

Na Jiang

Wrongful Convictions in China

Comparative and Empirical Perspectives

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China

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Preface

This book arises from a comparative research project which has its roots in several homes in Canada and China. I benefitted from the generous support of my supervisor Prof. Roach at the University of Toronto and my dearest friend Mr. Monkman in Ottawa. In 2011, I was granted funding through participation in the Canada-China Scholars' Exchange Program, which enabled me to undertake a comparison between wrongful convictions in between Canada and China. From 2012 to 2013, I had a great time at the University of Toronto, Faculty of Law, researching such convictions from a comparative perspective. After returning to Beijing, I conducted some interviews with justice personnel and collected data from numerous cases involving potential miscarriages of justice, so as to further complete my empirical study.

My ultimate goal is to offer the broad legal and factual bases necessary for a better understanding of wrongful convictions in China's judicial practice through comparative analyses, verifiable and empirical data and case studies. My hope is that this book will contribute to dialogues about such convictions from diverse perspectives. Over 2 years have passed since the implementation of the *2012 Criminal Procedure Law of the PRC*, so the time has come to summarize the lessons from wrongful convictions in China that can be learned from decades of repeated failures. Given the new challenges facing China in its transition to the adversarial system, it is very essential to compare how liberal Western countries and authoritarian China have responded to the public challenges created by wrongful convictions.

This book will start from a diverse understanding of the scope of wrongful convictions in various contexts and will further examine the similarities between the causes of such convictions in many countries around the world. Based on case studies, the different roots of wrongful convictions will be demonstrated in each

sample country in order to examine how far the movement for prevention has progressed. China's inadequate response to wrongful convictions will also suggest some institutional dilemmas in its justice practice and call for new strategies for better prevention of such convictions in the near future.

Beijing, China

Na Jiang

Acknowledgment

This book was inspired by the groundbreaking research of my Canadian supervisor Kent Roach, Prichard-Wilson Chair in Law and Public Policy at the University of Toronto. His excellent publications, distinguished insights, nice supervision, and comparative analysis of wrongful convictions have expertly shaped my thinking and have informed the worldwide comparisons explored in this book. Also, his advocacy for better prevention and remedy of such convictions provides leadership for scholars around the world.

I am deeply grateful to my dearest friend Mr. Monkman, who spent much time to expertly read, supervise, revise, edit, and comment on the draft chapters of this book's manuscript. He also frequently provided expert advice, valuable feedback, and essential encouragement on many of the individual draft chapters. Finally, he often rallied me when I was frustrated or when I faltered in the long march towards the completion of this research. Thank you so much for everything. Of course, any mistakes in this book are mine alone.

I am thankful for Springer's excellent support in the entire process of reviewing, editing, and publishing this book, which made its timely publication possible. I am particularly grateful for the assistance of my experienced responsible editor Li Leana and editorial assistant Chen Tianran who generously helped me in many respects to hasten the publication of this book. I do appreciate their professional skills and hard work to ensure the book's good quality. They also have my deeply heartfelt gratitude and admiration.

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Chapter 1

Introduction

In support of its further criminal justice reform, China has, since 2012, undertaken a series of reform measures to prevent miscarriages of justice and to improve its justice situation in criminal cases. The first Government White Paper on Judicial Reform, issued in October 2012, highlighted recent progress on “social fairness, justice and human rights protections”, including a discussion of the latest revision to the *Criminal Procedure Law of the PRC (2012CPL)*.¹ In its explanation of the effects of the revision, the Standing Committee of the National People’s Congress (NPC) made a strong statement on preventing and correcting wrongful convictions, and on protecting human rights in criminal justice.²

In August 2013, the Central Politics and Law Commission (Central PLC)³ issued the *Guidance on the Effective Prevention of Miscarriages of Justice (Guidance)*, requiring policemen, prosecutors and judges to take lifetime responsibility for wrongful convictions.⁴ Three months later, the *Decision of the 18th Chinese Communist Party Central Committee at the 3rd General Assembly* proposed to improve the Chinese system of preventing and correcting wrongful

¹The Information Office of the State Council, *Full Text: Judicial Reform in China*, XINHUA (9 October, 2012), http://news.xinhuanet.com/english/china/2012-10/09/c_131895159.htm.

²See Wang Zaoguo, *On Explanation of the Amendment to Criminal Procedure Law of the PRC (Draft)*, NPC (9 October, 2012), http://www.npc.gov.cn/npc/xinwen/lfgz/lfdt/2012-03/09/content_1705698.htm.

³It is a powerful organization under the Central Committee of the Chinese Communist Party, responsible for overseeing law enforcement authorities in practice. In each province, municipality, county and autonomous region, there are respective politics and law commissions established in P.R. China. See Central Political and Legal Affairs Commission, http://en.wikipedia.org/wiki/Central_Political_and_Legal_Affairs_Commission.

⁴See Peng Bo, *The PLC Clearly Requires Life Responsibility Undertaken for Wrongful Convictions*, People’s Daily (14 August, 2013), <http://politics.people.com.cn/n/2013/0814/c1001-22552310.html>.

convictions by issuing a general political guideline.⁵ The Supreme People's Court (SPC) subsequently adopted the *Directive on Establishing and Improving Work Mechanisms for Preventing Miscarriages of Justice (Directive)* in 2013, stressing 'zero errors' as the goal of death sentence reform.⁶ Alongside the SPC, the Supreme People's Procuratorate (SPP) also required strict prevention and lawful correction of such convictions in its *Working Report*, which was presented to the Second Session of the Twelfth National People's Congress in 2014.⁷

These official documents demonstrate that China is not irrevocably hostile to the idea of criminal justice or to the prevention of wrongful convictions. However, the fact that such discussions are occurring at all demonstrates that there is a high risk of potential miscarriages of justice, including in death penalty cases. Chinese authorities have stressed their commitment to criminal justice, but have adopted an overly optimistic standard of 'zero errors' as the major goal of justice in handling criminal cases, even though it is unlikely that this standard will be achieved in practice. Such language can be generally understood to judge, for a large part, the implementation of criminal justice based on whether or not the number of identified wrongful convictions can be minimized to zero. Without further substantive reforms to actually address the causes of wrongful convictions, this standard is more likely to discourage the authorities from seeking out wrongful convictions.

The Chinese Government is willing to respond to increased global concerns about wrongful convictions by numerous means, including legislative reforms. Like other countries, China seeks to implement mechanisms for preventing or remedying such convictions as it reforms its criminal justice system. It is still exploring what effect the acceptance of any popular model for remedying them should have on its domestic justice practice. This book examines this question by comparing the nature of wrongful convictions in Mainland China with the typical experiences in preventing and remedying such convictions in common law countries, mainly by examining copious data and many case studies.

⁵See The Ministry of Civil Affairs of the P.R. China, *The Chinese Communist Party Central Committee's Decision on Several Major Issues of Comprehensive and Deepening Reform (adopted by the 18th Central Committee of the Chinese Communist Party at the Third General Assembly on 12 November 2013)* [zhonggong zhongyang guanyu quanmian shenhua gaige ruogan zhongda wenti de jueding (2013 nian 11 yue 12 ri zhongguo gongchandang di shiba jie zhongyang wenyuanhui di sanci quanti huiyi tongguo)], <http://jnjd.mca.gov.cn/article/zjyd/dzbjs/201311/20131100553970.shtml> (consulted on 30 November, 2013).

⁶The SPC, *The SPC Issues the Notice of "The Opinion on Establishing and Strengthening Working Mechanisms for Preventing Miscarriages of Justice in Criminal Cases"* [zuigao renmin fayuan yinfa guanyu jianli jianquan fangfan xingshi yuanjia cuoan gongzuo jizhi de yijian de tongzhi], <http://www.chinacourt.org/law/detail/2013/10/id/147221.shtml> (9 October, 2013).

⁷See *Both the SPC and SPP Require Strict Prevention and Correction of Wrongful Convictions by Law*, *People's Daily* [lianggao baogao yaoqiu yanfang bing yifa jiuzheng yuanjia cuoan], *People's Daily* [renmin ribao] (11 March, 2014), http://news.china.com.cn/2014lianghui/2014-03/11/content_31743016.htm.

1.1 Preliminary Observations

In order to explain the comparative and empirical perspective used in this book, it necessary to explain its main object as well as how the investigations that underpin its conclusions were carried out. The central purpose of this comparative work is to assess wrongful convictions in China in light of the experiences of common-law countries. The book examines the scope of wrongful convictions in broad economic, social and cultural contexts, involving diverse types of convictions that have been considered as wrongful in law or in practice. Some such convictions have received considerable scholarly attention from around the whole world, whereas some are still little-known even in Mainland China. This examination is intended to explore the current standard for judging whether or not a conviction is wrongful in a domestic or international context in order to compare the scope of wrongful convictions in Mainland China and other relevant countries. The similarities and differences can help every country reflect its own system and learn from other countries in this respect.

By exploring the reasons for wrongful convictions, the book will also offer new insights into the worldwide movement for their prevention so as to assess how far it Chinese reforms have progressed and what further reforms are most needed in law or in practice. This exploration will be helpful for evaluating the advantages and disadvantages of China's reform measures on preventing or remedying wrongful convictions in its justice practice as it embarks on the rocky road to the reformation of its criminal justice system. In addressing wrongful convictions in diverse contexts, both national and international legal systems prevent or remedy such convictions in criminal cases, which can be demonstrated from two primary aspects. The first is to minimize the potential risk of errors that cause such convictions before their occurrence, thus contributing to the better prevention of the convictions in criminal justice practice. The second is to judicially rectify errors made in past convictions and to compensate the wrongly convicted after they have been officially identified. The latter approach may reduce the number of wrongful executions in criminal cases to a certain degree.

1.2 The Prevention of Wrongful Convictions

If the right to a fair trial can be fully protected in criminal cases, then will wrongful convictions or miscarriages of justice be reduced to "zero" as a result? The answer is 'generally not'. Even trials that follow or exceed international standards for fair trials can lead to wrongful convictions. However, adherences to these standards are good first step towards preventing wrongful convictions.

At the level of international law, this right is explicitly enshrined and respected in order to better protect any accused from unlawful detention or unfair trials, which might minimize the possibility of wrongful convictions, penalties or

executions in criminal cases. For example, an influential resolution, the *UN Safeguards on Protecting the Rights of Those Facing the Death Penalty* calls on all member States, including China, to refrain from carrying out capital punishment unless final judgments satisfy the following conditions: The judgments should be rendered by competent courts and not other institutions; The judgments or decisions cannot be judicially rendered unless a through legal process has been followed; And the legal process must respect, at the minimum, all of potential safeguards to ensure a fair trial in criminal cases as required by the *International Covenant on Civil and Political Rights (ICCPR)*.⁸ These standards are intended to promote fair trials to reduce the risk of judicial errors.

China signed but has not yet become a party to the *ICCPR*.⁹ Does this mean that the requirements of the *ICCPR* do not apply to a non-party State such as China, according to the general theory of international treaty law? It is essential to examine the nature of such requirements and their relation to signatory States in the theory of international public law. On the one hand, some rules have been part of customary law in nature, developed in the course of the evolution of international human rights law. Article 10 of the *Universal Declaration of Human Rights* clearly states that States must protect the right to a fair trial when hearing criminal cases as a component of international customary law. In detail, the article provided that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal”, in the determination of criminal charges against the accused, at trial or in appeal. This customary rule is universally applicable to all of UN member States including China, except for those insistent objectors. Particularly given that it did not object to this provision prior to its formation, China should be and is legally bound to follow it.

On the other hand, China as a signatory State still should uphold its moral duty not to defeat the purpose of the *ICCPR*, even before its ratification. Numerous human rights treaties reaffirm the great need for a fair trial in order to protect the rights of the accused. As a major civil right, it has been further stressed by other international standards such as Article 6 of the *European Convention on Human Rights (ECHR)*, article 8 of the *American Convention on Human Rights (ACHR)* and so on. As numerous commissions and courts continue to elaborate upon this right,¹⁰ the evolving contents of the right to a fair trial have been constantly expanded to a very broad scope under the relevant international standards. At the core of this right, it involves fair hearings, a presumption of innocence, prohibition of self-incrimination, adequate time for the preparation of a defense, the provision of information and facilities for the preparation of a defense, legal aid, interpretation services, witness examination, and appeals. These requirements should be

⁸U.N. ECOSOC, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, para. 5, E.S.C. Res. 1984/50, U.N. Doc. E/1984/92, 1984/.

⁹UN Doc. A/RES/2200A (XXI), 999/UNTS/171.

¹⁰See, e.g., European Court of Human Rights, *Golder v. the United Kingdom*, 18 Eur. Ct. H.R. (ser. A, 1975), Feb. 21, 1975.

safeguarded in China's justice practice, or the purpose of the *ICCPR* may be defeated.

Although the right to a fair trial has been theoretically protected in China's justice system, publicity surrounding wrongful convictions or miscarriages of justice has increasingly grown as result of the system in practice, particularly in recent years. For instance, in 2013, the cases involving the revelation of such convictions in Henan and Zhejiang provinces attracted worldwide attention. In April, the conviction of a farmer, who spent twelve years in prison following conviction for raping and murdering a young girl was overturned by the Higher People's Court (HPC) of Henan province, due to a lack of evidence of his guilt. Also, two men who were wrongly convicted of murdering a woman were judicially exonerated by the local HPC in Hangzhou, Zhejiang province. They were therefore finally released after spending fifteen years in prison. Both exonerations corrected convictions that had been obtained after coerced confessions. In July, for the similar reasons, the conviction of five men was reversed in order to correct their wrongful death sentences. The flagrancy of such injustices has frequently challenged public confidence in China's justice system, leading to calls for mechanisms for their better preventing, such as fair trials and so on.

1.3 Remedies for Wrongful Convictions

In the Chinese legal system, there are three legal mechanisms for remedying wrongful convictions, namely the procedure of trial supervision, executive pardons and amnesty according to the *Constitution of the PRC* and its basic laws. However in contemporary China, the mechanism of retrial based on trial supervision is the only one available under all circumstances in practice. Under Articles 241–247 of the current *CPL*, retrial courts have the legal power to remedy judicial errors by cancelling wrongful convictions, changing original judgments or sending cases back to original-trial courts. Meanwhile, compulsory conditions for the initiation of trial supervision mechanisms are limited to very specific circumstances, any of which should automatically lead to retrial for error-correction as per Article 242 of the *CPL*. In fact, however, appeal courts often would rather abuse procedural provisions that allow them to remand cases back for retrial, than to overturn convictions that are proved to be wrongful. Appellate courts are generally wary of completely overturning a lower court decision because they wish to avoid professional conflicts with trial judges. This practice has led many wrongful convictions to not be judicially rectified in a reasonable time, as demonstrated from high-profile cases such as that in Case SHE Xianglin, Case ZHAO Zuohai, in the wrongful execution identified on 15 December 2014 and so on.

Regarding the compensation of the wrongfully convicted, several international human rights treaties explicitly provide for the right to compensation in such cases. Among them, the *ICCPR* requires the relevant States to compensate any wrongfully convicted person who completely satisfy the requirements of Article

14(6) only. This requirement is overly high, and can limit criminal justice or human rights. Similarly, Article 3 of the *ECHR* and Article 10 of the *ACHR* require the conditional compensation of such victims.¹¹ Generally, the above right to compensation is limited to those whose final convictions are reversed or pardoned based on fresh or newly discovered facts that are solid enough to prove the convictions wrongful in practice. This limitation suggests that without new facts leading to the reversal of a conviction or a pardon, there is no international requirement to compensate the wrongly convicted. The inapplicability of the compensation requirements includes but is not limited to circumstances in which the actions of a wrongfully-convicted person led to his or her conviction. The gap between the current restrictions on compensation to reversals or pardons resulting from new or newly identified facts and the broader scope of wrongful convictions that are corrected based on other grounds remains to be filled in by State compensation provisions in domestic laws.

Under the *ICCPR*, State parties or signatory States like China tend to fulfill their international human rights obligation to provide compensation as required by Article 14(6) through some or all of the following means: Firstly, States can directly incorporate the requirements into domestic legislation, such as the *State Compensation Law of the PRC*, in order to establish a statutory right to compensation in laws or in constitutions. Secondly, States can leave administrative or judicial bodies a wide discretion to determine whether or not State compensation should be paid to the victims of wrongful convictions pursuant to the relevant law. Thirdly, States exercise the governmental power to make *ex gratia* payments to the wrongfully convicted. Each remedy or combination thereof may complement other means to ensure the duty of compensation is performed under international human rights standards. Also, a wrongly convicted person who is wrongfully convicted by a State that is party to the *First Optional Protocol to the ICCPR* may resort to remedies by submitting his or her complaints to the UN Human Rights Committee, but only if his or her right to compensation is not fully respected. Currently, China is not a party to the *First Optional Protocol to the ICCPR*.

Many countries provide their citizens with the legal right to seek remedies and compensation for damages caused by wrongful convictions in their domestic justice systems. This right is sometimes expressly enshrined in a State's Constitution¹² or in specific legislation.¹³ Generally, legislative provisions set down more explicit conditions and procedures for compensation than State Constitutions. Some influential national commissions were created in various jurisdictions to exercise the legal power to investigate and refer alleged potentially wrongful convictions to a competent court for retrial or re-appeal of the cases.

¹¹African Comm. on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247, 2001.

¹²See, e.g., Constitution of Portugal, art. 29(6); Constitution of Italy, art. 24; Constitution of Brazil, art. 5(LXXV).

¹³See, e.g., U.K.'s Criminal Justice Act, sec. 133.

Typical Criminal Cases Review Commissions have been established in such jurisdictions as England, Wales, Scotland, Northern Ireland and Norway. The United States (US) and Canada have failed to take legislative approaches at the federal or highest level to provide the wrongfully convicted with the right to compensation for wrongful convictions that have been judicially identified. However, in some of American states, compensation laws are adopted to provide the exonerated with state compensation by legal process or through lawsuits against the state.

In contrast to the UK model, Mainland China has not yet created a Criminal Cases Review Commission with mandates to both investigate cases of wrongful convictions and compensate victims of wrongful convictions. Under the current *CPL*, the investigation and correction of such cases remains the responsibility of courts, court presidents and prosecutors. These entities all have the power to initiate a trial supervision or a retrial procedure to correct errors that were not prevented because of poor checks on police or prosecutorial work. The *State Compensation Law of the PRC* has been frequently revised by the Standing Committee of the National People's Congress, the top legislature of China, and is not a matter for local legislatures. Both national laws universally apply to all of Chinese territories in principle. As demonstrated from the above statutory framework, Chinese mechanisms for preventing, correcting and compensating for wrongful convictions are basically complete in law or in form, albeit with many limitations amenable to further improvement.

1.3.1 Latest Responses to Wrongful Convictions

The latest developments in Chinese practice include the Central Political-Legal Commission's (PLC) issuance of the first *Guidelines on Miscarriages of Justice* in August 2013. The *Guidelines* have been an influential political declaration, and are intended to promote the prevention of and accountability for wrongful convictions in China. The *Decision*, made by the third Plenary Session of 18th Communist Party of China (CPC) in November 2013, also required the strengthening of prevention, correction and accountability systems for such convictions, strict prohibition on extorting confessions by torture, and application of exclusionary rules to illegally obtained evidence. Under the above political guidance, the Supreme People's Court (SPC) released the "*Directive on Establishing and Improving Working Mechanisms for Preventing Criminal Unjust Cases/Miscarriages of Justice*" (*Directive*) in the same month. The *Directive* stressed the need to attach "great importance to the quality of capital cases" in order achieve the goal of "a zero error" rate.¹⁴ The specific measures of the *Directive* are mainly those prohib-

¹⁴Authorities: Political and Legal Committees No Longer Intervene in Individual Cases except in Foreign-Related and Other Areas [*quanwei shiren chu shewai deng lingyu zhengfawei buzai jieru ge'an*], People's Daily—People's Daily Overseas Edition (2013-11-22), http://www.whnews.cn/news/node/2013-11/22/content_5855753.htm.

iting the imposition of death sentences on defendants without sufficient evidence of facts, those allowing for experienced judges to handle capital cases, and those allowing for the interrogation of defendants in the final review of such cases. They are intended to combine the implementation of exclusionary rules, the “trial-oriented” doctrine and the mechanisms for examination, supervision and restraints over case quality.

In an attempt to urge the curbing of wrongful convictions in China’s justice practice, prominent Chinese judges have recently criticized its judicial system in many aspects. For instance, the executive vice-president SHEN of the SPC stated that he viewed a reduction in the number of wrongful convictions as the goal of reforming the system. He also emphasized the need to prohibit the persistent presumption of suspects’ guilt contrary to law, and to mobilize other agencies, such as police, procuracies and the CCP to adopt better justice practices. By contrast, the Guangdong Provincial HPC President ZHENG mentioned the similarity between courts and administrative agencies. He further focused on reforming the basic structure of the Chinese justice system in order to prevent courts’ decision-making from being heavily influenced by any outside bodies, such as the police or local Politics and Law Committees (PLC) of the CCP. Due to financial dependence on and administrative control by police and the PLCs, Chinese courts have been deemed to be another governmental body that takes orders from their paymasters, without adequate independence from either. Given both presidents’ high positions in the judiciary, Chinese authorities seem to approve their views to a certain degree, including the directness of their critical comments. Together with a series of the latest specific measures on the prevention of, and remedies for, wrongful convictions, it appears promising for China to carry on justice reforms.

Following the acquittal of NIAN Bin, a man who was previously convicted of murder four times in the past ten years and was finally exonerated of all crimes in August 2014, Procurator-General CAO pledged greater efforts to prevent future wrongful convictions. He called on prosecutors to remove misconceptions around the presumption of guilt and to break away from their excessive reliance on confessions or testimony from law enforcement officials. The discovery of NIAN’s innocence raised public outcry for the proper implementation of the laws, which in part contributed to CAO’s pledge.¹⁵ In NIAN’s cases, he was not given the due benefit of doubts, but was presumed to be guilty, contrary to the presumption of innocence. Procurator-General CAO called on prosecutors to seriously reflect on the problems that cause wrongful convictions, to strictly adhere to the rule of law and professional ethics, to prudently supervise criminal cases, and resist the temptations of money and interests.¹⁶ His requirements might help prevent wrongful convictions from occurring in China, particularly in typical cases that result from

¹⁵Mark Godsey, China’s Top Prosecutor Vows to Fight to Prevent Wrongful Convictions, ShanghaiDaily.com, September 8, 2014.

¹⁶<http://wrongfulconvictionsblog.org/2014/09/08/chinas-top-prosecutor-vows-to-fight-to-prevent-wrongful-convictions/>.

orders given by superiors, abuses of legal principles, willful dereliction of duty, or intervention from outside bodies.¹⁷ But changes to the role of judges or legal officials can only be brought about as part of systemic justice reforms. There is still a long way to go before they are fully undertaken and properly implemented.

1.4 Research Methods Used in This Book

Adversarial and inquisitorial systems alike could benefit from comparative research and could learn from each other ways to effectively reduce the risk of wrongful convictions in the future. Given that contemporary China is moving towards adversarial processes from an inquisitorial tradition, increasing the number of procedural rules tends not to prevent but to cause injustice. In order to better prevent or remedy wrongful convictions in practice, China really needs to expertly combine the essential elements of the adversarial and inquisitorial systems that are most conducive to the discovery of truth in criminal cases.

The empirical research in this book provides fresh accounts that transcend the experience of individuals working inside China's criminal justice institutions, mainly by clarifying the causes of errors and identifying the institutional relationships that create bias in the justice system. Based on an analysis of interviews, questionnaires and trial transcripts from many cases of exonerations in China, factors contributing to wrongful convictions will be examined to illustrate pervasive errors made by police, prosecutors or judges, the vulnerabilities created by cognitive biases, and which reforms from a wide array of suggested remedies are most necessary. Judicial authorities make many mistakes, only some of which result in wrongful convictions. This book will examine why some errors are more likely to lead to wrongful convictions than others. Wrongful convictions are caused by human factors, including the bias or inadequacy of police, prosecutors and judges, as well as by institutional flaws inherent in the Chinese judicial system. The risk of error is increased by a culture that encourages voluntary false confessions and by procedural laws that often favour expediency over justice.

In light of the growing awareness of forensic errors, the role forensic science plays both in leading to wrongful convictions and in helping to free the wrongfully convicted will be fully considered. Although China positively responds to high-profile wrongful convictions by introducing laws and policies for the exclusion of tainted evidence in criminal trials or for the mandatory videotaping of entire police interrogations, formal remedies cannot guarantee better justice due to the practical barriers that aggrieved parties face when seeking legal relief. Hence, a holistic approach is needed for the reformation of the current mechanisms for preventing

¹⁷See Patrick Boehler, Supreme People's Court judge urges end to wrongful convictions, South China Morning Post (29 August, 2013) <http://www.scmp.com/news/china/article/1232279/supreme-peoples-court-judge-urges-end-wrongful-convictions>.

and correcting wrongful convictions in China that ensures that reforms can be implemented in China's judicial framework.

Over the past decade, the manner in which wrongful convictions are debated by Chinese academics and judicial authorities has changed. The debate has moved from defensive posture based on crime control to a position more embracing of human rights and criminal justice concepts. This new dynamic is rooted in international human rights treaties and is promoted by Britain and the common-law countries of North America. I will outline this new ideology that rejects wrongful convictions and shows how it has led to an international consensus that preventing wrongful convictions is each country's necessary task, albeit with each country adopting its own diverse interpretations of the scope, root causes and discovery of wrongful convictions, as well as the models and reforms most suitable for their prevention.

This book also notes the influence of these ideas on the debate in China, especially with regards to the argument that Chinese people have a different cultural attitude towards wrongful convictions. The possibility of further systemic reforms leading China to speedily prevent wrongful convictions in capital cases is discussed in the light of new data which has emerged from important recent research on public opinion and Party policy. The data make it clear that Chinese people still do not fully accept the need to respect human rights, even if they react negatively to the discovery of wrongful convictions. In order to make positive reforms, it is necessary for political leaders and legal practitioners to take the lead and act in advance of public opinion.

As mistakes may occur in spite of a fair trial and appellate review, there is a need for China to establish a water-proof post-conviction net to prevent, discover, correct and remedy wrongful convictions. China's response to wrongful convictions seems inadequate, but what is the next step that China can take to respond to the challenges created by injustices? Will China care enough to create a permanent and independent body to review contested wrongful convictions? This book will end by providing a new strategy for the better prevention and remedy of wrongful convictions in China. To cope with many defects in current institutional arrangements, the foremost mechanism that China should adopt, based on an examination of relevant overseas examples, would be a Criminal Cases Review Commission similar to the English model, independent of the executive and the courts. A Commission should be designed with the power to receive at its prerogative complaints of alleged errors in convictions, to reach conclusions on error correction, to potentially order compensation, and to further recommend systemic justice reforms by studying specific cases that require action.

Given the obstacles to and prospects for preventing wrongful convictions in China, the opinions in this book will be of great value to China's legislatures and law-enforcement organs. It is hoped that this book will contribute to the development of reform proposals for the adequate prevention and remedy of such convictions in judicial practice. This book acknowledges that sometimes, however, domestic practices are clearly incompatible with human rights standards and criminal justice requirements in law or in implementation. In order to better understand

the unique problems that make Chinese wrongful convictions so hard to prevent and remedy, this book will explain the historical background of the development of human rights in China, as a part of factors contributing to such convictions with China characteristics.

The difference between Chinese and Western societies, as well as the persistence in China's justice system of outdated practices may increase the difficulty of substantively reforming criminal justice, not to mention the difficulty of effectively preventing and efficiently remedying wrongful convictions. The following historical background should make it easier for readers, particularly foreigners, to better understand China's special cultural traditions and its old penal policy, both of which continue to strongly influence current practices and lead to many wrongful convictions. This law book will develop analyses and use the latest data from a comparative or empirical perspective in order to help the reader to learn the major factors leading to wrongful convictions in China under the current political and legal environment. Also, a new strategy for the better prevention or remedy of such convictions will be explored on the basis of lessons from China's frequent failures and alternative responses to relevant public challenges from those taken by liberal Western countries. Finally, it will include suggestions on how to remove misunderstandings in dialogues regarding wrongful convictions from diverse perspectives, particularly the dialogues between China and common-law countries, so as to promote better international co-operation.

Chapter 2

The Scope of Wrongful Convictions

There is no international consensus as to what constitutes a “wrongful conviction”. The scope of wrongful convictions is contested, with different fields of academic study and different countries adopting different definitions. This multiplicity of definitions exists within the People’s Republic of China (PRC or China). The question of what makes convictions wrongful involves issues of law and practice at the domestic and international levels, as well as the values underlying various criminal justice systems, which have been debated for decades throughout the world.

This chapter on the scope of wrongful convictions will begin with an overview of the general definitions of wrongful convictions that may apply to or influence any criminal justice systems in law or in practice. Next, it will proceed to review potential definitions of such convictions in China and will further examine the different understandings of some of major western countries. The core values of diverse justice systems will then be explored to re-evaluate the balance between crime control and due process. As a member of the United Nations’ Human Rights Council (UNHRC), China should take particular care to ensure that it completely fulfills its due international human rights obligations. The chapter will therefore conclude by explaining how China can better articulate the scope of wrongful convictions as part of its long march towards the rule of law.

2.1 The General Definition of Wrongful Convictions

The general definition of a problem is generally the standing point for analyzing its influence and scope, in theory or in practice. The problem of wrongful convictions is defined in popular law dictionaries may include basic elements that universally apply to any criminal justice system. Also, the relevant definitions provided in some typical court judgments can help explain the meaning or scope of wrongful convictions in practical use.

A. *The definition of wrongful convictions in law dictionaries*

In Duhaime’s Criminal Law Dictionary, the term “wrongful convictions” refers to the “conviction of a person accused of a crime which, in the result of subsequent investigation, proves erroneous.”¹ Without clarification of the causes leading to such convictions, the legal term includes (but is not limited to) the situation of persons “who are in fact innocent but who have been wrongly convicted” of a crime.²

The term “wrongful” means “having no legally established claim, unlawfully violating the rights of others, or not just or fair”.³ Other definitions of “wrongful” also include terms such as being “against the law, criminal, illegal” or “lawless,⁴ as well as being “unjust or unfair, having no legal right, or unlawful”.⁵ Another law dictionary defines “wrongful” as relating to “[A]n act or omission that exposes a person to civil or criminal liability”.⁶ Thus, the term “wrongful” seems to expand the scope of “wrongful convictions” to broadly cover unlawful, unjust decisions or those contrary to human rights, regardless of whether they are made in criminal or civil cases.

However, the word “conviction”, referring to “[T]he formal decision of a criminal trial which finds the accused guilty”,⁷ appears to limit the meaning of “wrongful convictions” to the context of criminal cases only. Also, the formal decision of finding guilt usually involves the conviction of the accused at trial. Given these definitions, the scope of wrongful convictions could be literally understood to be unlawful, unjust convictions in criminal cases that involve factual, legal or procedural errors in criminal cases. The definition could also include convictions in criminal cases that are contrary to human rights standards. This over-general approach to defining wrongful convictions still leaves much room for further interpretation.

B. *The definition of wrongful convictions in court judgments*

The definitions of “wrongful” and “conviction” set down in court judgments might be helpful to a certain degree for explaining the meaning of “wrongful convictions” in their practical use. For example, Justice Taschereau of the Supreme Court of Canada concluded in the case of *McLean v Pettigrew* that the term *wrongful* “means an act that is actionable as a tort or punishable pursuant to the criminal law”.⁸ This definition clearly shows the term’s

¹Available at: <http://www.duhaime.org/LegalDictionary/W/WrongfulConviction.aspx>.

²*Ibid.*

³Available at: <http://www.iciba.com/wrongful>.

⁴Available at: <http://legal-dictionary.thefreedictionary.com/wrongful>.

⁵Available at: <http://dictionary.reference.com/browse/wrongful>.

⁶Available at: <http://www.duhaime.org/LegalDictionary/W/Wrongful.aspx>.

⁷available at: <http://www.duhaime.org/LegalDictionary/C/Conviction.aspx>.

⁸*McLean v. Pettigrew*, [1945] S.C.R. 62.

possible relevance to criminal punishments and its potential application to the context of criminal cases in reality. A wrongfully convicted person may be able to sue police or prosecutors if they were negligent in their investigations.⁹ If the police or prosecutors committed criminal acts in their investigation, they may be punishable pursuant to criminal law. However, there may be cases in which a person is wrongfully convicted in spite of good faith on the part of police and prosecutors, for example, a wrongful conviction could be caused by confused eyewitness identification. Even so, erroneous identification can make the conviction of the accused unjust without malice on the part of an eyewitness. In this sense, the two factors, wrongful conduct and error of convictions, are essential ones contributing to the specific meaning of “wrongful convictions” in justice practice.

In another case, *Harris v Cooke*, the word “conviction” was defined as “meaning the finding guilty” sometimes and at other times “that finding together with the judgment or sentence”¹⁰ of courts. The detailed and broad approach to explaining the term might help expand the potential scope of the “conviction” in any form or cases. Among the both meanings of the word, however, the former meaning was totally accepted by many Justices as a popular one, i.e., in Canadian cases like *R v Hofer*.¹¹ Hence, the term “wrongful convictions” focuses on the conviction of the accused in finding him or her guilty at least, while involving both the judgments on the conviction and sentences imposed for the crime based on the nature of convictions by law. This definition leaves open the question of whether a conviction that accords with the facts but involves an unjust sentence is a wrongful conviction. Based on the definition, a disproportionate sentence should be considered a wrongful conviction. For example, the injustice done to a person who is given a disproportionately high sentence for a petty theft is still sufficient to make the conviction unsound.

⁹For example, in China a chief prosecutor in Hunan Province was sued for his negligence in investigating cases that led to wrongful convictions in 2007 and a policeman was prosecuted and punished for his negligent arresting of wrong persons in investigations that caused a wrongful conviction in 2015. See Tang Weijun, ‘Lessons Learned from the Chief Prosecutor in the Case of Negligence on Duty, Hunan Province Bravely Reveals “Scar” to Correct “Ideas” through Analyzing Theories based on Cases’, [*cong zhusu jianchaguan wanhu zhishou anzhong xiqu jiaoxun hunan yongjie shangba yi’an xili zheng linian*], Procuratorial Daily [*jianchabao*] (2 June 2007), available at: <http://www.jcrb.com/n1/jcrb1315/ca608501.htm>; also See Ma Yong, ‘In the Final Judgment of the Case on Arresting A Wrong Person across Provinces, A Qinghai Policeman Was Sentenced to One-year Imprisonment for His Negligence on Duty’, [*kuosheng zhuacuo ren an zongshen panjue qinghai dangshi jingcha yin wanhu zhishou beipan xing yin-ian*], Xinhua Net [*xinhua wang*] (27 March 2015), available at: <http://legal.people.com.cn/n/2015/0327/c188502-26762246.html>.

¹⁰*Harris v. Cooke*, 88 L.J.K.B. 253 (1918).

¹¹*R. v. Hofer*, [1977] 4 WWR 645; *R. v. Farinacci*, 109 D.L.R. (4th) 97 (1993).

2.2 Potential Definitions on Wrongful Convictions in China

In the context of Chinese society as opposed to the general definition, the term “wrongful convictions” is literally defined as the conviction of the accused in a wrongful or unjust way. So, it would include the conviction of someone who factually did not commit the crime but was convicted according to law, for reasons such as errors in judicially determined facts. Based on this definition, even the conviction of someone who freely admits to having murdered someone in order to cover up the fact that his wife is the real murderer would be a wrongful conviction. If a court finds him guilty, then errors in facts constitute a conviction in a “wrongful or unjust way”, even though the man was responsible for the error. Therefore, in this extreme example, the man has been wrongfully convicted, based on the above definition. In Chinese official media, academic research and public discourses, the term often refers to wrongful cases (*cuo-an*), unjust cases (*yuan-jia-cuo-an*) or criminal wrongful cases (*xing-shi-cuo-an*). The potential definitions of the word in China could be further explored based on the following diverse understandings held during different periods of time.

A. *Wrongful cases in ancient China*

In ancient China, there was no concept of wrongful convictions that literally referred to wrongly convicting the accused in an involved case. Similar terms, like unjust cases (*yuan-an*) or wrongful cases (*cuo-an*), were often used to refer to criminal wrongful cases (*xing-shi-cuo-an*) in a narrow sense, which indicates that only criminal judgments were ever considered to be “wrongful”. Terms like “unjust cases”, “wrongful cases” and “criminal wrongful cases” are modern ones used to refer to wrongful convictions in China, but that the term “criminal wrongful cases” was not used in ancient China. The modern distinction between unjust or wrongful cases and criminal wrongful cases is on their applicable scope, such that the former two apply to all cases in any law contexts and the latter to criminal cases only. Such unjust or wrongful cases (*yuan-jia-cuo-an*) were actually widespread in practice, making them as the rule and not the exception. The prevalence of unjust judgments was caused by several major institutional flaws, as follows.

In ancient or imperial times, the essence of feudal laws was to protect bureaucratic privileges, with authoritarian rulers having the supreme power over law. Laws were used against the public, who used to suffer from unfair or harsh treatment according to law or official practice. The biggest injustices to scholars in China happened in 210 BC. In that year, the First Emperor of the Qin dynasty executed more than 460 scholars who opposed his harsh laws, cruel punishments and tyrannical rule.¹² It was a part of the

¹²See ‘Qin Dynasty: History, Emperor Qinshihuang’, available at: <http://www.travelchinaguide.com/intro/history/qin/>.

famous historic case, called “*fen-shu-keng-ru*” in Chinese, which means to burn texts or books and bury Confucian scholars alive.¹³ In the view of this Emperor, both strict laws and severe punishments were considered to be effective deterrents for offenders. He therefore adopted Legalism as his official philosophy, in order to rule a highly centralized empire and greatly improve the imperial power.

In each dynasty of ancient China, the supreme imperial power came at great costs. Trials were basically controlled by the emperor, whose individual will was to be obeyed. There was merely a chain of command from the Emperor to his judges, with no independent trial mechanisms or separation of criminal trials from politics in practice. Before and after unfair and unjust trials, severe punishments were frequently imposed on suspects in order to avenge crimes. Even at trial, torture was used to extract oral confessions from suspects, which were used as evidence of their guilt and even as the sole basis for convicting, punishing or executing them. Clearly, institutional flaws in the ancient laws, trial model and reason for punishment inevitably caused and increased the risk of injustices.

Under the unfair ancient system, the examination of facts, application of law, conviction of the accused and imposition of the death penalty used to be mainly based on the obtained evidence, i.e., confessions. As a traditional Chinese saying reveals, ‘convictions begin with confessions’.¹⁴ The ancient Chinese system placed a high priority to the conviction of the accused and to the imposition of harsh punishments. In order to solve cases as early as possible, the authorities heavily relied on confessions, which were deemed to be the ‘king of evidence’ in China.¹⁵ Investigators, lacking adequate forensic techniques, used to torture suspects to obtain oral confessions that were often adopted as evidence of guilt in convicting the accused. Worse, torture was officially regarded as ‘a legitimate form of punishment’ or ‘lawful way to extort a confession’.¹⁶ Based on confessions obtained by torture, judges often convicted innocents and sentenced them to death, even when many doubts persisted regarding their actual guilt.

¹³‘Burning of books and burying of scholars’, available at: http://en.wikipedia.org/wiki/Burning_of_books_and_burying_of_scholars.

¹⁴Chang Jianzhong, ‘A Brief Discussion of the Harm, Causes and Preventive Measures to Address Coerced Confessions’ [*qiantan xingxun bigong de weihai, yuanyin ji duice*], Legal System and Society [*fazhi yu shehui*] (2007), 2:151.

¹⁵Yang Yuguan and Zhao Shanshan, ‘Preventing and Remediating Wrongful Convictions’ [*Xingshi cuoan de yufang yu bujiu*], Gansu Social Sciences [*Gansu Shehui Kexue*] (2010), 5:131.

¹⁶Michael McConville et al. (ed.), *Comparative Perspectives on Criminal Justice in China*, Edward Elgar Publishing (2013), p. 95.

It does not follow, however that traditional China paid no attention to wrongful convictions or wrongful executions. As demonstrated by Chinese history and literature, some of the identified wrongful convictions or executions were judicially corrected after the truth was revealed. In fact, numerous famous injustices occurred in each dynasty, mainly resulting from deep flaws in its law enforcement institutions, political frame-ups, corruption and judicial errors. The mechanisms for wrongful convictions included the official review of cases and individuals' appeals to the authorities.

As early as Yuan Dynasty, *Dou E Yuan* or *Injustice to Dou E that Touched Heaven and Earth*, a Chinese play written by Hanqin GUAN (c. 1241–1320), described the main causes, discovery and rectification of a typical wrongful conviction and execution in that dynasty.¹⁷ The injustice to innocent Dou E is revealed in the tragic story of her false confession under the undue pressure caused by the torture her mother-in-law. The confession led to her wrongful conviction and execution. Three years later, her soul appealed to her father, a senior official, in a dream. This incidentally prompted him to thoroughly reinvestigate the misjudged case. Finally, Dou E was posthumously proclaimed innocent and also the guilty persons received due punishments.

This capital case is a good example of ancient Chinese injustices, including errors in convicting, sentencing, executing the victim and in acquitting the real murderers. From the injustice that was corrected at a fair retrial under the ancient system then, it has been suggested that wrongful cases referred to criminal cases that included any errors in conviction, sentencing, execution or acquittal.

B. *Wrongful cases in modern China*

After thousands of years of ancient history, modern China started from 1840 when the First Opium War broke out in the last years of Qing Dynasty, till the year of 1949 when the People's Republic of China took the Republic of China's place to rule the country. During this period of over 100 years, the pervasive tragedy of wrongful conviction cases overshadowed the triumphs of new changes in trial mechanisms. In this context, such cases can be broadly defined or understood to cover any judgments with errors in facts or application of law, and not to cases involving procedural errors.

In modern China, the essence of law was not for justice or rights in the legal system, but went against them under the influence of political or institutional flaws. Specifically, the modern Chinese law actually accepted some western ideas, and some politicians proposed the restriction of the monarch's power in the late Qing Dynasty. The core intention of the law during the period of the Republic of China was mainly to maintain China's imperialist interests in its territories, while ideas of human equality contrary

¹⁷See Ni He, *Chinese Criminal Trials: A Comprehensive Empirical Inquiry* (Springer 2014), p. 32.

to the preservation of these interests consistently spread. Also, the essence appeared to be largely authoritarian as usual, though the authorities at least pretended to comply with just principles and the protection of human rights, even if they were not upheld in practice. With the reform of the bureaucratic system in the late Qing Dynasty, a single administrative organ could not concurrently be in charge of prosecuting and judging a trial. In the period of the Republic of China, the *Provisional Constitution* further clarified the independence of Chinese judges. New reforms and trial systems, however, could not change the essence of law or the nature of punishments. Thus, there was still a high risk that wrongful cases would occur.

Based on the examples of the high-profile capital injustices in cases such as Case Yang Naiwu or Case Chun Asi, the procedure for death penalty cases in the late Qing Dynasty became much stricter than it had hitherto been. Generally, such cases needed to go through a minimum of six levels of examination or review by different trial authorities, each handling the cases by law, before final decisions could be made. If a case was rejected by any of the relevant authorities, it had to be heard or reviewed by more trial bodies, moving back and forth among them at diverse levels. Unfortunately, this strict and complex procedure was usually a mere formality that did not promote justice in practice. Judicial officials in that time rarely had adequate trial knowledge or legal education, thus providing more chances for abuse of the required procedures, causing injustices in capital cases. Together with their tight cooperation and a lack of restraint, authorities couldn't reverse wrongful verdicts without the intervention of top leaders in high-profile cases.

From the injustices inflicted on Zhang Wenxiang, Huai'an and Wang Suwen in the late Qing dynasty, for instance, it is clear that some officials coped with the demands of cumbersome procedures by means of deliberately covering up facts and extorting oral confessions from suspects under torture. Ironically, judicial officials in the late Qing Dynasty had to prove the details of case facts to "the degree beyond all doubt", which appeared to be much stricter than the "beyond reasonable doubt" standard used in the Anglo-American law. In any system, the former standard is too ideal to be fully met in almost all circumstances. In order to achieve this impossible goal, officials often insisted on stressing the significance of confessions obtained during the first interrogation in convicting the accused. Even if the conviction was made based on false and coerced confessions, they only corrected substantive errors in conviction, sentencing or execution, instead of correcting procedural errors or rights abuses.

Moreover, the procedure for death penalty cases was originally designed to strengthen imperial control over local officials, rather than to protect the accused's rights. In this trial model, judicial officers were placed in the absolutely dominant position at trial, with the power to take any action against the accused. Also, there was no prosecution or defense to check and balance their supreme power in the process. Under this absolute