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The national security doctrine in Northern Ireland legislation

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The derailment of the Stormont House Agreement legacy Bill in late 2015 was a result of the belated inclusion of 'national security' caveats into the powers of the independent Historical Investigations Unit (HIU) the legislation was to establish. The Northern Ireland (Stormont House Agreement) Bill was to be introduced into Westminster in the autumn 2015 session. However, a leaked draft of the Bill shortly before this revealed that Whitehall had inserted provisions within it granting ministers unprecedented powers to change the contents of HIU investigative reports on grounds of 'national security' before they were given to families. Whilst such detailed codification of such powers would have taken the 'national security doctrine' in legislation to new levels, the doctrine itself has nevertheless already grown exponentially in recent years in the context of devolution. This article overviews these developments.

Hiding in plain sight: national security and legal certainty

National Security provisions appear throughout Northern Ireland legislation in different forms. There is no statutory definition of 'national security'. As the MI5 website clarifies: 'It has been the policy of successive Governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances.'[1]

Some legislation relies on essentially circular reasoning for interpreting national security that simply refers back to the undefined concept itself. For example, there are definitions of 'national security information' as: 'information the disclosure of which to the public would, or would be likely to, adversely affect national security'.[2] The formulation in legislation can rely on terms such as 'protected information', which is information that deals with issues of national security, or where such information would be contrary to national security interests.[3] How protected information is defined is

1 Committee on the Administration of Justice (CAJ), 'The Apparatus of Impunity? Human Rights Violations and the Northern Ireland Conflict: A Narrative of Official Limitations on Post-Agreement Investigative Mechanisms' (CAJ/Queen's University Belfast 2015) 30.

2 E.g. Civil Contingencies Act 2004, Article 12A(3), as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 3, para 103.

3 E.g. Police (Northern Ireland) Act 1998, s 41A(1), as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 3, para 22.

essentially discretionary and depends simply on the opinion of the Secretary of State.[4] For evolutionary reasons outlined below, identifying national security references is often complex, requiring the cross-referencing of a number of statutes.[5]

In this area, the courts have tended to exercise significant deference to the Executive, often upholding the latter in its determination of national security-related issues.[6] It is, of course, difficult to appeal against the misapplication of a power that is not defined, particularly to the judicial review standard of Wednesbury unreasonableness. It is complex to contend that the Secretary of State is going beyond his or her statutory powers in making determinations on which matters are to be considered issues of national security where there is little legal certainty and, hence, considerable discretion as to what this actually means. Until relatively recently, the courts determined that national security issues were 'par excellence a non-justiciable question'.[7] However, since the *Belmarsh* case, where the court declared a national security-related policy as incompatible with the ECHR, there has been a shift.[8] The domestic courts have therefore placed some parameters around the concept, as has Strasbourg itself.

Evolution of the national security doctrine

The use of national security in constitutional legislation has expanded dramatically in recent years in the context of the peace settlement. The concept was not mentioned in the Government of Ireland Act 1920 and was mentioned only once in the Northern Ireland Constitution Act 1973. By contrast, the Northern Ireland Act 1998, which was the main implementation legislation for the Belfast/Good Friday Agreement, contains a number of national security provisions. These included a power for the Secretary of State to veto 'any action proposed to be taken by a Minister or Northern Ireland department' (including legislation) that she 'considers' incompatible with the 'interests' of national security. The Secretary of State can also direct by order that a minister or Northern Ireland department take 'any action' (including legislation) that she again considers necessary to 'safeguard the interests of' national security.[9] A Schedule to the 1998 Act provides that among the 'excepted matters' which are retained within the legislative competence of Westminster, are matters of 'national security'.[10] Reform of policing and the establishment of oversight bodies for policing led to additional national security provisions being incorporated in legislation. The doctrine was further expanded on the devolution of policing and justice powers to Northern Ireland in 2010. The implementation statute contained 45 references to national security, essentially ensuring that power over national security elements of the justice system remained with the UK government.[11]

4 Criminal Justice (Northern Ireland) Order 2008, Article 16(4) as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

5 E.g. Police (Northern Ireland) Act 1998, s 63(4)(b) 'Restriction on disclosure of information', as inserted by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 3, para 33(3). This provision prevents the disclosure of certain information 'on the ground mentioned in section 76A(1)(a) of the Police (Northern Ireland) 2000 [as inserted by Police (Northern Ireland) Act 2003, s 29(1)]'. The ground in s 76A(1)(a) is: 'it is in the interests of national security'.

6 Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9:1 International Journal of Constitutional Law 172.

7 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 412 (per Diplock LJ).

8 *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

9 Northern Ireland Act 1998, s 26.

10 Ibid Sch 2, para 17.

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

The sole reference in the Northern Ireland Constitution Act 1973 to national security is found in the anti-discrimination provisions in s 23. This section provides an exemption to protections against discriminatory legislation when undertaken on grounds of, inter alia, 'safeguarding national security'. Sub-section 4 provides that a certificate from the Secretary of State certifying that the provision 'was done for the purpose of safeguarding national security shall be conclusive evidence that it was done for that purpose'.[12] Such provisions were then also found in Northern Ireland's subsequent anti-discrimination laws, including the 1976 Acts on fair employment and sex discrimination.[13] In a complaints tribunal, a certificate of national security was conclusive evidence to dismiss a complaint.[14] Subsequent anti-discrimination legislation has also contained such national security caveats.[15] This procedure, where there was no right of appeal from such a ministerial determination, was found to be incompatible with the right to a fair trial under Article 6 ECHR at the European Court of Human Rights.[16] As a result of such rulings anti-discrimination legislation was amended to provide for an appeal, but to a closed Special Tribunal.[17] These types of tribunals, often dubbed 'secret courts' and involving the special advocate system, have since grown exponentially. In recent years, legislative proposals to hold inquests behind closed doors were defeated on a number of occasions. However, other civil proceedings can now be subjected to a 'closed material procedure' under the Justice and Security Act 2013, where the information in question is deemed to potentially prejudice 'the interests of national security'.[18]

Institutions established as part of the peace process are subject to limitations based on national security. The Northern Ireland Human Rights Commission's powers of investigation are qualified by national security caveats.[19] National security qualifications are often to be found in relation to information disclosure to oversight bodies. For example, policing legislation in 2000 set out that the Chief Constable of the Police Service of Northern Ireland's duties to report to the Policing Board were qualified to the extent that, if the Chief Constable is of the view that information in the report should not be disclosed, 'in the interests of national security' (and other grounds such as public order), then the Chief Constable *may* refer the requirement to report to the Secretary of State. The Secretary of State then has powers to modify or set aside the requirement to report to the Board on this matter.[20] These powers were further codified in 2003 to empower the Secretary of State to either set aside the duty to report or, alternatively, to instead report to a Special Purposes Committee of the Board.[21] In the 2010 devolution statute, the qualifications were again amended so that the Secretary of State only deals

12 Northern Ireland Constitution Act 1973, s 23(4).

13 Sex Discrimination (Northern Ireland) Order 1976, s 53; Fair Employment (Northern Ireland) Act 1976, s 42.

14 Kieran McEvoy and Ciaran White, 'Security Vetting in Northern Ireland: Loyalty, Redress and Citizenship' (1998) 61(3) Modern Law Review 341, 350.

15 See Race Relations (Northern Ireland) Order 1997; Fair Employment and Treatment (Northern Ireland) Order 1998; Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003; Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006; Employment Equality (Age) Regulations (Northern Ireland) 2006; Equality Act 2010; Disability Discrimination Act 1995, Sch 3, para 8.

16 *Tinnelly & Sons Ltd and Others and McElduff and Others v UK* ECHR 1998-IV.

17 E.g. Fair Employment and Treatment (Northern Ireland) Order 1998, s 96, amends the Sex Discrimination (Northern Ireland) Order 1976 by adding a process for appeal against a national security certificate to the tribunal established in s 91 of the Northern Ireland Act 1998.

18 Justice and Security Act 2013, s 6(11); CAJ (n 1) 38.

19 Northern Ireland Act 1998, s 69B, inserted by Justice and Security Act 2007.

20 Police (Northern Ireland) Act 2000, s 59.

21 Ibid as amended by the Police (Northern Ireland) Act 2003, s 10.

with national security questions and the Department of Justice deals with other grounds for non-disclosure (such as public order).

The evolution of such powers becomes indicative of the emergence of a parallel system of accountability whereby devolution is restricted to 'non'-national security matters. At worst, this allows for a power through which devolved authorities are required to defer decisions to the Secretary of State on grounds that are yet to be fully delineated. Put cynically, in the absence of legal certainty over the concept, the Secretary of State may cry 'national security' at any point on a range of matters and usurp powers that had been devolved.

Throwing in everything: including the kitchen sink

By 1999, the national security doctrine had already been extended at a UK level to include, or rather exclude, the kitchen sink. Legislation establishing the Food Standards Agency gave the body wide entry and enforcement powers, but not to those kitchens that the Secretary of State regards it as requisite or expedient for it not to inspect 'in the interests of national security'.[22] Similar regimes were introduced as national security caveats on disclosure of information. The Freedom of Information Act 2000 maintains a national security caveat.[23] Personal data is exempt from data protection where there are national security considerations.[24] In all these cases, a certificate from a minister of the Crown is conclusive evidence.[25]

The embedding of the national security doctrine into the 2010 devolution statute for policing and justice in Northern Ireland in large part centres on caveats over disclosure. Throughout the legislation, the Secretary of State has a number of powers to intervene and determine if there is information that should not be published in a report. In this way, the Secretary of State may restrict the information from the Chief Constable or the Police Ombudsman, as both are required to inform her if they are 'of the opinion' that there is potential national security information to be included in reports. This process is also provided for in relation to a report of the Chief Inspector of Criminal Justice who is required to submit reports to the Secretary of State if the inspector believes they include protected information. In such circumstances, the report cannot be disclosed to anyone else, including the Department of Justice, and can be redacted. The Secretary of State must inform the department that the report will exclude protected information.[26]

The devolution statute, however, also embeds the doctrine in a different way in essentially creating a parallel chain of command for justice powers whereby the Department of Justice deals with non-national security matters and the Secretary of State continues to exercise national security powers.

This is particularly notable in relation to prisons where the 'Secretary of State may continue to exercise' pre-devolution functions in relation to national security. This explicitly includes powers to continue to make Prison Rules, to which rules made by the Department of Justice are subordinate, having effect only insofar as they comply with the Secretary of State's rules. The Secretary of State performs functions and may make decisions regarding national security which include, but are not limited to, 'the taking of decisions on the basis of protected information', 'the controlling of access to protected

22 Food Standards Act 1999, s 38(3), in relation to crown premises.

23 Freedom of Information Act 2000, s 24(1).

24 Data Protection Act, s 28(1).

25 E.g. Freedom of Information Act 2000, s 24(3).

26 Justice (Northern Ireland) Act 2002, s 49(1A)–(1E), as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 13, para 7(2).

information' and 'the holding and use of protected information'. In matters of national security, the Secretary of State even has the power to commandeer employees normally answerable to the Department of Justice bodies and proceed on the basis that they are then 'officers of the Secretary of State', answerable to her, and 'subject to her direction and control'.[27]

Codifying the national security doctrine: the leaked Stormont House Agreement Bill

The December 2014 Stormont House Agreement itself intentionally did not provide for any disclosure caveat on grounds of national security; in fact, the term does not appear at all within the Agreement. Government's intent to insert the doctrine only became clear in September 2015 when the Northern Ireland Office published a Summary of Measures document on the Bill. In addition to planning that the oversight body for the HIU would cease to be the Policing Board when the unit dealt with national security or other non-transferred matters (when instead the line of accountability would switch to the Secretary of State), the policy document also dealt with national security qualifications on disclosure. A version of the Bill leaked to the media revealed that such qualifications had been codified as never before. Rather than permissive powers for the heads of institutions to make decisions as to whether information may engage national security and be referred to the Secretary of State, instead whole classes of document would be pre-certified by any policing and security agency before being passed to the HIU. The doctrine went beyond national security to become 'national security+'. The provisions encompassed any information classified as national security information by any relevant authority, but also, for good measure, any document which emanated from the intelligence unit of the police or military would automatically receive the same classification. Once information had been classified in such a way, the sole decision-maker as to whether it would remain in HIU reports to families would be the Secretary of State herself. Should an HIU staff member pass such information to families without her consent, the leaked Bill provided that they could face a prison sentence. No right to appeal was contained within the Bill.

In this instance, the insistence on such provisions provoked the collapse of agreement on the introduction of the draft legislation and a return to the drawing board in relation to procedures over onward disclosure. It has nevertheless laid bare government's desired direction of travel regarding the further codification of the national security doctrine.

27 Prison Act (Northern Ireland) 1953, s 1A(7), as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 4, para 3.