COMMENT

Facing up to Miscarriages of Justice

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I. INTRODUCTION[1]

No criminal justice system, however good it is or is thought to be, will be immune from error. That, of course, is acknowledged in all developed systems by the process of appeal, but not all errors can be detected at that stage. Evidence may emerge only later, there may be developments in law and practice, there may be later evidence of impropriety, error or irregularity. Thus, in every system, however good and whatever its trial and appellate arrangements, there will be wrongful convictions or miscarriages of justice.

Most developed systems regard the reopening of convictions once the normal appellate processes have been exhausted as fairly rare and extraordinary. A power is usually vested in some person or body with appropriate authority, but it is typically immensely difficult to disturb a conviction or even persuade the relevant authority to reopen the matter for further investigation. These arrangements cannot be said to provide an adequate system for dealing with the inevitability of wrongful convictions. That is why it is essential to have standing

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1 For description, explanation and analysis of the Criminal Cases Review Commission which covers England, Wales and Northern Ireland, see Graham Zellick, "The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective" [2005] Crim. L. Rev. 937; Richard Nobles & David Schiff, "The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal" [2005] Crim. L. Rev. 173; L.H. Leigh, "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission" (2000) 38 Alta. L. Rev. 365; David Kyle, "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission" (2004) 52 Drake L. Rev. 657.

machinery of some kind to deal with these issues. Finality in civil proceedings has everything to commend it: finality in criminal proceedings, where liberty and reputation are at stake, is a singular evil.

It must, however, be emphasised that post-conviction review machinery is not a substitute for getting the criminal process right, for striking the correct balance between the prosecution and defence, and for having the appropriate procedural rules and safeguards. Post-appeal review presupposes a robust, effective and fair criminal justice system. Otherwise, the burdens placed on it will be unsupportable.

The ability and willingness of the criminal justice system in any country to confront miscarriages of justice and wrongful convictions is a fundamental test of its humanity, decency and fairness. Justice demands no less.

II. THE MODELS

There are three possible models for post-appeal review arrangements: to locate it within central government as part of the responsibility of a Minister; to confer the jurisdiction on the courts; or to establish a free-standing statutory body.

To locate the machinery within central government means simply that the body will never inspire the degree of confidence that is necessary. The Canadian experience testifies to this. Although the department within the federal Ministry of Justice has virtually all the powers that are necessary for such a review body, operates at arm's length from the normal sections within the Ministry, and has a direct line to the Minister, the number of applications for review it receives is so astonishingly small that it can only support the conclusion that its positioning within central government seriously diminishes its standing in the eyes of those who feel they have been wrongly convicted.[2] This is so even though prosecutions are a provincial responsibility and the federal government could therefore be said to be independent.

There is also the issue of principle, namely, that it is no part of a ministerial role to be involved in the administration of justice as it relates to individual cases. It is true that there is a long tradition of such involvement in the British system deriving from the Crown's role in exercising the royal prerogative of mercy. But the historical explanation should not be taken to legitimise a current ministerial role, which also implies a degree of parliamentary scrutiny. That is to risk infusing an individual criminal conviction with a political dimension, which is entirely undesirable. Moreover, any claim that the Minister's accountability to Parliament for the exercise of this power is in itself a worthwhile mechanism must be questioned. Those constitutionalists who are familiar with the working

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2 See *e.g.* The Honourable Mr. Justice Peter H. Howden, "Judging Errors of Judgment: Accountability, Independence & Vulnerability in a Post-Appellate Conviction Review Process" (2002) 21 Windsor Y.B. Access Just. 569 at 591.

of ministerial responsibility to the legislature will know only too well that it is a mechanism ill-suited to matters of this kind.[3] Thus, ministerial responsibility for dealing with miscarriages of justice is inappropriate for practical reasons as well as on grounds of principle.

It may be thought entirely apt to adapt the judiciary's role to deal with miscarriages of justice and wrongful convictions. However, that is to misunderstand the proper role of the judiciary and to ignore its methods of working and powers, at least within the common law world. (Civil law jurisdictions might conceivably be able to accommodate such a role within the judicial arm of government.) There are two objections to entrusting this role to the courts. The first bears on confidence and public perception, because it is the judiciary which has been implicated in the original conviction and appeal. The issue in question may turn on the behaviour or actions of the trial judge, and is likely to have involved at least one dismissal of an appeal by perhaps three more judges. Even if the courts could handle issues of this kind, the problems regarding independence, public perception and confidence would be insuperable.

Secondly, the issue of confronting miscarriages of justice and wrongful convictions is not only about the exercise of judgment in respect of new argument or evidence; it is primarily and essentially about investigating and reviewing in order to ascertain whether there is new evidence or argument which brings the conviction into question. That is a role for which the common law judiciary is not equipped to handle. Judges attend to arguments put before them, which they evaluate and then exercise judgment. That is only one part of the task of post-appeal review machinery. By far the greater task is investigation and review. There may indeed be a role for the courts at a later stage—I shall certainly argue below that there is—but it is fallacious to suppose that the courts are an alternative to independent statutory machinery, because it overlooks the fact that one of the greatest impediments to correcting miscarriages of justice is the difficulty faced by those convicted in uncovering the evidence and arguments necessary to overturn the conviction.

III. INDEPENDENCE

Any machinery established for this purpose must above all be independent of all those bodies and agencies which have hitherto been involved in the case leading up to the conviction. That is why any standing machinery must not lie within central government and why it cannot be a function entrusted to the prosecution service, the police or even the judiciary. The review body must be able to command confidence. Independence is therefore a *sine qua non*.

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[3] *Ibid.* at 593.

However, no public body can exist in a vacuum and difficulties arise. It is one thing to establish a statutory body outside any particular government ministry, but such a body must nevertheless be funded and there must be some degree of accountability to ensure that it behaves correctly and uses public funds appropriately. In Britain, the device that has been developed for this has been the so-called non-departmental public body (NDPB). Each NDPB has a government department which funds and sponsors it and whose ministerial head answers questions in Parliament about it, but even this may raise questions about independence. It is true that such a system would allow the government to starve the organisation of sufficient resources, subject only to parliamentary and public criticism, but it is difficult to imagine circumstances in which the body could have no formal link at all to central government. There are certain bodies of this kind in Britain which unusually have a direct line to Parliament rather than through a ministry, namely, the National Audit Office (headed by the Comptroller and Auditor General) and the Electoral Commission. The former is regarded as an officer of the House of Commons and the latter reports to a statutory parliamentary committee chaired by the Speaker. In the case of the English Criminal Cases Review Commission, although there is a good deal of oversight invested in the Home Secretary who also provides the funding, there can be no Home Office or parliamentary role in relation to specific cases. That critically important fundamental distinction is well understood and recognised. The Chairman of the Commission answers to the House of Commons Select Committee on Home Affairs, but even there the questions may not touch on specific cases with which the Commission has dealt or is dealing. In practice, this connection with central government and Parliament through the Home Office has not impaired public perception of its independence.

There is also a twofold link between the Commission and the English and Northern Irish courts. First, as a public body, the Commission is subject to judicial review exercised by the Administrative Court of the High Court (in England and Wales) and the corresponding court in Northern Ireland. The judicial review process ensures that government, ministers and public bodies operate within the law. Disappointed applicants frequently seek to challenge the Commission's conclusions or procedures by this route, but they are rarely successful.

The other link is with the Criminal Division of the Court of Appeal in England and Wales and the corresponding court in Northern Ireland to which cases are referred for a new appeal if the statutory test is met. That link does not in any way, in practice or theory, damage the Commission's independence. There are also informal contacts between the Chairman of the Commission and the members of the Court and the Registrar of Criminal Appeals. Independence need not and should not mean an absence of contact and exchange of views.

IV. FINAL DECISIONS

In Canada, the federal Minister of Justice may either refer a conviction back to the appropriate appeal court or order a retrial. That latter power would in Britain be regarded as strikingly unusual and offensive to principle on the ground that it infringed the separation of powers between the judiciary and executive. It involves a Minister of the Crown setting aside a decision of the courts. It is true that it does no more than submit the matter to the courts for a further trial, but it remains a unique intervention in the judicial process. The English Commission has no such power and nor did the Home Secretary under the regime which preceded its establishment by the *Criminal Appeal Act 1995*.[4]

The English Commission must decide whether there should be a new appeal. Once it has referred a case, the appropriate appeal court must hear the appeal on the grounds specified by the Commission. The Commission then has no further role unless the court requests it to undertake further inquiries. It is not a party to the proceedings and takes no part in the appeal.

It has sometimes been suggested that this procedure is deficient in that it returns the issue to the very people who have denied justice (to put it tendentiously by those who are critical of the system). But the fact is that the English courts are not in the least averse to quashing such convictions where necessary, even if this might once not have been the case. Around 70 percent of the 40 or 50 cases referred each year to the Court of Appeal by the Commission result in the relevant conviction or sentence being overturned.[5] That does not suggest hostility to the Commission or an unwillingness to acknowledge that mistakes have been made, whether those mistakes are attributable to the judiciary or not.

It has also occasionally been argued that the Commission itself should have been empowered to make these final judgments or that some new and separate tribunal should have been created to receive references from the Commission. Both suggestions, it seems to me, are misconceived.

The reason why the Commission itself should not make the final decision is that it is far better that the body tasked with the review and investigation should not also be the body responsible for deciding whether the conviction should be quashed and there should or should not be a new trial. A separation here is highly desirable. Furthermore, it is essentially a judicial decision and the post-appeal machinery should not only respect the independence of the judiciary but harmonise with the justice system. It is for the courts to make final judgments on the correctness of convictions and it is a much better arrange-

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4 *Criminal Appeal Act 1995* (U.K.), 1995, c. 35.

5 *Annual Report and Accounts of the Criminal Cases Review Commission, 2004–2005* (London: HMSO, 2005) (U.K.) at 13, online: CCRC <http://www.ccrc.gov.uk/publications/publications_get.asp>.

ment to retain the role of the ordinary courts in the process. Of course, there may well be systems in which the senior judiciary would be so hostile to overturning convictions in this way that a different arrangement would, in the interests of justice, have to be fashioned, but that is certainly not the position in Britain.

There are also serious objections to the creation of a new court or tribunal to deal with these cases. If it were just a question of quashing a conviction in a particular case or ordering a retrial, then such a system could work perfectly well. But appeals arising out of references by the Commission frequently involve a consideration of case law or statute and not infrequently involve application in novel circumstances, development, or at the very least clarification. To lose that opportunity flowing from the work of the Commission would be a serious weakness. It would also deny the Commission as well as the rest of the criminal justice system important knowledge about how to deal with similar cases in the future. This could be overcome only by creating a rival criminal appellate jurisdiction, which would not be a happy situation. The confluence of the Commission's review and Court of Appeal's judgment has proved highly satisfactory.

V. POWERS

It goes without saying that the review body needs adequate powers to investigate, interview, commission reports, obtain and examine exhibits and so on. There ought to be few if any limits to its powers. The English Commission has an unlimited power to obtain material from public bodies but surprisingly has no corresponding power in respect of private persons or bodies. This is currently the subject of review by Government. The Scottish Commission does have such a power exercisable by judicial order. Power also needs to be available to seek the co-operation of criminal justice authorities in foreign jurisdictions and to enlist the assistance of the police to carry out specific investigations that require the use of police powers or resources.

There was much discussion in Parliament at the time of the creation of the English Commission as to whether it should have its own team of investigators or should be able to use the ordinary police. In the end, Parliament chose to provide a power to obtain and direct police assistance. That power has been used only about 30 times in the eight-year history of the Commission during which 7 000 or so cases have been reviewed. For the most part, inquiries and investigations are conducted by the Commission's own staff, which includes a number of retired police officers as well as two Investigations Advisers, who have held senior rank as detectives.

VI. TEST FOR REFERRAL

There are many different ways to formulate the basis for reopening a case and having a new appeal. The *Criminal Appeal Act 1995* speaks of a "real possibility" that the conviction or sentence in question will be overturned.[6] Lord Bingham of Cornhill LCJ expressed the view that real possibility lay somewhere between bare possibility and racing certainty.[7] Real possibility implies that a proportion of references will not result in the quashing of the conviction. The 70 percent strike rate by the Commission seems to us about right, a view which is shared by the senior judges of the Court of Appeal if not all of our critics. What the Commission must decide, therefore, is whether there is a real possibility that the Court will find the conviction "unsafe" which is the basis for quashing a conviction in the Court. In order to know whether a conviction is unsafe, regard must of course be had to the relevant case law. It will be seen that neither the Commission nor the Court is looking for evidence of innocence as such: there are many reasons why a conviction may be unsafe, though clearly evidence which indicated innocence would also mean that the conviction was unsafe, but the CCRC is not an Innocence Commission in the American sense.

In Scotland there is a two-limb test: the Commission must (i) find a miscarriage of justice which (ii) it is in the interests of justice to refer for appeal.[8] The term "miscarriage of justice" may not be as wide as it seems, since it seems to be a term of art in Scottish criminal jurisprudence which corresponds to the concept of "unsafe" in England.

It would be a serious mistake to limit any post-appeal review body to innocence, because convictions may need to be overturned on other grounds. The integrity of the criminal process is an important value to be preserved and there are many reasons why a conviction should be questioned even where the evidence falls short of establishing innocence.

The English Commission has an enormously wide jurisdiction: it covers all criminal convictions and sentences, both summary and on indictment, without limit of time. It even deals with cases where the convicted person is dead. There is a case for saying that the jurisdiction should be more limited or, at any rate, the review body should explicitly be empowered to articulate a policy of excluding certain cases which because of their age or triviality ought not to consume the limited resources of the body. That argues for the power to formulate such a

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6 *Supra* note 4, s. 13(1)(a).

7 *R. v. Criminal Cases Review Commission, Ex parte Pearson*, [1999] 3 All E.R. 498 at 505 (Q.B.D.).

8 *Criminal Procedure (Scotland) Act 1995* (U.K.), 1995, c. 46, as am. by *Crime and Punishment (Scotland) Act 1997* (U.K.), 1997, c. 48, s. 194(c).

policy and the existence of a discretion to refuse to review or refer cases in specified circumstances.

One issue that must be decided is the law to be applied in dealing with cases some of which may go back many years. The English statute was silent on this point, but the Court of Appeal[9] has held that it is the statute law at the time of the conviction, but the common law and contemporary standards of fairness at the time of review and the new appeal. It may be questioned whether this is entirely correct or appropriate.[10] It must be open to any system to decide for itself what is the appropriate law to apply to old convictions. The ability to rewrite history and correct the wrongs of the distant past must inevitably be limited if the new body is not to be overwhelmed with work and is to ensure that justice is available to those who are currently experiencing its denial.

VII. REVIEW AND APPEAL

The Royal Commission on Criminal Justice,[11] whose report led to the establishment of the English Commission, expressed the view that the proposed statutory body should be subject to neither judicial review nor investigation by the Parliamentary Ombudsman. In the event, the former recommendation was rejected but the latter implemented. There is currently a reconsideration of whether it should remain outside the jurisdiction of the Ombudsman. The Royal Commission also said that there should be no appeal from decisions of the Commission. That, too, was accepted.

Because the Commission is the only way in which a criminal conviction can be reopened, a number of applicants who are dissatisfied turn to the internal complaints procedure or judicial review as final steps to prise open the door to the appeal court. Both impose a considerable, if inescapable, burden on the Commission.

VIII. MEMBERSHIP

The Royal Commission was adamant that the review body it proposed should not be the exclusive domain of lawyers or even dominated by lawyers. This recommendation was accepted by the Government and Parliament and the Act therefore requires that only one-third of the Commissioners need be lawyers and two-thirds need to have some experience of the criminal justice system.

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9 *R. v. Bentley*, [2001] 1 Cr. App. R. 307.

10 See Auld L.J., *Review of the Criminal Courts of England and Wales, Report* (London, October 2001) at 652–53, para. 106.

11 *Report*, Cm. 2263 (HMSO, London, England, 1993).

Thus, some Commissioners prior to their appointment will have had no experience of either the law or criminal justice. Indeed, the Commission's first Chairman fell into this category. The caseworkers are also drawn from diverse backgrounds. This multi-disciplinary body constitutes a powerful tool for reviewing possible miscarriages of justice.

The Act does not preclude the possibility of appointing a serving judge as a Commissioner, or indeed as Chairman, but that has not so far happened and there is an argument that the perception of the Commission's independence could be undermined by the presence of a serving judge (or, arguably, even a retired judge) among its membership.

It is vitally important that the Commissioners are appointed on merit as a result of a proper process initiated by public advertisement. Any suggestion that the appointments are political would do great damage to the Commission's standing and reputation.

IX. Inquisitorial or Accusatorial, Judicial or Administrative

The English Commission is not a court or tribunal. It does not hold oral hearings, but carries out inquiries and investigations as it sees fit. It obviously pays close attention to the submissions of applicants and their legal representatives and consults them as necessary. Towards the end of the process, a draft set of reasons, together with the appropriate disclosure of documents, will be given to the applicant so that representations can be made before a decision is finalised.

The role of the Commission would be dramatically changed if it were to proceed by way of oral hearings. Even if they did take place, they could not be adversarial, since we do not expect the Crown as prosecutor to play any role in the review and investigation. Of course, questions may be put to the Crown Prosecutor in appropriate cases, but otherwise they will come into the picture only if the case is referred to the Court of Appeal.

X. Compensation

It is essential that those victims of miscarriages of justice whose convictions are quashed as a result of this process should be entitled to compensation available quickly and without further effort or litigation, but this should not be a role for the review body. It is something quite distinct and needs to be settled elsewhere in accordance with the relevant legal principles.

XI. CONCLUSION

This short article has set out the case for an independent standing statutory body to review alleged or suspected miscarriages of justice, a body to be adequately funded by the taxpayer, accessible to all with only essential restrictions, with adequate powers to review and investigate, and able to command the respect and confidence of all those in government, the legislature and the criminal justice system and, by no means least, the judiciary. Such a body should be a conspicuous feature of any developed system of criminal justice.