

## ADDRESSING WRONGFUL CONVICTIONS OR MISCARRIAGES OF JUSTICE IN THE BRICS NATIONS

JAMIL DDAMULIRA MUJUZI,

University of the Western Cape (Cape Town, South Africa)

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*For many decades, international human rights law has recognised the danger of wrongful convictions and miscarriages of justice. It is against this background that measures have been taken to prevent or combat wrongful convictions. Thus, Article 14 of the International Covenant on Civil and Political Rights provides for the right to a fair trial as well as compensation in the case of a miscarriage of justice. The BRICS nations have implemented measures at the national level to prevent or combat wrongful convictions before and during trial as well as after conviction. These have included constitutional protection of the right to a fair trial, the establishment of a system to review convictions after the appeals process has been exhausted, should the offender exercise his or her right of appeal, and compensation for wrongful conviction in some countries. The purpose of this article is to highlight these measures and where needed, suggest ways in which these countries can learn from one another to prevent or minimise cases of wrongful convictions.*

*Keywords: wrongful convictions; miscarriage of justice; post-appeal procedure; compensation.*

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## Introduction

Wrongful convictions<sup>1</sup> or miscarriages of justice<sup>2</sup> take place in many countries,<sup>3</sup> including in the BRICS nations. Courts in some of the BRICS nations, for example China, have identified some of the factors that lead to wrongful convictions or miscarriages of justice.<sup>4</sup> The BRICS nations have put in place measures to prevent or minimise wrongful convictions. These have included the constitutional protection of the right to a fair trial, the establishment of a system to review convictions after the appeals process has been exhausted, should the offender exercise his or her right of appeal, and compensation for wrongful conviction in some countries. The purpose of this article is to discuss the measures which the BRICS nations have put in place to address the issue of wrongful convictions. The author suggests lessons that these countries can draw from one another in order to better protect their citizens and residents from

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<sup>1</sup> In *R. (Mullen) v. Secretary of State for the Home Department* [2004] U.K.H.L. 18 (29 April 2004), para. 4, the House of Lords (Lord Bingham) observed that: "The expression 'wrongful convictions' is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."

<sup>2</sup> In *Regina v. Connor & Anor* [2004] U.K.H.L. 2 (22 January 2004), para. 131, the Court (Lord Hobhouse) held that: "It is fundamentally wrong to use the phrase 'miscarriage of justice' selectively as if it only related to perverse convictions. This presents a false picture. Most miscarriages ... occur because of some corruption of the evidence used by the prosecution to prove guilt. Such corruptions may take many forms, e.g. non-disclosure of evidence or information favourable to the defence, undetected lies, undiscovered witnesses, partial or incompetent expert evidence. None of these involve any failure of the jury system: the verdict returned was in accordance with the evidence adduced at the trial. This leads on to the other reason why it presents a false picture: a perverse verdict of not guilty, whatever the reason for it, is also a miscarriage of justice. The criminal justice system has failed to convict a person whose guilt has been proved."

<sup>3</sup> Case law from different countries shows that courts have found that some people were convicted wrongfully. For example, *SKN v. Republic* [2017] eKLR (Kenya); *Eric Asante v. Republic* (J8A/03/2017) [2018] G.H.A.S.C. 33 (30 May 2018) (Ghana); *Yahaya Abdallah alias Dunda v. Republic* (Criminal Appeal 120 of 2004) [2005] T.Z.H.C. 1 (16 September 2005) (Tanzania); *R. v. Ramonyaloe* (CRI/A/10/90) [1994] L.S.C.A. 84 (18 April 1994) (Lesotho); *Hlophe and Another v. Rex* (17/1996) [1996] S.Z.S.C. 9 (16 April 1996) (Eswatini); *Kalibala & 3 Ors v. Uganda* (Criminal Appeal 16 of 2012) [2012] U.G.H.C. 147 (27 July 2012) (Uganda).

<sup>4</sup> For example, in *Kissel v. HKSAR* [2010] 2 H.K.L.R.D. 435 (2010) the Court of Appeal of Hong Kong gave the following as the factors leading to wrongful convictions: "a confusing, and therefore unfair, presentation of the case for the prosecution"; "a failure by the presiding judge to emphasise sufficiently a vital point for the defence"; and "a refusal to allow an adjournment, though applied for on reasonable grounds." See paras. 174 & 197.

wrongful convictions. In this discussion, the author focuses on three issues: the right to a fair trial; post-conviction measures; and compensation for wrongful convictions.<sup>5</sup> The discussion begins with the issue of the right to a fair trial.

### 1. The Right to a Fair Trial

One of the measures in place to prevent wrongful convictions is the protection of the right to a fair trial. This right is protected under Article 14 of the International Covenant on Civil and Political Rights, in the regional human rights instruments ratified by some of the BRICS nations and mentioned in the constitutions of all the BRICS nations. The majority of the BRICS nations have ratified or acceded to the International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup> and the People's Republic of China has signed this Covenant.<sup>7</sup> However, Article 14 of the ICCPR has been adopted as the Bill of Rights in Hong Kong.<sup>8</sup> Article 6 of the European Convention on Human Rights, to which Russia is a party, provides for the right to a fair trial. The Constitution of Russia provides for several rights which make up the right to a fair trial. These include the right to have one's case examined by a judge or jury,<sup>9</sup> as well as the right to qualified legal assistance;<sup>10</sup> the right to be presumed innocent until proven guilty;<sup>11</sup> the right against self-incrimination,<sup>12</sup> the right against double jeopardy<sup>13</sup> and the right not to be punished for conduct which is not criminalised by law.<sup>14</sup> In addition, Russian courts are not "allowed to use evidence received by

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<sup>5</sup> The author could not discover the law on post-appeal remedies in Brazil and India.

<sup>6</sup> Brazil (on 24 January 1992); Russia (on 16 October 1973); India (on 10 April 1979); and South Africa (on 10 December 1998).

<sup>7</sup> China signed the Covenant on 5 October 1998.

<sup>8</sup> See Art. 11 of the Bill of Rights Ordinance.

<sup>9</sup> Art. 47.

<sup>10</sup> Art. 48.

<sup>11</sup> Article 49 provides that: "[1]. Everyone accused of committing a crime shall be considered innocent until his guilt is proved according to the rules fixed by the federal law and confirmed by the sentence of a court which has come into legal force. [2]. The accused shall not be obliged to prove his innocence. [3]. Unremovable doubts about the guilt of a person shall be interpreted in favour of the accused."

<sup>12</sup> Article 51 provides that: "[1]. No one shall be obliged to give incriminating evidence, husband or wife and close relatives the range of whom is determined by the federal law. [2]. The federal law may envisage other cases of absolution from the obligation to testify."

<sup>13</sup> Art. 50(1).

<sup>14</sup> Article 54 provides that: "[1]. A law introducing or aggravating responsibility shall not have retro-spective effect. [2]. No one may bear responsibility for the action which was not regarded as a crime when it was committed. If after violating law the responsibility for that is eliminated or mitigated, a new law shall be applied."

violating the federal law”<sup>15</sup> and “[e]veryone convicted for a crime shall have the right to appeal against the judgement of a superior court according to the rules envisaged by the federal law, as well as to ask for pardon or a mitigation of punishment.”<sup>16</sup> An accused also has all the rights which are not expressly mentioned in the Constitution, provided they are provided for in international law. This is because Article 55 of the Constitution provides that “[t]he listing in the Constitution of the Russian Federation of the fundamental rights and freedoms shall not be interpreted as a rejection or derogation of other universally recognized human rights and freedoms.” The effect of this provision is, *inter alia*, that some of the rights which are not expressly mentioned in the Constitution but are universally recognised are also guaranteed to the accused. These include rights which have been developed by international human rights bodies, such as the European Court on Human Rights when interpreting Article 6 of the European Convention on Human Rights. Article 6 of the European Convention on Human Rights provides that:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly needed in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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<sup>15</sup> Art. 50(2).

<sup>16</sup> Art. 50(3).

The European Court of Human Rights has developed rich jurisprudence on Article 6, but it is beyond the scope of this article to discuss this jurisprudence. It is clear that some of the rights which are provided for under Article 6 of the European Convention on Human Rights are not expressly mentioned in the Russian constitution. These include the right to be informed of the offence; the right to adequate time and facilities to prepare for one's defence; and the right to the assistance of an interpreter. However, by virtue of Article 55(1) of the Constitution, these rights are also part of Russian law and the accused is entitled to them.

For example, in *Blokhin v. Russia*<sup>17</sup> the Grand Chamber of the European Court of Human Rights held that Article 6 of the Convention contains "far-reaching procedural guarantees."<sup>18</sup> Jurisprudence from the Grand Chamber of the European Court of Human Rights shows that the court has found that the accused in Russia have had their rights to a fair trial protected. These have included the right of the accused to call and cross-examine witnesses.<sup>19</sup> There are also instances in which the European Court of Human Rights has found that Russia violated some of the components of the right to a fair trial under Article 6 of the European Convention on Human Rights despite the fact that these rights are not expressly provided in the Russian Constitution. These have included the accused's rights to be tried within a reasonable amount of time,<sup>20</sup> the right to communicate with their lawyer,<sup>21</sup> the right to confront state witnesses,<sup>22</sup> the right to have a judgement and its reasons published publicly,<sup>23</sup> and the right to be tried before a tribunal established by law.<sup>24</sup> Unlike the Constitution which provides for the right to legal assistance during trial, the European Court of Human Rights held that, in the context of Article 6 of the Convention, this right should also be extended to a suspect who is being questioned.<sup>25</sup> However, the Russian Constitution has to be read in tandem with the Criminal Procedural Code<sup>26</sup> which provides for many rights that are relevant to the right to a fair trial but are not expressly mentioned in the Constitution.

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<sup>17</sup> *Blokhin v. Russia* (Application No. 47152/06) (23 March 2016).

<sup>18</sup> *Id.* para. 181.

<sup>19</sup> *Murtazaliyeva v. Russia* (Application No. 36658/05) (18 December 2018).

<sup>20</sup> *Svinarenko and Slyadnev v. Russia* (Applications Nos. 32541/08 and 43441/08) (17 July 2014), paras. 140–145; *Smirnova v. Russia* (Applications Nos. 46133/99 and 48183/99) (24 July 2003); *Kalashnikov v. Russia* (Application No. 47095/99) (15 July 2002).

<sup>21</sup> *Sakhnovskiy v. Russia* (Application No. 21272/03) (2 November 2010).

<sup>22</sup> *Idalov v. Russia* (Application No. 5826/03) (22 May 2012).

<sup>23</sup> *Ryakib Biryukov v. Russia* (Application No. 14810/02) (17 January 2008).

<sup>24</sup> *Posokhov v. Russia* (Application No. 63486/00) (4 March 2003).

<sup>25</sup> *Blokhin v. Russia* (Application No. 47152/06) (23 March 2016).

<sup>26</sup> Criminal Procedural Code of the Russian Federation No. 174-FZ of 18 December 2001.

The right to a fair trial is also provided for in the constitutions of Brazil,<sup>27</sup> India,<sup>28</sup> China<sup>29</sup> and South Africa,<sup>30</sup> as well as in the regional human rights instruments ratified by some of these countries.<sup>31</sup> Courts in these countries have also developed rich jurisprudence on the right to a fair trial.<sup>32</sup> One of the elements of the right to a fair trial is the offender's right to appeal against his or her conviction or sentence to have his or her conviction reviewed by a higher tribunal or court.

As mentioned above, one of the rights provided for in the constitutions of BRICS nations is the convicted person's right to appeal against conviction or sentence. For example, Article 50(3) of the Russian Constitution provides that "[e]veryone convicted for a crime shall have the right to appeal against the judgement of a superior court according to the rules envisaged by the federal law, as well as to ask for pardon or

<sup>27</sup> See, e.g., Art. 5(V) and (XXXVI)–(XL) of the Constitution of the Federative Republic of Brazil (1988).

<sup>28</sup> Art. 20 of the Constitution of India (1949).

<sup>29</sup> See, e.g., Arts. 125, 126 of the Constitution of the People's Republic of China (1982).

<sup>30</sup> Section 35(3) of the Constitution of South Africa (1993) provides that: "Every accused person has a right to a fair trial, which includes the right – (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; to be present when being tried; (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence; (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (o) of appeal to, or review by, a higher court." South African courts have also put in place safeguards to prevent wrongful convictions and these include the cautionary rules when dealing with the evidence of some categories of witnesses. See, e.g., *Sithole v. S* (A206/2011) [2017] Z.A.G.P.P.H.C. 90 (28 February 2017) (the purpose of a cautionary rule when dealing with the evidence of an accomplice is to reduce the risk of wrongful conviction); *Khumalo v. S* (AR5502/19) [2020] Z.A.K.Z.P.H.C. 63 (5 November 2020); *LR and Another v. S* (A333/2017) [2018] Z.A.F.S.H.C. 219; 2019 (2) S.A.C.R. 216 (F.B.) (14 December 2018) (the purpose of a cautionary rule when dealing with the evidence of a child witness is to reduce the risk of wrongful conviction); *BC v. S* (A8/2020) [2020] Z.A.F.S.H.C. 180 (30 October 2020) (the purpose of a cautionary rule when dealing with the evidence of a single witness is to reduce the risk of wrongful conviction).

<sup>31</sup> See Art. 8 of the American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969. Brazil ratified this treaty on 7 September 1992. See also Art. 7 of the African Charter on Human and Peoples' Rights (1981).

<sup>32</sup> Iain Currie & Johan de Waal, *The Bill of Rights Handbook* (2013); Daphne Huang, *The Right to a Fair Trial in China*, 7(1) Wash. Int'l L.J. 171 (1998); Neeraj Tiwari, *Fair Trial vis-à-vis Criminal Justice Administration: A Critical Study of the Indian Criminal Justice System*, 2(4) J. L. Conflict. Resolut. 66 (2010); and Andrey Borges de Mendonça, *The Criminal Justice System in Brazil: A Brief Account*, Resource Material Series No. 92 (2014) (Nov. 30, 2021), available at [https://www.unafei.or.jp/publications/pdf/RS\\_No92/No92\\_07PA\\_Andrey2.pdf](https://www.unafei.or.jp/publications/pdf/RS_No92/No92_07PA_Andrey2.pdf).

a mitigation of punishment.” However, it is possible that a person who has been convicted wrongfully may also have his appeal dismissed when the appellate court fails to notice the irregularity. Thus, it is important to take a look at the post-appeal conviction as one of the measures to deal with wrongful convictions.

## 2. Post Appeal Procedures to Set Aside a Wrongful Conviction

Another way in which BRICS nations are trying to prevent or minimise wrongful convictions is by putting in place post-appeal procedures to ensure that people who claim that they were wrongfully convicted have their cases re-examined even after the appeal process has been exhausted and the sentence has come into force. Article 6(2) of the Criminal Procedural Code of the Russian Federation<sup>33</sup> provides that one of the goals of criminal court proceedings is “protecting the person from unlawful and ungrounded accusations and conviction and from the restriction of his rights and freedoms.” Article 413 of the Criminal Procedural Code of the Russian Federation provides for “grounds for resumption of the proceedings on a criminal case because of new or newly revealed circumstances.” Article 413(1) provides that “[t]he court sentence, ruling or resolution, which has come into legal force, may be cancelled and the proceedings on a criminal case may be resumed because of new or newly revealed circumstances.” Article 413(2) provides for two broad circumstances in which a criminal case may be resumed (reopened) after the sentence has come into force. The first ground is “newly revealed circumstances – the circumstances . . . which existed at the moment of the entry into legal force of the sentence or other judicial decision, but were unknown to the court.”<sup>34</sup> These newly revealed circumstances “shall be”:

(1) a deliberate falsity of the evidence of the victim or of the witness, or of the expert’s conclusion, as well as the forgery of the demonstrative proof, of the protocols of the investigative and the judicial actions and of other documents, or a deliberate erroneousness of the translation, which have entailed the passing of an unlawful, unsubstantiated or unjust sentence or of an unsubstantiated ruling or resolution; (2) the criminal actions of the inquirer, the investigator or the public prosecutor, which have entailed the adjudgement of an unlawful, unsubstantiated or unjust sentence, or of an unlawful or unsubstantiated ruling or resolution; (3) the criminal actions of the judge which he has committed during the examination of the criminal case, established by the court sentence that has entered into legal force.<sup>35</sup>

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<sup>33</sup> Criminal Procedural Code of the Russian Federation No. 174-FZ of 18 December 2001.

<sup>34</sup> Art. 413(2)(1).

<sup>35</sup> Art. 413(3).

Article 413(5) provides for ways in which “newly revealed” circumstances can be established.<sup>36</sup> It is thus evident that the newly revealed circumstances apply to every person who in one way or another played a role in the accused’s conviction. In other words, the inquiry focuses on the conduct of the individuals involved in the criminal justice system, which conduct tainted the accused’s trial. The second ground on which a conviction may be reopened relates to “new circumstances ... unknown to the court at the moment when it passed the judicial decision, which eliminate the criminality and the punishability of the act.”<sup>37</sup> These new circumstances are:

(1) recognizing by the Constitutional Court of the Russian Federation of the law, applied by the court in the given criminal case, as not corresponding to the Constitution of the Russian Federation; (2) a violation of the provisions of the Convention on the Protection of Human Rights and Basic Freedoms, established by the European Court on Human Rights, during the examination of the criminal case by a court of the Russian Federation, involved in: (a) an application of the federal law, not corresponding to the provisions of the Convention on the Protection of Human Rights and Basic Freedoms; (b) other violations of the Convention on the Protection of Human Rights and Basic Freedoms.

Unlike in the case of the “newly revealed” circumstances where the inquiry focuses on the conduct of the individuals involved in the criminal justice system, in the case of the “new circumstances” the question is whether the accused’s trial was fair. In particular, whether the trial complied with the minimum standards of the right to a fair trial as provided for under Article 6 of the European Convention on Human Rights. In order to ensure that the victim of a wrongful conviction can challenge his or her conviction at any time, there is no time limit within which such a challenge can be brought. This is so because Article 414(1) of the Criminal Procedural Code provides that “[r]evision of the sentence of conviction because of new or newly revealed circumstances in favour of the convict is not limited by any time terms.” The conviction may also be revised posthumously.<sup>38</sup> The revision of the conviction under

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<sup>36</sup> Article 413(5) provides that these circumstances “may be established, in addition to the sentence, by a ruling or a resolution of the court, by a resolution of the public prosecutor, of the investigator or of the inquirer on the termination of the criminal case on account of an expiry of the term of legal limitation, of an act of amnesty or an act of mercy, in connection with the death of the accused or on account of the person not reaching the age, from when the criminal liability sets in.”

<sup>37</sup> Art. 413(2)(2).

<sup>38</sup> Article 414(2) of the Criminal Procedural Code provides that, “The death of the convict shall not be seen as an obstacle to resuming the proceedings on the criminal case for the purpose of his rehabilitation because of new or newly revealed circumstances.”

Section 413 of the Criminal Procedural Code is carried out by the Supreme Court.<sup>39</sup> The European Court of Human Rights held that reopening criminal proceedings under Article 413 of the Criminal Procedural Code is one of the forms of redress to deal with a conviction that was based on a trial in which the applicant's right to a fair trial under Article 6 of the Convention was violated.<sup>40</sup> The Court added that "[t]he most appropriate form of redress would, in principle, be the reopening of the relevant proceedings if requested."<sup>41</sup> The request has to be made by the "person concerned."<sup>42</sup> The purpose of reopening the proceedings or conducting the trial *de novo* is to ensure that the applicant is "put in the position in which he would have been had the requirements of that provision [Article 6 of the Convention] not been disregarded."<sup>43</sup> Apart from noting the existence of Article 413, the European Court of Human Rights is also called upon to "urge" the Russian authorities, in the operative part of the judgment, to reopen the proceedings.<sup>44</sup> When a national court reopens the proceedings, the guiding principle, developed by the European Court of Human Rights, is that "courts acting in the new proceedings should be under an obligation to remedy the violations of the Convention found by the Court in its judgment."<sup>45</sup>

Other BRICS nations have also put in place post-conviction measures to address wrongful convictions. For example, Section 327 of the South African Criminal Procedure Act<sup>46</sup> provides that:

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<sup>39</sup> Article 415(5) of the Criminal Procedural Code provides that: "Revision of the court sentence, ruling or resolution in accordance with the circumstances, indicated in Items 1 and 2 of the fourth part of Article 413 of the present Code, shall be performed by the Presidium of the Supreme Court of the Russian Federation at the presentation of the President of the Supreme Court of the Russian Federation not later than one month from the day of arrival of the given presentation. On the results of examining this presentation, the Presidium of the Supreme Court of the Russian Federation shall either cancel or amend the judicial decisions on the criminal case in conformity with the resolution of the Constitutional Court of the Russian Federation or with the resolution of the European Court on Human Rights. Copies of the resolution of the Presidium of the Supreme Court of the Russian Federation shall be forwarded within three days to the Constitutional Court of the Russian Federation, to the person, with respect to whom the given resolution is passed, to the public prosecutor and to the Authorized Person of the Russian Federation in the European Court on Human Rights."

<sup>40</sup> *Pishchalnikov v. Russia* (Application No. 7025/04) (24 September 2009), paras. 99, 100; *Lopata v. Russia* (Application No. 72250/01) (13 July 2010), para. 164.

<sup>41</sup> *Pavlenko v. Russia* (Application No. 42371/02) (1 April 2010), para. 127. See also *Karpenko v. Russia* (Application No. 5605/04) (13 March 2012), para. 100.

<sup>42</sup> *Aleksandr Zaichenko v. Russia* (Application No. 39660/02) (18 February 2010), para. 65.

<sup>43</sup> *Damir Sibgatullin v. Russia* (Application No. 1413/05) (24 April 2012), para. 73. See also *Y.B. v. Russia* (Application No. 71155/17) (20 July 2021), para. 49; *Nagmetov v. Russia* (Application No. 35589/08) (05/11/2015), para. 70.

<sup>44</sup> Joint Concurring Opinion of Judges Spielmann and Malinverni in *Ilatovskiy v. Russia* (Application No. 6945/04) (9 July 2009), para. 7.

<sup>45</sup> *Navalnyy v. Russia* (Application No. 101/15) (17 October 2017), para. 95.

<sup>46</sup> Criminal Procedure Act 51 of 1977.

(1) If any person convicted of any offence in any court has in respect of the conviction exhausted all the recognized legal procedures pertaining to appeal or review, or if such procedures are no longer available to him or her, and such person or his or her legal representative addresses the Minister by way of petition, supported by relevant affidavit, stating that further evidence has since become available which materially affects his or her conviction, the Minister may, if he or she considers that such further evidence, if true, might reasonably affect the conviction, direct that the petition and the relevant affidavits be referred to the court in which the conviction occurred. (2) The court shall receive the said affidavits as evidence and may examine and permit the examination of any witness in connection therewith, including any witness on behalf of the State, and to this end the provisions of this Act relating to witnesses shall apply as if the matter before the court were a criminal trial in that court. (3) Unless the court directs otherwise, the presence of the convicted person shall not be essential at the hearing of further evidence. (4) (a) The court shall assess the value of the further evidence and advise the President whether, and to what extent, such evidence affects the conviction in question. (b) The court shall not, as part of the proceedings of the court, announce its finding as to the further evidence or the effect thereof on the conviction in question. (5) The court shall be constituted as it was when the conviction occurred or, if it cannot be so constituted, the judge-president or, as the case may be, the senior regional magistrate or magistrate of the court in question, shall direct how the court shall be constituted. (6) (a) The State President may, upon consideration of the finding or advice of the court under subsection (4) – (i) direct that the conviction in question be expunged from all official records by way of endorsement on such records, and the effect of such a direction and endorsement shall be that the person concerned be given a free pardon as if the conviction in question had never occurred; or (ii) substitute for the conviction in question a conviction of lesser gravity and substitute for the punishment imposed for such conviction any other punishment provided by law. (b) The State President shall direct the Minister to advise the person concerned in writing of any decision taken under paragraph (a) ... and to publish a notice in the Gazette in which such decision ... is set out. (7) No appeal, review or other proceedings of whatever nature shall lie in respect of – (a) a refusal by the Minister to issue a direction under subsection (1) or by the State President to act upon the finding or advice of the court under subsection (4) (a); or (b) any aspect of the proceedings, finding or advice of the court under this section.

The Appellant Division (now the Supreme Court of Appeal), held that Section 327 can only be invoked in meritorious circumstances.<sup>47</sup> It also explained the circum-

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<sup>47</sup> *S. v. Nofomela* 1992 (1) S.A. 740 (A.D.), para. 26.

stances in which a court, by way of interdict, can intervene to postpone or suspend the execution of a sentence pending the application to exhaust the procedure under Section 327.<sup>48</sup> The South African Constitutional Court, the highest court in the country, held that “[t]he procedure in Section 327 of the CPA is not an appeal.”<sup>49</sup> The same court added that Section 327 is “geared at preventing an injustice”<sup>50</sup> and that the section “applies after the appeal processes are spent and permanently closed. The Section 327 procedure is also not a substitute for an appeal. It is a process beyond the appeal stage that is meant to be the final net in order to avoid a grave injustice.”<sup>51</sup>

In mainland China, Section 252 of the Criminal Procedure Law<sup>52</sup> provides that “[p]arties or their legally-designated representatives and close representatives may raise an appeal to a people’s court against a judgment or ruling that has already taken effect, but cannot stop the enforcement of the judgment or ruling.” Section 253 provides the grounds on which the people’s court can review a judgement or ruling which has “already taken effect.” It is to the effect that:

Where parties and their legally-designated representatives or close family member’s application meets any of the following circumstances, the people’s court shall hold a new trial: (1) Where there is new evidence showing that the facts verified in the original judgment or ruling were truly in error, and might influence conviction or sentencing determinations; (2) Where the evidence on which sentencing was based is not credible, is insufficient or should be excluded in accordance with law; or the principle evidence by which the case was proven is mutually contradictory; (3) Where the law applied by the original judgment or ruling is truly in error; (4) Where violations of statutory litigation procedures might influence the fairness of the judgment; (5) Where, at the time that adjudicators tried the case, there was corrupt, prejudicial or arbitrary conduct.

Sections 254–258 of the Criminal Procedure Law stipulate the steps that have to be followed to rectify the wrongful conviction, and these steps involve a retrial of the person who was initially convicted of the offence or offences. In Hong Kong, Section 83P of the Criminal Procedure Ordinance provides that:

(1) Where a person has been convicted on indictment ... the Chief Executive may, if he thinks fit, at any time either – (a) refer the whole case to the Court of

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<sup>48</sup> *Masuku v. Minister van Justisie en Andere* 1990 (1) S.A. 832 (A).

<sup>49</sup> *Liesching and Others v. S. and Another* 2017 (4) B.C.L.R. 454 (C.C.); 2017 (2) S.A.C.R. 193 (C.C.), para. 59.

<sup>50</sup> *Id.* para. 60.

<sup>51</sup> *Id.* See also *Chidi v. Minister of Justice* 1992 (4) S.A. 110 (A.D.), para. 10, where the Court held that Section 327 is applicable where the case has “effectively and finally been concluded.”

<sup>52</sup> Criminal Procedure Law (2018).

Appeal and the case shall then be treated for all purposes as an appeal to the Court of Appeal by that person; or (b) if he desires the assistance of the Court of Appeal on any point arising in the case, refer that point to the Court of Appeal for its opinion thereon, and the Court of Appeal shall consider the point so referred and furnish the Chief Executive with its opinion thereon accordingly.

(2) A reference by the Chief Executive under this section may be made by him either on an application by the person referred to in subsection (1), or without any such application.

(3) For the avoidance of doubt, it is hereby declared that this section also applies in a case where an appeal has been heard and determined by the Court of Final Appeal.

The Court of Appeal of Hong Kong referred to Section 83P of the Criminal Procedure Ordinance and held that:

Section 83P(1) gives the Chief Executive unfettered discretion to consider whether or not to refer a certain case to the Court of Appeal ... Factors the Chief Executive would consider included the prospects of success of the appeal, whether there was any delay in the application and the finality of the case etc. Prospects of success of the appeal are not the only determining factor.<sup>53</sup>

The Court added that the above-mentioned provision should be invoked in exceptional circumstances, and if it is, the case will be treated as an appeal.<sup>54</sup> For the section to be invoked, there has to be “substantial new evidence or other consideration in the case” to show that the accused’s conviction was unsafe.<sup>55</sup> Courts can review the legality, rather than the correctness, of the Chief Executive’s decision under Section 83P.<sup>56</sup>

### 3. Compensation for Wrongful Conviction

As mentioned above, all the BRICS nations have ratified or in the case of China, signed, the ICCPR. Article 14(6) of the ICCPR provides for the right to compensation for a miscarriage of justice. It is to the effect that:

<sup>53</sup> *HKSAR v. Chang Wai Hang Alab* [2016] H.K.C.A. 45; [2017] 1 H.K.L.R.D. 146; C.A.C.C. 71/2014 (29 January 2016), para. 48.

<sup>54</sup> *Id.* para. 50.

<sup>55</sup> *Muhammad Riaz Khan v. Chief Executive and Another* [2016] H.K.C.F.I. 231; H.C.A.L. 121/2015 (16 February 2016), para. 43 (referring to the relevant Court of Appeal decisions).

<sup>56</sup> *Wong Hon Lung v. Chief Executive of HKSAR* [2021] H.K.C.F.I. 2155; H.C.A.L. 712/2021 (25 August 2021), para. 13.

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

In Russia, the issue of compensation for wrongful convictions or miscarriages of justice has been dealt with at two levels – at the international law level and at the domestic law level. It is perhaps important to first deal with the approach Russia has taken to deal with compensation for wrongful conviction at the international law because its domestic legislation on this issue has to be assessed against its international law obligations. Russia ratified the ICCPR and as mentioned above, Article 14(6) of the treaty provides for the right to compensation for wrongful conviction. Russia also ratified Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>57</sup> Article 3 of this Protocol provides that:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

There are a few cases in which the European Court of Human Rights has dealt with the right to compensation for miscarriage of justice under Article 3 of the Protocol.<sup>58</sup> Only two of these cases had been brought against Russia as of the time of this writing, and these two will be discussed in the order in which they were decided. The first case was *Shilyayev v. Russia*.<sup>59</sup> In this case, the applicant was convicted of

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<sup>57</sup> Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Treaty 117. Russia ratified this Protocol on 5 May 1998.

<sup>58</sup> These cases, excluding those against Russia, were: *Allen v. The United Kingdom* (Application No. 25424/09) (12 July 2013); *Poghosyan and Baghdasaryan v. Armenia* (Application No. 22999/06) (12 June 2012); *O. v. Norway* (Application No. 29327/95) (11 February 2003); *Hammern v. Norway* (30287/96) (11 February 2003); *Čuden and Others v. Slovenia* (Application No. 38597/03) (21 December 2006); *Gerden v. Slovenia* (Application No. 44581/98) (18 March 2008); *Dolhar v. Slovenia* (Application No. 66822/01) (18 March 2008); *Teymurazyan v. Armenia* (Application No. 17521/09) (15 March 2018); *Knez and Others v. Slovenia* (Application No. 48782/99) (21 February 2008).

<sup>59</sup> *Shilyayev v. Russia* (Application No. 9647/02) (6 October 2005).

murder and rape in October 1997 and sentenced to 19 years imprisonment.<sup>60</sup> His conviction and sentence were upheld by the Supreme Court.<sup>61</sup> However, in January 1999, the “Regional Court reversed the conviction by reference to newly discovered circumstances and remitted the case for a fresh investigation to a prosecutor.”<sup>62</sup> In February of the same year, “the prosecutor took a decision fully to acquit the applicant.”<sup>63</sup> After his acquittal, the applicant instituted proceedings before a court to be paid damages for wrongful conviction and unlawful detention for twenty months.<sup>64</sup> The court awarded him damages (approximately 2,740 euros) for his conviction, the time spent in custody awaiting trial and “related after-effects, such as personal anxiety, anguish and feeling of isolation.”<sup>65</sup> The Ministry of Finance paid the money to the applicant accordingly.<sup>66</sup> The applicant relied on, *inter alia*, Article 3 of the Protocol to argue that the compensation paid to him “was insufficient.”<sup>67</sup> The Court referred to Russian legislation on compensation for wrongful conviction and to Article 3 of Protocol 7<sup>68</sup> and held that Article 3 of Protocol 7 provides for “a right to compensation for miscarriages of justice, when an applicant has been convicted of a criminal offence by a final decision and suffered consequential punishment.”<sup>69</sup> The Court added that Article 3 of Protocol 7 does not “prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach” nor does it “actually refer to any specific amounts.”<sup>70</sup> Against that background, the Court held that:

[T]he domestic authorities recognised the miscarriage of justice in the applicant’s criminal case, quashed his conviction ... as unlawful and granted him damages of RUR 70,000 (~2,740 euros) in this connection. This award does not appear arbitrary or unreasonable as the courts at two instances carefully examined all relevant circumstances of the applicant’s personal situation including the nature of the criminal case against him, total length of his detention and personal after-effects and reached reasoned conclusions

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<sup>60</sup> *Shilyayev v. Russia*, para. 5.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* para. 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* para. 7.

<sup>65</sup> *Id.* para. 8.

<sup>66</sup> *Id.* paras. 10–13.

<sup>67</sup> *Id.* para. 19.

<sup>68</sup> *Id.* paras. 14–19.

<sup>69</sup> *Id.* para. 20.

<sup>70</sup> *Id.*

as to the amount of the award. The applicant was fully able to take part in this procedure and the amount of the award does not appear disproportionate even in the domestic terms.<sup>71</sup>

Against that background, the Court dismissed the application as being manifestly ill-founded.<sup>72</sup> A few observations should be made about this judgement. Firstly, the amount of compensation awarded to a person who has been wrongfully convicted should not be arbitrary. The applicant should be informed the reason why he or she has been awarded a given amount. Secondly, the applicant should be able to take part in the procedure leading to the award of the compensation. He or she should, for example, adduce evidence to show how he or she was affected by the wrongful conviction. Finally, the amount should not be disproportionate when compared to the amounts awarded to victims of human rights violations.

In *Matveyev v. Russia*,<sup>73</sup> the European Court of Human Rights dealt with the question of whether the applicant qualified to be compensated for a miscarriage of justice under Article 3 of the Protocol. In August 1981, the applicant was convicted of forging a postal stamp and sentenced to two years' imprisonment.<sup>74</sup> His appeal against conviction and sentence were dismissed and he served his full sentence.<sup>75</sup> However, in October 1999, in "supervisory review proceedings" the regional court "reversed" the appellant's "conviction for forgery of a stamp, finding that it had been wrongful as there was no indication that a crime had been committed."<sup>76</sup> This was so because the applicant's conduct had not been criminalised at the time of his conviction, which only came to the attention of the review court after the applicant had served his sentence.<sup>77</sup> Following the reversal of his conviction, the applicant instituted proceedings for compensation for the wrongful conviction.<sup>78</sup> However, the court dismissed his application on the ground that "at the time of the conviction there had been no provision in domestic law for claiming such damages."<sup>79</sup> His appeal against the court's decision was dismissed.<sup>80</sup> However, he was awarded "pecuniary

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<sup>71</sup> *Shilyayev v. Russia*, para. 21.

<sup>72</sup> *Id.* para. 22.

<sup>73</sup> *Matveyev v. Russia* (Application No. 26601/02) (3 July 2008).

<sup>74</sup> *Id.* para. 10.

<sup>75</sup> *Id.* para. 11.

<sup>76</sup> *Id.* para. 12.

<sup>77</sup> *Id.* para. 34. His argument was that "at the time of his trial the relevant postal instructions concerning the use of the stamp and the receipt cards that replaced it had not been available to the court or to the parties. Accordingly, his conviction had eventually been reversed due to newly discovered evidence."

<sup>78</sup> *Id.* para. 13.

<sup>79</sup> *Id.* para. 14.

<sup>80</sup> *Id.* paras. 15–19.

damages” for the loss of income suffered as a result of the conviction.<sup>81</sup> The applicant argued that he should have been compensated for the wrongful conviction as well in accordance with Article 3 of the Protocol.<sup>82</sup> He submitted that he qualified for compensation under Article 3 of the Protocol because of the fact that his conviction was reversed after serving his sentence and that although the conviction took place before Russia ratified the Protocol, “the consequences of his unlawful conviction in 1981 had lasted until its reversal in 2001.”<sup>83</sup> The Russian Government advanced three reasons to support its submission that the applicant did not qualify for compensation for the wrongful conviction. Firstly, that the applicant’s conviction had been set aside on review because the trial court had incorrectly held that the applicant’s conduct had amounted to an offence;<sup>84</sup> secondly, that the applicant’s conviction “had been reversed within the framework of the supervisory review procedure and not as a result of the reopening of the case due to newly discovered circumstances” within the meaning of Article 3 of the Protocol;<sup>85</sup> thirdly, that at the time of the appellant’s conviction, Protocol No 7 had not yet entered into force in respect of Russia and therefore the Court did not have temporal jurisdiction over the matter.<sup>86</sup>

In resolving these issues, the Court referred to Article 3 of the Protocol and observed that the aim of this provision [Article 3 of the Protocol] is to confer the right to compensation on persons convicted as a result of a miscarriage of justice, where such a conviction has been reversed by the domestic courts. Therefore, Article 3 of Protocol No. 7 does not apply before the conviction has been reversed.<sup>87</sup>

The Court added that the condition for temporal jurisdiction was satisfied in the present case because the applicant’s conviction was dismissed after the Protocol had entered into force in respect of Russia.<sup>88</sup> The Court went on to say that the mere fact that it had jurisdiction over the matter did not mean that the applicant qualified for compensation. For the applicant to qualify for compensation, he had to meet the criteria under Article 3 of the Protocol.<sup>89</sup> The Court also stated that when interpreting Article 3 of the Protocol, it is important to refer to the Explanatory Report.<sup>90</sup> Against that background, the Court stated that in the Explanatory Report on Article 3 of

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<sup>81</sup> *Matveyev v. Russia*, paras. 20–28.

<sup>82</sup> *Id.* para. 32.

<sup>83</sup> *Id.* para. 34.

<sup>84</sup> *Id.* para. 35.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* para. 36.

<sup>87</sup> *Id.* para. 38.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* para. 39.

<sup>90</sup> The relevant parts of the Explanatory Report are paragraphs 22–25.

the Protocol that the procedure used to reverse the applicant's conviction was immaterial.<sup>91</sup> The Court added that at the time of the applicant's conviction, had the trial court interpreted the law correctly and assessed the evidence correctly, it would have held that the applicant's conduct did not amount to an offence.<sup>92</sup> Therefore, the fact that the applicant's conduct was not an offence at the time of his conviction was not a new or newly discovered fact within the meaning of Article 3 of the Protocol.<sup>93</sup> Against that background, the Court had regard to the Explanatory Report on Article 3 and concluded that "the conditions of applicability of Article 3 of Protocol No. 7" were not complied with.<sup>94</sup> One of the most important issues that emerge from this judgement is that the time of the applicant's conviction is immaterial when it comes to the issue of compensation for wrongful conviction. What matters is that the conviction was wrongful and that it was reversed, or that the applicant was pardoned at the time when the Protocol had come into force for Russia. As a result, the Court accepted the applicant's argument that the consequences of a wrongful conviction continue until the conviction is reversed.<sup>95</sup> This means that a wrongful conviction could be considered a continuing violation of the applicant's right to a fair trial.<sup>96</sup>

At the domestic level, Russian law provides for circumstances under which a person may be compensated for wrongful conviction. For example, Article 53 of the Constitution of Russia provides that "[e]veryone shall have the right for a state compensation for damages caused by unlawful actions (inaction) of bodies of state authority and their officials." This provision is limited to unlawful activities of state bodies or officials and does not extend to cases of wrongful convictions or miscarriages of justice unless it can be shown that the conviction was unlawful. For example, if it was based on a repealed law. Before bringing a case to the European Court of Human Rights, an applicant should first exhaust the domestic remedies available under Article 53 of the Constitution, such as suing the relevant state agency.<sup>97</sup> Article 1070(1) of the Civil Code of the Russian Federation<sup>98</sup> provides that:

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<sup>91</sup> *Matveyev v. Russia*, para. 41.

<sup>92</sup> *Id.* para. 42.

<sup>93</sup> *Id.* para. 43.

<sup>94</sup> *Id.* para. 44.

<sup>95</sup> *Id.* para. 34.

<sup>96</sup> For the European Court of Human Rights' discussion of the principles governing the concept of continuing violation of human rights, see, e.g., *Varnava and Others v. Turkey* (Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) (18 September 2009).

<sup>97</sup> Dissenting Opinion of Judge Sajó in *Ponyayeva and Others v. Russia* (Application No. 63508/11) (17 November 2016), para. 4.

<sup>98</sup> Civil Code of the Russian Federation Part One No. 51-FZ of 30 November 1994, Part Two No. 14-FZ of 26 January 1996, Part Three No. 146-FZ of 26 November 2001 and Part Four No. 230-FZ of 18 December 2006.

The injury inflicted on an individual as a result of illegal conviction, illegal institution of proceedings on criminal charges, illegal application of remand in custody as a measure of suppression or of a written understanding not to leave one's place of residence, of illegally taking to administrative responsibility in the form of administrative arrest, as well as the damage inflicted upon a legal entity as a result of illegally taking to administrative responsibility in the form of an administrative suspension of the activity shall be redressed in full at the expense of the state treasury of the Russian Federation and in cases, stipulated by law, at the expense of the state treasury of the respective subject of the Russian Federation or of the respective municipal body, regardless of the fault of the officials of bodies of inquest, preliminary investigation, procurator's offices or courts of law in the procedure established by law.

In *Gryaznov v. Russia*,<sup>99</sup> the European Court of Human Rights referred to Article 1070 and held that:

Article 1070 creates an exception to the general rule that all damage inflicted on a person must be compensated by the *tortfeasor*, contained in Article 1064 of the same Code, by establishing that damage caused as part of the administration of justice could be compensated by the State in two categories of cases only... Firstly, Article 1070 contains an exhaustive list of situations where damage caused by unlawful judicial decisions is compensated for, irrespective of any fault on the part of the judge. Secondly, it provides that damage may also be recoverable in cases where the judge's fault has been established in criminal proceedings. The Constitutional Court defined a third category of cases where damage incurred through a violation by a court of the right to a fair trial by acts of a procedural nature could be compensated for even in the absence of a final criminal conviction of a judge, if the fault of the judge has been established in civil proceedings... In all other cases, such as in the applicant's case, no liability could be imposed on the judges or the State.<sup>100</sup>

Article 1070 "provides for strict liability ... of the State treasury for damage incurred through" the commission of any of the acts mentioned therein.<sup>101</sup> In other words, a victim of wrongful conviction has a right to compensation "irrespective of the liability of the State authorities involved."<sup>102</sup> A person who has been convicted

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<sup>99</sup> *Gryaznov v. Russia* (Application No. 19673/03) (12 June 2012).

<sup>100</sup> *Id.* para. 74.

<sup>101</sup> *Fedotov v. Russia* (Application No. 5140/02) (25 October 2005), para. 53. See also *Roman Zakharov v. Russia* (Application No. 47143/06) (4 December 2015), para. 102.

<sup>102</sup> *Mikheyev v. Russia* (Application No. 77617/01) (26 January 2006), para. 100.

of an administrative offence has no enforceable right to compensation under Article 1070.<sup>103</sup> For a person to qualify for compensation under Article 1070, the conduct of the state must be unlawful and not just unjustified.<sup>104</sup> The unlawfulness is determined according to objective criteria<sup>105</sup> and it is limited to the actions or omissions enumerated in Article 1070.<sup>106</sup> A judicial decision granting compensation under Article 1070 “must be enforced within two months.”<sup>107</sup>

Likewise, Article 1100 of the Civil Code provides, *inter alia*, that:

The moral damage shall be compensated regardless of the guilt of the inflictor of damage in cases where ... damage has been done to an individual as a result of his illegal conviction, the illegal institution of proceedings against him, the illegal application of remand in custody as a measure of suppression or of a written understanding not to leave his place of residence, the illegal imposition of the administrative penalty in the form of arrest or corrective labour.

For a person to be compensated under Article 1100, the *tortfeasor's* fault is not a prerequisite.<sup>108</sup> The Civil Procedural Code of the Russian Federation<sup>109</sup> provides the procedure which a person has to follow to institute a claim for unlawful conviction.<sup>110</sup> There are a few observations to make about the preceding two provisions. Firstly, although the Civil Code provides for circumstances in which a person qualifies for compensation for “illegal conviction,” it does not describe or define what amounts to an illegal conviction. Based on case law from the European Court of Human Rights on compensation for wrongful conviction in Russia (discussed above), an illegal conviction is the same as a wrongful conviction. Secondly, unlike Article 3 of Protocol No. 7 and Article 14(6) of the ICCPR, which provide that a person qualifies for compensation for a miscarriage of justice after the appeal process has been

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<sup>103</sup> *Corley and Others v. Russia* (Applications Nos. 292/06 and 43490/06) (23 November 2021), para. 111.

<sup>104</sup> *Abashev v. Russia* (Application No. 9096/09) (27 June 2013), para. 40.

<sup>105</sup> *Udaltsov v. Russia* (Application No. 76695/11) (6 October 2020), para. 154.

<sup>106</sup> *Kuzhelev and Others v. Russia* (Applications Nos. 64098/09 and 6 others) (15 October 2019), para. 126.

<sup>107</sup> *Burdov v. Russia (No. 2)* (Application No. 33509/04) (15 January 2009), para. 37.

<sup>108</sup> *Burdov v. Russia (No. 2)* (Application No. 33509/04) (15 January 2009), para. 29; *Govorushko v. Russia* (Application No. 42940/06) (25 October 2007), para. 36.

<sup>109</sup> Civil Procedural Code of the Russian Federation No. 138-FZ of 14 November 2002.

<sup>110</sup> Article 29(6) of the Civil Procedural Code of the Russian Federation provides that: “Claims for the restoration of the labour, pension and housing rights, for the return of the property or of the cost involved in the recompense of the losses inflicted upon a citizen by an unlawful conviction, by an unlawful bringing to criminal responsibility or by an unlawful application as a measure of restraint of taking into custody or of the recognisance not to leave, or by an unlawful imposition of an administrative punishment in the form of arrest, may also be instituted in the court at the place of the plaintiff’s residence.”

completed and the conviction has been reversed or the person has been convicted, the Russian legislation is more flexible. Compensation is due as long as a person was wrongfully convicted. Thirdly, unlike Article 3 of Protocol No.7 and Article 14(6) of the ICCPR, which state that a person does not qualify for compensation if they contributed to their conviction, Russian legislation is silent on that issue. This implies that a person could qualify for compensation for an illegal conviction even if he or she contributed to his or her conviction. Finally, unlike in some countries where a person can only be compensated for wrongful convictions if he or she was innocent of the offence of which he or she was convicted,<sup>111</sup> the Russian legislation does not impose such a condition.

Other BRICS nations have also dealt with the issue of compensation for wrongful conviction. For example, Article LXXV of the Constitution of Brazil provides that “the State shall compensate anyone convicted by judicial error, as well as any person who remains imprisoned for a period longer than that determined by his sentence.”<sup>112</sup> In this case, the person qualifies for compensation if he/she was convicted because of a judicial error. As mentioned above, Brazil ratified the American Convention on Human Rights and Article 10 of the Convention provides that “[e]very person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.” The Inter-American Commission on Human Rights held that, “Article 10 recognizes the right to be compensated in the event of sentencing via a final judgment issued through judicial error. The determination as to whether there may have been such error ... is a precondition for the possible application of Article 10.”<sup>113</sup>

This means that Brazilian domestic law is more flexible than Article 10 of the Inter-American Convention on Human Rights. A person qualifies for compensation under Article 10 where, for example, his prosecution and conviction were tainted by human rights violations.<sup>114</sup> The Inter-American Commission of Human Rights held that Article 10 is not applicable where a person has been acquitted on appeal,<sup>115</sup>

<sup>111</sup> This is the case, for example, in the United Kingdom. See *Allen v. The United Kingdom* (Application No. 25424/09) (12 July 2013).

<sup>112</sup> Art. LXXV of the Constitution of Brazil (1988).

<sup>113</sup> *Arguelles v. Argentina*, Report, Report No. 40/02; Case No. 12.167 (IACmHR, Oct. 09, 2002), para. 59. See also *Acurso Marechal v. Argentina*, Report, Report No. 2/03; Case No. 11.306 (IACmHR, Feb. 20, 2003), para. 35.

<sup>114</sup> For example, in *Eduardo Cirio v. Uruguay*, Report, Report No. 124/06; Case No. 11.500 (IACmHR, Oct. 27, 2006), para. 124, the Inter-American Commission of Human Rights held “that the Uruguayan authorities violated Major Cirio’s human rights by depriving him of his status and benefits, as a punishment for his criticism of the actions of the armed forces and, even though they recognized the political and ideological nature of the punishment, they did not rescind the resolutions punishing him or offer full reparations (*restitutio in integrum*). In light of the above, the Commission concludes that the State violated Mr. Tomás Eduardo Cirio’s right under Article 10 of the Convention.”

<sup>115</sup> *Rojas Piedra v. Costa Rica*, Report, Report No. 43/04; Case No. 306/99 (IACmHR, Oct. 13, 2004), para. 64.

a court's ruling related to a civil matter "does not constitute a conviction,"<sup>116</sup> the state refuses to give effect to an order of the Human Rights Committee to compensate the petitioner,<sup>117</sup> the applicant is a victim of an unfair administrative body order because "there was no question of justice being dispensed by a judicial authority,"<sup>118</sup> and the prosecution against the accused was dismissed before conviction,<sup>119</sup> or the claim is based on a hypothetical situation.<sup>120</sup>

The Constitution of the People's Republic of China, unlike those of Brazil and Russia, does not provide for compensation for wrongful conviction. However, a person who has been wrongfully convicted can be compensated. This is on the basis of Article 15 of the State Compensation Law of the People's Republic of China<sup>121</sup> which provides that:

The victim shall have the right to compensation if an organ in charge of investigatory, procuratorial [prosecutorial], judicial or prison administration work, or its functionaries, infringe upon his right of the person in the exercise of its functions and powers in any of the following circumstances: (1) Wrong detention of a person without incriminating facts or proof substantiating a strong suspicion of the commission of a crime; (2) Wrong arrest of a person without incriminating facts; (3) Innocence is found in a retrial held in accordance with the procedure of trial supervision, but the original sentence has already been executed; (4) Extortion of a confession by torture or causing bodily injury or death to a citizen by using or instigating the use of violence such as beating one up; or (5) Causing bodily injury or death to a citizen by the unlawful use of weapons or police restraint implements.

It is thus clear that for a person to be compensated for wrongful conviction, he or she has to be innocent of the offence of which he or she was convicted. He or she can be compensated if the conviction has been set aside for retrial. In other words, he or she does not have to have exhausted the appeal procedure. There are indeed cases in which people have been compensated for wrongful conviction<sup>122</sup> and recently a man

<sup>116</sup> *Garcia Fajardo v. Nicaragua*, Report, Report No. 100/01; Case No. 11.381 (IACmHR, Oct. 11, 2000), para. 93.

<sup>117</sup> *Lewis v. Jamaica*, Report, Report No. 97/98; Case No. 11.825 (IACmHR, Dec. 17, 1998), para. 49.

<sup>118</sup> *Velez Loo v. Panama*, Report, Report No. 95/06; Case No. 92-04 (IACmHR, Oct. 23, 2006), para. 60.

<sup>119</sup> *Grande v. Argentina*, Report, Report No. 3/02; Case No. 11.498 (IACmHR, Feb. 27, 2002), para. 43.

<sup>120</sup> *Raxacaco Reyes v. Guatemala*, Report, Report No. 73/02; Case No. 50/02 (IACmHR, Oct. 09, 2002), para. 38.

<sup>121</sup> State Compensation Law of the People's Republic of China, adopted at the 7<sup>th</sup> session of the Standing Committee of the 8<sup>th</sup> National People's Congress on 12 May 1994 and amended in accordance with the Decisions on Amendment to the State Compensation Law of the People's Republic of China at the 14<sup>th</sup> session of the Standing Committee of the 11<sup>th</sup> National People's Congress on 29 April 2010 and shall take effect as of 1 December 2010.

<sup>122</sup> See, e.g., Na Jiang & Yue Wang, *Remedies for Wrongful Convictions in China*, 8(1) J. Civ. Leg. Sci. 1 (2018).

who was imprisoned wrongfully for 27 years applied for compensation.<sup>123</sup> However, not everyone who has been wrongfully convicted qualifies for compensation. This is because Article 17(1) of the State Compensation Law of the People's Republic of China provides that "[t]he State shall not be liable for compensation" if, *inter alia*, the "sentencing ... [was] due to a citizen's own intentionally made false statements or fabricated evidence of guilt."

Hong Kong, although an administrative region in China, has taken an approach different from that of mainland China on the issue of compensation for wrongful conviction. It did this by incorporating Article 14(6) of the ICCPR into its Bill of Rights Ordinance. As a result, Article 11(5) of the Hong Kong Bill of Rights Ordinance provides that:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Hong Kong has adopted two schemes to deal with compensation for wrongful convictions: the statutory scheme, under Article 11(5) of the Bill of Rights Ordinance, and the *ex gratia* scheme. On the issue of compensation for wrongful conviction under the *ex gratia* scheme, the policy in Hong Kong is to the effect that:

The Government may make an *ex gratia* payment in certain exceptional cases, where the claimant has spent time in custody following a wrongful conviction or charge resulting from a serious default by the police or other public authority. This might be the case, for example, when bail was refused because of incorrect information given to the court by the prosecutor or the police, or where the police suppressed material evidence that would have helped to exonerate a convicted person. Compensation may also be payable on this basis where the wrongful act was that of a judge or magistrate. The Government will assess these applications having regard to any relevant judicial views that the court(s) may have expressed during any appeal or review process(es) of the cases concerned, as well as all other available and relevant materials.<sup>124</sup>

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<sup>123</sup> Man detained wrongfully for 27 years applies for \$4.4m compensation in China, Nestia, 3 September 2020 (Nov. 30, 2021), available at <https://news.nestia.com/detail/-/4921838>.

<sup>124</sup> Compensation for persons wrongfully imprisoned, Information for claimants (June 2014), para. 5 (Nov. 30, 2021), available at <https://www.doj.gov.hk/eng/archive/pdf/ann20140617e.pdf>.

However, there is a disclaimer for both schemes:

There is no general entitlement to recompense for a wrongful conviction or charge. For example, compensation will not be awarded in cases where at the trial or on appeal the prosecution was unable to prove its case beyond reasonable doubt against the accused person, or where the conviction was quashed on a technicality. Where circumstances are such that compensation could be awarded, it may be refused or reduced if the claimant was wholly or partly to blame for his misfortune: for example, where he deliberately withheld evidence which would have demonstrated his innocence.<sup>125</sup>

In the case of *A v. Secretary of Justice and Another*,<sup>126</sup> the Court dealt with compensation for wrongful conviction under both the statutory and ex gratia schemes. With regards to the statutory scheme, the Court referred to Article 11(5) of the Bill of Rights Ordinance and held that:

Four conditions must be satisfied before a person is entitled to claim compensation under HKBOR 11(5), namely: (1) he has by a final decision been convicted of a criminal offence; (2) his conviction has been reversed or he has been pardoned; (3) on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice; and (4) he has suffered punishment as a result of such conviction. In addition, compensation is not payable if the non-disclosure of the unknown fact in time is wholly or partly attributable to the convicted person.<sup>127</sup>

The Court added that:

When considering the meaning of an article of the HKBOR that should be adopted by a Hong Kong court, it is important to bear in mind that the HKBOR is, after 1 July 1997, the means by which the relevant provisions of the ICCPR are applied to Hong Kong under Article 39 of the Basic Law. The consistent views of the HRC [Human Rights Committee] as regards the meaning or interpretation of a relevant article of the ICCPR should, in my view, be regarded as being highly relevant and persuasive ... I also consider that I should give an article of the HKBOR the same meaning that the corresponding article of the ICCPR is currently being given by the HRC unless there is some good reason to depart from the HRC's interpretation.<sup>128</sup>

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<sup>125</sup> Compensation for persons wrongfully imprisoned, *supra* note 124, para. 2.

<sup>126</sup> *A. v. Secretary for Justice and Another* [2020] H.K.C.F.I. 427; H.C.A.L. 176/2018 (11 March 2020).

<sup>127</sup> *Id.* para. 14.

<sup>128</sup> *Id.* para. 28.

On the issue of the ex gratia scheme, the Court held that an applicant has “no legal entitlement to be paid compensation under the Ex Gratia Scheme” and that the Department of Justice has the discretion to decide whether or not to compensate an applicant.<sup>129</sup> The Court held further that the Department of Justice has the discretion to decide “whether there is serious doubt about the Applicant’s innocence” before deciding to compensate the applicant.<sup>130</sup> The Court also explained the rationale behind limiting the number of people who should be compensated for wrongful convictions. It held that “there are good policy reasons for the Government to be circumspect about making an ex gratia payment under the scheme” and that one of them is not to spend government money unnecessarily.<sup>131</sup>

Unlike Russia, China, and Brazil, which have domestic legislation on compensation for wrongful conviction, a person who was wrongfully convicted in South Africa has to institute a civil claim (relying on the law of delict) in order to be compensated. For example, in *Nohour and Another v. Minister of Justice and Constitutional Development*,<sup>132</sup> the Supreme Court of Appeal held that although applicants had been acquitted of the offence after serving some time in prison, they could not be compensated for the conviction and sentence because they did not meet the required threshold for compensation in the law of delict. Although Section 327 of the Criminal Procedure Act<sup>133</sup> recognises that a person could be wrongfully convicted and provides for circumstances in which he or she could be released from prison, it does not provide for the right to compensation. Likewise, in India, a person who has been wrongfully convicted does not have a right to be compensated.<sup>134</sup>

## Conclusion

Wrongful convictions take place in many countries, which explains why national and international measures have been put in place to prevent and/or minimise them. The BRICS nations have taken two broad measures to prevent and/or minimise wrongful convictions: the signing or ratification of international human rights treaties

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<sup>129</sup> *A. v. Secretary for Justice and Another*, para. 40.

<sup>130</sup> *Id.* para. 42.

<sup>131</sup> *Id.* para. 41. For a detailed discussion of this decision and the law on compensation for wrongful convictions in Hong Kong generally, see Jamil Ddamulira Mujuzi, *Compensation for Wrongful Conviction/Miscarriage of Justice in Hong Kong in Light of A v Secretary for Justice and Another [2020] HKCFI 427; HCAL 176/2018 (11 March 2020)*, 10(2) Int'l Hum. Rts. L. Rev. 291 (2021).

<sup>132</sup> *Nohour and Another v. Minister of Justice and Constitutional Development (1139/2018) [2020] Z.A.S.C.A. 27 (26 March 2020)*.

<sup>133</sup> Act 51 of 1977. See also *Mosuwe v. Minister of Police and Another (18229/2011) [2021] Z.A.G.P.P.H.C. 507 (11 August 2021)* (in which the plaintiff instituted a civil claim for wrongful conviction).

<sup>134</sup> Law Commission of India, *Wrongful Prosecution (Miscarriage of Justice): Legal Remedies*, Report No. 277 (August 2018) (Nov. 30, 2021), available at <http://lawcommissionofindia.nic.in/reports/Report277.pdf>.

that include provisions relevant to wrongful convictions and the enactment of relevant domestic legislation. The discussion above has shown that South Africa and India do not have legislation providing for that right to compensation for wrongful conviction, whereas Russia, Brazil and China have such legislation. It is recommended that South Africa and India may have to amend their legislation to provide for that right in their domestic legislation. It has been illustrated above that in Hong Kong, there are two compensation schemes, namely the statutory scheme, which gives effect to Article 14(6) of the ICCPR, and the ex gratia scheme, which is to accommodate people who do not meet the threshold for being compensated under the statutory scheme. This ensures that as many victims of wrongful convictions as possible are accommodated and compensated. This is an approach that may have to be followed in the other BRICS countries. Unlike in some of the non-BRICS nations where there are specific institutions to deal with post-conviction cases of wrongful convictions,<sup>135</sup> none of the BRICS nations has yet to establish such an institution. This approach may have to be explored so that such cases are dealt with by a specialised body.

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### Information about the author

**Jamil Ddamulira Mujuzi (Cape Town, South Africa)** – Professor of Law, Faculty of Law, University of the Western Cape (Private Bag X 17, Robert Sobukwe Rd., Bellville, 7535, South Africa; e-mail: djmujuzi@gmail.com).

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<sup>135</sup> For example, section of the 194A Criminal Procedure (Scotland) Act 1995, c 46 establishes the Scottish Criminal Cases Review Commission; Criminal Cases Review Commission Act 2019 (New Zealand).