secrecy and the State in Modern Britain (Cambridge: Cambridge University Press, 2013)*; J. *Blackburn, F. De Londras, and L. Morgan, Accountability and Review in the Counter-Terrorist State (Bristol: Bristol University Press, 2020)*.

18 As Lord Denning once famously summarised, "There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary." *R. v Secretary of State for the Home Department ex p Hosenball [1976] 1 W.L.R. 766*. For a discussion on the shift in such views see L. Woods, L. McNamara and J. Townsend, "Executive Accountability and National Security" (2021) 84 Modern Law Review, 553.

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20 In the Northern Ireland context there is little controversy with regard to the state's legitimate national security concerns including keeping secret the identity of state agents (where their lives might be placed at risk if identified) or contemporary and lawful counter-terrorist methods and practices. Rather, as detailed below, the primary concern is that the vagueness of the term is deployed to cover-up unlawful and often embarrassing details about historical human rights violations that occurred during the conflict. See further *A. Bryson et al., Dealing with the Past in Northern Ireland: A Proposed Model from Information Redaction under the Stormont House Agreement (Belfast: QUB, 2017)*.

21 *P. Fitzpatrick, The Mythology of Modern Law (London: Routledge, 1992)*.

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26 Livesey, "Open Secrets: The British 'Migrated Archives: Colonial History and Post Colonial History" (2022) 93 History Workshop Journal 95, 97.

27 M. Banton, "Destroy? 'Migrate'? Conceal? British strategies for the disposal of sensitive records of colonial administrations at independence" (2012) 40(2) The Journal of Imperial Commonwealth History 321, 325.

28 *See e.g., S. Howe, Ireland and Empire: Colonial Legacies in Irish History and Culture (Oxford: Oxford University Press, 2002)*; *R. English, Irish Freedom: The History of Irish Nationalism in Ireland (London: Pan Macmillan, 2006)*; *B. O'Leary, A Treatise on Northern Ireland: Volume 1, Colonialism (Oxford: Oxford University Press, 2019)*.

29 R. English, "Alternative Ulsters: Ways of looking at the Troubles after Half a Century" (2020) 6128 TLS 24.

30 See e.g., F. Kitson, *Gangs and Counter-Gangs* (London: Barrie and Rockcliff, 1960) *H. Bennett, Uncivil War: The British Army and the Troubles, 1966–1975 (Cambridge: Cambridge University Press, 2023)*; *I. Cobain, Cruel Britannia: A Secret History of Torture (London: Granta, 2013)*. *B. Dooley et al., Bitter Legacy', The Report of the International Expert Panel into State Impunity and the Northern Ireland Conflict (Norwegian Center for Human Rights, Committee on the Administration of Justice, and Pat Finucane Centre, 2024)*.

31 R. Riegel, "Uk Refuses to Release 100-Year-Old Details of its Irish Spies" (7 September 2015), *Irish Independent*.

32 *B. Keane, The Limits of History: Barry Keane versus the Information Commissioners, Home Office and Metropolitan Police, September 2013–2016 (2016)*. The Information Appeal Tribunal upheld the decision by a 2-1 majority that the refusal to release the files was justified under the national security exception of the Freedom of Information Act. *See further Case No.EA/2015/0013, General Regulatory Chamber Information Rights, On Appeal from the Information Commissioner's Decision Notice No.: FS50532586 (13 August 2015)*.

33 "Operation Legacy continued for more than two decades, until the 1970s. Hundreds if not thousands of British colonial officials were involved, as were Special Branch officers and local MI5 liaison officers, all three branches of the armed services and countless servicemen and women". *I. Cobain, The History Thieves. (London: Portobello Books, 2016), p.130*.

34 *Cobain, The History Thieves (London: Portobello Books, 2016)*, Ch.6. *See further Cohen, States of Denial (Cambridge: Polity Press, 2001)*.

35 Detailed in MOD File D/0S840-5/8/1975. Appendix B. A UK Eyes B label meant that information could be shared with the RUC and Northern Ireland Civil Service on a discretionary basis.

36 A Cabinet Office memo dated from 1996 (two years after the cease-fires) which was designed to address such "anomalies" notes that the UK EYES label which had traditionally meant an "absolute bar" on member of the Northern Ireland Civil Service viewing files so designated had "caused difficulties in the past." NIO (HC) Security Notice/96, DU/TYP/5398. The proposed fix (allowing a discretion to allow "dual nationals" to view such restricted documents) was met with a dry response from the NI Civil Service that "that there is no doubt in my mind that its reference to dual nationals could cause a certain amount of irritation in NICS quarters." Memo from H. Kirkwood, NICIS Personnel Services, 1st May 1996. Both memos are available at https://cain.ulster.ac.uk/proni/1996/proni_NIO-31-6_1996-05-01.pdf [Accessed 15 February 2026].

37 *B. Hadfield, The Constitution of Northern Ireland (Belfast: SLS, 1989), p.78*. Legally it appears that Northern Ireland was long recognised as both a part of the United Kingdom and a dominion – the term used to refer to a colony that has been granted a degree of self-governance. For example, the 1949 Ireland Act notes in s.1(2) "It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom." Similarly, s.1 of the Northern Ireland Constitution Act 1973 (which formalised Direct Rule) states "it is hereby declared that Northern Ireland remains part of Her Majesty's dominions and of the United Kingdom…"

38 This wording was taken from the Colonial Laws Validity Act 1865, introduced to clarify the powers and limitations imposed upon colonial legislatures within the British Empire.

39 *G. Ellison and J. Smyth, The Crowned Harp: Policing Northern Ireland (London: Pluto, 2000), p.ix*. See also *G. Hogan and C. Walker, Political Violence and the Law in Ireland (Manchester: MUP, 1989)*; *M. Farrell, Arming the Protestants: The Formation of the Ulster Special Constabulary and the Royal Ulster Constabulary (London: Pluto, 1983)*.

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40 For a detailed analysis see L. Donohue, "Regulating Northern Ireland: The Special Powers Acts" (1998) 41(4) The Historial Journal 1089.

41 *B. Hadfield, "The Northern Ireland Constitution" in B. Hadfield (ed.), Northern Ireland: Politics and the Constitution (Buckingham: Open University Press, 1992), p.3.*

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44 *H. Wilson, The Labour Government 1964–1970: A Personal Record (London: Penguin, 1971), pp.871–872.*

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48 The Agreement at St Andrews (2006) Annex E.

49 *T. Leahy, The Intelligence War Against the IRA (Cambridge: Cambridge University Press, 2020)*; *Andrew, The Defence of the Realm: The Authorised History of MI5 (London: Penguin, 2009)*; *R. English, Does Counter-Terrorism Work? (Oxford: Oxford University Press, 2023), Ch.4.*

50 *Leahy, The Intelligence War Against the IRA (Cambridge: Cambridge University Press, 2020).*

51 See further *L. Lustgarten and I. Leigh, In from the Cold: National Security and Parliamentary Democracy. (Oxford: Oxford University Press, 1994), pp.23–26.* The "purge" procedures introduced by the Atlee government in Britain in 1948 (and revised periodically thereafter) designed primarily to prevent communists from occupying sensitive security posts was never replicated in Northern Ireland.

52 K. McEvoy and C. White, "Security Vetting in Northern Ireland: Loyalty, Redress and Citizenship" (1998) 61(3) Modern Law Review 341; D. Holder and C. Verdirame, "The National Security Doctrine in Northern Ireland legislation" (2016) 67 Northern Ireland Law Quarterly 93.

53 Memo CS 27/28 Annex CSC 27/7 September 1978 "Procedure to be Followed when the Reliability is Thought to be in Doubt on Security Grounds".

54 McEvoy and White, "Security Vetting in Northern Ireland: Loyalty, Redress and Citizenship" (1998) 61(3) Modern Law Review 341, 349.

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57 *See further K. McEvoy, Information Retrieval and Acknowledging the Past in Northern Ireland (Belfast: QUB, 2025).*

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63 The Good Friday Agreement (1998), paras 26–29. See also the Policing Justice Section, para.7.

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64 *A. Moore, The Long Game: Inside Sinn Féin (Dublin: Penguin, 2023).*

65 Martin McGuinness was Sinn Féin's deputy leader, Minister for Education (1999–2002) and Deputy First Minister (2007–2017). He was also a reputed member of the IRA's ruling Army Council at different periods. See further P. Taylor, *Provos: The IRA and Sinn Féin* (London: Bloomsbury, 1997), p.213.

66 See further Holder and Verdirame, "The National Security Doctrine in Northern Ireland legislation" (2016) 67 Northern Ireland Law Quarterly 93.

67 Northern Ireland Act 1998, s.26. The SOSNI can also direct a Minister or devolved department to take "any action" (including legislation) considered necessary to "safeguard the interests of" national security. Northern Ireland Act 1998, sch.2, para.17.

68 Northern Ireland Act 1998, sch.2, para.17.

69 C. Northcott, "The Role, Organization, and Methods of MI5" (2007) 20(3) International Journal of Intelligence and Counterintelligence 453, 462. The RUC became the PSNI in 2001 following a series of reforms introduced by the Patten Commission established under the Good Friday Agreement.

70 Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

71 For example, the smaller nationalist party (The Social Democratic and Labour Party, SDLP) opposed the transfer of national security to MI5 arguing that: unlike the PSNI, there were no oversight, accountability, or complaints mechanisms for MI5; there was a risk of MI5 "mission creep", a deepening of MI5 power: and a risk to the authority of the devolved institutions. SDLP Letter to the Northern Ireland Assembly Review Committee Inquiry into Devolution of Justice and Policing, (31 August 2007).

72 *A. Mulcahy, Policing Northern Ireland: Conflict, Legitimacy and Reform (London: Routledge, 2013).*

73 *K. Hearty, Critical Engagement: Irish Republicanism, Memory Politics and Policing (Liverpool: LUP, 2017).*

74 NIO, "Handling Arrangements for National Security Related Matters After Devolution of Policing and Justice to The Northern Ireland Executive" (2010), para.10.

75 A. Bryson, and K. McEvoy, "Human rights activism and transitional justice advocacy in Northern Ireland" (2023) 17(3) International Journal of Transitional Justice 453.

76 *McKerr v UK (2002) 34 E.H.R.R. 20*; *Kelly and others v UK (App. No.30054/96), judgement of 4 May 2001*; *Shanaghan v UK (App. No.37715/97), judgement 4 May 2001*; *Jordan v UK (2003) 37 E.H.R.R. 2*. See further *B. Dickson, The European Court of Human Rights and the Conflict in Northern Ireland (Oxford: Oxford University Press, 2010).*

77 F. Ní Aoláin, "Truth telling, accountability and the right to life in Northern Ireland" (2002) 5 European Human Rights Law Review 572.

78 *Committee on the Administration of Justice (CAJ), The Apparatus of Impunity? Human Rights Violations and the Northern Ireland Conflict (Belfast: CAJ, 2015).*

79 *Committee on the Administration of Justice, The Apparatus of Impunity? Human Rights Violations and the Northern Ireland Conflict (Belfast: CAJ, 2015)*. As the now Chief Constable of the PSNI Jon Boutcher concluded in his independent investigative report (as part of the Package of Measures) into the actions of the British agent "Stakeknife" "It is abundantly clear that agencies of the state involved in dealing with the Troubles have made decisions not to disclose information that should have been passed to legacy investigations, and have permitted a culture of delay and obstruction. Those leading previous legacy investigations have evidenced these actions. This should not happen, particularly where grounds exist to indicate the state was complicit in or turned a blind eye to serious criminality", J. Boutcher, "Operation Kenova: Northern Ireland Stakeknife Legacy Investigation" (2024), para.37.1-2, https://www.psni.police.uk/sites/default/files/2024-03/Operation%20Kenova%20Interim%20Report%202024.pdf [Accessed 15 February 2026].

80 Police Ombudsman for Northern Ireland, "The Murders at the Heights Bar in Loughinisland, 18 June 1994" (2017, amended 2020), para.5.11.

81 Boutcher, "Operation Kenova: Northern Ireland Stakeknife Legacy Investigation" (2024).

82 Alexander Litvenenko *(Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London) [2013] EWHC 3724 (Admin)* at [53].

83 The Police Act (Northern Ireland) 1998, ss.65, 66.

84 Boutcher, "Operation Kenova: Northern Ireland Stakeknife Legacy Investigation" (2024).

85 Hansard, HC Vol.547, col.908, Jeffery Donaldson MP (4 July 2012).

86 C. McCurry, "Foster: Why I Blocked Plans to Speed Up Troubles Probes: Inquests 'Skewed' Towards Killings Committed by the State" (4 Mary 2016), *Belfast Telegraph*; The then Lord Chief Justice Sir Declan was reported as being "bitterly disappointed" at this delay, Vincent Kearney (3 May 2016), *BBC*

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Television News. See also Claire Simpson, "Troubles Inquests Delayed Again After DUP Blocks Funding Bid" (4 May 2016), *Irish News*.

87 *Hughes (Brigid) Application [2018] NIQB 30.*

88 For example, the Kingsmill Massacre inquest determined that the IRA had been responsible for the sectarian murder of 10 protestant civilians, *In The Matter of Inquests into the Deaths of ten men on the Kingsmill Road, County Armagh* [2024] NICoroner 21.

89 *In the Matter of a Series of Deaths That Occurred in August 1971 at Ballymurphy, West Belfast* [2021] NICoroner 6. The Ballymurphy Massacre inquest completed in July 2021, after 100 days of evidence, heard by Mrs Justice Keegan (now Lady Chief Justice). See further Committee on the Administration of Justice, "What could substantive 'root and branch' reform of the ICRIR look like? and would it be enough?" (2024), https://caj.org.uk/wp-content/uploads/2024/11/CAJ-Reform-of-ICRIR-Report-November-24.pdf [Accessed 15 February 2025].

90 C. Mallory, S. Molloy and C. Murray, "Tort, Truth Recovery and the Northern Ireland conflict" (2020) 3 European Human Rights Law Review 244.

91 *Flynn v Chief Constable of Northern Ireland [2017] NICA 13 and [2018] NICA 3.*

92 Mr Justice Rooney held that the police knew that the informant had already confessed to his role in other killings but had "not only turned a blind eye to Informant 1's serious criminality" but also "went further and took active measures to protect (him) from any effective investigation and from prosecution, despite the fact that (he) had admitted his involvement in previous murders and criminality." See Alan Erwin, "Belfast man awarded £90k damages over grandfather's killing involving police informant" (31 March 2023), *Belfast Telegraph*.

93 M. Maguire, "Lessons Learned from Investigating the Past in Northern Ireland" (2023) 17(3) International Journal of Transitional Justice 470.

94 Police Ombudsman for Northern Ireland, "Statement by Mrs Nuala O'Loan, then Police Ombudsman for Northern Ireland, into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters, (Operation Ballast Report)" (22 January 2007).

95 Police Ombudsman for Northern Ireland, "The Murders at the Heights Bar in Loughinisland, 18 June 1994" (2017, amended 2020).

96 See B. McCaffrey, "Was Taking an Investigatory Powers Tribunal Worth it?" (17 December 2024), *The Detail*.

97 Police Ombudsman for Northern Ireland, "Investigation into Police Handling of Loyalist Paramilitary Murders and Attempted Murders In South Belfast In The Period 1990–1998" (2022); Police Ombudsman for Northern Ireland, "Investigation Into Police Handling Of Certain Loyalist Paramilitary Murders And Attempted Murders In The Northwest Of Northern Ireland During The Period 1989 To 1993" (2022).

98 Boutcher, "Operation Kenova: Northern Ireland Stakeknife Legacy Investigation" (2024).

99 Boutcher, "Operation Kenova: Northern Ireland Stakeknife Legacy Investigation" (2024), see e.g., paras 71.8, 16.23, 76.3.

100 Northern Ireland Affairs Committee, "Written evidence submitted by Police Service of Northern Ireland, relating to The Government's new approach to addressing the legacy of the past in Northern Ireland inquiry" [LPNI0015] Appendix "Legacy talk for the British Irish Association- Chief Constable Jon Boutcher' 8th September 2024".

101 An earlier example of this was the attempt through the Inquiries Act 2005, to codify ministerial control over public inquiries, to thwart a peace-agreement commitment to an independent public inquiry into the murder of human rights lawyer Pat Finucane. See further E. Ireton, "The ministerial power to set up a public inquiry: issues of transparency and accountability" (2016) 67 NILQ 209. In September 2024 the new Labour government announced its intention to finally establish a public inquiry into the murder of Mr Finucane.

102 Northern Ireland Office, "The Stormont House Agreement" (2014).

103 Northern Ireland Office, "The Stormont House Agreement" (2014).

104 See further K. McEvoy and A. Bryson, "Justice, Truth and Oral History: Legislating the Past 'From Below' in Northern Ireland" (2016) 67 NILQ 67-90.

105 J. Manley, "Charlie Flanagan Critical of National Security Smothering Blanket" (27 November 2015), *Irish News*. The Irish Foreign Minister stated "…I don't believe it's acceptable that the smothering blanket of national security should on all occasions be used in the manner you've seen in Northern Ireland over a number of years."

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106 UN Human Rights Council, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland" (17 November 2016) UN Doc A/HRC/34/62/Add.1.

107 Bryson, and McEvoy, "Human rights activism and transitional justice advocacy in Northern Ireland" (2023) 17(3) International Journal of Transitional Justice 453.

108 See further K. McEvoy, "Acknowledging the Past in the Post Truth Era: Witch-hunts, Lawfare and the Veterans's Amnesty in Northern Ireland" (2026) Journal of Law and Society 53, https://onlinelibrary.wiley.com/doi/10.1111/jols.70041.

109 *B. Dooley et al., Bitter Legacy', The Report of the International Expert Panel into State Impunity and the Northern Ireland Conflict (Norwegian Center for Human Rights, Committee on the Administration of Justice, and Pat Finucane Centre, 2024)*.

110 *Re Dillon and others [2024] NICA 59*; *In the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the Secretary of State for Northern Ireland [2024] NIKB 11*.

111 See Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, Schs 6 and 7.

112 Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, ss.30(7) and 4(1). Under s.33(3) of the Legacy Act the Secretary of State may give guidance to the ICRIR on the scope of national security in this specific context.

113 ECtHR Press Release, "New Interstate Application Brought By Ireland Against the UK" (19 January 2024), https://www.echr.coe.int/w/new-inter-state-application-brought-by-ireland-against-the-united-kingdom [Accessed 15 February 2026].

114 *Re Dillon and others [2024] NICA 59, [245]*.

115 Independent Commission for Reconciliation & Information Recovery, "Enhanced Inquisitorial Proceedings: A Brief Explanation" (2024), https://icrir.independent-inquiry.uk/document/enhanced-inquisitorial-proceedings-a-brief-explanation/ [Accessed 15 February 2026].

116 See the Joint Committee on Human Rights, "Written Evidence submitted by the Committee on the Administration of Justice" (NIL0002), http://committees.parliament.uk/writtenevidence/134544/default/ [Accessed 15 February 2026]; Relatives for Justice (NIL0003), Amnesty International UK (NIL0004); Baroness O'Loan DBE MRIA (NIL0007) JUSTICE (NIL0008), Northern Ireland Legacy Remedial Order —Written evidence—Committees—UK Parliament [Accessed 15 February 2026].

117 *Re Dillon and others [2024] NICA 59, paras 224, 232-4.*

118 Committee on the Administration of Justice, "Written Evidence to the Joint Committee on Human Rights on the Northern Ireland Legacy Remedial Order" (2025).

119 J. O'Neill, "The Troubles: Legacy Act Denies Me Closure", *Irish Times*, 1 May 2024, "Northern Ireland inquests involving 74 deaths during Troubles will not go ahead after Legacy Act takes Effect" (1 May 2024), *BBC News*,

120 BBC News, "Sean Brown: State Agents Linked to GAA Official's Murder, Court Hears" (27 Februry 2024).

121 *In the Matter of an Inquest Touching the Death of Sean Brown* [2024] NICoroner 18, paras 24–25.

122 C. Young, "High Court Judge Believes Legacy Body Not Appropriate Mechanism to Investigate Sean Browns Murder" (18 April 2024), *Irish News*.

123 *Brown's (Bridie) Application [2024] NIKB 109.*

124 *In the matter of an application by Brown (Bridie) [2025] NICA 16.*

125 C. Macauley, "UK Government Seeks to Appeal Ruling Over Brown Inquiry" (31 May 2025), *RTE News*; Re SOSNI recommendation to families to go to the ICRIR see *Irish Times*, "Families of loyalist murder victims 'not giving up' after public inquiry request refused" (19 September 2024); S. Graham, "UK government refuses to grant public inquiry into murder of Seán Brown in Co Derry in 1997" (13 September 2024), *Irish Times*.

126 *In the matter of an application by Brown (Bridie) [2025] NICA 16, paras 120-3.*

127 "Statement by Family of Sean Brown" (27 February 2024), *KRW Law*, https://krw-law.ie/sean-brown-statement/ [Accessed 15 February 2026]. This judicial review is stayed pending the outcome in Thompson.

128 Springfield Park Residents Association, "Report of the Inquiry int the Murder of Paul Thompson and the Wounding of Patrick Elley" (1994).

129 *Mohamed v Secretary of State for the Home Department [2014] EWCA Civ 559 at [20].*

130 *The Chief Constable of The Police Service of Northern Ireland's Application and The Secretary of State for Northern Ireland's Application [2024] NIKB 18, para 22*.

131 *Secretary of State for Northern Ireland Application [2024] NIKB 32.*

132 *Secretary of State for Northern Ireland Appeal Against Coroner Fee [2024] NICA 39.*

133 *Secretary of State for Northern Ireland Appeal Against Coroner Fee [2024] NICA 39 at [57]–[58].*

134 S*ecretary of State for Northern Ireland Appeal Against Coroner Fee [2024] NICA 39* at [59] and [66]. In dissenting, McCloskey LJ (para.64) concluded that the Coroner had been in error because there was no "cogent reason" for the Coroner to depart from the Ministers assessment of the damage to national security.

135 J. Ware, "The PSNI Chief Constable has Challenged the Securocrats and They Don't like it One Bit" (13 June 2025), *Irish News*, Tensions between the Chief Constable and the NIO were also apparent in 2024 in another legacy inquest – into the loyalist murder of Fergal McCusker with collusion again suspected. The case revealed correspondence from the SOSNI criticising the Chief Constable's "unwelcome" approach to considering gisting sensitive information without reference to him. J. Boutcher replied in "fairly robust terms" pointing out that "I am independent of the executive and not subject to the direction or the control of government ministers, department or agencies" C. Young, "Exclusive: Chris Heaton-Harris Accused of 'Unprecedented Political Intervention' in Legacy Inquest" (10 April 2024), *Irish News*.

136 Cabinet Office, "Guidance Note on NCND Principle" (2017), https://www.kenova.co.uk/41.%20D5371%20Guidance%20Re%20NCND%202017.pdf [Accessed 15 February 2026].

137 *In the matter of an application by the Secretary of State for Northern Ireland for Judicial Review (Appellant) [2025] UKSC 47.*

138 *In the matter of an application by the Secretary of State for Northern Ireland for Judicial Review (Appellant) [2025] UKSC 47*, the investigative journalist John Ware has suggested that the Supreme Court might have selected the justices "more judiciously" given that, as Treasury Counsel, Lord Sales had controversially advised the UK Government on how to safeguard NCND and prevent the naming of an agent within the IRA known as Stakeknife. See further J. Ware, "Boucher v's Benn: A Legacy of Conflict in the Courtroom" (13 June 2025), *The Article*.

139 *In the matter of an application by the Secretary of State for Northern Ireland for Judicial Review (Appellant) [2025] UKSC 47* at [129]–[130]. In narrowing the role of the judiciary on national security assessment to Wednesbury irrationality, the Court took the view that the previously established fifth principle set out in Litvinenko on such national security assessments—that the assessment of the Secretary of State should be accepted unless there are cogent or solid reasons to reject it—"is capable of being misleading" at [130].

140 I*n the matter of an application by the Secretary of State for Northern Ireland for Judicial Review (Appellant) [2025] UKSC 47 at [136].*

141 See e.g., A. Deb, C. Murray and G. Tan, "Legacy Issues: In re Secretary of State for Northern Ireland [2025] UKSC 47" (18 December 2025), *UKCLA Blog*; International Federation of Human Rights Press Statement, "Supreme Court Thompson Ruling Could Enable Secretary of State to Conceal Involvement of State Agents in Troubles Killings" (17 December 2025).

142 *In the matter of an application by the Secretary of State for Northern Ireland for Judicial Review (Appellant) [2025] UKSC 47 at [161].*

143 *J. Boutcher, "Neither Confirm Nor Deny and Legacy Investigations" (11 December 2025), Annual Lecture of the Committee on the Administration of Justice, p.6.*

144 *Boutcher, "Neither Confirm Nor Deny and Legacy Investigations" (11 December 2025), Annual Lecture of the Committee on the Administration of Justice, p.5.*

145 UK and Irish Governments, "The Legacy of the Troubles: A Joint Framework between the Government of the UK and the Government of Ireland" (2025).

146 UK and Irish Governments, "The Legacy of the Troubles: A Joint Framework between the Government of the UK and the Government of Ireland" (2025), para.13 notes that interested parties "may appeal a decision to withhold sensitive information from onward disclosure to the relevant court, consistent with the principles applicable on an application for judicial review".

147 "UN Special Rapporteurs Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Special Rapporteur on extrajudicial, summary or arbitrary executions and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, communication on UK and Ireland Joint Framework" (30 October 2025), OL GBR 18/2025, p.9.

148 *Bok, Secrets: On the Ethics of Concealment and Revelation (Oxford: Oxford University Press, 1984), p.199.*

149 In addition to introducing the Legacy Act discussed above, the previous government also introduced proposals to establish a new official history of the conflict to counter republican narratives on what happened. Harry Yorke, "Minsters Plan Official Account of the Troubles Amid Fears IRA Supporters are

Rewriting History" (13 November 2021), *Daily Telegraph*. At the time of writing, the Labour government appears to be continuing with this initiative.

150 In the Thompson case, Paul's brother Eugene was chief litigant and by the time the case reached the Supreme Court he was terminally ill. A week before he died, the PSNI Chief Constable hand delivered a formal written apology at his hospital bed (later published) for police failings in relation to the killing, including "failing to investigate and arrest three potential suspects and for disclosure delays at the Inquest." PSNI, "Statement of Apology from Chief Constable Jon Boutcher Police Service of Northern Ireland" (22 July 2025). Mr Thomspon welcomed the apology and stated "I thank Jon Boutcher for coming himself and for acting quickly in delivering the apology from the PSNI after we had asked for it." C. Young, "PSNI Chief Constable Delivers Bedside Apology to Terminally Ill Brother of Catholic Murder Victim" (23 July 2025), *Irish News*.

151 K. McCallum, "Latest Threat Update" (8 October 2024), *MI5*, https://www.mi5.gov.uk/director-general-ken-mccallum-gives-latest-threat-update [Accessed 15 February 2026].

152 *M. Osiel, Mass Atrocity, Collective Memory, and the Law (Transaction Publishers 1999).*

153 *E. P. Thompson, The Making of the English Working Class (London: Vintage, 1968), p.561.*

154 *J. C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (New Haven: YUP, 2020).*

155 *P. Scott, The Nation Security Constitution (Oxford: Hart, 2018).*

156 G. Simmel, "The Sociology of Secrecy and of Secret Societies" (1906) 11(4) AJS 441.

157 Ekins uses the term legalised lawlessness to describe "the incremental legalizing, bureacratising, and legitimating of exceptional state directed violence when ordinary laws proved insufficient for maintaining order and control." See *Elkins, Legacy of Violence: A History of the British Empire (London: Bodley Head, 2022), p.141. Cobain, Cruel Britannia: A Secret History of Torture (London: Granta, 2013)*; *Bennett, Uncivil War: The British Army and the Troubles, 1966–1975 (Cambridge: Cambridge University Press, 2023)*.

158 L. D Sutter (ed.), *Zizek and Law* (London: Routledge, 2016). Zizek juxtaposes public law as the code of rules that govern society, juxtaposed to "nightly law", examples of which include practices such as the activities of Klu Klux Klan in the American South, where even thought they may be common, or indeed well known, they are nightly because they are "..not to be exposed to the light of day, even as they are formally disavowed." See further J. Dean, "Zizek on Law" (2004) 5 Law and Critique 1, 15.

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