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The Criminal Cases Review Commission's Effectiveness in Handling Cases from Northern Ireland

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Abstract

This Comment considers the Northern Ireland Criminal Cases Review Commission (CCRC), its establishment, and its likely effects on miscarriages of justice. Part I of this Comment considers British and Northern Irish law. Part I also highlights British law leading up to the creation of the CCRC and Northern Irish law in light of its unique elements. Part II explains the establishment of the CCRC, its powers, and structure. Additionally, Part II discusses various commentary on the creation of the CCRC. Part III analyzes the future effectiveness of the CCRC in correcting miscarriages of justice, paying particular attention to the case of Northern Ireland. This Comment concludes that although the Commission is an improvement on the Home Office, miscarriages of justice cases still face a system riddled with many challenges.

COMMENTS

THE CRIMINAL CASES REVIEW COMMISSION'S EFFECTIVENESS IN HANDLING CASES FROM NORTHERN IRELAND

*Siobhan M. Keegan**

INTRODUCTION

In 1920, the Republic of Ireland gained independence from the United Kingdom.¹ Northern Ireland remained a part of Great Britain and governed itself via the Northern Ireland Parliament.² The people of Northern Ireland differed among themselves on the future relationship between Northern Ireland and Britain.³ The Protestant majority wanted the area to remain a part of the United Kingdom, but many in the Catholic minority hoped to unite Northern Ireland with the Republic of Ireland.⁴ The self-governance system of the Northern Ireland Parliament (known as "Stormont"⁵), allowed the Protestant majority to pursue discriminatory policies of employment, housing, and voting rights against Catholics.⁶ These policies prevented and discouraged many Catholics from participating in the government of

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1. See *CAIN Project Website Glossary* (visited Feb. 13, 1999) <<http://cain.ulst.ac.uk/othelem/glossary.htm>> (on file with the *Fordham International Law Journal*) (describing term United Kingdom as including England, Scotland, Wales, and Northern Ireland); see also Elizabeth Kondonijakos, Note, *The Reasonable Suspicion Test of Northern Ireland's Emergency Legislation: A Violation of the European Convention of Human Rights*, 3 BUFF. J. INT'L L. 99, 102 (1996) (explaining how British Parliament decided that autonomy for Ireland was in Britain's best interest, after violent campaign of IRA).

2. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND LEGAL DEFENSE IN NORTHERN IRELAND 13-14 (1993) (explaining how Northern Ireland Parliament had jurisdiction over most governmental functions except for taxation and defense).

3. *Id.* at 14.

4. See *id.* (stating that population of Northern Ireland was approximately two-thirds Protestant and one-third Catholic). More recent, though unofficial, figures show to be 57% Protestant and 43% Catholic. *Id.*

5. See *id.* (explaining that Northern Ireland Parliament was called Stormont, named after large building in which it was housed).

6. See *id.* at 14-15 (noting some members of Catholic minority joined IRA's infrequent activities, in pursuit of reunification).

Northern Ireland.⁷

In the late 1960s, vast changes occurred in the political climate of Northern Ireland.⁸ Many Catholics, upset with the discriminatory parliamentary practices, organized peaceful demonstrations modeled after the civil rights movement in the United States.⁹ The Stormont Government ignored or rejected the demonstrators' demands,¹⁰ and some members of the Protestant majority responded to the marches with violence.¹¹ The violent response of the Protestants led some Catholic marchers to leave the peaceful protests and join the previously inactive Irish Republican Army ("IRA").¹² Loyalist¹³ paramilitary groups also resurfaced,¹⁴ and in August 1969, the British government sent troops into Northern Ireland to restore order.¹⁵

The violence in Northern Ireland continued,¹⁶ and the British government reacted to this violence.¹⁷ In 1972, the British government suspended the role of Stormont and governed Northern Ireland directly from the British Parliament ("Parlia-

7. *Id.* at 15.

8. *Id.*

9. *Id.*

10. Oren Gross, *Once More unto the Breach*, 23 YALE J. INT'L L. 437, 474 (1998).

11. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 15.

12. *See id.* (stating that "majority violence encouraged some in the minority to turn away from peaceful protest to participate in the IRA"); *see also* HUMAN RIGHTS WATCH/HELSINKI, *TO SERVE WITHOUT FAVOR: POLICING, HUMAN RIGHTS, AND ACCOUNTABILITY IN NORTHERN IRELAND* at vii (1997) (defining Irish Republican Army as IRA); *CAIN Project Website Organizations* (visited Feb. 13, 1999) <<http://cain.ulst.ac.uk/othelem/organ/iorgan.htm>> (on file with the *Fordham International Law Journal*) (describing IRA as main Republican paramilitary group in Northern Ireland having central goal of ending British control of Northern Ireland and unifying Northern Ireland with Republic of Ireland).

13. *See CAIN Project Website Glossary*, *supra* note 1 (defining loyalist as person who is loyal to British Crown and noting that in context of Northern Ireland term may imply that person is giving some support to paramilitary groups to use force to remain loyal to Crown).

14. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 15 (explaining how Ulster Defense Association and Ulster Volunteer Force reappeared).

15. *See* Gross, *supra* note 10, at 475 (stating that British Army assumed role of police to maintain law and order). Introducing the army into the conflict, along with continued rioting and the rise of paramilitary groups, began the militarized stage of the conflict. *Id.* As of 1992, British troops in Northern Ireland numbered approximately 18,500. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 15-16.

16. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 15 (explaining how violence peaked in 1972 with 467 political deaths, but had reached 3000 fatalities by August 1993).

17. *Id.*

ment").¹⁸ In 1974, the IRA expanded its terrorist campaign to England.¹⁹ The Parliament responded to the IRA's violence with emergency legislation in the form of Emergency Provisions Acts ("EPAs") and Prevention of Terrorism Acts ("PTAs").²⁰ EPAs and PTAs result in the admissibility of confessions obtained after extended detention and interrogation²¹ and limit due process protections.²²

The emergency legislation intrudes more upon the use of ordinary law in Northern Ireland than in England or Wales.²³ PTAs apply in all of the United Kingdom,²⁴ but EPAs apply only in Northern Ireland.²⁵ Therefore, the situation in Northern Ireland sets Northern Ireland apart from the criminal justice system in the rest of the United Kingdom.²⁶ The climate in Northern Ireland and the British government's reaction to it provoked numerous criticisms from human rights organizations,²⁷ the U.S.

18. See JOHN JACKSON & SEAN DORAN, *JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM* 8 (1995) (explaining how when British government assumed direct control of Northern Ireland, it re-evaluated effectiveness of criminal justice process in context of increasing political violence). Since 1971, Stormont exercised the power of internment, which constitutes detaining suspects without trial, but this practice intensified the situation. *Id.*

19. See BOB WOFFINDEN, *MISCARRIAGES OF JUSTICE* 215 (1987) (citing IRA bombings in Guildford, Woolwich, and Birmingham, England in October and November, 1974).

20. See generally Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4 (Eng.) (setting forth powers afforded to government in case of "terrorist investigations"); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 17; WOFFINDEN, *supra* note 19, at 216 (stating that Prevention of Terrorism Acts ("PTAs") were introduced by Home Secretary one week after Birmingham bombing).

21. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 17.

22. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *AT THE CROSSROADS: HUMAN RIGHTS AND THE NORTHERN IRELAND PEACE PROCESS* 6 (1996) (explaining that under emergency legislation, due process rights are rights most frequently and extensively limited).

23. *Id.* at 60; see Gross, *supra* note 10, at 476 (explaining that over time emergency legislation became more entrenched and broad-based and substantially impacted "ordinary" non-emergency legislation).

24. See Brice Dickson, *The Prevention of Terrorism Acts*, in *JUSTICE IN ERROR* 178, 178 (Clive Walker et al. eds., 1993) (stating that PTAs are central to Britain's strategy against terrorism).

25. See Gross, *supra* note 10, at 476 (describing Emergency Provisions Acts ("EPAs"), enacted in 1973 after bloodiest year in conflict).

26. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 22, at 57 (describing how duties of judges in states suffering from violence are particularly difficult and Northern Ireland is no exception).

27. See generally *id.* at 131-35 (making recommendations regarding series of long-term human rights violations in Northern Ireland, including use of emergency powers and abnormal functioning of criminal justice system); HUMAN RIGHTS WATCH/HELSIN-

government,²⁸ and international bodies.²⁹

Over the last few decades, scholars,³⁰ human rights organizations, and civil liberties groups³¹ criticized the British criminal justice system regarding miscarriages of justice.³² Many high-profile miscarriage of justice cases involved the situation in Northern Ireland and the activity of the IRA.³³ Previously, miscarriage of justice cases were brought before the British Home Office or the Northern Ireland Office, once other appellate procedures had been exhausted.³⁴ The British government recently established the Criminal Cases Review Commission³⁵ ("Commis-

SKI, *supra* note 12, at 7-13 (considering allegations of abuse by police in Northern Ireland in light of existence of emergency legislation that broadens police power).

28. See generally U.S. Embassy, *Country Reports on Human Rights Practices 1997: The United Kingdom* (visited Sept. 15, 1998) <<http://www.usembassy.org.uk/humrtsuk.html>> (on file with the *Fordham International Law Journal*) (noting that Royal Ulster Constabulary ("RUC") committed human rights abuses).

29. *Id.* The European Parliament criticized the government for allowing the RUC to use plastic bullets in controlling riot situations. *Id.*; see U.N. Press Release HR/4231 (visited Feb. 14, 1999) <<http://www.un.org>> (on file with the *Fordham International Law Journal*) (citing committee member of U.N. Committee Against Torture expressing disappointment that emergency powers of police and army were not lifted during cease-fire).

30. See generally ROSEMARY PATTENDEN, *ENGLISH CRIMINAL APPEALS 1844-1994: APPEALS AGAINST CONVICTION AND SENTENCE IN ENGLAND AND WALES 1-4* (1996) (exploring history and recent developments in appellate process in light of public discussion of miscarriages of justice); WOFFINDEN, *supra* note 19, at 324-46 (discussing miscarriages of justice).

31. See Fiona McElree & Keir Starmer, *The Right to Silence*, in *JUSTICE IN ERROR*, *supra* note 24, at 73 (explaining that Amnesty International, Justice, and Liberty criticized government for limiting right to silence).

32. See generally WOFFINDEN, *supra* note 19, at 3-193 (chronicling existence of cases of miscarriages of justice, specifically from 1946 to 1986). In 1950, the government tried, convicted, and hung Timothy Evans, who was mentally retarded, for murdering his infant daughter. *Id.* at 5-6. At the trial, Evan's defense counsel argued that the murderer was a neighbor, John Christie. *Id.* at 6. In 1953, three years after Evans was hung, Christie confessed to the infant's murder and six other killings. *Id.* at 6.

Six Irish men living in Birmingham, England served sixteen years for the 1974 IRA bombing of pubs in Birmingham. PADDY JOE HILL, *FOREVER LOST, FOREVER GONE* (1995). A court quashed their convictions when it was discovered that police had fabricated confession statements and that the scientific evidence against them was faulty. *Id.* at 246-47.

33. See generally WOFFINDEN, *supra* note 19, at 213-301 (devoting several chapters of book to cases involving suspected IRA activity, which were later discovered to be miscarriages of justice).

34. CCRC Ann. Rep. 1997-98, at 4.

35. *Id.* The Criminal Cases Review Commission ("Commission" or "CCRC") was established under the 1995 Criminal Appeal Act and began operations in January 1998. Criminal Appeal Act, 1995, ch. 35, § 8(1) (Eng.). The Commission is an independent body established by the British government to investigate suspected miscarriages of jus-

sion" or "CCRC") as an independent body³⁶ to review cases for possible miscarriages of justice.³⁷ The Commission assumed this responsibility from the Home Office³⁸ and from the Northern Ireland Office³⁹ (or "NIO"), which previously accepted requests for reconsideration of cases.⁴⁰ The Commission may investigate cases from England, Wales,⁴¹ and Northern Ireland.⁴² In contrast, the former system only allowed cases from Northern Ireland to be considered by a body in Northern Ireland, specifically the Northern Ireland Office, as opposed to a wider United Kingdom-based body.⁴³ The CCRC's structure does not allow for a separate mechanism solely for dealing with cases from Northern Ireland.⁴⁴

This Comment considers the Commission, its establish-

tion in England, Wales, and Northern Ireland. CCRC Ann. Rep. 1997-98, *supra* note 34, at 4.

36. See Criminal Appeal Act, 1995, § 4(2) (explaining that Commission shall not be regarded as servant or agent of Crown and property of Commission's is not property of Crown).

37. *Id.* Miscarriage of justice is defined as "a failure to attain the deserved end result of justice." Clive Walker, *Introduction*, in JUSTICE IN ERROR, *supra* note 24, at 2.

38. See Home Office, *Home Office Internet Service* (visited Jan. 21, 1999) <<http://www.homeoffice.gov.uk/index.htm>> (on file with the *Fordham International Law Journal*) (stating that Home Office is government department handling internal affairs for England and Wales).

39. *Id.*; see Northern Ireland Office, *Northern Ireland Office Website* (visited Feb. 13, 1999) <<http://www.nio.gov.uk>> (on file with the *Fordham International Law Journal*) (introducing Northern Ireland Office ("NIO") as office of Secretary of State for Northern Ireland, dealing with political and constitutional matters, law and order, policing, and criminal justice policy relating to Northern Ireland).

40. See Duncan Campbell, *Guilty Until Proven Innocent*, GUARDIAN, Aug. 19, 1998, at 17 (explaining that number of cases that CCRC received since taking over responsibility from Home Office); CCRC Ann. Rep., *supra* note 34, at 6 (stating that cases were transferred from Northern Ireland Office and Home Office to new Commission).

41. See Criminal Appeal Act, 1995, §§ 9, 11 (Eng.) (setting forth Commission's power to investigate cases dealt summarily and on indictment in England and Wales); *id.* §§ 10, 12 (outlining Commission's role in Northern Ireland).

42. See *id.* §§ 9-12 (affording Commission mandate to consider cases from England and Wales and Northern Ireland); see also Carmel Robinson, *41 Miscarriages of Justice Dealt with In First Week*, Irish Times on the Web, Apr. 9, 1997 (visited Sept. 15, 1998) <<http://www.irish-times.com/irish-times/paper/1997/0409/hom24.html>> (on file with the *Fordham International Law Journal*).

43. See CCRC Ann. Rep., *supra* note 34, at 6 (explaining how cases were transferred to CCRC from Northern Ireland Office).

44. See Scottish Office, *News Release - 1653/97 November 4, 1997* (visited Oct. 22, 1998) <<http://www.scotland.gov.uk/news/releas97/pr1653.htm>> (on file with the *Fordham International Law Journal*) (introducing plans to establish Scottish Criminal Cases Review Commission, Scotland's own CCRC).

ment, and its likely effects on miscarriages of justice. Part I of this Comment considers British and Northern Irish law. Part I also highlights British law leading up to the creation of the CCRC and Northern Irish law in light of its unique elements. Part II explains the establishment of the CCRC, its powers, and structure. Additionally, Part II discusses various commentary on the creation of the CCRC. Part III analyzes the future effectiveness of the CCRC in correcting miscarriages of justice, paying particular attention to the case of Northern Ireland. This Comment concludes that although the Commission is an improvement on the Home Office, miscarriages of justice cases still face a system riddled with many challenges.

I. THE DEVELOPMENT OF BRITISH AND NORTHERN IRISH LAW IN RELATION TO THE CCRC

The systems of justice in Great Britain and Northern Ireland share some similarities and some differences in structure and application.⁴⁵ Many of these distinctions revolve around the role of emergency legislation.⁴⁶ The notion of the CCRC developed from criticism of these systems,⁴⁷ and the CCRC performs its role within these environments.⁴⁸

A. British Law

Great Britain and Northern Ireland operate under a Parliamentary system.⁴⁹ The criminal justice system consists of a prosecution service,⁵⁰ as well as trial and appellate courts.⁵¹ This system also includes emergency legislation⁵² and limits on fundamental rights.⁵³

45. See THE STATEMAN'S YEAR-BOOK: A STATISTICAL, POLITICAL, AND ECONOMIC ACCOUNT OF THE STATES OF THE WORLD FOR THE YEAR 1996-97, at 1305 (Brian Hunter ed., 1997) (describing systems of Northern Ireland and England and Wales separately).

46. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 17.

47. WOFFINDEN, *supra* note 19, at 322.

48. See Criminal Appeal Act, 1995, §§ 9-12 (Eng.) (mandating Commission to consider cases from England, Wales, and Northern Ireland).

49. See THE STATEMAN'S YEAR-BOOK, *supra* note 45, at 1305 (describing structure of Parliament).

50. Crown Prosecution Service Website (visited Feb. 18, 1999) <http://www.cps.gov.uk/home_page.htm> (on file with the *Fordham International Law Journal*).

51. THE STATEMAN'S YEAR-BOOK, *supra* note 45, at 1305.

52. Dickson, *supra* note 24, at 178.

53. Andrew Sanders & Lee Bridges, *The Right to Legal Advice*, in JUSTICE IN ERROR, *supra* note 24, at 38.

1. British Justice System's Bodies and Powers

The United Kingdom of Great Britain and Northern Ireland functions under a parliamentary system.⁵⁴ Criminal cases begin with a police investigation, but are ultimately handled by a special prosecution office of the government.⁵⁵ After a trial, defendants may apply for an appeal.⁵⁶ During the investigation and prosecution processes, suspects retain certain rights.⁵⁷ Emergency legislation altered some of these rights in an attempt to deal with terrorism.⁵⁸

The United Kingdom of Great Britain and Northern Ireland functions under a Parliamentary system that consists of the Crown, the House of Lords,⁵⁹ and the House of Commons.⁶⁰ Some members of Parliament hold offices of Secretary of State or minister and are responsible for supervising a government department.⁶¹ Secretaries of State and ministers also meet formally as part of the cabinet where they discuss government policy issues.⁶² The House of Lords remains the final appellate court in England, Wales, and Northern Ireland, although its use as such is limited.⁶³ The Crown maintains the Royal Prerogative of Mercy.⁶⁴

54. *Id.*

55. *Review of the Crown Prosecution Service: Summary of the Main Report with the Conclusions and Recommendations Service* § 13 (visited Feb. 18, 1999) <<http://www.official-documents.co.uk/document/cm39/3972/summary.htm>> (on file with the *Fordham International Law Journal*); *Crown Prosecution Service Website*, *supra* note 50.

56. See *THE STATEMAN'S YEAR-BOOK*, *supra* note 45, at 1338-39.

57. Sanders & Bridges, *supra* note 53, at 38.

58. Dickson, *supra* note 24, at 187-91.

59. See *THE STATEMAN'S YEAR-BOOK*, *supra* note 45, at 1305 (describing members of House of Lords and non-election hereditary appointment system); TERENCE INGMAN, *THE ENGLISH LEGAL PROCESS* 4-11 (1996) (explaining how House of Lords retains power as appellate court).

60. See *THE STATEMAN'S YEAR-BOOK*, *supra* note 45, at 1305-06 (describing eligibility requirements for House of Commons and election procedures).

61. See DONALD GIFFORD & JOHN SALTER, *UNDERSTANDING THE ENGLISH LEGAL SYSTEM* 13 (1997) (explaining how Members of Parliament are responsible to Parliament for their own actions or in-actions and also for actions or in-actions of department(s) or statutory authority that he or she supervises).

62. *Id.* at 13-14.

63. See INGMAN, *supra* note 59, at 4-5 (stating that criminal cases must involve points of law of general public importance and be given permission by Court of Appeal or House of Lords to be considered by House of Lords). Only a few cases manage to reach the House of Lords as many fail to meet these two criteria. *Id.* at 8.

64. See PATTENDEN, *supra* note 30, at 359, 378-79 (stating that Royal Prerogative of Mercy can be exercised by way of free pardon or remission of sentence). The Crown

Criminal cases begin with police investigations,⁶⁵ are transferred to the Crown Prosecution Service⁶⁶ ("CPS"), and then may end up in the court system.⁶⁷ The CPS⁶⁸ initiates criminal prosecutions in the United Kingdom.⁶⁹ The case is then brought to the Magistrate Courts.⁷⁰ If the case involves a summary offense, then it will be heard before a Magistrate Court, by a judge or justice of the peace, without a jury.⁷¹ If a charge is indictable, then it is transferred to the Crown Court where a jury hears the case.⁷²

Appeals are initially heard by different courts depending on which court held the trial.⁷³ The Crown Court hears appeals on cases from the Magistrate Courts.⁷⁴ Appeals from the Crown

has maintained the power to pardon a defendant for centuries. *Id.* The prerogative to do so derives from the sovereign's power to determine punishments for crimes. *Id.* at 378.

65. See *Review of the Crown Prosecution Service*, *supra* note 55, § 13 (stating that police obtain evidence as part of investigation prior to handing cases to the Crown Prosecution Service ("CPS")).

66. See *Crown Prosecution Service Website*, *supra* note 50 (describing CPS as "a national service, working closely with the police, the courts and others in the criminal justice system to improve its effectiveness"); see also *Review of the Crown Prosecution Service*, *supra* note 55, § 1 (stating CPS is headed by Director of Public Prosecutions and under superintendent of Attorney General). The Attorney General is a minister of Parliament and is responsible for the conduct of most criminal prosecutions. *What Is the Crown Prosecution Service?* (visited Feb. 18, 1999) <http://www.cps.gov.uk/cps_a/what_is.htm> (on file with the *Fordham International Law Journal*).

67. See GARY SLAPPER & DAVID KELLY, *SOURCE BOOK ON ENGLISH LEGAL SYSTEM* 292-93 (1996) (describing CPS's discretion in deciding whether to prosecute).

68. *Id.* at 369. Until the legislation was enacted in 1986, the responsibility of initiating criminal prosecutions rested with the police. *Id.* The CPS followed from a 1970 report by Justice arguing that the police did not consider the public policy issues in prosecuting and that the involvement of the police in the actual investigation might encourage police to prosecute even in light of weak evidence. *Id.*

69. Prosecution Offenses Act, 1985, § 10 (Eng.). The police decide on the charge and prepare the case file for the CPS. *Review of the Crown Prosecution Service*, *supra* note 55. This report was presented to Parliament by the Attorney General in June 1998. *Id.* The Attorney General criticized the CPS, particularly stating that the CPS should have an earlier role in producing prosecution files, currently a role of the police. *Id.* § 13.

70. GIFFORD & SALTER, *supra* note 61, at 54.

71. See *id.* at 66 (explaining that case is summary not necessarily because it is not serious, but because Parliament has designated it to be summary offense). Magistrate Courts can impose fine up to UK£5000 and jail sentence up to six months for each offense. *THE STATEMAN'S YEAR-BOOK*, *supra* note 45, at 1338.

72. See GIFFORD & SALTER, *supra* note 61, at 66 (defining indictable as requiring judge or jury).

73. *THE STATEMAN'S YEAR-BOOK*, *supra* note 45, at 1338-39.

74. See *id.* (describing how appeals from magistrates are heard by Crown Court

Court go to the Court of Appeal, Criminal Division ("CACD").⁷⁵ Only appeals that involve a question of law go right to the Court of Appeal.⁷⁶ The Attorney General in Northern Ireland, and in England and Wales, can also refer a case to the Court of Appeal in order to have the sentence imposed by the Crown Court increased.⁷⁷

The Government in Great Britain require the police to inform arrested suspects of certain rights.⁷⁸ Following recent changes in legislation,⁷⁹ defendants possess an absolute right to legal advice and to be made aware of that right, yet there is no mechanism to enforce this right.⁸⁰ Police do maintain the discretion, however, to delay legal advice, and in the case of suspects under the PTAs, some rights are not guaranteed.⁸¹

The right to silence has been encroached upon across the United Kingdom through Parliament's legislation,⁸² even though this move was criticized by the Royal Commission on Criminal Justice ("RCCJ").⁸³ Since 1968, several pieces of legisla-

when it regards conviction or sentence, but cases go to Divisional High Court when only point of law is involved).

75. *See id.* at 1139.

76. *Id.*

77. *See* BRICE DICKSON, LEGAL SYSTEM OF NORTHERN IRELAND 160 (1993) (explaining how this provision became law when highly publicized sex offenders received light sentences from trial judges).

78. *See* Sanders & Bridges, *supra* note 53, at 38 (explaining how suspects arrested are supposed to be informed about right to legal advice, to have someone know about their arrest, and to make phone call).

79. *See* Police and Criminal Evidence Act, 1984, ch. 60, § 58(1) (Eng.) (stating that person arrested and held in custody is entitled to consult solicitor privately at any time, if he so requests); Sanders & Bridges, *supra* note 53, at 38 (noting that Code of Practice for Detention, Treatment, and Questioning of Persons by Police requires that legal advice is absolute right and that police must inform persons detained of such right).

80. *See* Sanders & Bridges, *supra* note 53, at 38-39 (analyzing research studies of particular police stations that show that 25% of all suspects requested legal advice and that 21% received it, but contending that it does not make sense why three out of four suspects who are supposed to be informed as to their right to legal advice would in effect refuse free gift of advice).

81. *Id.* at 38. Six to eight percent of those requesting legal advice fail to receive it or receive it when it is already too late. *Id.* at 39.

82. Mark Berger, *Of Policy, Politics and Parliament: The Legislative Rewriting of the British Right to Silence*, 22 AM. J. CRIM. L. 391 (1995).

83. *See* Adrian Clarke, *A Painfully Slow Process*, 146 NEW L.J. 946, 946 (1996) (explaining how Royal Commission on Criminal Justice ("RCCJ") specifically disapproved of abolition of right to silence in police stations). The RCCJ was established in 1991 to examine the effectiveness of the criminal justice system in England and Wales in convicting the guilty and acquitting the innocent. Walker, *supra* note 37, at 1. The RCCJ

tion have included restrictions on the right to silence.⁸⁴ Many have limited the defendant's right not to speak in particular circumstances when charged with certain offenses.⁸⁵ The Criminal Justice and Public Order Act 1994 allows juries to draw adverse inferences from the defendant's silence prior to trial.⁸⁶

Proponents of the argument favoring the abolition of the right to pre-trial silence believe that the right to silence only protects the guilty.⁸⁷ The right to silence prior to trial gives the defendant the opportunity to fabricate a defense for the trial.⁸⁸ An innocent defendant, however, may be inadequately informed of his charge and believe that remaining silent may be more beneficial than trying to respond to an unclear accusation.⁸⁹

In order to control terrorism, and specifically paramilitary activity associated with Northern Ireland, the British government enacted PTAs.⁹⁰ Much of the PTAs occurred as an immediate

was also given the responsibility of considering the use of resources, whether changes are needed in the conduct of police investigations, the role of prosecutors and experts, provisions and opportunities for the defendant to state his position, the court's power in directing proceedings, the Court of Appeal's role, and the arrangements for dealing with and investigating miscarriages of justice. *Id.*

84. *See* McElree & Starmer, *supra* note 31, at 62-64 (listing several pieces of legislation, including Theft Act, 1968, § 31, Supreme Court Act, § 72, Criminal Justice Act 1987, § 2, and Criminal Evidence (Northern Ireland) Order 1988, that limited defendant's right to silence).

85. *See id.* at 59 (stating that right to silence does not have universal application and has in many instances been restricted).

86. Criminal Justice and Public Order Act, 1994, §§ 34, 36, 37 (Eng.); *see* PETER MIRFIELD, SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE 240 (1997) (noting that common law did allow some inferences to be drawn from silence of accused, but this legislation extends applicability).

87. *See id.* at 242 (quoting Bentham on right to silence, who stated that innocence never takes advantage of right to silence, as innocence claims right of speaking, and as guilt invokes privilege of silence). Bentham was considering the right to silence at trial, where there already are certain safeguards in place, including the presumption of innocence and the fact that is open and recorded. *Id.* A committee took his statements, however, and used them to alter the right to pre-trial silence. *Id.*

88. *See id.* at 243 (explaining that if suspect had to speak when arrested, he would state any defenses at that time, whereas right to silence allows him not say anything until he has come up with defense).

89. *Id.* at 245; *see* McElree & Starmer, *supra* note 31, at 59 (explaining that right to silence preserves human dignity by defining nature of relationship with individual and state and provides safeguards for vulnerable against wrongful convictions).

90. *See* Dickson, *supra* note 24, at 178 (explaining that since mid-1970s emergency legislation under PTAs forms central part of British government's regulatory strategy against terrorism).

reaction to a series of bombings,⁹¹ and the British government designed the PTAs to prevent terrorism rather than to eliminate it.⁹² Similarly, at least some of the PTAs exist for political reasons, mainly to demonstrate that the British government is doing something to prevent terrorism.⁹³

PTAs do not demonstrate an equilibrium between measures necessary to combat terrorism and the protection of civil rights of society.⁹⁴ Under current legislation, police may arrest persons with very little cause and hold them for up to seven days without formally charging them with a crime.⁹⁵ The European Court of Human Rights struck down the seven day detention provision as a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), yet the British government has chosen to ignore that ruling.⁹⁶

PTAs allow police to search with additional powers, including both relaxed requirements for the types of materials for which the police can search and greater ease in obtaining search warrants.⁹⁷ Additionally, high level police officers may override the need for a search warrant if they reasonably believe that an emergency exists that demands immediate action.⁹⁸ These powers lack safeguards that would otherwise protect their overzealous application.⁹⁹ The British government needs the power to counteract terrorism, but it is argued by some authors that these

91. *See id.* (stating that bombings in pubs in Birmingham created panic that led in part to PTAs).

92. *Id.* at 179.

93. *Id.* at 194.

94. *See id.* at 178 (stating that inordinately broad power of arrest that emergency legislation allows and its powers to detain are not in line with liberal democracy founded on rule of law).

95. *See id.* at 189 (explaining that official justification for these powers is to allow police enough time to gather evidence to justify charging detainee with crime, however, only one-quarter of those detained are ever charged with any crime).

96. *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R. (ser. B) (1988); *see Dickson, supra* note 24, at 189 (describing holding in *Brogan and Others v. United Kingdom*, where European Court of Human Rights ruled that British government breached European Convention for the Protection of Human Rights and Fundamental Freedoms).

97. *See Dickson, supra* note 24, at 192-93 (delineating eight respects where PTA allows greater search powers).

98. *Id.* at 193.

99. *See id.* at 194 (noting that much of emergency legislation overlaps with ordinary rules of law, but does so while stripping away protective safeguards).

provisions seem to do so at the cost of unnecessarily limiting fundamental rights.¹⁰⁰

2. The CCRC's Legal Background

Criminal justice scholars debated the issue of justice in the nineteenth century when there was no mechanism available to correct false verdicts.¹⁰¹ Since then, the Court of Appeal¹⁰² (or "Court") and the Home Office acquired the responsibility of correcting miscarriages of justice.¹⁰³ In recent decades, the United Kingdom faced public criticism regarding the existence of miscarriages of justice.¹⁰⁴ Many cases that received high publicity involved suspected IRA terrorist activities.¹⁰⁵ Several other recognized miscarriages, however, occurred outside of the terrorist context.¹⁰⁶

Prior to the establishment of the formal appellate court, the public clamor for reform reached Parliament.¹⁰⁷ The perception of criminal appeals as non-political in nature weakened the import of establishing a criminal appeal process.¹⁰⁸ Parliament finally approved the Court of Appeal in the United Kingdom following the exposure of two miscarriages of justice.¹⁰⁹ Parliament supposedly designed the Court to correct miscarriages of justice, and the Court initiated formal appeal procedures in 1907.¹¹⁰

100. *See id.* (questioning whether PTAs are necessary since other laws exist that have same purpose, but also have sufficient safeguards that PTAs lack).

101. *See* WOFFINDEN, *supra* note 19, at 321 (describing how no machinery existed for correcting errors in criminal trials and how judges resisted such machinery).

102. *See id.* (stating Court of Appeal (or "Court") was established in 1907, after 31 bills in Parliament failed to do so, and was created to remedy miscarriages of justice); PATTENDEN, *supra* note 30, at 30-31 (stating that controversy surrounding series of convictions persuaded politicians of need for criminal appeal system).

103. *See* WOFFINDEN, *supra* note 19, at 324 (describing how in 1968, Home Office gained powers to refer cases of miscarriage of justice back to Court and to recommend to Crown exercise of pardon).

104. *See* PATTENDEN, *supra* note 30, at v (stating in General Editor's Introduction that public discussion regarding miscarriages of justice in 1980s and 1990s centered on British criminal appeal structure).

105. Walker, *supra* note 37, at 8.

106. *Id.*

107. PATTENDEN, *supra* note 30, at 28.

108. *See id.* at 27 (citing lack of political will to push legislation on what was regarded as non-political issue).

109. *See id.* at 28-29 (explaining case of Adolf Beck's mistaken identification and conviction). The second case involved George Edalji, who the government wrongly convicted of animal maiming. *Id.* at 30.

110. WOFFINDEN, *supra* note 19, at 321.

The Court, however, never seemed to consider the defendant's guilt or innocence as its founders originally intended, but restricted its work to points of law.¹¹¹

The appellate process in the United Kingdom continues to interpret its role narrowly.¹¹² The Court is reluctant to expand its role and become more critical of the original trial¹¹³ because the Court and the public appreciate the need for closure in the appellate process, so that a case has a true point of termination.¹¹⁴ The Court considers only points of law because it also fears a flood of cases.¹¹⁵ Furthermore, the Court restricts appellate issues because it wishes to preserve jury findings and to emphasize the importance of the original trial.¹¹⁶

In the early 1960s, Justice,¹¹⁷ a non-governmental organization ("NGO"), initiated an inquiry into the existence of judicial miscarriages or errors.¹¹⁸ In 1964, the British government began its own investigation of the Court of Appeal with the Donovan Commission.¹¹⁹ This investigation caused the British government to reconsider the criminal justice system and led to the introduction of the Criminal Appeal Act 1968 ("1968 Act").¹²⁰ Under the 1968 Act, the Home Office acquired the power to consider cases after an applicant had exhausted his rights at the appellate level.¹²¹ The Home Secretary could act on his own initiative and recommend that the Queen exercise her Royal Prerogative of Mercy.¹²² Alternatively, under the 1968 Act, the

111. *See id.* at 321 (quoting Lord Paget, Member of Parliament, stating that Court's original function was forgotten and Court confined itself to considering points of law).

112. *Id.* at 322.

113. *Id.* at 323.

114. *Id.* at 322.

115. *Id.*

116. *See id.* at 323 (stating that if jury decisions were regularly overturned, jury decisions would lose value and juries themselves would not take their roles as seriously).

117. *See* Clare Dyer, *In Pursuit of Justice*, *GUARDIAN*, June 17, 1997, at T17 (stating that Justice began in 1957 and has become British branch of International Commission on Jurists).

118. WOFFINDEN, *supra* note 19, at 322.

119. *See id.* (noting that British government recognized authority and respectfulness that Justice's report would receive, and therefore government initiated their own investigation to counteract Justice's investigation).

120. Criminal Appeal Act, 1968, ch. 19, § 2 (Eng.).

121. *Id.* § 17.

122. WOFFINDEN, *supra* note 19, at 323. The Home Office could recommend that the Crown exercise the royal prerogative of mercy prior to the establishment of the Court of Appeal. PATTENDEN, *supra* note 30, at 28.

Home Office maintained the right to send a case back to the Court if the decision was unsafe and unsatisfactory.¹²³

The Home Office and its Northern Irish counterpart, the Northern Irish Office, assumed the role of considering miscarriages of justice, but the offices have been criticized.¹²⁴ The Home Office and the Northern Ireland Office faced huge backlogs of cases waiting to be considered, and this backlog resulted in extensive delays.¹²⁵ In its role of investigating cases for miscarriages of justice, the Home Office operated within a culture of secrecy.¹²⁶ Under Home Office investigations, the first and sometimes the only correspondence that the Home Office might send a defendant was a concise rejection of the petition.¹²⁷ A report by the RCCJ¹²⁸ recommended that the Home Office should disclose any new evidence that comes to light during an investigation that is relevant to a representation or casts doubt on a conviction.¹²⁹ Additionally, in 1994, Lord Justice Simon Brown, in *R. v. Secretary of State for the Home Department, ex parte Hickey and others* ("Hickey case"), ruled that the Home Office had not been forthcoming with evidence and that the Home Office should not withhold any information that would help the applicant best present his case.¹³⁰

In the past, the Court did not embrace the involvement of the Home Office in the appeals process and therefore looked unfavorably at some cases referred to it by the Home Office.¹³¹ Justice's 1971 Annual Report criticized the Court of Criminal

123. See Criminal Appeals Act, 1968, ch. 19, § 1(a), 17 (stating Court of Appeal will allow appeal against conviction if judges on Court think that conviction is unsafe).

124. See Michael Mansfield & Nicholas Taylor, *Post Conviction Procedures*, in JUSTICE IN ERROR, *supra* note 24, at 163 (stating that "such have been the quantity and scale of recent mistakes that the post-appeal system [Home Office] itself could be regarded as the ultimate miscarriage of justice").

125. Grania Langdon-Down, *Justice Will Be Done*, INDEPENDENT, Mar. 30, 1998, at 23.

126. Clarke, *supra* note 83, at 946.

127. Mansfield & Taylor, *supra* note 124, at 164-65.

128. Walker, *supra* note 37, at 1.

129. Clarke, *supra* note 83, at 946.

130. See *R. v. Secretary of State for the Home Department, ex parte Hickey and others*, 1 All E.R. 490 (1995) (holding that in accordance with Section 17 of Criminal Appeal Act 1968, convicted prisoners are entitled to disclosure of new evidence that police uncover in conducting investigations for Home Office and have opportunity to use that material in their petition to Home Office).

131. Kate Malleson, *The Criminal Cases Review Commission: How Will It Work?*, CRIM. L. REV. 929, 934 (1995).

Appeal¹³² (“CACD”) for not handling two cases that seemed worthy for appeal.¹³³ Justice suggested that the CACD refused to handle these cases because, among other reasons, the Home Office had repeatedly referred another case to the CACD and the CACD had rejected it each time.¹³⁴ Justice’s report also criticized the CACD for its unwillingness to reconsider cases that the CACD had previously dismissed and to reopen cases that the CACD believed that it had finalized.¹³⁵

According to one author, years later, the contempt of the CACD towards repeat appeals grew because of pressures from the public, the press, and politicians.¹³⁶ The media’s investigation of miscarriages of justice and its televised portrayal of miscarriages particularly upset some judges and further damaged the relationship between the Home Office and the CACD.¹³⁷ One of these judges made a comment at the first and unsuccessful appeal of the Birmingham Six,¹³⁸ stating that the longer a case continues, the more convinced the Court becomes that the original decision was correct.¹³⁹

132. See PATTENDEN, *supra* note 30, at 2 (explaining that Court of Appeal, Criminal Division (“CACD”) can hear appeals from Crown Court on sentence, or against conviction of error of law, error of fact, or both).

133. *Id.* at 368.

134. See *id.* (describing reluctance of CACD to intervene in two cases because Cooper and McMahon affair was sent to CACD by Home Office four times).

135. *Id.*

136. See *id.* (discussing speech given at London School of Economics by Stephen Sedley QC, who worked on high profile miscarriage of justice case and is now High Court judge).

137. See *id.* (noting Lord Denning’s statement that television’s involvement with these cases undermined public confidence in criminal justice system). Lord Lane attacked the BBC TV program, *Rough Justice*, for its reporting of a particular case, which Lord Lane said contained fallacies and unsupported assumptions. *Id.*

138. See HILL, *supra* note 32, at 246-47 (explaining that Birmingham Six were six men charged, wrongly convicted, and sentenced for IRA bombing in Birmingham, England in November 1974). They were finally released from prison in March 1991. *Id.*

139. See *id.* at 369 (quoting now infamous comment Lord Lane CJ regarding Birmingham Six case, who stated: “as has happened before in references by the Home Secretary to this court . . . under the Criminal Appeal Act of 1968, the longer this case has gone on, the more convinced this court has become that the verdict of the jury was correct.”). As stated earlier, the Birmingham Six were released from detention in 1991 as it became evident that the evidence that convicted them was insufficient. See *id.* at 250 (quoting Lord Justice Lloyd speaking to Birmingham Six, “In light of fresh evidence which has become available since the last hearing in this court, your appeal will be allowed and you will be free to go.”).

B. Northern Irish Law

The criminal justice system in Northern Ireland is not isolated from miscarriages of justice.¹⁴⁰ Although the number of allegations of such incidents grew in recent years, allegations of miscarriages of justice occur with less frequency than in England and Wales.¹⁴¹ The British government retains control over Northern Ireland through a Secretary of State.¹⁴² The legal system and specific emergency legislation create a system in Northern Ireland that differs from the rest of the United Kingdom.¹⁴³

Currently, the British government maintains power over Northern Ireland.¹⁴⁴ The recent Agreement Reached in Multi-Party Negotiations¹⁴⁵ ("Agreement") is expected to bring significant changes to the system.¹⁴⁶ For the most part, however, these changes have yet to be implemented because the Assembly, the new legislative body created under the Agreement, does not yet have legislative powers.¹⁴⁷

The Northern Ireland Office is the major government body under the old system in Northern Ireland¹⁴⁸ and is headed by the Secretary of State for Northern Ireland.¹⁴⁹ The Secretary of State attends meetings as a member of the British Cabinet.¹⁵⁰

140. See JACKSON & DORAN, *supra* note 18, at 51 (stating that since 1987 number of allegations of miscarriages of justice in Northern Ireland grew, citing examples of cases held to be miscarriages).

141. *Id.*

142. *Northern Ireland Office Website*, *supra* note 39.

143. See THE STATESMAN'S YEAR-BOOK, *supra* note 45, at 1337-43, 1369-70 (describing justice systems in Northern Ireland and England and Wales separately); see also LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 17 (describing existence and use of additional emergency legislation in Northern Ireland).

144. DICKSON, *supra* note 77, at 11.

145. Agreement Reached in Multi-Party Negotiations, Apr. 10, 1998 [hereinafter Agreement].

146. See *id.* (creating specific democratic institutions in Northern Ireland, North/South Ministerial Council, and Councils between Ireland and rest of the United Kingdom).

147. *Id.*, Validation, Implementation and Review ¶ 3; see John Mullin, *Policy and Politics: Blair Steps Up the Pressure on Arms*, GUARDIAN, Mar. 4, 1999, at 11 (stating that deadline for transfer of legislative power to Belfast Assembly is March 10, 1999, although fears exist that deadline will not be reached because decommissioning debate continues).

148. *Northern Ireland Office Website*, *supra* note 39.

149. *Id.* The Secretary of State is answerable to the British Parliament. *Id.*

150. *Id.*

The NIO mirrors the British Home Office¹⁵¹ in its role of directing and controlling political, constitutional, security, and criminal justice matters.¹⁵² The NIO office also oversees the work of six social and economic departments.¹⁵³

England and Wales operate a separate judiciary from the judiciary in Northern Ireland.¹⁵⁴ The legal system in Northern Ireland today reflects the system in England and Wales, but Northern Ireland operates its own system¹⁵⁵ and is greatly affected by emergency legislation.¹⁵⁶ When Ireland was partitioned in 1920, Northern Ireland established its own legal system.¹⁵⁷ Like England and Wales, the House of Lords acts as the final court of appeal in cases of major importance involving points of law.¹⁵⁸ The Court, the Crown Court,¹⁵⁹ and the Magistrate Courts¹⁶⁰ play the same role in England and Wales and Northern Ireland.¹⁶¹ Some types of cases, however, specified under emergency legislation, are tried without a jury, in Diplock Courts.¹⁶²

151. See *supra* note 38 and accompanying text (explaining role of Home Office as handling internal affairs).

152. *Northern Ireland Office Website*, *supra* note 39.

153. See *id.* (stating that NIO is responsible for Department of Agriculture, Department of Economic Development, Department of Education, Department of the Environment, Department of Finance and Personnel, and Department of Health and Social Services).

154. See generally THE STATESMAN'S YEAR-BOOK, *supra* note 45, at 1337-43, 1369-70 (devoting two separate sections to discussion of judiciary in Northern Ireland and in England and Wales).

155. *Id.*

156. See Gross, *supra* note 10, at 477 ("Northern Irish legislation combines permanent, complex, and de facto aspects of emergency regimes. Conceptualizing the situation in terms of 'deviations' and 'aberrations' from an otherwise general rule of 'normality' patently misses the point. Emergency is the norm in Northern Ireland.").

157. DICKSON, *supra* note 77, at 3.

158. *Northern Ireland Government WWW Server* (visited Feb. 17, 1999) <<http://www.nics.gov.uk/pubsec/courts/crtchart.htm>> (on file with the *Fordham International Law Journal*).

159. *Id.* The Crown Court has exclusive jurisdiction to hear all serious criminal cases. *Id.*

160. *Id.* The Magistrate Courts hear less serious criminal cases and also determine whether a case should be brought before the Crown Court. *Id.*

161. See THE STATESMAN'S YEAR-BOOK, *supra* note 45, at 1338-39 (discussing Court of Appeal, Crown Court, and Magistrates Court in England and Wales); see also *Northern Ireland Government WWW Server*, *supra* note 158 (describing roles of courts in Northern Ireland Court Service).

162. *Northern Ireland Government WWW Server*, *supra* note 158. Non-jury trials are called Diplock Courts and are part of the emergency legislation. See Martin Flaherty, *Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland*, 7 HARV.

1. Emergency Legislation

PTAs apply in Northern Ireland, but additional emergency legislation, unique to Northern Ireland, also exists.¹⁶³ Parliament enacted stronger legislation in 1973,¹⁶⁴ and again in 1991,¹⁶⁵ that applies only in Northern Ireland.¹⁶⁶ This legislation, which does not preserve traditional procedural rights, removed some of the protective gates between arrest and conviction.¹⁶⁷

The Lawyers Committee for Human Rights¹⁶⁸ claims that this legislation creates the core of a system formulated to convict defendants in cases involving suspected paramilitary activity.¹⁶⁹ The alleged scheme under this system works by convicting suspects based on confessions that result from prolonged detentions and intense interrogation.¹⁷⁰ The law allows for internment without trial and permits police to stop, question, and search persons without prior approval from a judge.¹⁷¹ The authorities also have the power to search residences and to seize

HUM. RTS. J. 87, 96 (1994) (defining Diplock Courts as courts lacking juries, in which offenses are often, but not necessarily related to political violence). All cases that may have a terrorist connection, including murder, manslaughter, riot, most not-fatal offenses against the person, robbery, aggravated burglary, arson, offenses involving firearms and explosives, and membership of proscribed organizations, are tried by Diplock Courts. JACKSON & DORAN, *supra* note 18, at 11. The Attorney General may deem a particular case to have no connection with the emergency situation and therefore allow a jury trial. *Id.* Some types of offenses, however, including robbery and aggravated burglary involving firearms or explosives cannot be moved from the Diplock context even if they are unrelated to the political conflict. *Id.*

163. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 17 (stating that emergency legislation has been feature of Northern Ireland since Northern Ireland was established originally as temporary provision, but since 1933 it is permanent feature of Northern Ireland legal system).

164. Gross, *supra* note 10, at 476.

165. See *id.* at 476 (explaining how 1991 legislation created new offenses and gave authorities additional emergency powers).

166. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 1.

167. Flaherty, *supra* note 162, at 95.

168. See Lawyers Committee for Human Rights, *About Lawyers Committee for Human Rights* (visited Jan. 21, 1999) <<http://www.lchr.org/aboutlchr/aboutlchr.htm>> (on file with the *Fordham International Law Journal*) (describing Lawyers Committee for Human Rights as organization begun in 1978 to protect and promote fundamental human rights).

169. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 1; see *id.* at 4 (describing how under PTA arrested individual may be held for as long as seven days without being charged with crime).

170. *Id.*

171. See Flaherty, *supra* note 162, at 96 (stating that EPA empowers police to stop

documents without prior judicial approval.¹⁷² One author asserts that the British government uses terrorism as a justification for the imposition of draconian powers in Northern Ireland.¹⁷³

2. Mechanisms Prior to Trial

In addition to the Diplock Courts, the pre-trial procedures differ in Northern Ireland and effect the trial process.¹⁷⁴ The trial is not isolated from the earlier phases of the criminal process.¹⁷⁵ Some of these pre-trial procedures and their impact on the trial have raised questions regarding the use of Diplock Courts.¹⁷⁶

In Northern Ireland, emergency legislation is used more broadly than elsewhere in the United Kingdom,¹⁷⁷ and it has greater scope and strength.¹⁷⁸ The broadness of the effect of the legislation in Northern Ireland is regardless of whether the legislation is confined to Northern Ireland or applies across the United Kingdom.¹⁷⁹ Accordingly, scholars contend that this legislation has intruded more upon the use of ordinary law in Northern Ireland than in England or Wales.¹⁸⁰ The Agreement initiated reviews of the current legislation, but the Agreement does not specifically mandate the elimination of PTAs or EPAs.¹⁸¹ No immediate prospect exists for Parliament to overturn, repeal, or amend this legislation, and it has actually recently extended it for two years.¹⁸² The Lawyers Committee for

and question persons regarding their identity and movements, to search persons and their homes, and to seize documents without prior judicial approval).

172. *Id.*

173. Kondonijakos, *supra* note 1, at 115.

174. See JACKSON & DORAN, *supra* note 18, at 32 (explaining how special evidentiary rules are part of emergency legislation, therefore effecting link between pre-trial procedures and trial).

175. *Id.*

176. See *id.* (stating that combined effect of search powers, lenient arrest powers, seven-day detentions, questionable interrogations, weak restrictions on admissibility of confessions, and non-jury trials produced system weighted against defendant).

177. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 22, at 60 (stating that emergency legislation is implemented more widely in Northern Ireland and has effected ordinary law more in Northern Ireland than in England and Wales).

178. Gross, *supra* note 10, at 476.

179. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 22, at 60.

180. *Id.* at 60; Gross, *supra* note 10, at 476.

181. Agreement, *supra* note 145.

182. Tim Cunningham, *The Sound of SACHR's Silence*, JUST NEWS (Committee on the Administration of Justice), Sept. 1998, at 6.

Human Rights believes that because of the divided nature of the society, confidence in, and adherence to, the law is essential to any lasting agreement.¹⁸³

Several authors contend that as the climate improves in Northern Ireland, the need for emergency legislation will subside.¹⁸⁴ There is still, however, no immediate prospect that the emergency legislation will be repealed.¹⁸⁵ Authors believe that ideally this legislation will be amended and fundamental rights will be afforded greater protection.¹⁸⁶ In the meantime, this legislation does exist and has an impact on cases from Northern Ireland.¹⁸⁷ Emergency legislation allows police to take confessions under questionable circumstances and ensures that the prosecution can use these confessions and other implicating statements at trial.¹⁸⁸

Under the Criminal Evidence (Northern Ireland) Order of 1988, a negative inference may be drawn from the defendant's exercise of the right to silence at arrest, pretrial, and even at trial under certain circumstances.¹⁸⁹ Authors are particularly concerned with the effect of this legislation in the Diplock Courts.¹⁹⁰ This infringement is of particular concern in a highly-politicized environment like Northern Ireland, where a substantial part of the population feels alienated from the police force.¹⁹¹

183. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 22, at 61.

184. Kondonijakos, *supra* note 1, at 115; *see* JACKSON & DORAN, *supra* note 18, at 9 (stating that due to events indicating future peace in Northern Ireland, it is time for revision of emergency legislation approaches).

185. *See* JACKSON & DORAN, *supra* note 18, at 9 (contending that restoration of jury trial, that is, elimination of Diplock Courts, which are part of emergency legislation, for all indictable offenses is unlikely in near future, and even if so, it would be gradual phase out).

186. Kondonijakos, *supra* note 1, at 99, 115.

187. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 22, at 60.

188. *See* Flaherty, *supra* note 162, at 109 (stating that under emergency legislation police have conditions, time, and freedom to procure confessions and can produce those confessions with ease at trial).

189. *Id.* at 111.

190. *See* JACKSON & DORAN, *supra* note 18, at 32 (stating that changing confession rules and right to silence most likely would concern itself, but when applied to non-jury trials, where common law traditions have already been infringed concern has been intensified).

191. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 22, at 72 ("Silence in the face of . . . authorities is as logically consistent with fear and civil non-cooperation as with consciousness of guilt.").

3. Diplock Courts

The British government established the Diplock Courts over twenty years ago.¹⁹² Critics maintain that courts lacking juries are problematic, based on their history and possible rigidity.¹⁹³ Individual rights receive greater limitations under the Diplock Courts.¹⁹⁴

Diplock Courts try defendants accused of certain offenses without juries.¹⁹⁵ Judges, who determine fact and law in these cases, operate under relaxed rules of evidence.¹⁹⁶ The Emergency Powers Act ("1991 EPA") of 1991 added new offenses to the list of prosecutable crimes and gave the police more emergency powers.¹⁹⁷ Michael Mansfield, a well-known attorney specializing in miscarriage of justice cases,¹⁹⁸ contends that there is a hidden agenda to limit jury trials in the United Kingdom and cites Northern Ireland's Diplock Courts as an example.¹⁹⁹ Mansfield believes that juries are the most democratic element in the British judicial system, but that authorities view juries as a threat to their system.²⁰⁰ Mansfield further states that miscarriages of justice cases have not arisen due to the fault of juries.²⁰¹

Diplock Courts face criticism of becoming case hardened.²⁰² Case hardening occurs where judges acclimate and readily accept evidence of the police and security forces over the evidence of the defense.²⁰³ The prosecution often relies upon confessions

192. See JACKSON & DORAN, *supra* note 18, at 8-9 (stating that government established Diplock Commission to consider whether changes should be made to better deal with terrorism).

193. MICHAEL MANSFIELD, *JUSTICE UNDONE*, reprinted in SLAPPER & KELLY, *supra* note 67, at 533-34; see JACKSON & DORAN, *supra* note 18, at 39 (noting that Diplock Court judges may too easily accept evidence).

194. Flaherty, *supra* note 162, at 110.

195. Gross, *supra* note 10, at 475.

196. *Id.*

197. *Id.*

198. See Kevin Toolis, *The Best Form of Attack: Michael Mansfield Is the Undisputed Champion of the Miscarriage-of-Justice Trial*, *GUARDIAN*, Oct. 25, 1997, at 36 (chronicling Mansfield's involvement with many high profile miscarriage of justice cases, including Birmingham Six).

199. MANSFIELD, *supra* note 193.

200. See *id.* (stating that authorities are threatened based on their arrogance that they know who is guilty, better than jury).

201. *Id.*

202. See JACKSON & DORAN, *supra* note 18, at 30 (explaining that several factors have led to possibility of easy acceptance of evidence by Diplock Court judges).

203. *Id.*

that form the basis of many of the prosecution's cases, as witnesses generally do not exist or are reluctant to become involved.²⁰⁴ Michael Mansfield contends that confessions are the most unreliable source of evidence because they often result from police pressures, and courts fail to instruct juries adequately to consider their credibility.²⁰⁵

Because many of the prosecution's paramilitary cases are based on confessions, the deterioration of the right to silence has the potential to be even more problematic.²⁰⁶ According to one author, the continued use of doubtful confessions makes the effective use of the right to silence even more important.²⁰⁷ The European Court of Human Rights held that the lack of the right to silence in the context of Northern Ireland, where access to attorneys is delayed, violated the fair trial provisions agreed to in the European Convention.²⁰⁸

As the evidence standards apply, confessions continue to play a role in many Diplock Court cases.²⁰⁹ In 1981, an independent study reported that the Director of Prosecutions in Northern Ireland used confessions in eighty-nine percent of scheduled offense cases,²¹⁰ and the frequency of use of confessions is expected not to have changed since.²¹¹ In a 1994 interview, Sir Patrick Mayhew, the Secretary of Northern Ireland, said that uncorroborated confessions are admissible.²¹² He stated that while there is a good argument for the belief that confessions must be corroborated before they can be admissible, he does not think corroboration is necessary.²¹³

204. *See id.* at 30-31 (stating that prosecution would have limited success if relying on civilian witnesses, as often they do not exist and when they do they are afraid to become involved with cases involving members of terrorist organizations). The lack of other witnesses has accentuated the importance of confessions. *Id.*

205. *See* MANSFIELD, *supra* note 193, at 533-34 (citing plea bargains and lesser sentences as pressures to confess, and lack of instructions to jury to consider reliability of such evidence).

206. Flaherty, *supra* note 162, at 111.

207. *Id.*

208. *Murray v. United Kingdom*, Case 41/1994/488/570 (1996).

209. Flaherty, *supra* note 162, at 110.

210. *Id.*

211. *See id.* (stating that the Committee for Administration of Justice ("CAJ") believes that there has been no change in these figures of significance).

212. Mary Ann Dadisman, *Irish Question: Into the Lion's Den*, 21 HUM. RTS. 14, 16 (1994).

213. *Id.*

4. Judges and the Judicial Framework in Northern Ireland

The Lawyers Committee for Human Rights acknowledges that Northern Ireland judges are committed professionals, operating in an often hostile environment.²¹⁴ Concern exists, however, that the judiciary in Northern Ireland is not sufficiently aware of its responsibilities to protect the rights of defendants, particularly when many basic rights are already limited.²¹⁵ The role of judge is even more crucial when there are no juries at trials and pre-trial processes and rules of procedure are significantly altered.²¹⁶ The changes to the trial proceedings undoubtedly affected the judiciary and modified its perception within the community.²¹⁷ The Lawyers Committee for Human Rights notes that history scarred the perception of judges and their reputation for independence with nationalists and loyalists alike.²¹⁸

After courts squashed a series of convictions following extensive criticism that the evidence used to convict was not trustworthy, judges hesitated to convict without corroboration.²¹⁹ Because of potential and actual damage to the reputation of the courts, an adjustment of priorities emerged, initially by individual judges, but then spreading to the Court.²²⁰ Although the Court corrected these cases, no mechanism exists to prevent judges from making this type of error again.²²¹ The Lawyers Committee for Human Rights argues that returning to a system of trial by jury would be the best mechanism to prevent convictions based on untrustworthy evidence.²²²

The recent case of Baker, Groves, and Valente illustrates

214. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 22, at 60.

215. *Id.* at 61. Individual judges in the system seem to believe that the decisions of local authorities have greater insight into problems of terrorism than European Commission on Human Rights. Gross, *supra* note 10, at 437, 479.

216. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 22, at 68-69 (stating that in divided society judges must ensure that law is applied equally and it is perceived that way and also noting context of no-jury trial in which courts function).

217. *Id.*

218. *See id.* at 70 (discussing series of criticized cases, known as "supergrass," where uncorroborated informer evidence was used to convict dozens of defendants).

219. *See id.* at 71 (stating that judge involved refused to admit that procedural rules of evidence in quashed cases failed to guarantee right to fair trial).

220. *Id.*

221. *Id.*

222. *Id.*

how the actions of judges do not protect defendants rights.²²³ Police arrested and charged Sam Baker, William Groves, and Sean Valente with a highly-political and publicized killing in February 1998.²²⁴ From the time of their arrest, advocates voiced concerns regarding the existence of evidence and its quality and nature.²²⁵ At the indictment hearing of Baker, Groves, and Valente, a judge relied on a police officer's statement that the officer could connect the three defendants with the evidence in the case.²²⁶ The judge failed to inquire into the nature of the evidence and how this evidence specifically connected Baker, Groves, and Valente with the crime.²²⁷ Lawyers have argued that the judge violated the European Convention by failing to inquire thoroughly into the basis of Baker, Groves, and Valente's continued retention.²²⁸ In August, the prosecutor dropped the charges and released all three men, from what the Committee on the Administration of Justice²²⁹ ("CAJ") notes is effectively internment on demand based on questionable evidence.²³⁰ This case illustrates the difficulties related to miscarriages of justice resulting from the trial courts, the Court, and the Home Office.²³¹ The CCRC is the British Government's response to such difficulties.²³²

II. CCRC AND RELEVANT COMMENTARY

The British government established the Commission follow-

223. Kara Irwin, *Case by Case: Update on Baker, Groves, and Valente*, JUST NEWS (Committee on Administration of Justice), Sept. 1998, at 5.

224. *See id.* (describing murder of loyalist Robert Dougan as part of series of killings following murder of loyalist Billy Right in prison in December 1997). Baker, Groves, and Valente were charged with murder and as members of the IRA. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. CAJ Website (visited Sept. 15, 1998) <http://ourworld.compuserve.com/homepages/Comm_Admin_Justice> (on file with the *Fordham International Law Journal*). The CAJ is a non-governmental civil liberties organization based in Belfast and is affiliated with the International Federation for Human Rights. *Id.*

230. *See Irwin, supra* note 223, at 5 (noting that this practice has occurred in number of cases).

231. *See WOFFINDEN, supra* note 19, at 323 (stating that throughout current century, appeal court judges have evaded responsibilities that Parliament prescribed for them and that constituents have expected of them).

232. Paul Taylor, *Is Justice Being Served by the Criminal Cases Review Commission?*, LAWYER, Apr. 21, 1998, at 24.

ing government and independent inquiries and investigations into miscarriages of justice in the United Kingdom.²³³ The Criminal Appeal Act 1995²³⁴ ("1995 Act") gave the Commission the mandate to consider applications of miscarriages of justice, previously a role of the Home Office.²³⁵ The new Commission's mandate affords the Commission powers that are broader than the previous powers of the Home Office,²³⁶ but commentators expressed concern over the Commission's effectiveness since its initial proposal.²³⁷

A. Background to the Establishment of the Commission

The British government established the Commission as the result of the May Inquiry²³⁸ and other pressures.²³⁹ The May Inquiry investigated the *Maguire* case²⁴⁰ and the Guildford and Woolwich bombings.²⁴¹ The May report criticized the Home Of-

233. Malleon, *supra* note 131, at 929; PATTENDEN, *supra* note 30, at 347.

234. Criminal Appeal Act, 1995, ch. 35, § 8(1) (Eng.).

235. *Id.*

236. See Paul Donovan, *Still No Answer to Riddle of Appeal*, INDEPENDENT, Oct. 15, 1997, at C1 (describing Commission's expanded role in investigating, accessing documents, and acquiring previously undisclosed materials).

237. Taylor, *supra* note 232, at 24.

238. Malleon, *supra* note 131, at 929; Rachel Donnelly, *Supporters Angry as McNamee Appeal Delayed*, Irish Times on the Web (Nov. 12, 1998) (visited Nov. 13, 1998) <<http://www.irish-times.com/irish-times/paper/1998/1112/hom28.html>> (on file with the *Fordham International Law Journal*); see PATTENDEN, *supra* note 30, at 353 (explaining that May Inquiry was set up by Sir John May in order to investigate case against Maguire family). When Sir John's interim report was published, the Home Secretary referred the case to the Criminal Court of Appeal where the convictions were quashed. *Id.*

239. PATTENDEN *supra* note 30, at 347. In 1981-82, the Home Affairs Committee conducted a limited inquiry on how the Home Office conducted investigations into alleged miscarriages of justice and reported concerns regarding the lack of independent scrutiny in handling these cases. *Id.* Nearly ten years later, the Home Affairs Committee recommended that the government carefully study whether the CPS, the prosecuting authorities in England and Wales, needed an external monitor to look at how the CPS conducted individual cases. CROWN PROSECUTION SERVICE, FOURTH REPORT OF THE HOME AFFAIRS COMMITTEE HOUSE OF COMMONS (1989-90). Justice, a branch of the International Commission of Jurists, produced a report in July 1989 entitled *Miscarriages of Justice*. PATTENDEN, *supra* note 30, at 346-47.

240. PATTENDEN, *supra* note 30, at 352-53. The *Maguire* case involved seven members of the Maguire family, the youngest 14 years of age, who were all convicted based on positive results obtained from hand-swab tests to determine the presence of the bomb substance, nitroglycerine. *Id.* The investigation never uncovered even traces of the substance in their home, which the prosecution claimed was a bomb-making factory. *Id.*

241. *Id.* at 347. The Guildford Four were four men who in 1975 were sentenced to life imprisonment for bombing public houses in Guildford and Woolwich in England.

face²⁴² for not being proactive enough in the cases that the Home Office received for review.²⁴³ The RCCJ conducted an additional inquiry following the release of the Birmingham Six.²⁴⁴ The RCCJ and the law reform and human rights organization, Justice,²⁴⁵ recommended the establishment of a new independent review body to replace the Home Office in its role reviewing cases for miscarriages of justice.²⁴⁶ This recommendation received significant support and led to the proposed Criminal Cases Review Authority.²⁴⁷ This proposal resulted in the Commission, which was established under the 1995 Act.²⁴⁸

The RCCJ claimed that the approach that successive Home Secretaries had taken regarding the reference of cases led to the change.²⁴⁹ The RCCJ realized that the Home Office only considered and investigated cases that contained some form of new evidence.²⁵⁰ Additionally, all of the sixteen members of C3, the division of the Home Office responsible for considering miscarriages of justice, lacked professional legal qualification.²⁵¹ C3 considered, yet failed to correct, several of the worst miscarriage of justice cases.²⁵² For example, in the *Maguire* case,²⁵³ the Home Office made a conscious decision not to investigate the

Id. Although their first appeal had been initiated when another group confessed to the crime, it was not successful. *Id.* Their second appeal, 12 years later, was successful, and they were released. *Id.* It was determined that evidence that finally led to their release had been in the files of the Guildford police station, idle for fifteen years. *Id.*

242. *Id.* at 345-48. The Home Office gained the responsibility of detecting wrongful convictions when the appeal courts have failed in England and Wales. *Id.*

243. Malleeson, *supra* note 131, at 929.

244. Donnelly, *supra* note 238, at T17.

245. Dyer, *supra* note 117.

246. Malleeson, *supra* note 131, at 929.

247. *Id.*

248. *Id.*

249. *See id.* (noting that Sir John May believed that home secretaries had taken reactive, rather than proactive approach in handling cases).

250. *See id.* (stating that RCCJ received commentary that stated that Home Office only considered cases with new evidence as Home Office did not have commitment or resources to act otherwise).

251. *See* SLAPPER & KELLY, *supra* note 67, at 95 (stating that none of members of C3 were trained as lawyers).

252. *Id.*

253. Patrick O'Connor, *Prosecution Disclosure: Principle, Practice, and Justice*, in JUSTICE IN ERROR, *supra* note 24, at 105. The prosecution failed to disclose the scientific reports after the defense had requested them over a nine month period preceding the trial. *Id.* The defense also did not know that another test, of which the prosecution was aware, had found negative results for nitroglycerine on each of the swabs. *Id.*

case because the Home Office believed that it was not the government's responsibility.²⁵⁴ Scholars believe that the Home Office made this decision either because of a lack of commitment to this role, to act otherwise, or because of a lack of resources.²⁵⁵ The Home Office saw its position as an executive power in conflict with the role of reviewing and referring cases.²⁵⁶ Others countered that the proposal of the Commission was the direct reaction to a series of high-profile miscarriage of justice cases.²⁵⁷ In either case, authors believe that the RCCJ proposed a body with greater resources and independence, which the 1995 Act reflects.²⁵⁸

B. *Establishment of the Commission*

The 1995 Act established the Commission²⁵⁹ and abolished the power of the Home Secretary to refer cases to the Court.²⁶⁰ The Home Secretary previously could only refer cases resulting in convictions.²⁶¹ The Commission, however, can refer cases involving convictions and sentences.²⁶² The Commission also possesses greater power to investigating possible miscarriages of justice.²⁶³ In addition, the Commission has greater access to information and documents from the police, the government, and

254. See PATTENDEN, *supra* note 30, at 353 (stating that it is not government's role to uncover new evidence and that is the reason for not having scientist's committee attempt as that would be what they attempted to do).

255. Malleon, *supra* note 131, at 929.

256. *Id.*; see Clarke, *supra* note 83, at 946 (citing RCCJ report that role assigned to Home Office, of reviewing cases, was not compatible with constitutional separation of powers that exists between courts and executive). The Home Office has the difficulty of "being saddled with incompatible duties, invigilating a system whose integrity it must protect." WOFFINDEN, *supra* note 19, at 334.

257. Taylor, *supra* note 232, at 24-25.

258. Malleon, *supra* note 131, at 929-30.

259. See Criminal Appeal Act, 1995, § 8(1) (Eng.) ("There shall be a body corporate to be known as the Criminal Cases Review Commission.")

260. Taylor, *supra* 232, at 24; see Criminal Appeal Act, 1995, ch. 35, § 3 (abolishing power of Secretary of State to refer cases). The Home Secretary can still pardon convicted persons by exercising the Royal Prerogative of Mercy. PATTENDEN, *supra* note 30, at 420.

261. Taylor, *supra* note 232, at 24.

262. See Criminal Appeal Act, 1995, § 9(1)(a) (stating that Commission "may . . . refer the conviction to the Court of Appeal"); see also *id.* § 9(1)(b) (stating that Commission "may . . . refer to the Court of Appeal any sentence"); Taylor, *supra* note 232, at 24-25 (stating that Commission has wider powers than Home Secretary).

263. Taylor, *supra* note 232, at 24-25.

the prosecution.²⁶⁴ The Commission may order the police to produce all material in a case, including undisclosed material.²⁶⁵ Authors believe that these powers may prove helpful in determining whether the police are abusing their discretion.²⁶⁶ The Commission, however, cannot obtain documents that government departments have created in the process of the Home Secretary's consideration of the case.²⁶⁷

1. Powers and Responsibilities

The Commission is a non-departmental public body.²⁶⁸ The 1995 Act gives the Commission the responsibility of reviewing cases for miscarriages of justice and referring back to the appropriate Court of Appeal²⁶⁹ any case that has a real possibility of not being upheld.²⁷⁰ The Commission also investigates and reports back to the Court any matter that the Court asks the Commission to consider.²⁷¹ Additionally, the 1995 Act afforded the CCRC the power both to consider whether or not the Queen

264. Donovan, *supra* note 236, at C1.

265. *Id.*

266. *Id.*

267. See PATTENDEN, *supra* note 30, at 418 (stating that documents produced in Home Office's investigation do not have to be produced and that those documents that do have to be produced may not be disclosed by CCRC without consent).

268. CCRC Ann. Rep., *supra* note 34, at 8; see PATTENDEN, *supra* note 30, at 418 (stating that Home Secretary will not play any role in day-to-day operation, but CCRC will create annual report, which Home Secretary will present to Parliament).

269. See John Jackson, *Trial Procedures*, in JUSTICE IN ERROR, *supra* note 24, at 132 (explaining how British justice system uses magistrate judges, without juries, to handle summary cases and how what is defined as summary case has expanded significantly over recent years so that availability of defendants to elect for jury trial is limited). Jackson believes that as more serious crimes are classified as summary, it becomes of greater importance that the defendants receive a fair trial. *Id.* He also notes that there are concerns about the secrecy shrouding the selection of magistrates, their independence and impartiality, and their tendency to accept easily police evidence. *Id.* Many of those pleading not guilty, prefer to have their case with a jury, which is in the Crown Court, as they feel they are more likely to be acquitted. *Id.* Additionally, almost all Crown Court cases receive legal aid. *Id.* The selection of jurors, however, is not as random as it could be, and recent decisions by the government have given the prosecution more power in the jury selection process and the defense less. *Id.*

270. See Criminal Appeal Act, 1995, ch. 35, § 13(1)(a) (Eng.) (stating that conviction, verdict, or sentence should not be sent back to Court of Appeal unless "there is a real possibility that the conviction, verdict, or sentence would not be upheld were the reference to be made").

271. See Criminal Appeal Act, 1995, § 15(1) (stating that where direction is given by Court, Commission shall investigate specific matter).

should exercise her power of mercy and to report such decisions to the Secretary of State.²⁷²

2. Structure

According to the 1995 Act, the Commission consists of thirteen commissioners, a chairman, a chief executive officer, a few dozen caseworkers, and a secretarial and administrative staff.²⁷³ The Queen, according to the recommendations of the Prime Minister, appoints the commissioners²⁷⁴ following specific staffing criteria.²⁷⁵ In accordance with the 1995 Act, one-third of the commissioners must be lawyers²⁷⁶ and two-thirds must have knowledge or experience of some aspect of the criminal justice system according to the Prime Minister.²⁷⁷ The 1995 Act also requires that at least one member appears to the Prime Minister to have some knowledge of some aspect of the criminal justice system in Northern Ireland.²⁷⁸ The 1995 Act formally established the CCRC on January 1, 1997, and the CCRC began its review of cases on March 31, 1997.²⁷⁹ On March 31, it received 284 cases transferred from the Home Office and the Northern Ireland Office.²⁸⁰ Within a year, nearly 1350²⁸¹ individuals applied, and by August 1998, the number of applicants exceeded 1800.²⁸²

272. *See id.* § 16 (mandating Commission to consider cases on whether Her Majesty should exercise her prerogative of mercy and to refer conclusions on issue to Secretary of State).

273. *See id.* § 8(3) (stating that Commission must have at least eleven members).

274. *Id.* § 8(4).

275. Malleon, *supra* note 131, at 930.

276. *See* Criminal Appeal Act, 1995, § 8(5)(a-c) (Eng.). At least one-third of the members of the Commission must be persons who are legally qualified, and for this purpose a person is legally qualified if he has a ten year general qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990, or he is a member of the Bar of Northern Ireland, or solicitor of the Supreme Court of Northern Ireland, of at least ten years' standing. *Id.*

277. *See id.* § 8(6) (stating that criteria for having knowledge or experience of any aspect of criminal justice system, particularly investigation of offenses and treatment of offenders, is based on how candidates appear to Prime Minister).

278. Criminal Appeal Act, 1995, § 8(6).

279. CCRC Ann. Rep., *supra* note 34, at 5.

280. Taylor, *supra* note 232, at 25.

281. *Id.*

282. *See* Campbell, *supra* note 40, at 17 (noting further that as of August, 1998, 20 cases have been referred back to Court, 61 cases were turned down by Commission, and over 1000 wait for review).

3. Procedural Aspects

When a trial court convicts a defendant of a criminal offense, the defendant may appeal a conviction or sentence to the Court.²⁸³ The Court can grant only one appeal, even if there is an application for another appeal showing new evidence that points to a defendant's innocence.²⁸⁴ Once all of the appeals processes are exhausted, the Commission may consider a case, and new evidence not presented at the original trial or at the appeal must exist.²⁸⁵ This new evidence may include evidence that was unavailable or undisclosed to the defense earlier.²⁸⁶ Under exceptional circumstances,²⁸⁷ a case can be referred back without new evidence.²⁸⁸ Once a case qualifies for consideration, a caseworker will examine and investigate it.²⁸⁹ The caseworker may conduct original research or interview the applicant and any possible witnesses.²⁹⁰ If the caseworker believes that there is a strong possibility of a miscarriage, then the case notes are forwarded to three of the thirteen commissioners²⁹¹ who decide whether to refer the case back to the Court.²⁹²

C. Effectiveness of CCRC

As noted by the Commission,²⁹³ the effectiveness of the

283. PATTENDEN, *supra* note 30, at 348.

284. *See id.* (explaining how British system is contrary to practice of most countries in continental Europe where an appellate court can re-open case at any time).

285. *See* Criminal Appeal Act, 1995, § 13(1)(a)(b)(i) (Eng.) (stating that reference to Court of Appeal shall not be made unless there is "an argument or evidence, not raised in the proceedings which led to it or on any appeal or application for leave of appeal against it").

286. *See* Campbell, *supra* note 40, at 17 (noting that defendants who lack new evidence but are in fact innocent may not be eligible to be considered by CCRC).

287. *See* Criminal Appeal Act, 1995, § 13(2) (using language of "exceptional circumstances which justify making" reference).

288. *See* Donovan, *supra* note 236, at C1 (assuming that "exceptional circumstances" language would allow possibility of less rigid standard).

289. *See* CCRC Ann. Rep., *supra* note 34, at 22 (explaining case review process, which separates procedure into three stages).

290. *See* Criminal Appeals Act, 1995, § 19 (allowing Commission to appoint investigating officers); *see also* Campbell, *supra* note 40, at 17 (stating that applicants may be interviewed and almost half of applicants are in prison).

291. Campbell, *supra* note 40.

292. *See* CCRC Ann. Rep., *supra* note 34, at 22 (stating that caseworker provides overview of case to committee of at least three Commission Members, who then make "case decision" whether to refer case back to Court of Appeal); Paul Donovan, *Cold Comfort for Victims of Injustice*, INDEPENDENT, Aug. 7, 1996, at 20.

293. *See* CCRC Ann. Rep., *supra* note 34, at 5 (discussing how before establishment

CCRC has been in question since the concept of the CCRC was first introduced.²⁹⁴ The concern involves current challenges and is rooted in a history of criticism of independent bodies²⁹⁵ and the criminal justice system.²⁹⁶ The wariness of the Commission ranges from the body's limited power²⁹⁷ and the appointment of its commissioners,²⁹⁸ to the language of the mandate,²⁹⁹ legal aid,³⁰⁰ and expected delays.³⁰¹

1. The CCRC's Role in England and Wales and in Northern Ireland

The United Kingdom has appointed independent bodies to investigate a variety of circumstances.³⁰² Human rights groups complain that a related body, the Independent Commission for Police Complaints³⁰³ ("ICPC"), has been particularly unsuccessful in its independent role.³⁰⁴ The government established the

of CCRC concerns were expressed regarding its independence and ability to investigate thoroughly); *see also id.* at 7 (acknowledging concerns expressed by commentators when CCRC was being established).

294. *See* Taylor, *supra* note 232, at 24 (noting that commentators expressed concern over proposed set-up and on whether Commission will be able to function any more effectively than Home Secretaries).

295. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 85-91 (describing ineffectiveness of complaints procedures in Northern Ireland for abuses against defense attorneys).

296. *See* WOFFINDEN, *supra* note 19, at xi (stating that United Kingdom is complacent in recognizing faults with its judicial system, even though mechanisms exist to detect and correct errors).

297. Robinson, *supra* note 42.

298. *Id.*

299. J.C. Smith, *Criminal Appeals and the CCRC – Part 2*, 145 *NEW L.J.* 572, 573 (1995) (suggesting that language of act needs further explanation as it is currently vague).

300. Campbell, *supra* note 40, at 17.

301. CCRC Ann. Rep., *supra* note 34, at 7.

302. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 87-88 (describing independent investigative role of Independent Commission for Police Complaints ("ICPC") and of coroners in inquests); *see also* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 22, at 21-29 (chronicling series of independent reviews of emergency legislation, which authors criticize, particularly for ignoring international obligations that emergency legislation violates).

303. *Id.* The ICPC was established by the Police (Northern Ireland) Order 1987 in 1988 to be an independent observer of investigations of complaints against the RUC, the police force in Northern Ireland. U.S. Embassy, *supra* note 28.

304. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 87-88. The ICPC, like the CCRC, has its commission members appointed by the Secretary of State for Northern Ireland, the equivalent to the British Home Secretary that appoints the CCRC commissioners. *Id.* There is a requirement for the ICPC that half of its eight members

ICPC to review complaints lodged against the police in Northern Ireland.³⁰⁵ Similar to the CCRC, the police conduct ICPC investigations.³⁰⁶ The police have not been effective in investigating their own misconduct, and there have been very few prosecutions stemming from these investigations.³⁰⁷ The U.S. State Department commented on this inadequacy when it stated that the ICPC did not corroborate any of 840 claims of police misconduct that it had received in the first two years of existence.³⁰⁸

The CCRC has resources and power to conduct its own investigations, but still relies heavily on the police.³⁰⁹ The CCRC generally uses police officers from forces other than the one that conducted the initial inquiry,³¹⁰ but the CCRC has used police from the same force in at least one case.³¹¹ In many of the major miscarriages of justice cases, according to one author, the conduct of the police in dealing with the suspects has been called into question.³¹² The CCRC's annual report emphasizes that the CCRC closely monitors these police investigations,³¹³ however, the ICPC has exemplified that the role of supervising investigations may be a hollow one.³¹⁴

Under the existing system, critics are concerned as to how independent a body can be.³¹⁵ An initial attack on the Commission warns that police, who erred in the first place during the

are solicitors and one other needs to be legally trained. *Id.* They have a similar role in choosing police investigators, in that the ICPC can reject the RUC's choice of officers to investigate, but cannot actually choose them. *Id.*

305. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 87-88.

306. *Id.*

307. *Id.*

308. *See id.* at 8 (discussing undetermined U.S. Department of State report, which criticized ICPC for failure to answer to complaints filed).

309. *See* CCRC Ann. Rep., *supra* note 34, at 22 (discussing use of police in investigations).

310. *See* Mansfield & Taylor, *supra* note 124, at 164-65. It is contended that police forces should not be expected to reinvestigate their own misconduct, as they may actually interpret the evidence to protect themselves and to quash any notion of their own misconduct. *Id.* Additionally, even police officers from other forces may act out of fraternal solidarity within the police and may lessen the impact of new minds. *Id.* Police may also be reluctant to expose mistakes by other police in order to preserve the public's confidence in the police force. SLAPPER & KELLY, *supra* note 67, at 95.

311. CCRC Ann. Rep., *supra* note 34, at 22.

312. SLAPPER & KELLY, *supra* note 67, at 93.

313. *See* CCRC Ann. Rep., *supra* note 34, at 22 (stating that CCRC also meets and exchanges information with investigating officers during investigation).

314. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 8.

315. Taylor, *supra* note 232; *see* Donovan, *supra* note 292, at 20 (stating that contin-

initial investigation, would investigate the body's cases.³¹⁶ The CCRC's limited power to send cases back to the Court, which also already made a mistake, compounds this concern.³¹⁷

2. Appointment, Makeup, and Use of Commissioners

The Queen appoints members of the Commission on the recommendation of the Prime Minister.³¹⁸ Authors argue that this system may not be the most effective way to staff such a body; as the current staffing procedure results in a connection with the government that does not further the independence of the commission.³¹⁹ Critics point out that the appointments are essentially political in nature.³²⁰ Additionally, critics question the qualifications of originally appointed commissioners.³²¹

Under the 1995 Act, one-third of the commissioners must be trained lawyers, and two-thirds must have some experience in the criminal justice system.³²² In practical terms, if the 1995 Act is interpreted loosely, which the Commission seems to have done, then one-third of the Commission members do not have to be lawyers or have any experience with any aspect of the criminal justice system.³²³ Some scholars, in their early analysis of the CCRC, viewed this mandate to mean that all of the commissioners would fall into one of the two groups, either a lawyer or one

ued use of police, to investigate police, is what many regard as the Achilles' heel of police investigation).

316. See Taylor, *supra* note 232 (quoting another author describing CCRC as "a toothless commission whose inquiries will be conducted by the police [who made mistakes that led to injustices] and whose only power is to refer a case to the Court of Appeal [which made the mistake in the first place]").

317. *Id.*

318. See Criminal Appeal Act, 1995, § 8(4), (6) (Eng.) (stating that Her Majesty appoints members of Commission following recommendation from Prime Minister and that Prime Minister has discretion on choosing members who appear to be qualified).

319. See Leonard Jason-Lloyd, *The Criminal Cases Review Commission—One Year On-Part 2*, 148 *NEW L.J.* 1244, 1244 (1998) (describing how number of commentators expressed concern over appointment process); see also Malleon, *supra* note 131, at 930 (stating that connection to government is not completely severed with this appointment process).

320. SLAPPER & KELLY, *supra* note 67, at 93.

321. Robinson, *supra* note 42.

322. Malleon, *supra* note 131, at 930; see Criminal Appeal Act, 1995, § 8 (5), (6) (providing that "at least one-third of the members of the Commission shall be persons who are legally qualified" and "two thirds of the members of the Commission shall be persons who appear to the Prime Minister to have knowledge or experience of any aspect of the criminal justice system").

323. Criminal Appeal Act, 1995, § 8 (5), (6).

with some exposure to the criminal justice system.³²⁴ Of the current thirteen commissioners and one chairman, three appear not to fall into either category.³²⁵ Moreover, only one of the members, John Leckey, is from Northern Ireland.³²⁶ Although trained to be a lawyer, Leckey has little miscarriage of justice experience and is a coroner by profession.³²⁷ The fact that Leckey is part of the establishment in a flawed system may also limit his work with miscarriages of justice.³²⁸ Additionally, defense attorneys argue that the Commission's membership is weighted towards the prosecuting authorities.³²⁹

Notable concern exists among critics with respect to the appointment of Sir Frederick Crawford as chairman and regarding the advertisement of the position.³³⁰ Sir Crawford's credentials as a plasma scientist, who formerly worked with the National Aeronautics and Space Administration³³¹ ("NASA"), do not readily fill the mandate for the CCRC personnel.³³² Authors contend that Crawford's role, particularly because of its supervisory na-

324. See Malleon, *supra* note 131, at 930 (stating belief that all members will have some experience).

325. See CRIMINAL CASES REVIEW COMMISSION, APPLICATION MATERIALS (1997) (showing that Sir Frederick Crawford is engineer and past Master of Worshipful Company of Engineers). Crawford's criminal justice experience involved his role as High Sheriff and Deputy Lieutenant in the West Midlands, which has a record involving miscarriage of justice cases recently. *Id.*; see Donovan, *supra* note 292 (stating Crawford's main role has been as academic and his experience with miscarriages of justice is not evident from this information); see *supra* (describing Tony Foster as chemist who has been involved with manufacturing and business community). Mr. Weiss is Chartered Accountant who has been involved with corporate finance, but there is no mention of any relevant experience with the criminal justice system. *Id.*

326. Robinson, *supra* note 42; see Langdon-Down, *supra* note 125 (detailing speech by Jane Winter of British Irish Rights Watch regarding concern that Commission is not familiar enough with justice system in Northern Ireland); E-mail interview from Jane Winter, Dec. 19, 1998 (on file with *Fordham International Law Journal*) (describing March 11, 1998 CCRC training session on criminal justice system in Northern Ireland held for one afternoon).

327. Robinson, *supra* note 42.

328. Interview with Martin Flaherty, Associate Professor of Law, Fordham University School of Law, in New York, New York (Dec. 2, 1998).

329. Michael Mansfield, *Justice for All*, RED PEPPER: ARCHIVE (visited Sept. 15, 1998) <<http://www.redpepper.org.uk/xmansfld.html>> (on file with the *Fordham International Law Journal*).

330. Donovan, *supra* note 292, at 20.

331. *National Aeronautics and Space Administration Homepage* (visited Mar. 30, 1999) <http://www.nasa.gov/nqpao/welcome_letter.html> (on file with the *Fordham International Law Journal*).

332. Donovan, *supra* note 292, at 20.

ture, would seem to require that he had experience investigating miscarriages of justice, but he does not.³³³ Jim Nichol, an experienced solicitor who has handled high-profile cases,³³⁴ stated that Crawford has no record in the area of miscarriages of justice, and Nichol found no record of Crawford speaking out against injustices anywhere.³³⁵ Additionally, Crawford is a member of an elite branch of the Freemasons, a fraternal secret organization.³³⁶ Critics question whether a Mason should have a role in the CCRC because the Masons have had a role in several miscarriages of justice according to the Director of Liberty.³³⁷ Critics also claim that the British government did not widely publicize³³⁸ the part time, £88,000-a-year chairman position, as it had promised.³³⁹ Also, some of the applicants who were rejected seem to be more qualified than those chosen.³⁴⁰ For example, Chris Price, who has a background in correcting miscarriages of justice, received a rejection.³⁴¹ In the 1970s, while a Member of Parliament, he successfully cleared the name of Maxwell Comfait by uncovering police corruption.³⁴²

The CCRC recognizes that as of its first annual report the number of caseworkers needed to be increased.³⁴³ Indeed, within the first week of operation, Crawford stated that there was a shortage of funding and staff to deal with the number of cases.³⁴⁴ In spite of the fact that there does not appear to be any

333. *Id.*

334. *See id.* (stating that Jim Nichol was solicitor on Bridgewater Four case).

335. *See id.* (quoting Jim Nichol, who stated that Crawford "has no record in the area of miscarriages of justice" and no record was found "of Crawford speaking out on injustices anywhere").

336. Duncan Campbell & Malcolm Glynn, *Justice Commission Chief Is Elite Mason*, *GUARDIAN*, Aug. 15, 1996, at 1.

337. *Id.* Liberty is non-governmental civil liberties organization. Donovan, *supra* note 292, at 20.

338. Donovan, *supra* note 292, at 20.

339. *See* PATTENDEN, *supra* note 30, at 418 (noting that government committed to advertise all positions, including position of chairman).

340. *See* Donovan, *supra* note 292, at 20 (noting that Chris Price MP has had experience with miscarriage of justice cases and with exposing police corruption).

341. *Id.*

342. *Id.*

343. *See* CCRC Ann. Rep., *supra* note 34, at 5 (stating plans to increase number of case managers from 24 to 50).

344. *Justice Snowed Under*, *LEGAL NEWS* (Apr. 15, 1997) (visited Sept. 15, 1998) <<http://www.gti.co.uk/law/lawnews1504.htm>> (on file with the *Fordham International Law Journal*).

particular staffing criteria for the caseworkers,³⁴⁵ they seem to have a substantial amount of discretion in review and investigation.³⁴⁶ A member of the House of Lords raised the issue in Parliament of whether case review managers should be trained, but the topic did not receive significant discussion, citing the Commission's discretion in appointing its own staff.³⁴⁷

3. Limitations of the CCRC's Mandate

The CCRC only considers cases where there is new evidence.³⁴⁸ This means that the CCRC might not consider a case where a defendant has been wrongly convicted but does not have new evidence to show.³⁴⁹ In some cases where applicants presented new evidence to the Commission, the Commission made a quick referral to the Court.³⁵⁰ But in a case where only a possibility of new evidence exists following a future investigation, it is unclear how dedicated the CCRC will be to the investigation, and it is questionable as to whether it will investigate.³⁵¹ As discussed earlier, the reluctance of the Home Office to investigate triggered the creation of the CCRC.³⁵²

Some interest groups, including Justice, hope that the CCRC conducts these investigations because these interest groups and their clients do not have the resources to do so themselves.³⁵³ Additionally, the CCRC has broader power in ob-

345. CCRC Ann. Rep., *supra* note 34 at 12; Criminal Cases Review Commission, *Management Statement for the Criminal Cases Review Commission* (visited June 1, 1998) <<http://www.coi.gov.uk/coi/depts/GRC/coi0184e.ok>> (on file with the *Fordham International Law Journal*).

346. CCRC Ann. Rep., *supra* note 34, at 22.

347. See *Criminal Cases Review Commission: Case Review Managers, Hansard Debates Before the House of Commons, British Parliament*, June 29, 1998 (visited Oct. 22, 1998) <<http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansrd/pdvn/alldays.htm>> (on file with the *Fordham International Law Journal*) (stating that Lord Lester of Herne Hill asked Her Majesty's Government whether they agree with CCRC position that trained lawyers are not necessary when investigating suspected miscarriages of justice). Lord Williams of Mostyn answered that under the Criminal Appeal Act of 1995 the CCRC has discretion in choosing employees, subject to approval from the Secretary of State. *Id.* Additionally, he added that it would "not be appropriate for Her Majesty's Government to comment on the Criminal Cases Review Commission's internal arrangements concerning recruitment." *Id.*

348. Campbell, *supra* note 40, at 17.

349. *Id.*

350. Donovan, *supra* note 236, at C1.

351. *Id.*

352. Malleon, *supra* note 131, at 929; PATTENDEN, *supra* note 30, at 347.

353. Donovan, *supra* note 236, at C1.

taining documents from the police than these groups.³⁵⁴ Critics fear, however, that because of the Commission's limited resources, the Commission will interpret its mandate narrowly and only consider cases where there is already new evidence and no need for any new investigation.³⁵⁵ In this regard, critics argue, the Commission would be no different from its predecessor, the Home Office.³⁵⁶

4. The Effectiveness of the Commission in Light of the Court

The overall effectiveness of the CCRC depends on the subsequent actions of the appellate courts.³⁵⁷ One of the strongest early criticisms of the CCRC concept was that it lacks the power to decide cases for itself.³⁵⁸ The CCRC only maintains the power to refer cases back to the Court, thus the appellate courts have the final word on whether or not miscarriages of justice will be corrected.³⁵⁹ The Commission does not have the ability to act itself, by overturning or quashing a conviction, or altering a sentence.³⁶⁰ Under the CCRC mandate, one of the elements in considering whether to refer back a case is the likelihood that the appellate court will quash it.³⁶¹ Even if the CCRC is structurally independent, it will depend on the approach of the Court because the Court is the sole body that can alter a verdict.³⁶²

One author believes that the CCRC has the potential to alter that relationship in light of positive feedback from some members of the bench.³⁶³ This author realizes, however, that even if the relationship is amiable between the Court and the Commission, the 1995 Act mandates the Court to treat a referral from the Commission as an ordinary appeal.³⁶⁴ Two authors ar-

354. *Id.*

355. *Id.*

356. *Id.*; see Malleon, *supra* note 131, at 933 (stating that applicants to Home Secretary sometimes found themselves in predicament where Home Secretary would not investigate unless there was new evidence, but new evidence would not be found until investigation was initiated).

357. Malleon, *supra* note 131, at 929.

358. *Id.* at 926.

359. Clarke, *supra* note 83.

360. *Id.*

361. Malleon, *supra* note 131, at 929, 934.

362. *Id.*

363. *Id.*

364. *See id.* (noting that Court has not "acted as a rubber stamp" in past and is unlikely to do so in future).

gue that there is no evidence to assert that the new Commission will alter the practices of the Court, particularly in light of the fact that the animosity that existed between the Home Office and the Court may develop between the CCRC and the Court because the reasons for this animosity may still be present.³⁶⁵

5. Unlikelihood of Changing the System

Some believe that the CCRC will positively effect the overall functioning of the criminal justice system.³⁶⁶ Under the 1995 Act, however, there is nothing to ensure that the work of the CCRC will have any effect on the courts or the criminal justice system.³⁶⁷ In particular, the Court is supposed to deal with references from the CCRC with the same scrutiny and deference as any other appeal, using general appellate principles.³⁶⁸ To the contrary, the CCRC expects to gain knowledge on its own performance by considering the reaction to the cases that it has referred back to the Court.³⁶⁹

Logically, if the criminal justice system operated effectively, then there would be no need for the CCRC.³⁷⁰ The effectiveness of the criminal justice system at lower levels would save money³⁷¹

365. David Schiff & Richard Nobles, *Criminal Appeal Act of 1995: The Semantics of Jurisdiction*, 59 MOD. L. REV. 573 (1996).

366. See Donnelly, *supra* note 238 (quoting Kevin McNamara MP, speaking of recent delay of Danny McNamee case that was sent back to Court by CCRC). "There is also an historical significance about this trial because we hope it brings to an end an era of judgments in the British Courts leading to gross miscarriages of justice." *Id.*

367. Criminal Appeal Act, 1995, ch. 35 (Eng.).

368. Malleon, *supra* note 131, at 934.

369. CCRC Ann. Rep., *supra* note 34, at 7.

370. See BBC News, *One Thousand Innocent Prisoners, Says Former Governor*, Aug. 10, 1998 (visited Oct. 22, 1998) <http://bbcnews.org/low/english/uk/newsid_76000/76830.stm> (on file with the *Fordham International Law Journal*) (stating view of Dr. David Wilson that CCRC exists because government knows that there are innocent prisoners).

371. See CCRC Ann. Rep., *supra* note 34, at 38-48 (illustrating how saving money does seem to be of concern considering financial sophistication of CCRC annual report and questions in parliament). Lord Avebury questioned: "If the number of convictions overturned by the Criminal Cases Review Commission continued to be the same proportion as at present, how much public money would be saved through the release of those wrongfully imprisoned." Parliament, *Hansard Written Answers, Criminal Cases Review Commission*, May 19, 1998 (visited Oct. 22, 1998) <<http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansrd/pdvn/allddays.htm>> (on file with the *Fordham International Law Journal*). Lord Mostyn answered: "Such a calculation would require too many assumptions to make it useful. The importance of correcting

and better preserve justice.³⁷² Currently, however, there is a need for the CCRC to handle cases with which the system has not adequately dealt.³⁷³ A former prison governor and current academic recently told the British Broadcasting Company (“BBC”) that the existence of the CCRC amounts to an admission by the system that it convicted some prisoners wrongly.³⁷⁴ The 1995 Act includes a recommendation made by the RCCJ to amend the Criminal Appeals Act to include what the RCCJ refers to as a broader scope for finding justice.³⁷⁵ The 1995 Act proposes to do so by expanding the rules of admissibility of evidence.³⁷⁶ The RCCJ recommended that the phrase “likely to be credible” be replaced with “capable of belief.”³⁷⁷ The RCCJ believes “capable of belief” is a broader definition, under which more evidence will be admissible.³⁷⁸ The British government’s Discussion Paper³⁷⁹ (“Paper”), however, does not reflect the content of this recommendation in the same way.³⁸⁰ The Paper refers to the amendment as the current operating method of the Court, not as an attempt to change it.³⁸¹

History further evidences the unlikelihood of change in the Court.³⁸² According to one author, the 1995 Act will probably not have much of an effect on the Court’s practices because such efforts for change in the past through Parliamentary statute have been extremely difficult.³⁸³ Additionally, this Parliamentary statute did not contain language that expressed a clear intent to

miscarriages of justice does not in any way depend on any consequential savings to public funds.” *Id.*

372. BBC News, *supra* note 370.

373. *Id.*

374. *Id.*

375. See Malleon, *supra* note 131, at 929, 935 (stating that Government Discussion Paper said that 1995 Act reflected how Court was already operating).

376. *Id.*

377. *Id.*

378. *Id.*

379. See Smith, *supra* note 299, at 573 (describing Government Discussion Paper as document of government in power that contains proposals for legislation).

380. Malleon, *supra* note 131, at 935.

381. *Id.*

382. See *id.* (quoting Lord Devlin, from history, who stated “Parliament can as we know, do anything it likes, but it has not yet found a way of suggesting to the judges in statutory language that they should be less sticky about the use of its powers”).

383. *Id.*

change the Court, so it is even less likely to have any effect on the Court's approach.³⁸⁴

6. Vague Language in the Mandate and Evidentiary Concerns

Critics argue that currently the language of the 1995 Act is ambiguous.³⁸⁵ The 1995 Act does not say anything about what criteria the CCRC should consider when determining whether the finding in a case is unsafe.³⁸⁶ The CCRC itself hopes to gain insight into what is meant by phrases such as "exceptional circumstances," "capable of belief," "real possibility," and "unsafe."³⁸⁷ The Commission currently does not consider the innocence of the defendant along with the way that the case had been conducted,³⁸⁸ even though some authors believe that it should.³⁸⁹ Those who think the Commission is necessary, believe that the Commission must consider whether the defendant actually committed the crime.³⁹⁰

Under the current rules of evidence, there may be some materials that the CCRC uses to consider cases that are not admissible in the Court.³⁹¹ Therefore, although this information might be useful, and even necessary, to persuade the Court of a defendant's innocence and may have already persuaded the CCRC, it is simply not admissible and cannot be used to consider

384. *Id.*

385. *See* Taylor, *supra* note 232, at 24-25 (stating that terms of Criminal Appeal Act are ambiguous and that parliamentary debates did little to clarify meanings).

386. *See* Smith, *supra* note 299, at 572 (suggesting that mandate of Commission be further explained, by addition of following provision: "a conviction is unsafe where, in the light of representations made to the court, of any fresh evidence, and of all the circumstances, it is not satisfied (i) that the appellant is guilty of the offence; or (ii) that a reasonable jury would have convicted the appellant if the trial had been properly conducted in all respects.").

387. *See* CCRC Ann. Rep., *supra* note 34, at 7 (discussing development of meanings of terms used to consider cases, Commission states that in coming year, Commission will gain valuable insight into practical interpretation of terms in 1995 Act, including "exceptional circumstances," "capable of belief," "real possibility," and "unsafe," which affect case review, particularly as its case referrals are heard by courts of appeal).

388. *See* Taylor, *supra* note 232, at 24-25 (describing clarifying discussion author had with CCRC, where it was determined that safeness of conviction is in issue, not innocence of applicant).

389. *See* Smith, *supra* note 299, at 573 (stating that 1995 Act says nothing about referring cases where there is real doubt whether defendant committed crime, but author assumes that Commission must consider issue of defendant's innocence).

390. *Id.*

391. *Id.*

the "safeness" of the case.³⁹² Under this system, authors believe that it is pointless even to refer back a case to the Court if the decision of the CCRC to refer the case is based solely on inadmissible evidence.³⁹³

7. Challenges in the Existing Criminal Justice System

The new Commission has not cured a myriad of problems in the system that have been instrumental in causing some miscarriages in the first place.³⁹⁴ Rather, these challenges will limit the successfulness of the body.³⁹⁵ These challenges include concerns of legal aid,³⁹⁶ delays,³⁹⁷ and disclosure.³⁹⁸

The Commission addressed concerns regarding legal aid directly in their application materials.³⁹⁹ The CCRC included a page that describes the use of a lawyer and how one may apply for legal aid.⁴⁰⁰ Some critics believe that legal aid is crucial to the success of the CCRC.⁴⁰¹ One author believes that in order to have success, applicants need a committed lawyer, supportive family and friends, or good luck.⁴⁰² The CCRC itself states that although it is not necessary to have a lawyer, the process may be quicker with a lawyer's assistance.⁴⁰³ Current CCRC figures show that only one in ten CCRC applicants has legal representation.⁴⁰⁴

392. *See id.* at 573-74 (stating that ideally no evidence that might render conviction unsafe would be excluded from trial, but currently that is not within rules of evidence).

393. *See id.* at 574 (stating that even though inadmissible evidence may show case to be unsafe, there is no point in referring case to Court because Court must follow rules of evidence).

394. *See id.* at 573 (describing how rules of evidence may prevent relevant material from being admitted); *see also* Campbell, *supra* note 40 (citing lack of legal aid, potential delays, and issues of disclosure continuing).

395. Campbell, *supra* note 40, at 17.

396. CRIMINAL CASES REVIEW COMMISSION, APPLICATION MATERIALS, LEGAL AID SCHEME DOCUMENTATION (1997).

397. Campbell, *supra* note 40, at 17.

398. Clarke, *supra* note 83, at 946.

399. CRIMINAL CASES REVIEW COMMISSION, *supra* note 396.

400. CRIMINAL CASES REVIEW COMMISSION, APPLICATION MATERIALS, PAYING A SOLICITOR TO HELP WITH YOUR APPLICATION (1997).

401. *See* Campbell, *supra* note 40, at 17 (noting that good lawyers do exist, but only one in ten applicants to Commission are legally represented).

402. *Id.*

403. *See* CRIMINAL CASES REVIEW COMMISSION, *supra* note 400 (stating that applicant does not have to use solicitor when applying to Commission, but having one may help Commission get to point of making decision more quickly).

404. Campbell, *supra* note 40, at 170.

Many of these applicants claim that they did not have adequate representation at trial.⁴⁰⁵

The ordinary legal aid application scheme generally allows two hours of legal aid.⁴⁰⁶ The CCRC form says that more time can be allowed to cover an application to the Commission,⁴⁰⁷ but according to one author it is difficult to receive additional time.⁴⁰⁸ Also, the legal aid scheme will not be in effect while the Commission carries out its investigation.⁴⁰⁹ The lack of legal aid coverage may even increase costs to the Commission, as the Commission's work might be made easier if the commissioners and caseworkers could speak directly with lawyers, rather than the individual applicants.⁴¹⁰ The only solution to this dilemma is to find a lawyer willing to work for free.⁴¹¹

Despite the Royal Commission report and the *Hickey* case holding, the 1995 Act still leaves the disclosure rules uncertain.⁴¹² Nothing in the 1995 Act speaks of disclosure of materials to the applicant.⁴¹³ Disclosure seems to be a detrimental omission from the 1995 Act as one of the most significant functions of the Commission will be to uncover undisclosed material currently under the prosecution's control.⁴¹⁴ There are strict rules about disclosure at trial and appeal, but once the appeals are exhausted these rules do not apply.⁴¹⁵ The CCRC will be attempting to find previously-undisclosed information, particularly from the prosecution.⁴¹⁶

Lawyers familiar with submitting miscarriage of justice appli-

405. *Id.*

406. See Clarke, *supra* note 83, at 948 (noting that Commission may actually be saved money by greater legal aid, as Commission's job would be easier if they could work directly with lawyers).

407. CRIMINAL CASES REVIEW COMMISSION, *supra* note 400.

408. See Clarke, *supra* note 83, at 948 (stating that it is unclear whether Commission can contract lawyers to represent applicants within Commission's budget).

409. *Id.*

410. *Id.*

411. *Id.*

412. Criminal Appeal Act, 1995, ch. 35, §§ 17-18 (Eng.); see Clarke, *supra* note 83, at 948 (stating that 1995 Act gives Commission power to require production of documents from public bodies, but does not address issue of disclosure of information to applicant).

413. Clarke, *supra* note 83, at 947.

414. *Id.*

415. *Id.*

416. See *id.* (stating that not solving issue of disclosure is "major omission from the Act").

cations have noted that delays were a trademark of the Home Office and the Northern Ireland Office.⁴¹⁷ With the daily addition of four to five cases⁴¹⁸ and greater investigative power, the Commission realizes that it needs more Case Review Managers to handle the load to prevent further delays.⁴¹⁹ One author particularly notes that the coexistence of the CCRC and the Criminal Procedure and Investigation Act of 1996⁴²⁰ poses a potential problem.⁴²¹ Certain materials, specifically under the code of practice relating to retention of materials by the police, could be destroyed by police when the CCRC decides not to refer a case back to the courts.⁴²² According to this author, this material would then be unavailable in the event that new forensic tests and techniques were developed that would cause the case to be reconsidered.⁴²³

III. *THE CCRC AND NORTHERN IRELAND*

The situation in Northern Ireland presents unique challenges to the CCRC. It is unclear whether the commissioners and caseworkers are currently equipped to deal effectively with these distinctions.⁴²⁴ Lawyers and NGOs, particularly concerning cases heard before Diplock Courts, have raised concerns.⁴²⁵ The Commission did participate in some training regarding the Northern Ireland cases, but such training lasted only a few hours.⁴²⁶ Additionally, academics taught the course, rather than practitioners.⁴²⁷ The meeting took place after lawyers from

417. See Langdon-Down, *supra* note 125, at 23 (quoting Razia Karim, legal officer for Justice, who stated that once cases were sent to Home Office, it might take years before hearing decision).

418. CCRC Ann. Rep., *supra* note 34, at 5.

419. *Id.* at 7.

420. Criminal Procedure and Investigation Act, 1996 (Eng.).

421. See Robinson, *supra* note 42.

422. *Id.*

423. *Id.*

424. See *supra* note 326 and accompanying text (noting only one Commissioner is from Northern Ireland and detailing Jane Winter of British Irish Rights Watch's speech regarding concern that Commission is not familiar enough with justice system in Northern Ireland).

425. *Id.*; see Flaherty, *supra* note 162, at 96 (defining Diplock Courts as courts in which certain offenses, which are mostly, but not entirely related to political violence, are tried in absence of a jury in front of one judge).

426. See *supra* note 326 and accompanying text (describing e-mail from Jane Winter regarding March 11, 1998 CCRC training session held for one afternoon).

427. *Id.*

Northern Ireland and NGOs urged the CCRC to do so.⁴²⁸ The session did not focus on the elements of the Northern Irish system likely to create miscarriages of justice, but rather presented a straightforward description of the ways that the Northern Ireland justice system is different.⁴²⁹

A. *Emergency Legislation*

The emergency legislation of Northern Ireland stands in striking contrast to the ordinary criminal standards applied in Britain and Northern Ireland. To consider the situation in Northern Ireland as one with only minor differences from a non-emergency situation is incorrect.⁴³⁰ Police can stop, question, and search persons without approval from a judge.⁴³¹ Once arrested, the defendant can be held for prolonged periods of time and be subjected to intense interrogation.⁴³² The confessions that may result from the interrogations and extended detentions are then used to convict the individual.⁴³³ This emergency legislation is more broadly used than elsewhere in the United Kingdom, and its effects have also infected the ordinary law of Northern Ireland.⁴³⁴ Some NGOs fear that the CCRC is not sufficiently aware of this distinction⁴³⁵ and will not thoroughly consider the effects of this legislation on cases from Northern Ireland.

B. *Role of Judges Under Emergency Legislation*

The role of judges demands even greater attention when the judges operate under a jury-less system as in the Diplock Courts of Northern Ireland.⁴³⁶ As discussed earlier, human

428. *Id.*

429. *Id.*

430. *See supra* note 156 and accompanying text (stating that emergency element of legislation has become part of ordinary functioning of system in Northern Ireland).

431. *See supra* note 171 and accompanying text (describing powers that police have regarding search and seizure under EPAs).

432. *See supra* note 169 and accompanying text (discussing seven-day detention without charge under EPA).

433. *Supra* note 170 and accompanying text.

434. *See supra* note 177 and accompanying text (contending that emergency legislation has greater effect in Northern Ireland than in England and Wales).

435. *See supra* note 326 and accompanying text (noting Jane Winter's concern regarding Commission's lack of familiarity with Northern Ireland's system).

436. *See supra* note 216 and accompanying text (noting need for judges to consider divided nature of society, in light of non-jury trials).

rights organizations believe that members of the judiciary are not sufficiently aware of their obligation to protect the rights of defendants, especially when legislation has encroached upon many basic rights.⁴³⁷ This particular criticism is relevant following a series of previous cases that courts eventually quashed, involving the admission of uncorroborated evidence.⁴³⁸ Additionally, the notion that judges become case hardened is an issue that the CCRC should address carefully. The theory is that because judges rely on confessions so frequently and lay witnesses rarely testify in these cases, the judiciary may too easily accept the testimony of the police and security forces.⁴³⁹ The recent case of Baker, Groves, and Valente illustrates a recent mistaken judgment by a judge in the Northern Irish system.⁴⁴⁰

C. Other Challenges Relating to the Criminal Justice System in Northern Ireland

The elimination of the right to silence is an infringement on the rights of the accused and is of particular concern in Northern Ireland.⁴⁴¹ Where a substantial number of the population distrusts the police, it is dangerous to assume that the people's silence is based on guilt rather than on fear, mistrust, or the civil decision not to cooperate.⁴⁴² This assumption is further discredited by the coexistence of the elimination of the right to silence and coercive interrogations permitted under the emergency legislation.⁴⁴³ The CCRC needs to be aware that miscarriages of justice in Northern Ireland do in fact exist. Therefore, it is imperative that when the CCRC is reviewing cases from

437. *See supra* note 215 and accompanying text (describing how individual judges believe that they know better than European Commission on Human Rights).

438. *See supra* note 218 and accompanying text (discussing practice of convicting based on informer evidence, which is no longer used).

439. *See supra* notes 202-03 and accompanying text (describing how the routine admission and reliance on confessions may lead to lower standard of admissibility, especially in regard to confession evidence).

440. *See supra* notes 223-30 and accompanying text (explaining how judge failed to protect defendants' rights by not inquiring into nature of police evidence that connected defendants with crime).

441. *See supra* notes 174-75 and accompanying text (considering right to silence limitations in non-jury trials as intensifying concern over right to silence).

442. *See supra* note 179 (stating that fear and civil non-cooperation may be reasons for remaining silent, rather than guilt).

443. *See supra* note 179, 191 (stating that silence is as likely to be caused by fear or civil non-cooperation as guilt in Northern Ireland situation).

Northern Ireland, it is aware of EPAs and their effects on the whole system of justice in Northern Ireland.

CONCLUSION

Many organizations see the CCRC as a definite improvement over the Home Office and the Northern Ireland Office. They generally, however, do so with a certain level of reservation. The CAJ, an NGO, stated that although it is too early to come to a final judgment on the Commission, its operations over the first year appear encouraging.

The CCRC, however, has several structural challenges and is faced with problems from the existing criminal justice system. These challenges are further exacerbated by the situation in Northern Ireland and its emergency legislation. The Commission does, however, have certain powers that the Home Office and the Northern Ireland Office did not have. How the CCRC decides to use these powers will be the true test. Additionally, because the Court has the final say, the Court's reaction to the CCRC will determine whether miscarriages will be corrected.