

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 [xinghua 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 Remedying 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

inquisitorial system, the accused had to passively wait for judicial officers' investigation into case facts or to follow judicial instructions to confess to crimes with which they were not involved. Imperial control over officials focused on whether or not crimes could be controlled in local places, so as to encourage officials to conduct substantive a review of case facts, rather than to correct all of fundamental errors in the process or final decisions.

The justice system in Republican times was worse than the justice system during the late Qing Dynasty. For instance, a former leader of the Republic of China, Wang Jingwei, held the Kuomintang Central's Emergency Conference on August 8, 1927, at which he presented a slogan against the Communist Party.¹⁸ It is “*ning-ke-cuo-sha-yi-qian, bu-ke-fang-guo-yi-ge*”, which means that it is better wrongly kill 1000 innocents than allow one guilty person to live. Since then, numerous Communist Party members were arrested, convicted, sentenced or executed for concocted crimes, directly leading to a complete rupture of the first Kuomintang-Communist cooperation in history. This approach demonstrates that the justice system was ultimately politicized, and its role as a tool for achieving the state's desired outcomes had not changed.

Essentially, in modern China there was no justice system but an authoritarian rule, under the cloak of using western experiences for reference. Inspired by the Constitutional Movement, the imperial government modernised its legal system in the early 20th century, and the Kuomintang's government further developed its Western-style penal system in 1927. But in practice, the progress was curtailed due to political dictatorship and violent means. Often, torture was used to extract confessions from the accused. Indeed, torture was considered necessary to secure a conviction, so almost all of convictions could have been wrongful due to a lack of reliable evidence. Even with consequent sentences or executions to hinder justice practice, wrongful cases then mainly involved convictions at the core of injustices.

C. *Wrongful convictions in contemporary China*

After the founding of the PRC in 1949, its new Soviet-based legal system still incorporated torture and other cruel or degrading treatment. Such treatment was used when convicting, sentencing or executing an accused. Currently, the socialist legal system with Chinese characteristics also uses laws to control crime and maintain social security. Given the widespread use of extorted confessions in the conviction and consequent sentencing of the accused, the term “wrongful convictions” in contemporary China broadly includes both their conviction and sentences, as in wrongful cases of ancient or modern China.

¹⁸See Yang Liwen, “Is Wang Jinwei A Pure Traitor or Not?” [*wang jinwei shibushi cunzhong de maiguozei*], Chinese Water Transport Net [*zhongguo shuiyun wang*] (August 7, 2012), available at: <http://www.zgsyb.com/GB/Article/ShowArticle.asp?ArticleID=175246>.

C.1. Historical influences on the term

Historical influences on the conception of the term “wrongful convictions” are far-reaching in China’s practice. This can be demonstrated from the following aspects in the evolution course of the term.

From the perspective of its developing trends, the essence of the legal system changed from the defence of an ancient autocratic monarchy to the maintenance of equality before the law. Thus, a conviction made against the equality in law might be considered as wrongful in contemporary China, a concept foreign to the ancient autocratic monarchy. Similarly, trial bodies have gradually become independent from administrative ones, and the purpose of penalties has shifted away from cruel punishment. With the new changes, convictions based on procedural abuses against legal requirements are now considered unjust in law. Accordingly, the definition or scope of wrongful convictions in contemporary China should matter, and should be shaped by, procedural issues in practice.

Under the traditional influence of severe punishment and strict law, however, the nature of wrongful convictions has followed a zigzagging road, since the year of 1949. The meaning of the term “wrongful convictions” from 1949 to 1966 involves both the conviction and sentencing of the accused, under the influence of the Soviet-based legal system. From 1966 to 1976, the term was used when the accused was wrongly convicted by administrative or political orders without trial at all. In a strict sense, all “convictions” during the Cultural Revolution (occurring between 1966 and 1976) were wrongful because they were handed down as a result of administrative or political diktat, not imposed by a competent court. After 1976, convictions have been made by judges at trial according to law and not based on explicit political orders, though in some cases judicial results may be directed by other authorities. Indeed, the perceived necessity of obtaining a conviction to control and deter crimes is often given more attention than adherence to procedures. Given this widespread abuse of the trial process, the wrongfully convicted are likely to face unjust sentencing, execution or both in practice. The term hence refers to errors in conviction, sentencing or execution, as well as those in procedure.

Even worse than ever, there was no effective law during the ten years of the Cultural Revolution (1966–1976). Consequently, there were no real competent courts, and the justice system operated on the basis of political decrees. Once being wrongly convicted, sentenced and tortured for political reasons at random, the victims had no way to seek remedies and correct such injustices. With revolution against bourgeois elements infiltrating the government and society as a prime objective,¹⁹ the Red Guard groups, who were formed by China’s youth answer to Mao’s appeal to combat bourgeois elements infiltrating the government and society, smashed the police,

¹⁹See “Cultural Revolution”, available at: http://en.wikipedia.org/wiki/Cultural_Revolution.

prosecutors and courts to surpass their authority overturning the law and subverting justice. Among the numerous innocents, who were arbitrarily convicted of political crimes by non-judicial bodies without trial,²⁰ was Chinese former Chairman LIU Shaoqi, who suffered the biggest injustice of committed against anyone during the Cultural Revolution as “part of an intra-Party struggle by Mao Zedong”, who maintained his supreme power.²¹ In this social context, any conviction was political and wrongful, the scope of which involved almost all kinds of unjust cases. After the Cultural Revolution, numerous high-profile injustices perpetrated against innocent people were corrected. It was found that the administrators who ordered punishments often did so based on incomplete or incorrect facts. Given that these decisions were made arbitrarily and the laws were overturned by the Red Guards, there were no laws to apply, no procedures to follow and no courts to hear cases. Any convictions made during that time were wrongful.

C.2. Further developments on the term

Further developments on the nature of wrongful convictions have mainly been promoted by basic legislation since 1978. During this period of time, the National People’s Congress enacted a series of basic laws, including but not limited to the *Organic Law of the People’s Courts*, *Organic Law of the People’s Procuratorates*, *Criminal Law of the PRC* and the *Criminal Procedural Law of the PRC* (CPL),²² to promote the formation of China’s socialist legal system. These basic laws form the beginning of large-scale legislative work involving both substantive law and procedural law to prevent injustices in a comprehensive and gradual approach. Gradually, the scope of wrongful convictions has been expanded to include convictions reached in trials involving procedural errors.

On the one hand, further influences on the development of the definition of wrongful convictions tend to be specific and regulated in nature. The wrongful cases involving political causes during the Cultural Revolution used to be generally considered as unjust cases (“*yuan-jia-cuo-an*”). After the Cultural Revolution, the Chinese authorities widely re-examined old cases to overturn unjust, false or wrongful government actions in diverse fields, including but not limited to the actions of legal system. In contrast,

²⁰See Roger Hood & Surya Deva, *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion*, Oxford University Press (2013), p. 48.

²¹“Li Jie: The Successes of Mao Zedong in Exploring the Path of Socialism with Chinese Characteristics May Not Be Written Off”, China Copyright and Media (17 September 2013), available at: <https://chinacopyrightandmedia.wordpress.com/2013/09/17/li-jie-the-successes-of-mao-zedong-in-exploring-the-path-of-socialism-with-chinese-characteristics-may-not-be-written-off/>.

²²See The State Council Information Office of the People’s Republic of China, “White Paper on Socialist Legal System with Chinese Characteristics” (27 October 2011), available at: http://www.china.gov.cn/government/whitepaper/2011-10/27/content_23738846.htm.

the above large-scale legislation restricted the context of the term to convictions in legal cases. With more laws to enrich its meanings, the general term has evolved into a specific one involving procedures in law or practice.

Similar to *yuan-jia-cuo-an*, another term on wrongful cases appeared in Chinese academia and legal practice. This frequently used term is *wei-fa-cai-pan* or *wang-fa-cai-pan* in Chinese, or “illegal judgments” in translation. Literally, the legal term refers to any judgments that have been made against law at the national or international level. In this sense, only legal errors causing wrongful cases are covered by the term’s scope or focus, rather than any other error that often leads to wrongful convictions in practice. Clearly, the difference between both terms is in their scope, of which the latter illegal judgments specify the element of law, generally covering substantive and procedural laws.

With deepening reform in 1990s, China made the scope of wrongful cases more specific than ever. Specifically, it evolved from encompassing only a narrow scope involving convictions to a broader conception including both convictions and sentences. As demonstrated by criminal laws and criminal procedure laws, the use of severe punishments like the death penalty or torture, was restricted or prohibited, mainly by basic criminal laws from 1979. But such punishments were often imposed contrary to the law. With increased procedures in the elements of justice, it also expanded from involving only factual errors to all forms of errors in conviction, including mainly factual errors, evidential errors and errors in the application of law.

Furthermore, wrongful cases have been defined in diverse contexts, such as *xing-shi-cuo-an*, or unjust criminal cases in the context of criminal law and so on. As a former Vice President of the Supreme People’s Court (SPC) expertly pointed out, a *xing-shi-cuo-an* “involves man-made errors in basic facts, in underlying evidence or in applicable laws, caused by the police, prosecutors or courts” in China’s criminal justice practice.²³ Obviously, it tends to totally exclude all of natural errors and those made by forensic experts from the scope of such convictions, but focuses on errors made by the police, prosecutors or courts. In fact, some forensic sectors are affiliated to the system of the police so that such experts inside cannot independently make expert opinions. Also, the police, prosecutors or courts may wrongfully rely on experts so that their errors are included. Among them, wrongful convictions in capital cases are most frequently revealed in China, which further promoted the reform of its legal system towards the rule of law in recent years.

On the other hand, there is no clear definition on the scope of wrongful convictions in law or regulation, but, in the *People’s Procuratorates’ Regulation on the Accountability for Wrongful Cases (For Trial Implementation)* (“1998 Regulation” or in pinyin “*renmin jianchayuan cuoan zhuijiu tiaoli*”

²³Zhang Jun, On Investigation into Wrongful Convictions [*Xingshi cuoan zhuijiu*], Mass Press [*qunzhong chubanshe*] (1990), p. 3.

shixing”),²⁴ a similar concept was defined, namely, wrongful cases (*cuo-an*). The authoritative interpretation of wrongful cases, without mentioning particular fields of law, appears in Article 2 of that regulation, which was released by the Supreme People’s Procuratorate (SPP) on July 17, 1998. Wrongful cases are defined to be those in which prosecutors’ intent or gross negligence caused definite errors in facts-finding or the application of law, or those in which they erroneously violated legal proceedings while exercising their authority to handle cases. The *1998 Regulation* is intended to implement a system of prosecutors’ accountability for wrongful cases, focusing on errors in facts-finding, law application or procedural breaches. Clearly, the scope of such cases is narrowly defined to encompass of prosecutors only, rather than any other actors who may cause errors in cases.

C.3. Latest improvements on the term

The latest improvements to the term “wrongful convictions” can be traced back to China’s human rights campaigns over the past twelve years. Particularly, to better implement the principle of human rights enshrined in the *2004 Constitution of the PRC*, the idea of respect for and protection of human rights is highly upheld and specified in the *2012 CPL*. Thus, the issue of human rights has become an essential factor that deeply influences the legal term’s nature in diverse aspects, such as its definition, scope and so on.

Strictly speaking, any convictions made against human rights in principle or against any specific rights might be wrongful in criminal cases. From the perspective of the above legal requirements, protecting anyone from human rights abuses can be seen as an intrinsic element of the term in explaining its concise meaning. Within this expansive scope, human rights have become a newly added major standard for judging whether or not a conviction is wrongful. Even without factual, evidential or legal errors in a conviction, any abuse of human rights, e.g., the right to a fair trial, still defeats the safety of convictions, so as to directly make them wrongful. Inclusion of human rights may widen the scope of wrongful convictions and further deepen the term’s definition, though it remains to be clarified by scholars or legislatures as to whether the current scope of wrongful convictions should be construed narrowly. Generally, the term includes any convictions made against law, justice or human rights. Given legal principles on human rights, convictions involving rights abuses are also included in the scope of wrongful convictions, but wrongful acquittals are excluded.

Concerning the scope of wrongful convictions in China, the authorities never have a proper or consistent position on the relationship between

²⁴See *The People’s Procuratorates’ Regulation on the Accountability for Wrongful Cases (Trial Implementation)* [renmin jianchayuan cuoan zhuijiu tiaoli (shixing)], available at: http://www.law-lib.com/law/law_view.asp?id=14026.

wrongful convictions and wrongful acquittals. For achieving the goal of crime control, China often emphasizes minimizing acquittals and maximizing convictions, preferring to wrongly convict more accused than acquit the guilty in doubted cases. This usual practice implies that authorities take the conviction of the accused as the first and foremost objective when solving cases. Acquittals are seen as risky, potentially allowing dangerous criminals to go free. This approach contributes to the worst injustices against the goal of preventing wrongful convictions. Thus, acquittals are generally misunderstood as police officers' or prosecutors' poor achievements in handling cases.

2.3 The Western Understanding of Wrongful Convictions

Over the last 100 years, the term “wrongful convictions” has gradually become popular among western scholars and practitioners in the criminal justice processes of diverse jurisdictions. The western understanding of this legal term evolved from the context of wrongful convictions in capital cases to those in any criminal cases. Particularly given the developments of law and practice in common law countries, the understanding of wrongful convictions tends to be various and specific. The similarities and differences between the Western and Chinese understandings will be explored in order to examine their potential mutual influences on each other in future.

A. *The comparison between the Western and Chinese understanding*

Similar to the Chinese understanding of wrongful convictions that concerns “injustices”, the Western one pays attention to “errors of justice” or “miscarriages of justice” that share the same meaning. Both of them are deemed to be failures in the criminal justice systems of western countries, just as “injustices” are considered to be failures in China’s criminal justice practice.

Also, the three are terms broader in scope, encompassing more than just wrongful convictions. For example, “errors of justice” arguably include “both the conviction of the innocent and the failure to convict the guilty”.²⁵ Remarkably, both forms of errors can interact with each other. Convicting the innocent often leads to a failure to convict the guilty, whereas the failure to convict the guilty may lead to the conviction of innocents if all cases must be solved to achieve a high rate of convictions. Absent a conviction, judges need to keep on fighting for a satisfactory case resolution in most circumstances, regardless of whether they end up convicting the innocent or

²⁵Brian Forst, *Errors of Justice: Nature, Sources and Remedies* (New York: Cambridge University Press, 2004).

the guilty. Judges, particularly when they are incentivized to achieve a certain conviction rate, they often conclude cases with the conviction of an accused. Even if the accused is actually innocent, judges prefer a wrongful conviction to having to continue their investigations. This approach suggests that Chinese judges need to adopt the idea that “it is better that ten guilty persons escape than that one innocent suffer”,²⁶ so that the rights of the accused are upheld and innocents are protected from wrongful convictions. Different from the Chinese understanding that confuses the distinction between wrongful convictions and injustices, the Western understanding cautiously considers the inclusive relationship between miscarriages of justice and wrongful convictions in defining their scope. In practice, the scope has been largely understood as developing proportionately with the changing reach of the miscarriages. As a part of the miscarriages, wrongful convictions were accordingly shrinking to a narrow scope, namely, those in capital cases. Likewise, as the miscarriages often apply to criminal cases and mainly refer to falsely identified culpability, the scope of such convictions has also been extended cases beyond those involving the death penalty. In the Western understanding, wrongful convictions are synonymous with miscarriages of justice only in the context that they refer to the conviction of the accused reached against law or justice. Although miscarriages of justice can apply to criminal or civil cases, wrongful convictions merely occur in criminal cases. Also, the Western definition narrows down the scope of such convictions to the conviction of the accused, excluding any error in acquitting the accused from their scope. This exclusion helps clarify the difference between errors in conviction and errors in acquittal in order to avoid confusing such acquittals with miscarriages of justice that often happens in China. In most circumstances, miscarriages of justice or injustices broadly cover more than one direction of wrongful convictions in the Western definition of their scope. At least, they include both the conviction of the innocent and the failure to convict the guilty in practice. The former type of error judicially identifies an innocent person to be guilty, and in contrast, the latter type of error results from “a lapse of justice that allows a culpable offender to escape justice”.²⁷ Given the great danger of wrongful convictions, the importance of false acquittals has been overshadowed, with very limited research conducted regarding them.²⁸

In the West, a popular definition of the term “miscarriages of justice” is “a grossly unfair outcome in a judicial proceeding, as when a defendant is

²⁶William Blackstone, *Commentaries on the Laws of England*. (Univ. Chicago, 1979). 4 vols. 1979, p. 358.

²⁷Brian Forst, *Errors of Justice: Nature, Sources and Remedies* (New York: Cambridge University Press, 2004), 10.

²⁸See H. Richard Uviller, *Client Taint: The Embarrassment of Rudolph Giuliani*, *Criminal Justice Ethics* 9 (1), 1990.

convicted despite a lack of evidence on an essential element of the crime”.²⁹ This narrow definition stresses the important role of unfair convictions based on evidential errors, in contributing to the miscarriages of justice. The reported number of innocents accounts for 2.3–5 % of American prisoners.³⁰ Unlike China, the high risk of convicting the innocent has largely promoted the emergence and growth of innocence movements in many American states. The American Innocence Project, founded in 1992 as a non-profit agency, is devoted to investigating cases of wrongful conviction, in order to keep the innocent from conviction and exonerate prisoners who were convicted of crimes they never committed. The success of the Project can be reflected from the exonerations of 316 innocent people including, including 18 convicts on death row, as of June 2014,³¹ and from major findings that promote reform the justice system to better prevent future wrongful convictions.³² Both the exonerations and relevant legislative reforms are highly praised by worldwide reformers. Particularly, the correction of wrongful executions enhances the public awareness of the need to abolish the death penalty and contributes to more states’ banning executions or declaring moratoria on them.³³

As a common phenomenon, the American and Chinese understanding of wrongful convictions appear to pay more attention to the conviction of innocents against facts than others against law or justice, with factual innocence found in the majority of identified wrongful convictions in practice. Based on their own experiences, any overdue or partial emphases on a conviction with factual errors would leave open more wrongful convictions involving other errors. For instance, the use of a DNA testing as a main way to exonerate factual innocents in the Innocence Project is limited merely to 5–10 % of criminal cases.³⁴ The number of exonerations has been just a minor piece of iceberg in American justice practice. This is also the case in China, as well as any other Western countries. Hence, only focusing on factual innocence in wrongful convictions may omit such convictions without involving innocence. More attention should be paid to errors in law or justice, in order to prevent the weakening of the justice system and the impairment of its overall effectiveness at preventing wrongful convictions.

²⁹Bryan A. Garner, *Black’s Law Dictionary*, 8th ed. (West Group, 2004), 811.

³⁰“How many innocent people are there in prison?”, Innocence Project (December 9, 2014), available at: <http://www.innocenceproject.org/about-innocence-project/faqs/how-many-innocent-people-are-there-in-prison>.

³¹“Innocence Project”, available at: http://en.wikipedia.org/wiki/Innocence_Project.

³²“About Us”, Innocence Project (December 9, 2014), available at: <http://www.innocenceproject.org/about-innocence-project>.

³³Brian Rosenthal (2011), “Death Penalty Moratoria”, Evanston, IL: Northwestern University (June 6, 2012).

³⁴“The Innocence Project”, New York, NY: Innocence Project. 2012 (June 6, 2012).

Compared with the Chinese understanding, wrongful convictions in Western countries focus more on remedies for convicting innocents and better ensure the presumption of innocence. For example, in Britain, the 1993 Runciman Commission proposed the establishment of the Criminal Cases Review Commission for England and Wales (CCRC) as an independent agency in charge of the remedies, whereas in China there is no such independent review or remedy mechanism. The criterion for referring cases back to the appeal court is not limited to innocence, but relates to the safety of guilty verdicts. Based on 543 cases that the CCRC referred to the appeal court,³⁵ the presumption of innocence has been upheld to ensure the acquittal of any accused with a reasonable doubt as to guilt. Many convictions were identified for new evidence that raised doubt. These remedies help promote the achievement of the justice system's goals: both convicting the guilty and acquitting innocents.

B. *Potential influences of the Western understanding on the Chinese one*

The similarity and difference between the Western and Chinese understanding of wrongful convictions seems to suggest their great potential for mutual influences on each other. Will the American or British models of remedying wrongful convictions be successfully transported to any of other countries or jurisdictions in the world? Will China or other countries face challenges or difficulties to the adoption of such remedies? Could such convictions be fully prevented or totally avoided in the justice system of any country, after its abolition of the death penalty in law or in practice?

Concerning the first question, the above-mentioned American model is featured with making the issue of factual innocence a high priority. At the core of the American model, the Innocence Project has brought together numerous innocence organizations from across the United States of America (USA or America) and in many of other common law jurisdictions since the 1990s. The influence scope of this Project mainly extends to England and Wales, as well as Canada, Australia, New Zealand and Ireland.³⁶ Its achieved successes appear to widely apply to any of other justice systems, but the fact is on the contrary. The requirement of factual innocence may conflict with some countries' current laws or practice.

In fact, not all of countries or jurisdictions declare factual innocence after the identification of a wrongful conviction. For example, in 2007 the Supreme Court of Canada decided that courts have no jurisdiction to declare factual innocence in the case *R. v. Mullins-Johnson*. Clearly, this decision is against the principle of a reasonable doubt about guilt that should be ensured in acquitting the innocent or convicting the guilty for better justice

³⁵See "About the Criminal Cases Review Commission", Justice (November 30, 2014), available at: <http://www.justice.gov.uk/about/criminal-cases-review-commission>.

³⁶"Mission Statement", Innocence Network (December 12, 2006), available at: http://en.wikipedia.org/wiki/Innocence_Project-cite_note-network-25.

or human rights purposes. Yet, factual innocence has not been explicitly recognized in Canadian law or in many of other common law systems. Even in the USA, where almost all of American states fail to recognize it, the law of North Carolina is still an exception. Given the above obstacles, it would be quite hard for the American model to be widely used in all of its jurisdictions, and adopted by the criminal justice system in any other common law countries.

Also, there is no much chance that China will embrace the American model, particularly during the current period of China's transition towards the adversarial process. This transition is a long course of reforming its criminal justice system from the inquisitional process to the adversarial one. The traditional inquisitional process that should be changed and reformed focuses on crime control, which is similar to the American model, with a tough policy on crime and offenders. On the contrary, the adversarial process is intended to ensure due process and protect human rights, which requires China to reduce the high rate of convictions and severe punishments. Over the last decade, China has been on the way to gradually abolish the death penalty and protect human rights in the use of criminal process, further away from its tough policy on crime.

In comparison, the British model may better protect human rights and ensure due process. England and Wales allow any convictions of the accused to be reversed, due to the safety of verdicts that may involve a lurking or reasonable doubt about his or her guilt. Unlike the American model, the British one created an independent review mechanism for investigating potential wrongful convictions, which provides superior resources to the accused. China should learn from the British model to use state powers to prove guilt beyond doubt, and not demand that convicts to bear the burden of proving their own innocence, as in the American model. Also, any countries that are broadly concerned with miscarriages of justice may move backwards if they adopt the American method that merely focus on the conviction of innocents. Hence, reformers may be skeptical about embracing the innocence model, but follow may wish to follow the British model to ensure that the accused have the benefit of a reasonable doubt.

For the better prevention of wrongful convictions and for progress towards human rights, China and many of other countries have to overcome challenges and cope with difficulties from diverse aspects. Challenges involve the tension between crime control and due process and between fairness and innocence. One of shining examples can be found from a core human rights treaty, namely, the *International Covenant on Civil and Political Rights (ICCPR)*. Article 14 of the *ICCPR* is designed to protect a series of due process rights. But its compensation provision narrowly applies to the innocent victim who can disclose the new evidence "that there has been a miscarriage of justice". This scope excludes the victims in rights violations. As a party to this treaty, Canada, Britain and other countries sets up compensation schemes based on Article 14 that require the accused to establish

innocence before receiving compensation. Thus, the tension built into the *ICCPR* expands to more and more State parties that adopt the provision.

The following will further examine from the relationship between the prevention of wrongful convictions and the abolition of the death penalty. Given the great danger of wrongful death sentences or executions, the judiciaries of China or America have spared no efforts to rectify misjudged cases with respect to innocent people in their respective justice systems. In fact, the above abolition appears to have no influence on preventing or reducing any errors in non-capital cases. Worse, it was reported that “most wrongful convictions are for crimes less serious than major felonies such as rape and murder, as judicial systems are less careful in dealing with those cases”.³⁷ There remains a big gap to fill in practice.

The core of preventing wrongful convictions is to ensure due process. It is not only because the certainty of DNA testing is only available in the minority of criminal cases, but also due to the importance of universal commitments to fundamental human rights, including but not limited to the presumption of innocence. The need to promote due process emphasizes the due role of the presumed innocence in preventing wrongful convictions. Any accused must be given the benefit of any reasonable doubt about their guilt, so that should be judicially acquitted in cases involving uncertain innocence.

Errors of due process or miscarriages of justice broadly include more aspects than errors in the conviction of any accused. Even so and any errors undermining the integrity and legitimacy of justice systems, the scholarship of injustices mainly focuses on errors of due process,³⁸ involving the unwarranted conviction and the excessive sanction of the accused. The convictions that falsely identified the accused’s culpability are often against the requirements of due process including a fair trial, but even after that wrongful conviction still cannot be avoided.

Under the adversarial system, moreover, the due process model was dominated by defence lawyers and appellate judges who were concerned with legal and factual guilt. They define wrongful convictions to include convictions that were obtained by violating the accused’s rights, i.e., the right not to be tortured. The exclusionary rule has played an essential role in the model, according to which the evidence obtained in a manner against human rights should be excluded from use at trial. Otherwise, wrongful convictions occur. Before making the rule, such evidence was still used according to an unjust law.

Therefore, the abolition of the death penalty in China or the USA cannot necessarily contribute to the adequate prevention of, or total avoidance of,

³⁷Miscarriages of Justice, available at: https://en.wikipedia.org/wiki/Miscarriage_of_justice.

³⁸See Brian Forst, *Errors of Justice: Nature, Sources and Remedies* (New York: Cambridge University Press, 2004), 212–219.

wrongful convictions in theory or in practice. They cannot be avoided in any justice system, but be minimized through ensuing due process. Respecting it is most needed to better prevent them in all of jurisdictions and countries. Also, the misunderstandings of their scope in China and the USA should be removed, of which China needs to understand that the mistaken acquittal of the guilty is not a wrongful conviction or error of due process. The USA needs to make clear that the conviction of the innocent is not the only form of unjust conviction.

2.4 An Appraisal of the Value of Criminal Justice Systems

Without examining the values that underpin justice systems, it might be impossible to justify any definition or scope of wrongful convictions. Based on the experience of diverse jurisdictions, no criminal justice system can really avoid all wrongful convictions, but can merely improve its effectiveness to better prevent and minimize their number. Even so, both western countries and China still take efforts to balance crime control and human rights values. Given that western justice systems strongly affect China's ongoing and future reforms, it is necessary to explore the core values of that support the justice systems in China and in western countries.

A. *Evaluating the Value of Crime Control in China*

China is transitioning from the inquisitorial process of criminal justice to an adversarial process and is shifting its penal policy from "strike hard"³⁹ to "balancing leniency and severity".⁴⁰ With further justice reforms and human rights progress, to what degree will China abandon its traditions of crime control to embrace human rights values and balance the two values in practice? Some legal scholars on Chinese issues have argued that the value of crime control is dominant in China, as usual. Evidence for this view includes the fact that Chinese authorities are often overly concerned with crime control and substantive justice, in order to maintain so-called social security, even at the cost of human rights and procedural justice. The weight of this evidence would seem to imply that the legal scholars are correct, unless the

³⁹Since 1980, Chinese authorities have initiated various "strike hard" campaigns against specific types of serious crimes. The policy used in campaigns was called "strike hard" policy, featured with the streamlining of criminal cases where investigations were conducted, appeals were heard or sentences were carried out rapidly or severely.

⁴⁰Since 2006, the policy of "strike hard" has been officially replaced with that of "balancing leniency and severity". The new penal policy is mainly featured with tempering justice with mercy in all of criminal cases. Accordingly, many measures are taken to improve the criminal justice system. Particularly, in capital cases involving serious cases, China has attempted to improve the quality of appeals by mandating the SPC review, increase using the death sentence with two years' suspension, and require both clear facts and abundant evidence for each conviction.

authorities' concern does not reflect the underlying values of the justice system. In China's transition towards the adversarial process and human rights progress, several waves of justice reforms have been undertaken in recent two decades, in order to increase due process provisions and improve rights protection on the accused. Implementing the procedures by law can contribute to better justice in China, to a certain degree.

In practice, the emphasis Chinese authorities placed on confessions and the use of torture further supports the above view of legal scholars. High probative value is placed on confessions, and the limited investigative resources available to the authorities mean that they often focus on confessions to obtain other evidence. Together with the pressure to solve all crimes in a timely manner, 'the police's widespread use of torture'⁴¹ is generally considered 'the most efficient method to get a confession'.⁴² But in fact, confessions extracted through torture may greatly increase the high risk of convicting the innocent,⁴³ especially given the fact that close co-operation between the police, prosecutors and the judiciary means that the use of such confessions is likely to go unchallenged by officials. Prosecutors accept such confessions from the police and then provide them to judges, who also tolerate and even use them as evidence for conviction.⁴⁴

Another convincing evidence of primacy of crime control in the Chinese justice system is that the public demand that all cases end with a conviction, regardless of the evidence. For the purpose of deterrence, they often tolerate the use of harsh interrogation methods, if resulting in their true confessions only. The public judge whether a confession obtained with harsh interrogation methods is true or not, mainly based on the probability of convictions or a chain of evidence.

However, the public may express their serious resentment in many ways if the innocent people are convicted in cases in which no crime actually occurred. For example, a man named SHE Xianglin was convicted for murdering his wife, however, his wife eventually reappeared alive, proving her husband's factual innocence. The public was shocked and angry following the discovery of Mr. SHE's wrongful conviction. Public outrage

⁴¹Na Jiang, 'A Comparison of Wrongful Convictions in Death Penalty Cases between China and the United States, (2013) 41 International Journal of Law, Crime and Justice 144–66 at 145.

⁴²WU Xiaofeng, 'An Analysis of Wrongful Convictions in China' (2011) 36(2) Oklahoma City University Law Review 451–69 at 455.

⁴³Na JIANG, 'A Comparison of Wrongful Convictions in Death Penalty Cases between China and the United States, (2013) 41 International Journal of Law, Crime and Justice 144–66 at 145.

⁴⁴See Na JIANG, 'A Comparison of Wrongful Convictions in Death Penalty Cases between China and the United States, (2013) 41 International Journal of Law, Crime and Justice 144–66 at 147; also See Huanglin FU, 'Institutionalizing Criminal Process in China' in Guanghua YA ed., *The Development of the Chinese Legal System: Change and Challenges* (London, Routledge 2011) 26–48.

is heightened if someone truly guilty of a crime is allowed to go free as the result of an innocent person being convicted. The above partial practice of disregarding the importance of due process indicates that, similar to the authorities, the public also consider the deterrence of crime as the foremost role of China's justice system. But in practice, the more unduly optimistic the public are about potential errors, the less challenge they may pose against the authorities' harsh interrogation. Undoubtedly, minimizing procedural error against law or justice cannot deter crime or prevent injustices, but would lead to more wrongful convictions.

Since 2013, when the *2012 CPL* began to be implemented and more adversarial procedures were introduced to protect human rights, the core value of the Chinese justice system has slowly shifted from crime control toward due process. As a major driver of justice reforms, concerns about convicting innocents are intended to promote due process and reduce judicial errors. Some shining examples of reform are mainly related to reviews of death sentences and the exclusion of illegally obtained evidence. However, such reforms are inadequate to achieve the goal of due process or overcome the traditional value of crime control, and China is therefore far from preventing or correcting wrongful convictions in practice.

Specifically, Article 42 of the *2012 CPL* and Article 306 of the *Criminal Law of the PRC* make it more difficult for the accused or their counsel to prove innocence. Article 49 of the *2012 CPL* cannot specify the quantum of proof, leaving much room for the use of a lower standard than proof beyond a reasonable doubt. The failures of the new legislation to safeguard the rights of the accused are often exacerbated by the use of incompetent counsel or by the authorities' circumvention of procedural safeguards and misuse of evidence. Also, errors in convictions are very unlikely to be judicially rectified on appeal or final review. Particularly in rural areas, appeal courts hear cases in camera without allowing the public and the press to watch or based on paper review without the cross-examination of both parties. Appellate courts more often grant relief for factual innocence than use procedures to remedy convictions. In capital cases, the SPC's final review has not yet been made transparent a requirement necessary to ensure due process or human rights.⁴⁵ Chinese practices usually lead to almost full conviction rates and very low acquittal rates, which posits convicting guilty people or the control of crime as the core value of the system.

B. *On Crime Control or Due Process in the West?*

As in China, the tension between the values of crime control and due process sometimes appears in the justice system of the West. Many scholars of

⁴⁵See Na JIANG, 'A Comparison of Wrongful Convictions in Death Penalty Cases between China and the United States,' (2013) 41 *International Journal of Law, Crime and Justice* 144–66 at 418.

the American criminal system believe that that the former value is dominant to a certain degree, particularly in the early 1960s. This reminds us of a famous American scholar Professor Herbert L. Packer who commented on the value of crime control in the USA and described two models of diverse criminal processes⁴⁶. One is the crime control model, and the other is the due process model. The contrast of two models has been frequently applied in evaluation of worldwide justice systems.

For instance, in the USA, requiring any applicant to provide evidence of actual innocence for remedying wrongful convictions implies the idea of crime control that focuses on factual guilt, to a certain degree, which essentially diminishes support for due process.⁴⁷ Due process has been enshrined and practiced in American law for a long time, but America's growing concern with actual innocence, demands a burden of proof hard to satisfy in cases where DNA evidence is unavailable.⁴⁸ The demanding requirements of factual innocence are designed to protect the finality of convictions, so as to make it difficult for convicts to overturn their convictions on grounds of the innocence. Even after American judges have found that an accused has met demanding standards of innocence, prosecutors continue to prosecute the innocent who is obliged to shoulder the burden of proof but fails to provide evidence of actual innocence.⁴⁹ The difficulties that the wrongfully convicted face in obtaining remedies result from more concerns with factual guilt to control crime than due process at the core of American law.⁵⁰ Thus, the scope of wrongful convictions that can be overturned is largely shrinking in practice, so that those who are factually innocent but cannot actually prove it, are very likely to be excluded from obtaining a remedy.

Due process in the West, especially in the USA, fails to prevent wrongful convictions that are mainly caused by such factors as mistaken identification, forensic errors and inadequate defence counsel. Criminal justice systems that are dominated by police or prosecutors are more likely to produce than to correct wrongful convictions. Theoretically, good investigative or prosecutorial officers should not allow the guilty to go free or the innocent to be convicted. But in fact, crackdowns on crime or policies that strike hard on crime may put too much pressure on officials to convict 'an assumed offender'. Even the innocent might be convicted if zealous police are

⁴⁶See Herbert Packer, *The Limits of the Criminal Sanction* (Stanford CA, Stanford University Press 1968).

⁴⁷See Garland, David, 2001 *The Culture of Control* (Chicago: University of Chicago Press).

⁴⁸See Finlay, Keith, 2011 "Defining Innocence" 74 *Albany Law Review* 1157–1208.

⁴⁹See O'Brien, Sean, 2009 "Mothers and Sons: The Lloyd Schlup Story" 77 *University of Missouri at Kansas City Law Review* 1021–1047; also See Barry, Jordan, 2012 "Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause" *Stanford Law Review*.

⁵⁰See Robert Kagan, 2001 *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press); also See Roach, Kent, 2011 *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press).

inclined to extract confessions by illegal means and prosecutors misinterpret it as evidence for conviction at trial. As indicated from numerous wrongful convictions, the authorities often take actual guilt as a main goal and the public accept probable errors of justice if they do not harm the repression of crime, in order to prevent the guilty from weakening the efficacy of the criminal laws and the justice systems.

Distinct from the American focus on factual innocence only, many adversarial systems, like those in the United Kingdom (UK) and Canada, are often concerned with the possibility that innocent and other accused have been convicted contrary to law or justice. In the West, the scope of wrongful convictions is generally defined by common law countries to broadly include the conviction of the innocent, convictions obtained through procedural unfairness and convictions for which evidence is discovered that raises a doubt as to their safety. Particularly, the UK never requires the accused to establish his or her actual innocence for relief, and Canada frequently allows appeals against potential wrongful convictions, even after ordinary appeals have been exhausted, so long as new evidence is available. Some wrongful convictions have been overturned on the basis of such evidence. This illustrates that the due process model not only stresses potential errors in fact-finding to prevent or eliminate factual errors in convictions to the greatest possible extent, but also focuses on the fairness and reliability of the criminal process to ensure no procedural or other errors in convictions.

Neither the crime control model nor the due process one can avoid wrongful convictions in any jurisdictions as the experience of numerous countries like the USA, UK and Canada demonstrates. It seems to be necessary to balance both models to improve the justice system, or to move away from Professor Packer's models to adopt a new, more reliable one. This new model would build on the fact that 311 innocents were exonerated through DNA testing in the USA, with another 30 in Canada and more in other countries, e.g., the UK or China. Based on the worldwide examination of wrongful convictions, Professor Roach expertly pointed out that the best system to prevent the convictions will have both inquisitorial and adversarial features.⁵¹ This combination has been widely applied in many jurisdictions and would be a developing trend for further reform and better justice systems.

C. *The Influence of Values on Understanding Wrongful Convictions*

In both adversarial and inquisitorial systems, the core value of criminal justice systems has important effects on the scope of wrongful convictions. If a criminal justice system focuses on the value of crime control, their scope will resolve around actual guilt and mainly include the conviction of innocents, no matter what procedures are abused in convicting suspects. The conviction will only be wrongful if an innocent is convicted. On the

⁵¹See Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 North Carolina Journal of International Law and Commercial Regulation (2010).

contrary if the justice system is mainly concerned with the value of due process, their scope can broadly cover the conviction of any accused if his or her human rights have been violated or if the conviction was the result of an unjust law. Even if the accused is actually not innocent, convicting him or her contrary to due process is still wrongful. Under due process values, any accused, guilty or not, should be acquitted if there is reasonable doubt about guilt.

As an example, China's justice system falls into the pattern of crime control, based on its fundamental values. Its focus on actual guilt often puts wrongful convictions in a narrow scope, and its inclusion of acquittal as the one likely making the convictions wrongful aims to achieve the goal of crime control. Early in 2005, the Supreme People's Procuratorate (SPP) required the acquittal rate to be no more than 0.2 % when appraising the procuratorial work performance of the handing of cases by public prosecutors. The Supreme People's Court (SPC) further introduced zero acquittal as a criterion for evaluating the case quality, so as to encourage courts to convict any accused who might be potentially guilty.⁵² The annual rate of acquittal⁵³ has been constantly low in China, e.g., at 0.07 % (825 acquittals out of 1,158,000) in 2013,⁵⁴ or perhaps lower in 2014 with 778 acquittals.⁵⁵ Thus, acquittals that may let the guilty go, against crime control, are often regarded as errors.

Clearly, Chinese authorities confuse the difference between an acquittal and a wrongful acquittal. For the purpose of crime control, minimizing acquittal rates has been misunderstood as a means of improving the case quality, in order to solve as many cases as possible by concluding them with conviction. But undoubtedly, the reduction of acquitting the innocent would influence the good quality of cases. In order to improve the justice system and cut down on wrongful convictions, it is "preferable to spare guilty people

⁵²'The Local Judicial Watch of 2014: Chinese Acquittal Rates Continued to Be Close to Zero' [*erling yisi defang sifa guancha: zhongguo wuzui lv chixu quling*], Caixin News [*caixin xinwen*] (12th February 2015), available at: <http://china.caixin.com/2015-02-12/100783530.html>.

⁵³Luo Wen, 'Issue 1025: That the Rate of Acquittal Bing Low Should Not Become Achievements in Judicial Work' [*yiling erwu qi: wuzui panjue lv di buying chengwei sifa zhengji*], Netease News [*wangyi xinwen*], available at: <http://view.163.com/special/reviews/rateofinnocence0313.html>.

⁵⁴See Ye Hongtai, 'Both the SPC's and SPP's Working Reports Require Strict Prevention and Correction Wrongful Convictions by Law' [*lianggao baogao yaoqiu yanfang bing yifa jiuzheng yuanjia cuoan*], People's Daily [*renmin ribao*] (11th March 2014), available at: http://news.china.com.cn/2014lianghui/2014-03/11/content_31743016.htm.

⁵⁵'The Supreme People's Court's Working Report in the Year of 2015 (Full-text Record)' [*erling yiwu nian zuigao renmin fayuan gongzuo baogao quanwen shilu*] People's Net [*renmin wang*] (12th March 2015), available at: http://news.china.com/2015lh/news/11170076/20150312/19373609_all.html#page_3.

than to give innocents wrongful punishments”, as the SPC vice-president SHEN Derong expertly stated in 2013.⁵⁶ Together with the protection of human rights, priorities should be given to acquittals in deciding cases. Even in doubted cases, any acquittal should not be deemed as the one that possibly makes the convictions wrongful.

In fact, the greater attention paid to potential errors that could lead to an acquittal than to those that could lead to a conviction the accused may defeat the value of due process, particularly under the influence of crime control values. Given that wrongful convictions or acquittals are inevitable in practice after a fair trial as required by law, the idealistic goal of minimizing the risk of judicial errors till zero would be totally turned into an empty dream in the criminal process. For protecting the accused’s rights, acquittals should be completely excluded from the narrow scope of wrongfully decided cases. Only in their broad scope should wrongful acquittals be included as errors of justice.

It is worthy of note that China is transitioning towards the value of due process or human rights. By laws, including the 2012 *CPL*, effective from 2013, errors of justice can be quashed mainly on the legal grounds of proven innocence, legal errors or procedural unfairness. Accordingly, the scope of wrongful convictions should be expanded from those involving guilt. Apart from legal or factual errors, actions contrary to the right to a fair trial may result in convictions that need corrections at retrial. In implementing the *CPL*, the convictions that courts can overturn mainly involves factual innocence, legal or procedural errors, unfair trials and rights abuses as well. It does not follow that any error in convicting the accused may make the convictions wrongful. At least, acquittals should be excluded from the scope of wrongfully decided cases during China’s long march towards due process and human rights.

Deviating from due process in the justice system, academic understanding of wrongful convictions appears not to properly define their scope in China. Based on errors that are punishable by the SPP’s 1998 *Regulation*,⁵⁷ their diverse academic understanding has generally been categorized into five main doctrines, in the light of criteria for judging errors in convicting the accused. These doctrines include the objective criteria, of subjective criteria, of a combination of subjective and objective criteria, of procedural abuses,

⁵⁶See available at: http://language.chinadaily.com.cn/news/2013-05/09/content_16486720.htm.

⁵⁷See ‘The People’s Procuratorates’ Regulation on the Accountability for Wrongful Cases (For Trial Implementation)’ [*renmin jianchayuan cuoan zhuijiu tiaoli (shixing)*], available at: http://www.law-lib.com/law/law_view.asp?id=14026.

and of triple standards.⁵⁸ These diverse categories can promote a better understanding of wrongful convictions from different perspectives and help generalize the primary criteria used to judge the convictions in principle, but cloud or distract from the priority of preventing them in law or in practice. Also, such classification fails to define their scope in a particular field of law, and to mention any potential exceptions to criteria.

Chinese authorities have long insisted on a popular slogan: “by law neither an innocent can be convicted, nor the guilty one can easily escape from justice”.⁵⁹ This slogan indicates the official tendency towards zero tolerance for wrongful convictions, wrongful acquittals or any major errors in convicting the accused. The Chinese public often holds opinions similar to those of officials. Under the influence of ancient classifications in the *Tang Code* [*tanglv*],⁶⁰ a penal code effective in the Tang Dynasty of China, contemporary China still pays less attention to errors in acquitting the accused than in convicting him or her. The former of errors in acquittal is favorable to the accused’s rights and the latter of errors in conviction is intended to control crimes. There is a need to balance both values and to stress the protection of human rights. Hence, the scope of wrongful conviction broadly includes the conviction that goes against human rights rather than acquittal.

2.5 Conclusion

Each criminal justice system attempts to assure that its determinations of actual guilt are accurate, but they often do not accomplish this goal in preventing or rectifying wrongful convictions in fact. This chapter has explored the scope of wrongful convictions from diverse aspects, compared and contrasted the similarities and differences between their scope in China and in Western common law countries. Given that the specific scope of wrongful convictions has long been quite vague

⁵⁸See Zeng Youyi, ‘Research on the Prevention of Wrongful Convictions in the Prosecutorial Link’ [*jiancha huanjie xingshi cuoan fangfan yanjiu*], Justice Net [*zhengyi wang*] (5th November 2014), available at: http://sn.jcrb.com/xian/changan/llzs/201411/t20141127_1510412.shtml; See Zhong Yuzhou, ‘Research on the Prevention of Wrongful Cases in the Trial Link’ [*shenpan huanjie cuoan fangfan yanjiu*], Guangzhou Trial Net [*Guangzhou shenpan wang*] (20th February 2012), available at: <http://www.gzcourt.gov.cn/fxtt/2012/02/20104222805.html>; See Yu guangsheng & Xiu Zhenhua, ‘The Identification of Wrongful Convictions and Investigation into the Responsibility for them’ [*xingshi cuoan de rending yu zeren zhuijiu*], Legal System and Economic [*fazhi yu jingji*] 2009 (225), p. 42.

⁵⁹Jiang Shuhui, ‘By Law Neither Innocent Person Can Be Convicted, Nor the Guilty One Can Easily Escape’ [*falv bu yuanwang yige haoren ye buneng qingyi fangguo yige huai ren*], Shanghai Legal System Newspaper [*Shanghai fazhi bao*] (9th November 2010), available at: http://news.sina.com.cn/jfdaily.com/shfzb/html/2010-11/09/content_449983.htm.

⁶⁰See ‘The Tang Code’, available at: https://en.wikipedia.org/wiki/Tang_Code.

in law, the practice of correcting them could be a major source of evidence for the evolution of their scope.

China has insisted on an undue emphasis on the value of crime control for long so as to include any acquittal in the scope of wrongful convictions in their narrow or broad scopes. In reality, China tends to presume suspects to be guilty until proven innocent and often would rather convict than acquit an accused in doubted cases. These approaches are designed to control or suppress crime, but in fact they are contrary to the rights of the accused and to due process, thus increasing the risk of wrongful convictions. In order to prevent such convictions and protect human rights, China should take particular care to ensure the proper implementation of the justice system by law and to complete the fulfillment of its due international human rights obligations as a member state of the UNHRC. Particularly in its transition towards human rights, a good balance between crime control and due process is needed.

Without exploring the values of justice systems, it is never adequate to provide or justify any definition of the above scope. The balance or imbalance between crime control and due process in any systems has deeply influenced the scope of the term “wrongful convictions” in many aspects. In comparison, criminal justice systems in China and the West do share the same concern with factual innocence and the protection of human rights, but to different degrees based on core values. Respect for human rights is important when the accused is factually guilty and when their guilt is uncertain. Some human rights like freedom from torture are absolute. In difficult cases factual innocence might be always uncertain. The proper definition of the term should take a broad approach, including the conviction of innocents and cases involving rights abuses, unfair trials or convictions that are the result of unjust laws.

Different from the narrow scope of the term in the West, China often includes all acquittals, wrongful sentences and unjust executions in the scope of wrongful convictions. This may result from the misunderstanding of Chinese authorities that confuse acquittal with wrongful convictions and errors of justice with wrongful convictions, in order to better control crime and solve all cases by convicting the accused. This suggests that any errors about convictions in the judgments of criminal cases may make the convictions wrongful and thus contribute to the broad scope of wrongful convictions to a certain degree. With the legal grounds for changing the judgments of criminal cases, the scope of such convictions not only includes wrongful convictions in the judgments, but also covers a wide range of other errors in judgments, such as wrongful sentences, executions and even acquittals.

My point in defining the western conception of wrongful convictions is not to reveal how much better the western system is than the Chinese one. But the differences in the conceptions of wrongful convictions may reflect the differences in their legal and political cultures and law enforcement institutions. All of these contextual factors help explain why the scope of wrongful convictions could be similar in theory and why a number of such convictions were identified but cannot be remedied by any law in a justice system with institutional restraints or inherent

flaws. Any jurisdiction has its own experience and lessons on preventing or remedying wrongful convictions. Given the inevitability of such convictions and potential difficulties in abandoning the practice of crime control, it is necessary for any countries to greatly promote due process and embrace human rights by all means in order to ensure better justice and rights progress in reality.



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