Title

Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts

Author

Dr. Alexei Trochev
Associate Professor of Political Science and International Relations
School of Humanities and Social Sciences
Nazarbayev University

Contact Information

Address: 53 Kabanbay Batyr Avenue, Astana, Republic of Kazakhstan, 010000
Email: atrochev@nu.edu.kz Telephone: +7-717-270-5920

Biographical Sketch

Dr. Alexei Trochev is an Associate Professor of Political Science and International Relations in the School of Humanities and Social Sciences at Nazarbayev University in Astana, Republic of Kazakhstan.

Acknowledgements

I am grateful to Cornell Law School for hosting the 2016 Cornell International Law Journal Symposium with Nazarbayev University entitled The Rule of Law in Central Asia.

Disclaimer

The opinions expressed in this article are the author’s and do not represent the opinions of Nazarbayev University.
Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts

Two decades of criminal justice reforms in Kazakhstan show that legal innovations take root only when they match the informal power map on the ground. The major impetus for reforms – reducing prison population to minimize international shaming – that was coupled with the more recent drives for closing cases on the basis of reconciliation, the total registration of crimes and zero tolerance approach to combating crime led to the change of the incentive structure in the criminal justice system. The post-Soviet innovation of closing criminal cases of public prosecution based on the reconciliation with the victim of crime, has taken root and proliferated in Kazakhstan because they suited well both the incentives of the criminal justice system and demands from private actors who are involved in criminal proceedings. However, other reforms, such as jury trials which implement the right to a fair trial and cultivate judicial independence – requirements of the Constitution of Kazakhstan – remain arduous tasks because they disrupt existing power relationships within the law-enforcement system.

Rough draft – do not cite

If someone fell asleep in the late 1980s in a courtroom in the Kazakh Soviet Socialist Republic and suddenly awoke today in a courtroom of independent Kazakhstan, would she notice any continuity? The answer is yes and no. On the one hand, post-communist judges would behave in some very familiar ways. In addition to keeping the trials quick and soporific, they would also be systematically biased in favor of state prosecution in the criminal justice system. Similar to the period of “developed socialism,” the first twenty years of post-communism demonstrate that judges consistently show the Soviet-era “accusatory bias” and side with the state prosecutors in both pre-trial and trial stages of criminal proceedings. Despite serious expansion of judicial discretion, a more vibrant bar, and the introduction of adversarial court proceedings, post-communist judges continue to strengthen two late socialist legacies of criminal justice systems: near
universal approval of pre-trial detention of the accused, and avoidance of acquittals.

Post-communist judges in Kazakhstan have the newly acquired exclusive power to detain the accused, yet they consistently approve 95% detention requests and nearly all (99%) requests for extension of detention proposed by state prosecutors. They acquit defendants in criminal trials extremely rarely (with no higher than 1% rates of acquittal)—much like socialist-era judges did in the 1980s when they acquitted about 1% of the defendants.

On the other hand, Kazakhstani judges and, most recently, police investigators and state prosecutors would behave very differently. Instead of proving the guilt of the accused, sending cases for trial and issuing sentences, these law-enforcement officials would be busy closing criminal cases on the basis of reconciliation between the defendants and the victims of crimes. Soviet-era Criminal Codes did not allow closing criminal cases of public prosecution on this basis. But in 2013, Kazakhstani state prosecutors closed 1 out of every 3 criminal cases on the basis of reconciliation, while judges managed to reconcile the accused and the victims in 4 out of every 10 heard cases. This proportion of reconciled cases is much higher than in any other post-Soviet country.

Why do Kazakhstani judges almost always say yes to the state prosecution in criminal cases the same way they did under late socialism while at the same time encouraging private actors to reach reconciliation and avoid being sentenced in the context of authoritarian political regime? More broadly, how and why do some legal reforms take root while others fail?

By drawing on how Kazakhstan’s criminal justice system processed criminal cases since gaining independence in late 1991, this paper argues that the answer to these questions lies in a mix of Soviet legacy relationships and post-communist incentives.

---

1 I use “the accused” and “defendant” interchangeably throughout the paper.
Like in the 1980s, judges today face a host of formal and informal pressures and expectations, which discourage both acquittals and denials of detention requests yet encourage quick handling of criminal cases. In Kazakhstan, these pressures and expectations persist due to two types of Soviet legacies. The first type is a Soviet legacy of simple fragmentation. Here, the old guard remains in charge: courts have been renamed, and the word “socialist” no longer precedes “legality,” but the essential task of judges in criminal cases remains the same: to support the procuracy – the chief law-enforcement institution of the Soviet state. This type of legacy is formally entrenched in the legal framework of criminal proceedings – the Criminal Procedure Code and various guiding explanations of the Supreme Court. And it is also entrenched in the system of evaluating judicial performance through the importance attached to “stability of sentencing,” the Soviet-era indicator of the number of overturned sentences on appeal. State investigators and state prosecutors remain the key actors in the criminal justice system still view denials of arrests and acquittals as unacceptable failures. They do their best to overturn them on appeal and often succeed. Appellate judges overturn a much higher proportion of acquittals than convictions and themselves acquit a very small number of defendants. The message to the trial-level judges is clear: convict or have your Soviet-era indicator of “stability of sentences” lowered with potential dismissal from the bench.

Another type of the legacy relationship, an embedded way of thinking and behaving, is less formal. It is clearly present in criminal justice of Kazakhstan and remains a backbone of the informal mechanism of conserving and reproducing judicial

---

deference to law-enforcement agencies. Even though a new generation of judges and prosecutors that never worked in the Soviet era enters the scene, old habits of mutual agreements and cover-ups among them persist. True, judges frequently and openly criticize the poor quality of the job state prosecutors do, yet when it comes to deciding criminal cases judges tend to cover it up or to give law-enforcement officials a second chance. Appellate judges who preserved their power to overturn acquittals thanks to the massive lobbying efforts of law-enforcement elites do not praise judges who acquit as heroes protecting judicial independence. Court chairs, who remain important figures in the judicial system, tend to recruit judicial candidates from the pool of trusted court clerks and judges’ assistants – insiders in the judicial system who are already imbued with the sense of conformity to the orders of judicial bosses and state prosecutors in criminal proceedings. These types of legacies are at work in most post-communist countries.³

Moreover, Kazakhstan’s post-communist transformation added two new pre-accusation incentives to the mix. One of them is the new government’s priority to reduce prison population while registering all crimes. This priority coupled with the clearance rate serving as the key indicator of the law-enforcement performance has resulted in the expanded use of closing criminal cases via reconciliation of the defendants with the victim. Here, investigators, prosecutors and judges have a strong incentive to work together to convince the victim and the accused to reconcile. It is both less labor-intensive and less risky: closing case on this ground is much easier than conducting a

full-blown investigation or a trial while cancellation of the reconciliation by appellate courts does not harm investigators, prosecutors and judges in any way.

Another incentive is the need to protect one’s career on the bench, as the job of a judge becomes better paid and more prestigious. Unlike in the Soviet era when judges often switched between professions, generous salaries and retirement benefits of post-communist judges are too attractive for them to change their careers. Judges who disagree with state prosecutors over detention or conviction are blamed for incompetence, suspicious leniency, and for selling judicial decisions to the accused, all of which are bases for potential dismissal and criminal charges from the very same state prosecutors. Facing widespread general public distrust in the judiciary, politicians’ haste to blame someone else for corruption, and the media’s sensationalism over judicial bribery, recalcitrant judges have nowhere to turn for protection against unfounded accusations. As a result, trial judges engage in risk-averse behavior by strengthening their already existing relationships, loyalties, and friendships with state prosecutors and appellate judges.

To show the impact of the Soviet legacy in criminal proceedings, this paper first analyzes remarkable continuity in the patterns of pre-trial detentions. Next, it demonstrates the impact of Soviet legacy on the continuity of the ways the criminal justice system has been avoiding acquittals. Then, it explores how Soviet legacy affected the new post-Soviet institution of closing criminal cases on the basis of reconciliation between the accused and the victim. It concludes that legal reforms are more likely to take root when they do not disrupt existing power relationships.

Map of Kazakhstan
Wholesale Approval of Pre-Trial Detention

The continuity of informal relationships between judges and state prosecutors during the first two decades of independent Kazakhstan is remarkably stable. The criminal justice system in the last years of the USSR witnessed both the domination of the Procuracy (the centralized state agency in charge of both state prosecution and supervision of legality in the work of the judiciary) and the increasing role of appellate-level courts in maintaining judicial discipline. Procurators detained accused persons and
prosecuted them in criminal proceedings. Trial-level judges were subject to the sanctions of the higher-level courts.⁴

The collapse of communism and of the Soviet Union did little to break this structure of incentives –quantitative indicators inherited from Soviet era remain the key tools of assessing performance of law-enforcement agencies and judges. State investigators, most of whom work in the police force, are rewarded based on the numbers of criminal cases sent to courts. Naturally, having the accused in custody makes the job of investigating the crime and completing the criminal case much easier. At the same time, Kazakhstan faced the challenge of reducing its prison population, which includes persons held in custody – the challenge that was made visible by international shaming.⁵

In the late 1990s, Kazakhstan was among the USA and Russia in the top 3 countries in terms of the number of prisoners (590 in 2001) per 100,000 inhabitants.⁶ But at the beginning of 2015, Kazakhstan ranked 55th in the world (231 prisoners per 100,000) in terms of its prison population rate below Turkmenistan, Russia, Belarus, Azerbaijan, Lithuania, Latvia, and Ukraine. As Kazakhstan’s Procurator-General proudly announced on January 15, 2016, Kazakhstan’s prison population declined below 40,000 to 39,945 “for the first time” and placed the country “on par with the leading European countries.”⁷

One reason for this rapid decline of prison population is that starting in 2002, when the total prison population almost reached 85,000, the use of pre-trial detention became less

---

⁶ Unless otherwise noted, all information on prison population in this paragraph comes from the World Prison Brief published by International Centre for Prison Studies at http://www.prisonstudies.org/.
frequent (see Table 1).

Table 1. Pre-trial detainees in Kazakhstan

<table>
<thead>
<tr>
<th>Year</th>
<th>Number in pre-trial/remand imprisonment</th>
<th>Percentage of total prison population</th>
<th>Pre-trial/remand population rate (per 100,000 of national population)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>16,498</td>
<td>21.1%</td>
<td>110</td>
</tr>
<tr>
<td>2005</td>
<td>8,324</td>
<td>15.8%</td>
<td>55</td>
</tr>
<tr>
<td>2010</td>
<td>7,903</td>
<td>12.5%</td>
<td>50</td>
</tr>
<tr>
<td>2014</td>
<td>6,601</td>
<td>13.2%</td>
<td>38</td>
</tr>
<tr>
<td>2015</td>
<td>5,775</td>
<td>14.1%</td>
<td>33</td>
</tr>
</tbody>
</table>

Source: [http://www.prisonstudies.org/country/kazakhstan](http://www.prisonstudies.org/country/kazakhstan)

Prior to August 30, 2008, Kazakhstani procurators formally shared with judges the power to approve pre-trial detention while in practice procurators approved most detentions. On average, procurators approved about 94% of pre-trial detentions requested by investigators.\(^8\) After August 30, 2008, judges gained the exclusive power to approve detention requests in a separate hearing with the accused, the defense attorney, and the state procurator present. Importantly, until January 2015, judges were not allowed to choose the pre-trial regime of the accused; they could only approve or deny the request of the procurator. Not surprisingly, this limited discretion to detain did not result in the change on the ground. In the remainder of 2008, Kazakhstani judges approved 98% of detention requests (6,928 accused) and denied 2% detention requests (144 accused). Between 2009 and 2014, judges stably approved detention requests: 96% in both 2009 (24,137 detained) and in 2010 (19,457 detained), 94.5% in 2012 (10,318 detained), 94.4% in 2013 (13,568 detained), and 97.2% in 2014 (12,148 detained). As the falling

---

\(^8\) Official statistics are available at [www.pravstat.kz](http://www.pravstat.kz)
numbers of detained defendants clearly show, procurators have been sending fewer
detention requests to judges. For example, in 2012 procurators refused to request 10% 
(1,090) detentions that investigators asked for yet asked for the release on bail or
requested house arrest in less than 1% of all coercive measures. This means that now
procurators scrutinize the work of investigators more attentively than 10 years ago when
procurators did not have to ask for judge’s approval for the detention of the accused. But
judge-enforced habeas corpus protections do not motivate procurators to conduct this
heightened scrutiny. Instead, this hesitation to ask for detention mostly comes from the
top – Procurator General has to report to the President on how his agency is helping to
reduce prison population and demands fewer detentions from his subordinates.
Importantly, in practice, neither judges nor procurators face severe penalties for detaining
someone who is subsequently released from custody due to dropped criminal charges,
non-custodial sentence or exoneration.9 As Table 1 shows, at the end of 2015, those
detained made up 14% of prisoners, as compared to 18% in Russia, 19% in Belarus, 24% 
in Ukraine or 17% in Azerbaijan.10

Monitoring of detention hearings by domestic and international human rights
observers showed that Kazakhstani judges agree to detain for the reasons other than the
existence of convincing evidence against the accused. In 1 out of 3 cases law-
enforcement officials did not even try to justify the necessity of arrests – judges approved
them automatically. In 1 out of 7 cases law-enforcement officials justified detention
solely on the basis of the severity of crime – contrary to the standard of the Supreme

---

9 *Kazakhstanskaia Pravda*, 15 January 2011
10 [http://www.prisonstudies.org/world-prison-brief](http://www.prisonstudies.org/world-prison-brief)
Court that the severity of crime alone could not be the grounds for approving detention.\textsuperscript{11}

As the chairman of the Pavlodar City Court No.2 confirmed at the end of 2013: “in our work we sometimes face an opinion that someone who is accused of a grave crime will automatically be kept in custody.”\textsuperscript{12} Monitoring of detention hearings also showed that in 9 out of 10 cases judges failed to ask the defendant if she or he suffered from the illegal methods of investigation (procurators asked the same question in 1\% of observed cases).\textsuperscript{13} Judges openly admit that they approve detention requests if they contain falsified timing of the initial arrest (72 hours is the maximum length of arrest without judicial approval) or no data about initial arrest of the accused, if detention requests contain no reasoning for the detention (Criminal Procedure Code requires a “reasoned” detention request), and if the procurator keeps silent during the detention hearing. In these situations, judges issue formal warnings to the procurators yet still approve detention requests. In turn, procurators respond that “measures have been taken” to address these warnings yet continue both to falsify data in the detention requests and to fail to provide reasoning for detention, in effect, violating the due process rights of the accused.\textsuperscript{14} The chairman of the Aktobe Province Court Erlan Aitzhanov revealed the reason for this wholesale approval: judges who release the accused from custody are

\begin{itemize}
\item[\textsuperscript{12}] \url{http://www.zakon.kz/4589614-sankcija-na-arest-dolzha-byt.html}
\end{itemize}
automatically punished via disciplinary proceedings initiated by law-enforcement officials if the accused are nowhere to be found.\textsuperscript{15} This incentive is strong in the courts of his province, which dared to disagree with only 2\% of pre-trial detention requests, as Tables 2 shows. A former trial-level judge from the Pavlodar Province confirms that a judge who dares to deny

<table>
<thead>
<tr>
<th>PROVINCE</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>AKTOBE</td>
<td>490 (98%)</td>
<td>419 (98%)</td>
<td>436 (98%)</td>
<td>460 (99%)</td>
</tr>
<tr>
<td>NORTH KAZAKHSTAN</td>
<td>562 (93%)</td>
<td>495 (96%)</td>
<td>425 (93%)</td>
<td>396 (99%)</td>
</tr>
<tr>
<td>ALMATY CITY</td>
<td>1949 (95%)</td>
<td>1697 (97%)</td>
<td>2392 (98%)</td>
<td>1833 (98%)</td>
</tr>
<tr>
<td>SOUTH KAZAKHSTAN</td>
<td>1227 (95%)</td>
<td>1396 (96%)</td>
<td>1555 (95%)</td>
<td>1571 (98%)</td>
</tr>
<tr>
<td>AKMOLA</td>
<td>612 (94%)</td>
<td>602 (96%)</td>
<td>557 (97%)</td>
<td>454 (98%)</td>
</tr>
<tr>
<td>ALMATY PROVINCE</td>
<td>1336 (97%)</td>
<td>1147 (97%)</td>
<td>981 (96%)</td>
<td>1071 (98%)</td>
</tr>
<tr>
<td>KARAGANDA</td>
<td>1281 (95%)</td>
<td>1219 (96%)</td>
<td>1303 (94%)</td>
<td>1120 (97%)</td>
</tr>
<tr>
<td>ZHAMBYL</td>
<td>987 (90%)</td>
<td>902 (90%)</td>
<td>777 (92%)</td>
<td>774 (97%)</td>
</tr>
<tr>
<td>KOSTANAY</td>
<td>707 (96%)</td>
<td>596 (97%)</td>
<td>537 (98%)</td>
<td>439 (97%)</td>
</tr>
<tr>
<td>ASTANA CITY</td>
<td>774 (94%)</td>
<td>868 (90%)</td>
<td>929 (94%)</td>
<td>937 (95%)</td>
</tr>
<tr>
<td>MANGISTAU</td>
<td>333 (95%)</td>
<td>386 (93%)</td>
<td>384 (95%)</td>
<td>276 (93%)</td>
</tr>
<tr>
<td>PAVLODAR</td>
<td>423 (97%)</td>
<td>395 (95%)</td>
<td>398 (93%)</td>
<td>410 (93%)</td>
</tr>
<tr>
<td>ATYRAU</td>
<td>376 (93%)</td>
<td>353 (94%)</td>
<td>316 (95%)</td>
<td>258 (93%)</td>
</tr>
<tr>
<td>KYZYL-ORDA</td>
<td>404 (97%)</td>
<td>411 (99%)</td>
<td>421 (95%)</td>
<td>358 (92%)</td>
</tr>
<tr>
<td>WEST KAZAKHSTAN</td>
<td>405 (96%)</td>
<td>478 (95%)</td>
<td>477 (97%)</td>
<td>505 (91%)</td>
</tr>
<tr>
<td>EAST KAZAKHSTAN</td>
<td>1477 (91%)</td>
<td>1511 (89%)</td>
<td>1624 (86%)</td>
<td>1253 (89%)</td>
</tr>
</tbody>
</table>

Source: Official court statistics, \url{http://www.pravstat.kz}.

detention request is personally responsible for the fact of disappearing of the accused in addition to the suspicion of judicial corruption. According to this former judge, “virtually any judge could be criminally charged in this situation for issuing illegal judicial act

\textsuperscript{15} Svetlana Merkulova, “Enough Producing the Arrested!” \textit{OKO}, 9 November 2011, \url{http://www.oko.kz/uridicheskiy-klub/chvatit-plodit-arestantov}
under Article 350 of the Criminal Code of Kazakhstan.”

Table 2 also shows a growing inter-provincial variation in terms of wholesale approval of detention requests and that this variation does not always depend on the numbers of requested detentions. There is no clear evidence to support the claim that procurators request fewer yet well-reasoned detentions. For example, judges in the Kyzyl-Orda Province now receive fewer requests yet deny a higher proportion of them than in the past. The Pavlodar Province judges have doubled the proportion of denied detention requests in the past 4 years while having received roughly the same number of detention requests every year. While judges in the South Kazakhstan approve detentions more frequently now than four years ago even though they receive 27% more detention requests.

In short, the transfer of power to detain from the procurators to judges did not make much difference. Judges play the same role as procurators did prior to 2008: neither former nor latter are interested in scrutinizing the work of detectives and investigators. Now judges approve detention with the same frequency as procurators did in the past, thus, processing detention requests instead of carefully scrutinizing them. Meanwhile, law-enforcement officials no longer prioritize pre-trial detention in order to follow the official line of reducing the prison population set by President Nazarbayev in response to international shaming. Indeed, Kazakhstan’s judicial chiefs learned from other post-communist countries, which had introduced judicial arrest warrants prior to 2008, that empowering post-communist judges would not necessarily result in more serious checks

---

16 Interview with the former judge, Astana, April 2014. Article 350 of the then in force Criminal Code “Passing a Deliberately Unjust Sentence, Decision, or Other Judicial Act”: 1. Passing by a judge (judges) of a deliberately unjust judgment, decision, or other judicial act, shall be punished by a fine in an amount from five hundred up to seven hundred monthly calculation bases, or in an amount of wages or other income of a given convict for a period from five to seven months, or by imprisonment for a period up to five years with deprivation of the right to hold certain positions or to engage in certain types of activity for a period up to three years.”
of detention requests. Indeed, as the outputs of criminal prosecution – closing cases, sending them back to the prosecutors or issuing sentences – show, judges process criminal cases and remain junior partners in the criminal justice system.

Avoiding Exoneration and Acquittals

Unlike the newly acquired monopoly over approving pre-trial detentions, the power of judges to acquit in criminal trials existed during Soviet era. During late socialism, judges, who depended for their salaries and careers on the Justice Ministry and Communist Party bosses, were strongly expected to convict the accused and strongly discouraged from acquitting by procurators, court chairs, and appellate judges.\(^{17}\) In cases where procurators did a poor job of assembling incriminating evidence, judges were expected to convict on less harsh criminal charges or to return cases back to procurators for supplementary investigation at the end of the trial, in effect giving the prosecution a second chance. Acquittals were extraordinary events considered equal to a failure of the prosecution, with potentially serious repercussions for the careers of procurators. Acquittals were also extraordinary for judges, who, in the event of an acquittal, would be fulfilling the role of whistleblowers in a closed law-enforcement system. Many acquittals would be overturned on appeal by cassation courts at the request of the procurators, who had a much stronger influence on Communist Party bosses.\(^{18}\) Meanwhile, cassation courts acquitted extremely rarely. The incentives for trial-level judges were clear: maintaining a working relationship with the procurators, avoiding acquittals, and keeping


stably high conviction rates were the keys to maintaining performance bonuses and obtaining promotions, as much as regularly attending Communist Party meetings. Acquittal rates in the USSR at the end of the Soviet era dropped to less than 1%, down from 9% in 1945.19

A former judge from Semipalatinsk Askar Mardanov describes what happened after he had acquitted four persons in late 1980s:

“I presided in a trial against 25 persons in the case of a group theft from the local wool factory. It was a famous case, in which investigation lasted nine months, and one half of the accused was in custody. The Central Committee of the Republic’s Communist Party, the Party Committee of the Province, and law-enforcement organs closely monitored the trial. My boss told, “You answer with your head for legality and validity of the sentence.” But there were no orders on how to judge and how many years of imprisonment to give to whom. The problems began after I had acquitted four persons and they had been set free in the courtroom. Detectives, investigators and procurators started a fuss because they would not receive a pat on their heads for wrongful indictment. And issuing an acquittal in those days was a risky business. Honestly, that judgment was a difficult one. Now, after so many years, I shudder to recall how I felt. I risked my honor and dignity. And I was pleased when I learned that the Supreme Court of the Kazakh Soviet Socialist Republic, having reviewed the appeal of the procurator, confirmed our sentence. Although, as I have learned later, the Supreme Court had been pressured to overturn the

acquittal.”

Article 24 of the 1997 Criminal Procedure Code (much like its Soviet-era predecessor) requires investigators, prosecutors and judges to explore both incriminating and exonerating facts “fully, objectively and in all-rounded manner.” This requirement has been preserved in the Article 24 of the 2014 Criminal Procedure Code. However, as one judge who had worked in procuracy for twenty years, confessed, “this law-enforcement structure has built-in accusatory bias,” and it was psychologically difficult for him to transform himself from a procurator to a judge. As Table 3 shows, until 2013, procurators exonerated in no more than 3% of criminal cases. Until 2013,

Table 3. Procurators’ Decisions in Criminal Cases in Kazakhstan, 2008-2014

<table>
<thead>
<tr>
<th></th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>Jan-June 2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal cases, total</td>
<td>140,249</td>
<td>131,548</td>
<td>132,183</td>
<td>204,212</td>
<td>306,898</td>
<td>386,710</td>
<td>213,217</td>
</tr>
<tr>
<td>Criminal cases sent to courts</td>
<td>73,351</td>
<td>72,299</td>
<td>69,700</td>
<td>63,893</td>
<td>58,607</td>
<td>65,318</td>
<td>31,517</td>
</tr>
<tr>
<td>Criminal cases closed on non-rehabilitative grounds</td>
<td>9,262</td>
<td>7,619</td>
<td>6,782</td>
<td>9,974</td>
<td>26,134</td>
<td>34,153</td>
<td>21,323</td>
</tr>
<tr>
<td>Criminal cases closed on exonerating grounds</td>
<td>1,864</td>
<td>1,630</td>
<td>1,373</td>
<td>6,609</td>
<td>4,664</td>
<td>18,346</td>
<td>11,964</td>
</tr>
</tbody>
</table>

procurators were rewarded solely for the number of cases that resulted in conviction or that were closed on non-rehabilitative grounds, i.e., when the guilt of the accused is

---

21 [http://adilet.zan.kz/eng/docs/Z970000206](http://adilet.zan.kz/eng/docs/Z970000206)
22 [http://adilet.zan.kz/rus/docs/K1400000231](http://adilet.zan.kz/rus/docs/K1400000231)
23 Казахстанская правда, 23 сентября 2010 г. [http://kazpravda.softdeco.net/c/1285184496](http://kazpravda.softdeco.net/c/1285184496)
established (the accused is reconciled with the victim, the accused actively repented, and so on). As in Soviet times, acquittal and exoneration were considered failures resulting in denial of job-related bonuses or even demotion for investigators and procurators.

But when, in 2013, Procuracy chiefs introduced the number of closed cases as the key job performance indicator (in order to maintain low prison population while insisting on total crime registration and zero tolerance for crimes), procurators on the grounds began closing cases more frequently instead of sending them for trial. In 2013 alone, state prosecutors closed 18,346 criminal cases on exonerating grounds – more than in previous six years taken together. As I show below, this jump results in fewer cases closed on exonerating grounds by judges at the trial stage.

Until 2013, the low share of exonerations before the trial was not due to the high quality of criminal investigations. Presidential Human Rights Commission concluded that, in 2011, “not infrequently violations of the constitutional rights of citizens occur because detectives and investigators improperly perform their duties, have low level of professional training and lack the basic knowledge of the criminal procedure legislation and of the international-legal acts in the sphere of human rights, ratified by Kazakhstan.”\textsuperscript{24} In January 2013, the Procurator-General of Kazakhstan Askhat Daulbayev was more frank: “systemic weaknesses and gaps continue to exist in the activities of any and all law enforcement agencies and the judicial system.” According to him, in 2012, procurators received over 100,000 complaints against the low quality of criminal investigation.\textsuperscript{25}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{25} “Nazarbayev Conducted a Meeting with the Power Ministries: Procurator-General Criticizes Everyone,” \textit{Vlast.KZ}, 30 January 2013.
\end{enumerate}
\end{footnotesize}
Judges also often criticize performance of investigators and procurators. Yet the former almost universally agree with the conclusions of the latter when it comes to handling criminal cases. Performance of judges is assessed by the stability of sentences, an indicator inherited from the late Soviet era: good judges have no or very few of their decisions reversed, while poorly performing judges have several overturned judgments.26 To avoid both reversals and acquittals in cases with weak evidence, judges sometimes refuse to decide cases and demand supplementary investigation, thus, shifting responsibility for handling shoddy investigations to procurators. Between 2007 and 2012, Kazakhstani judges returned to procurators about 1.2% of all cases for supplementary investigation (between 450 and 540 cases each year), in effect, giving state prosecutors a second chance.27 State prosecutors brought back for trial only half of those cases. Only in November 2011 did the Chair of the Supreme Court of Kazakhstan propose to eliminate this Soviet-era judicial mechanism of avoiding acquittals.28 This proportion (1.2% sent for supplementary investigation and 1% returned cases to procurators) is similar to the Soviet-era figures. In late 1980s judges in the USSR returned some 4-5% of criminal cases for supplementary investigation instead of handing down acquittals.29 Even though the 2014 Criminal Procedure Code banned judges from sending criminal cases back to procurators for “supplementary investigation,” judges still kept sending them instead of deciding. The Deputy Chief Procurator General Nurmakhanbet Isaev publicly complained that he had to have a special meeting with provincial judges and the Supreme

27 I exclude cases that are returned to procurators on the grounds of the disappearance of the accused.
Court at the end of 2015 to cease this practice. According to him, “a person should leave the courthouse as either as convicted or acquitted. There is no third option.”

This proportion of cases sent by judges back to procurators is about the same as the proportion of cases closed on exonerating grounds and acquittals taken together (see Table 4). The proportion of cases closed on exonerating grounds is unstable because it is often driven by political mood of those on the top and by what judges receive from the procurators. In 2010, most of such cases were group thefts, in 2011 – drug-related and road traffic crimes, and in 2012 – illegal business activity. The 2012 data includes 156 businesspersons, cases against whom had been reviewed in the course of the Procuracy-General campaign “Business Shall Be Defended against Wrongful Conviction!” and exonerated by judges. These kinds of campaigns reflect another late Soviet-era legacy of holding short-term propaganda campaigns that is not unique to criminal justice. In 2013 and 2014 taken together, which did not experience any campaigns yet saw the threefold jump in procurator-made exonerations, judges exonerated only 50 persons (19 of them in the cases of private of prosecution) in 35 criminal cases. Note that it is much easier and less risky for the judge to close the case than to issue a sentence.

Table 4. Outcomes of Criminal Cases in Kazakhstan’s Trial-Level Courts, 2010-2014

<table>
<thead>
<tr>
<th></th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>TOTAL NUMBER OF CASES WITH SENTENCE</strong></td>
<td>30,364</td>
<td>22,012</td>
<td>18,230</td>
<td>21,833</td>
<td>20,571</td>
</tr>
<tr>
<td><strong>CONVICTED DEFENDANTS</strong></td>
<td>36,477</td>
<td>27,380</td>
<td>22,292</td>
<td>26,968</td>
<td>25,079</td>
</tr>
<tr>
<td><strong>ACQUITTED DEFENDANTS</strong></td>
<td>705</td>
<td>482</td>
<td>400</td>
<td>507</td>
<td>478</td>
</tr>
</tbody>
</table>

30 http://www.kazpravda.kz/articles/view/doverie-grazhdan--prezhde-vsego/
31 http://www.nomad.su/?a=13-201203130007
| CASES RETURNED FOR SUPPLEMENTARY INVESTIGATION (DEFENDANTS) | 539 (819) | 540 (882) | 457 (768) | 446 (731) | 435 (690) |
| CASES RETURNED TO PROCURATORS, EXCLUDING CASES WHERE THE DEFENDANT HAS DISAPPEARED | 481 | 421 | 520 | 797 | 1,131 |
| CASES CLOSED | 21,490 | 22,293 | 21,257 | 20,922 | 18,649 |
| INCLUDING CASES CLOSED ON THE GROUNDS OF RECONCILIATION BETWEEN THE ACCUSED AND THE VICTIM | 18,701 | 19,764 | 17,001 | 19,392 | 16,639 |
| INCLUDING CASES CLOSED ON EXONERATING GROUNDS (EXONERATED DEFENDANTS) | 45 (93) | 701 (774) | 176 (185) | 21 (29) | 14 (21) |


As Table 4 shows, acquittal rates in Kazakhstan went up to 1.7% (507 tried persons) in 2013. This in contrast to the trend of the early 2000s, when the number of acquitted persons steadily declined: 423 acquitted persons in 2000, 383 in 2001, and 334 in 2002.\(^{32}\)

However, the growing rates of acquittals are misleading because the tripling of acquittal rates is largely due to high rates of acquittal in two categories of criminal cases: cases of private prosecution, like libel or battery, in which state prosecutors do not participate and judges seem to avoid accusatorial bias, and cases decided by jury trials, which disrupt the cozy relationship between judges and procurators.

\(^{32}\) «Обзор судебной практики вынесения оправдательных приговоров». Бюллетень Верховного Суда Республики Казахстан № 3, 2004 г.
Indeed, in 2014, acquittals in cases of private prosecution, when judge directly receives a written complaint from the victim, have tripled and reached the record high 91% of acquittals in all criminal cases (see Table 5), as compared to 29% of all acquittals issued between 2000 and 2002. As data on criminal cases of private prosecution make clear, judges close more than a half of these cases and decide on the merits only those cases, in which plaintiffs insist that they have strong evidence against the defendants. Judges tend not to reconcile the litigants and to acquit more than convict in these cases. This is not because plaintiffs bring weak cases but because judges do not have to be accountable to state prosecutors. These high acquittal rates may be responsible for the overall reduction in the total number of cases of private prosecutions in the last four years.

Table 5. Criminal Cases of Private Prosecution in Kazakhstan, 2010-2014

<table>
<thead>
<tr>
<th>Year (Total number of cases)</th>
<th>2010 (5,077)</th>
<th>2011 (3,073)</th>
<th>2012 (2,105)</th>
<th>2013 (1,956)</th>
<th>2014 (2,928)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of cases closed</td>
<td>2,962</td>
<td>1,832</td>
<td>1,370</td>
<td>1,110</td>
<td>1,671</td>
</tr>
<tr>
<td>Including cases closed on the basis of reconciliation</td>
<td>512</td>
<td>218</td>
<td>134</td>
<td>149</td>
<td>238</td>
</tr>
<tr>
<td>Including cases closed on exonerating grounds (persons)</td>
<td>27 (49 persons)</td>
<td>150 (188 persons)</td>
<td>16 (17 persons)</td>
<td>12 (19 persons)</td>
<td>11 (14 persons)</td>
</tr>
<tr>
<td>Total number of cases with a sentence</td>
<td>1,338</td>
<td>708</td>
<td>383</td>
<td>454</td>
<td>565</td>
</tr>
<tr>
<td>Persons convicted</td>
<td>968</td>
<td>408</td>
<td>178</td>
<td>184</td>
<td>238</td>
</tr>
<tr>
<td>Persons acquitted</td>
<td>599</td>
<td>388</td>
<td>318</td>
<td>436</td>
<td>437</td>
</tr>
<tr>
<td>% of acquitted persons in all criminal cases</td>
<td>85%</td>
<td>80%</td>
<td>80%</td>
<td>86%</td>
<td>91%</td>
</tr>
</tbody>
</table>


33 «Обзор судебной практики вынесения оправдательных приговоров». Бюллетень Верховного Суда Республики Казахстан № 3, 2004 г.
34 If a victim recalls a complaint in the criminal case of private prosecution, the case is automatically closed.
Acquittals in cases of public prosecution (when the procurator represents prosecution) continue to decline: from 106 acquitted persons in 2010 to 71 in 2013 to 41 in 2014. These numbers are ten times lower than the number of defendants, whose cases judges return for supplementary investigation (see Table 4 above). Drug-related crimes, a category of crimes that is often used by police to fabricate criminal charges, constituted the largest share of acquittals in 2010. These crimes together with white-collar crimes like fraud and abuse of power composed the majority of acquittals in 2011 and 2012. Jury trials, which have been judging grave crimes like rape and murder since 2007, are responsible for about a third of acquittals in criminal cases of public prosecution. These trials show that it is possible to have an adversarial criminal procedure and overcome accusatorial bias because judges can shift the blame for acquitting to the jurors. As Table 6 shows, even though in Kazakhstan 10 jurors deliberate the verdict together with a professional judge, until 2014, the acquittal rate in jury trials has never been below 6%. On average, until 2014, jury acquittals made up about one-third of all acquittals in the criminal trials of public prosecution.

Such a high acquittal rate in the trials by jury is so unusual that in January 2013 Procurator-General Daulbayev had to ask President Nazarbayev in public to intervene and order the conviction of Botabayev, who had been acquitted by jury in Astana on charges of multiple murders and his acquittal was confirmed by the appellate court. Botabayev was released and later accused of terrorism. Procurator-General complained that judges did not listen to the prosecution and have not been punished for that. President
Nazarbayev immediately ordered Chief Justice of the Supreme Court Bektas Beknazarov to hold highly publicized trial (gromkoe razbiratelstvo).\(^{35}\) Initially, judges resisted by

<table>
<thead>
<tr>
<th>YEAR (TOTAL NUMBER OF JURY TRIALS)</th>
<th>2007 (36)</th>
<th>2008 (44)</th>
<th>2009 (59)</th>
<th>2010 (270)</th>
<th>2011 (355)</th>
<th>2012 (288)</th>
<th>2013 (190)</th>
<th>2014 (64)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DEFENDANTS CONVICTED</td>
<td>57</td>
<td>72</td>
<td>101</td>
<td>334</td>
<td>461</td>
<td>355</td>
<td>289</td>
<td>118</td>
</tr>
<tr>
<td>DEFENDANTS ACQUITTED</td>
<td>5</td>
<td>6</td>
<td>15</td>
<td>43</td>
<td>30</td>
<td>24</td>
<td>30</td>
<td>3</td>
</tr>
<tr>
<td>% OF ACQUITTED TO THE TOTAL NUMBER OF TRIED DEFENDANTS</td>
<td>8%</td>
<td>7.70%</td>
<td>12.90%</td>
<td>11.40%</td>
<td>6.10%</td>
<td>6.30%</td>
<td>9.40%</td>
<td>2.48%</td>
</tr>
<tr>
<td>% OF ACQUITTED TO THE TOTAL NUMBER OF ACQUITTED IN CASES OF PUBLIC PROSECUTION</td>
<td>41% (43 out of 106)</td>
<td>32% (30 out of 94)</td>
<td>29% (24 out of 82)</td>
<td>42% (30 out of 71)</td>
<td>7% (3 out of 41)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


saying that it was the acquittal on the basis of the jury verdict and that the prosecutors did not provide evidence of guilt. But later they reopened the case and sent it back for the retrial by jury, which found Botabayev guilty in absentia. Chief Justice Beknazarov underscored the legality of this reversal of the acquittal by the fact that conviction was secured on the basis of the directive of the President and internal investigation.\(^{36}\) Both grounds are absent from the Criminal Procedure Code. Three months later, when this scandal calmed down, one judge of the Supreme Court publicly attributed the initial

\(^{35}\) “Nazarbayev Conducted a Meeting with the Power Ministries: Procurator-General Criticizes Everyone,” *Vlast.KZ*, 30 January 2013.

acquittal in this case to the efforts of the defense attorney who displayed “all of his public speaking talent” and provided “irrefutable” evidence of innocence of the defendant that persuaded jurors to declare acquittal.\textsuperscript{37}

This episode clearly demonstrates how the balance of power is maintained in the criminal justice system. Chief Justice Beknazarov stressed that most jury verdicts are lawful and well-grounded – as based on their review by the appellate courts. Yet, in a clear nod to the Procurator-General, he proposed that the jurisdiction of the jury trials should no longer include cases of extremism and terrorism because the accused could threaten the jurors.\textsuperscript{38} Indeed, in July 2013, these cases have been removed from the jurisdiction of the jury trials, which explains the drastic decline in the number of jury trials in the last couple of years and the lower acquittal rate in 2014 (see Table 6).

Meanwhile, in the course of drafting the new Criminal Procedure Code, Procuracy chiefs tried to trim jurisdiction of jury trials even further by insisting that jury trials were useless in Kazakhstan, an effort that the Supreme Court judges vocally opposed.\textsuperscript{39} As Kairat Mami, current Chief Justice of the Supreme Court, argued in 2004, “jury trial should not be judged not only from the point of view of convenience of

\textsuperscript{37} Московский Комсомолец в Казахстане, 3 июля 2013 г. \url{http://mk-kz.kz/articles/2013/07/03/878758-zaslugov-advokata-nazvan-opravdatelnyiy-verdikt-po-delu-nyine-razyskivaemogo-za-ubiyystva-v-ilealatauskom-natsparke-botabaeva.html}

\textsuperscript{38} “B. Beknazarov Believes that Jurors May Be Partial While Hearing Terrorism-Related Cases,” \textit{Zakon.KZ}, 1 April 2013. \url{http://www.zakon.kz/4549191-b.beknazarov-schitaet-chto-prisjazhnye.html}

investigators, procurators, attorneys and judges, but how well it protects rights and lawful interests of all participants of criminal proceedings.”

Acquittals, including acquittals by the jury, in Kazakhstan can be reversed on appeal, as in the USSR – an opportunity that the state prosecutors pursue with vigor. This is because the appellate courts are much more likely to reverse acquittals than convictions. In 2007, acquittals of 25 defendants (8% of all acquitted) were overturned, in 2008 – 36 (11%), and in 2009 – 19 defendants (5%). Compare this to the total 0.5% of overturned sentences in these three years. Procurator-General proudly reported that between 2010 and 2012, procurators successfully appealed acquittals of 71 defendants. In 2013, acquittals of 35 defendants or 8% of all acquitted that year have been overturned on appeal. Meanwhile, in 2014, acquittals of 21 defendants (or of every other defendant!) in cases of public prosecution have been overturned. Appellate courts exonerate and acquit very few defendants themselves: 27 in 2008, 15 in 2009, 19 in 2010, 40 in 2011, 42 in 2012, 46 in 2013, and 40 in 2014.

Judges are clearly discouraged from handing down acquittals, and some argue that there is an informal rule: three overturned sentences in a year lead to the dismissal from the bench. In most cases judges have to justify acquittals personally in front of appellate...
courts and the Supreme Court. As one judge put it, “the most important concern for a judge is that his decision not be overturned.”

For example, in 2012, judge Aliya Zhumashova from Pavlodar Oblast received a reprimand from the Judicial Disciplinary Tribunal for acquitting two persons in the case of a stolen fridge. She complained that appellate judges had told her not to scrutinize the evidence of the prosecution and had insisted that good relations with procurators were a key to her successful career on the bench. In her 3-year career on the bench, she issued 2 acquittals and was eventually dismissed from the bench in July 2013 for this “disciplinary” offense. A judge of the Supreme Court confirmed her complaints: “Unfortunately, there are judges who unconditionally trust the prosecution.” Yet none of judges faced any negative consequences. Table 7 shows declining exoneration and acquittal rates in the criminal cases of public prosecution among the provinces of Kazakhstan between 2011 and 2014 as well as declining range of variation among provinces, in contrast to growing variation in approval of pre-trial detention.

Table 7. The Ratio of Exonerated and Acquitted Defendants to Convicted Defendants in the Cases of Public Prosecution in the Trial-Level Courts in Kazakhstan, 2011-2014, by province, in the order of declining ratio in 2014

<table>
<thead>
<tr>
<th>PROVINCE</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>NORTH KAZAKHSTAN</td>
<td>28/1,375</td>
<td>20/1,005</td>
<td>4/928</td>
<td>5/865</td>
</tr>
<tr>
<td>KOSTANAY</td>
<td>51/1,955</td>
<td>57/1,584</td>
<td>1/1,826</td>
<td>6/1,465</td>
</tr>
<tr>
<td>ATYRAU</td>
<td>12/1,002</td>
<td>7/799</td>
<td>1/1,109</td>
<td>4/1,027</td>
</tr>
<tr>
<td>WEST KAZAKHSTAN</td>
<td>33/1,027</td>
<td>13/805</td>
<td>13/1,102</td>
<td>4/1,053</td>
</tr>
<tr>
<td>SOUTH KAZAKHSTAN</td>
<td>78/2,147</td>
<td>5/2,348</td>
<td>10/2,849</td>
<td>10/2,773</td>
</tr>
<tr>
<td>AKMOLA</td>
<td>65/1,532</td>
<td>8/1,162</td>
<td>7/1,215</td>
<td>3/973</td>
</tr>
<tr>
<td>MANGISTAU</td>
<td>25/1,102</td>
<td>8/780</td>
<td>1/887</td>
<td>2/815</td>
</tr>
</tbody>
</table>


EAST KAZAKHSTAN | 58/2,988 | 3/2,550 | 5/2,792 | 4/2,251
AKTOBE | 19/1,175 | 25/969 | 15/1,115 | 2/1,111
KARAGANDA | 70/2,142 | 29/1,823 | 4/2,022 | 2/1,755
ALMATY PROVINCE | 44/2,408 | 40/1,878 | 3/2,281 | 2/2,173
PAVLODAR | 37/1,369 | 16/1,009 | 4/1,143 | 1/1,096
ALMATY CITY | 63/2,452 | 1/2,135 | 3/2,756 | 2/2,778
ZHAMBYL | 51/1,790 | 1/1,663 | 3/1,635 | 1/1,551
KYZYL-ORDA | 14/908 | 0/781 | 0/964 | 0/931
ASTANA CITY | 28/1,250 | 15/1,143 | 2/1,635 | 0/1,837


 variation among provinces: obtaining an acquittal in Kyzyl-Orda Province is nearly impossible, while acquittal is rare yet possible in neighboring Aktobe Province thanks mostly to the jury trials. The caseload of courts does not seem to affect this pattern. The trend of disappearing acquittals and exonerations at the trial stage over last four years is similar to the trend in the late socialism but now it is a product of shrunk jury trials discussed above and the growth of exonerations at the pre-trial stage discussed below. To sum up, if the late Soviet-era judicial chiefs saw statistics on convictions of modern Kazakhstan, they would award bonuses to judges for low number of acquittals and exonerations, and of returns of cases to procurators for supplementary investigations, and for high rates of stability of sentences.

Closing Cases Based on Reconciliation between the Victim and the Accused

Unlike the powers to exonerate or acquit, which Kazakhstani judges had in the Soviet-era, the power to close cases based on reconciliation between the victim and the accused is a post-Soviet innovation. This power has been a topic of discussions among Soviet criminal law experts in the early 1990s yet it has not been codified in actual criminal

\[46\] Closing or dismissing or terminating a criminal case mean the same throughout the paper.
codes, in part, due to the collapse of Soviet Union at the end of 1991. In Kazakhstan, closing criminal cases on the basis of reconciliation became formally possible, when Article 67 of the newly adopted 1997 Criminal Code vaguely stated: “A person who committed an offence of a lesser gravity or medium gravity for the first time may be released from criminal liability, if that person reconciled with the victim and made good for the harm caused.” In terms of paperwork, all that is required for reconciliation is a short written statement from the victim that she or he accepts reconciliation, wants the case to be closed, and has received compensation caused by the crime. In theory, closing cases on the grounds of reconciliation centers on the interests of the victim: repairing the harm to the victim and preventing re-victimization.47 If the judge or the investigator agrees to dismiss the case due to the reconciliation, the defendant’s record still reflects the criminal charges.

Over objections of procurators, judges slowly but steadily expanded the use of this reconciliation and applied to juvenile defendants and to cases of criminal negligence, like deaths caused by traffic accidents.48 In 2001, the Supreme Court confirmed this broadened application of reconciliation as a basis for closing cases.49 The December 2002 amendments to the Criminal Code further expanded the application of reconciliation. The amended wording of Article 67 required closing criminal cases on these grounds of crimes of lesser gravity (like theft and joyride) committed multiple times and of crimes of medium gravity (like robbery), committed for the first time and without the grave harm to

49 «Казахстанская правда» от 21 июля 2001 г.
health of or death of the victim, and permitted closing criminal cases for the repeated crime of medium gravity:

“1. A person who committed an offence of a lesser gravity or for the first time committed an offense of medium gravity, which did not cause death or grievous harm to an individual's health, shall be released from criminal liability, if that person reconciled with the victim and made good for the harm caused.

2. A person who committed a medium gravity offence may be released from criminal liability if he reconciled with the victim or the applicant and made good for the harm caused to the victim or the applicant.”

As Table 8 shows, judges enthusiastically used this expansion of reconciliation and tripled the proportion of criminal cases closed on this basis in 2003. Between 2000 and 2005, Kazakhstan courts most often dismissed reconciled cases involving offenses of larceny, robbery, fraud, rape, and reckless driving. Over objections of procurators, Kazakhstan judicial chiefs actively lobbied for expanding the use of reconciliation.\(^5\) At the end of 2009, when judges closed every third criminal case on this basis (see Table 8)

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Heard</th>
<th>Cases Resolved by Reconciliation</th>
<th>Percentage of Cases Resolved by Reconciliation after Charges Filed in Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td></td>
<td></td>
<td>5%</td>
</tr>
<tr>
<td>2001</td>
<td></td>
<td></td>
<td>6%</td>
</tr>
<tr>
<td>2002</td>
<td></td>
<td></td>
<td>8%</td>
</tr>
</tbody>
</table>

\(^5\) Д. Джапулаков. «Слабое звено. Нечеткая позиция Верховного суда РК в некоторых вопросах играет на руку преступникам». Юридическая газета. № 1 (424) от 9 января 2002 г.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>22%</td>
<td>25%</td>
<td>22%</td>
<td>32%</td>
<td>32%</td>
<td>39%</td>
<td>48%</td>
<td>47%</td>
<td>41%</td>
</tr>
</tbody>
</table>


the then Chief Justice of the Supreme Court Musabek Alimbekov argued that wider use of reconciliation would allow “slowly to move away from mandatory punitive principles” of administering criminal justice. As a result of these lobbying efforts framed as both humanization and reduction of prison population, Article 67 was further amended in 2010 and 2011 with the addition of two new sections:

“3. A minor who for the first time committed a grave offence which did not cause death or serious harm to a person’s health may be released from the criminal liability by a court if that person reconciled with the victim and made good for the harm caused to the victim. At the same time, compulsory education measures stipulated by Article 82 of this Code shall be applied upon a given minor.

51 Глава ВС РК ратует за то, чтобы большинство споров разрешалось примирением сторон во внесудебном порядке. 5 ноября 2009 г. ИА Новости-Казахстан.
4. If an offence harms the legally protected interests of the public and the state, a person specified in the first and the second parts of this Article may be released from criminal liability if he sincerely repents and makes amends for the harm caused to the protected interests of the public or the state. The provisions of this Article shall not apply to persons who have committed crimes of corruption.”

Again, these amendments made a difference in judicial decision-making. As Table 8 shows, judges closed about 18,000 cases annually or every other criminal case based on reconciliation in 2011 and 2013. Most of these cases were thefts and non-violent robberies – crimes of medium gravity, which meant that judges had and exercised discretion in deciding whether to close the case or continue the trial. Some courts even have templates of reconciliation forms posted on their websites.52

As Table 9 shows, until 2013, judges closed about 70% of all reconciled cases

<table>
<thead>
<tr>
<th>Year</th>
<th>Closed reconciled cases, total</th>
<th>Closed reconciled cases at the pre-trial stage</th>
<th>%</th>
<th>Closed reconciled cases by judges at the trial stage</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>21,412</td>
<td>6,315</td>
<td>30%</td>
<td>15,097</td>
<td>70%</td>
</tr>
<tr>
<td>2009</td>
<td>21,201</td>
<td>5,867</td>
<td>27%</td>
<td>15,334</td>
<td>73%</td>
</tr>
<tr>
<td>2010</td>
<td>23,948</td>
<td>5,247</td>
<td>22%</td>
<td>18,701</td>
<td>78%</td>
</tr>
<tr>
<td>2011</td>
<td>27,197</td>
<td>7,433</td>
<td>27%</td>
<td>19,764</td>
<td>73%</td>
</tr>
<tr>
<td>2012</td>
<td>27,038</td>
<td>10,037</td>
<td>37%</td>
<td>17,001</td>
<td>63%</td>
</tr>
<tr>
<td>2013</td>
<td>53,392</td>
<td>34,000</td>
<td>64%</td>
<td>19,392</td>
<td>36%</td>
</tr>
</tbody>
</table>

Source: Концепция проекта «БІТІМГЕРШІЛІК – ПРИМИРЕНИЕ» (в уголовном и гражданском процессах), http://kazmediation.kz/files/2013/docs/2.pdf. The 2013 data are provided by the Deputy Procurator-General Zhakip Asanov at

---

while investigators closed the remaining 30%. However, in 2013, this proportion
diametrically reversed due to the insistence of Presidential Administration on registration
of all criminal cases while reducing the prison population and the warning of judicial
chiefs that reduction of the prison population could be possible only when the law-
enforcement agencies would limit the number of criminal cases sent to overloaded courts.
This reversal shows that bureaucratic incentives drive decision-making of the law-
enforcement officials on the ground and that investigators take an active part in
convincing the victim and the accused to reconcile. The Deputy Prosecutor-General
Zhakip Asanov admitted that the problem of the law-enforcement officials pressuring the
victim and the defendants to reconcile exists.\(^{53}\) Media reports indicate that judges also
pressure victims to reconcile with the defendants, especially when defendants are
governmental officials or local VIPs, for whom conviction would mean the end of their
careers.\(^{54}\) Paradoxically, pressure on the victim to reconcile may bring perverse
adversariality in the inquisitorial criminal proceedings: law-enforcement officials work
together with the accused to force the victim to agree to reconciliation.

What explains this attractiveness of reconciliation procedures? Alkon argues that
reducing caseloads and decreasing the responsibility of the criminal justice professionals
(detectives, investigators, procurators and judges) for outcomes serve as the prime
motivators behind the increased use of reconciliation procedures.\(^{55}\) Reducing caseload is
a strong motivator for the criminal justice system in any country. Judges spend much less


time writing dismissal of the case than writing a guilty sentence. Meanwhile, the
decreasing responsibility is a sign of legacy of late socialism: judges continue to cover-up
the shoddy work of the state prosecution. Prosecution still secures a conviction since the
defendant receives criminal record albeit with a court sentence. Up until 2013,
investigators and procurators clearly shirked responsibility for closing cases by sending
such cases for trial, just as they hoped to secure conviction on the basis of sloppy
investigation. Until 2013, investigators and procurators were rewarded for a higher
number of cases sent to courts; they misinformed the defendants and victims that
reconciliation was to be done only by judges.\textsuperscript{56} Table 10 demonstrates that judges in
different provinces vary greatly in terms of closing cases on this basis, as procurators
seem not to insist on conviction that carries a risk of expanding the prison population, a
process that is discouraged by the country’s leadership. This wide inter-provincial
variation is in the stark contrast with the lack of variation in acquitting or refusing to
detain discussed above. As seen in Table 10, there is no direct relationship between the
caseload and frequency of reconciliation albeit courts with the lowest caseload tend to
have the lowest share of closed cases. Courts in the top four rows of the Table 10 tend to
close every other criminal case on the basis of reconciliation even though procurators
have been sending fewer cases to courts. Judges in the large urban centers like Almaty
and Astana, where defendants and victims are less likely to know each other, see higher
caseload and appear to close more cases via reconciliation now than four years ago.
Finally, province-level data in Table 2 on pre-trial detentions, Table 7 on exonerations
and acquittals and Table 10 shows that courts in the same province may perform

\textsuperscript{56} Концепция проекта «БІТІМГЕРШІЛІК — ПРИМИРЕ
НИЕ» (в уголовном и гражданском процессах), р. 12, \url{http://kazmediation.kz/files/2013/docs/2.pdf}.
differently in processing these three categories of judicial business.

Table 10. Criminal Cases of Public Prosecution Closed by Judges via Reconciliation in 2011-2014, by province, in the order of declining share of closed cases (% of all handled criminal cases) in 2014

<table>
<thead>
<tr>
<th>PROVINCE</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>KOSTANAY</td>
<td>2,007 (51%)</td>
<td>1,876 (50%)</td>
<td>2,271 (56%)</td>
<td>1,605 (54%)</td>
</tr>
<tr>
<td>AKTOBE</td>
<td>1,630 (59%)</td>
<td>988 (50%)</td>
<td>1,358 (56%)</td>
<td>1,110 (51%)</td>
</tr>
<tr>
<td>PAVLODAR</td>
<td>1,170 (45%)</td>
<td>1,283 (49%)</td>
<td>1,294 (49%)</td>
<td>1,220 (50%)</td>
</tr>
<tr>
<td>KARAGANDA</td>
<td>2,082 (50%)</td>
<td>1,674 (46%)</td>
<td>2,004 (49%)</td>
<td>1,547 (48%)</td>
</tr>
<tr>
<td>KYZYL-ORDA</td>
<td>948 (53%)</td>
<td>765 (50%)</td>
<td>945 (50%)</td>
<td>739 (46%)</td>
</tr>
<tr>
<td>SOUTH KAZAKHSTAN</td>
<td>1,148 (34%)</td>
<td>1,312 (35%)</td>
<td>1,622 (37%)</td>
<td>2,518 (46%)</td>
</tr>
<tr>
<td>AKMOLA</td>
<td>1,805 (53%)</td>
<td>1,336 (49%)</td>
<td>1,211 (50%)</td>
<td>681 (43%)</td>
</tr>
<tr>
<td>ALMATY PROVINCE</td>
<td>770 (26%)</td>
<td>575 (23%)</td>
<td>1,306 (36%)</td>
<td>1,458 (40%)</td>
</tr>
<tr>
<td>EAST KAZAKHSTAN</td>
<td>3,408 (52%)</td>
<td>3,152 (49%)</td>
<td>2,505 (46%)</td>
<td>1,454 (38%)</td>
</tr>
<tr>
<td>WEST KAZAKHSTAN</td>
<td>510 (61%)</td>
<td>450 (33%)</td>
<td>482 (32%)</td>
<td>603 (38%)</td>
</tr>
<tr>
<td>NORTH KAZAKHSTAN</td>
<td>1,561 (55%)</td>
<td>1,357 (55%)</td>
<td>891 (51%)</td>
<td>389 (34%)</td>
</tr>
<tr>
<td>ALMATY CITY</td>
<td>676 (24%)</td>
<td>494 (19%)</td>
<td>1,287 (33%)</td>
<td>1,351 (33%)</td>
</tr>
<tr>
<td>MANGISTAU</td>
<td>360 (28%)</td>
<td>346 (35%)</td>
<td>446 (37%)</td>
<td>336 (32%)</td>
</tr>
<tr>
<td>AtyRAU</td>
<td>559 (72%)</td>
<td>375 (32%)</td>
<td>555 (35%)</td>
<td>438 (29%)</td>
</tr>
<tr>
<td>ASTANA CITY</td>
<td>363 (23%)</td>
<td>454 (25%)</td>
<td>652 (28%)</td>
<td>674 (26%)</td>
</tr>
<tr>
<td>ZHAMBYL</td>
<td>496 (33%)</td>
<td>413 (20%)</td>
<td>392 (21%)</td>
<td>248 (15%)</td>
</tr>
</tbody>
</table>


From the point of view of the defendant, reconciliation is the real opportunity to avoid being sentenced in the context of the high probability of serving a real prison sentence and a miniscule chance of being exonerated and acquitted. Indeed, avoiding the sentence is the key priority because the risk of real imprisonment is high. Between 2006 and 2014, the share of real prison sentences among all sentences has been stably high even though it gradually declined from 52% to 37%. From the point of view of the victim, reconciliation may be the only viable option to recover any kind of compensation, which usually takes monetary form. What is going on during negotiations between the accused and the victim is not very well known but it is clear that the bargaining power is determined by negotiation skills of the parties and social status of the offender. For
example, when a drunken son of the member of Kazakhstani Parliament shot a security
guard in Astana in 2007, the criminal case against him was closed on the basis of
reconciliation after his father had paid for the medical treatment and presented a 1-
bedroom apartment to the victim.\textsuperscript{57} Alkon argues that investigators and judges are heavily
involved in this process and receive kickbacks from the accused for persuading the victim
to reconcile.\textsuperscript{58} For example, investigators and procurators could lessen the criminal
charge to medium gravity, thus, making the Article 67 of the Criminal Code applicable.
Or they could bring charges under the Code of Administrative Offenses, thus, removing
the case from the criminal justice system altogether.\textsuperscript{59} These tricks have been
successfully yet controversially used by local VIPs and their family members in the high-
profile traffic accidents involving deaths. The public controversy surrounding these cases
eventually resulted in the amendments to the Article 67 of the Criminal Code banning
reconciliation as a basis for closing cases in which criminal negligence resulted in death
of one or more persons. In practice, however, given that 7 out of 10 convicted are jobless
working-age adults, it is less likely that the defendants have sufficient amounts to bribe
the law-enforcement officials. More likely, the accused themselves have strong incentives
to bargain with the victims regardless of involvement of any law-enforcement official.

In short, the new post-Soviet criminal procedure - closing criminal cases based on
reconciliation - works in Kazakhstan because it aligns well with three types of demands
and incentives:

\textsuperscript{57} \url{http://pravo.zakon.kz/85425-ugolovnoe-delo-v-otnoshenii-syna.html}.
\textsuperscript{58} Alkon, “The Increased Use of “Reconciliation” in Criminal Cases in Central Asia: A Sign of Restorative
Justice, Reform or Cause for Concern?”
\textsuperscript{59} Alkon, “The Increased Use of “Reconciliation” in Criminal Cases in Central Asia: A Sign of Restorative
Justice, Reform or Cause for Concern?”
1) political incentives of conducting “zero tolerance” criminal justice yet reducing prison population;

2) bureaucratic incentives of law-enforcement officials and judges (less work and less responsibility for the output without disrupting the working relationship among criminal justice professionals); and

3) demand for broader autonomy from the defendant (who does not want to be sentenced) and the victim of crime (who prefers actual and quick compensation for the harm to the punishment of the defendant).

More generally, this is a pragmatic way for the ruling regime to empower private actors to settle their disputes in the shadow of the criminal justice system. As most criminal cases are closed on the basis of reconciliation either by judges or procurators in Kazakhstan, defendants face a choice between being sentenced or released based on the reconciliation with the victim, with higher social status and affluence helping the defendants to avoid being sentenced. Meanwhile, judges process and most likely approve decisions of procurators, when reconciliation was not possible, and monetary bargains between the defendants and the victims, when reconciliation has been achieved.

**Conclusion**

Two decades of reforms of criminal procedure in Kazakhstan clearly show that these reforms take root only when they match the informal power map on the ground. The major impetus for reforms – reducing prison population to reduce international shaming – that was coupled with the more recent drives for the total registration of crimes and zero tolerance approach to combating crime led to the change of the incentive
structure in the criminal justice system. However, implementing the right to a fair trial and cultivating judicial independence – requirements of the Constitution of Kazakhstan – are arduous tasks because they disrupt existing power relationships. In administering criminal justice, post-communist judges still remain junior partners to law-enforcement agencies, which dominate:

1) in the pre-trial phase when they get approval for detentions in 9.5 out of 10 cases
2) during criminal trials when they succeed in avoiding acquittals and exonerations;
3) in appellate proceedings when they have their appeals against denied detentions, lenient sentences, or acquittals confirmed at a much higher rate than defense attorneys do.

The Soviet-era treatment of acquittals as failures of state prosecutors and trial-level judges drives the unwillingness of judges to acquit because judges know that acquittals have a much higher chance of being overturned. The Soviet-era indicator of “stability of sentences” is still one of the most important job performance indicators for a judge. Add to this the ability of the law-enforcement agencies to allege that recalcitrant judges are selling their decisions and to influence judicial careers even where judges have life tenure. As a result, judges are strongly expected both to detain and to convict, yet are unable to convince the public that bails, house arrests, and acquittals are good for society. The strength of the Soviet-era informal judge-procurator relationship, as shown by surprisingly stable detention and acquittal rates, lies in the blend of trust, mutual understanding and fellow feeling between judges and law-enforcement officials, who exert occasional pressure against recalcitrant judges, judges who dare to disagree with the wishes of prosecutors. In Kazakhstan, this close relationship is preserved by the old guard
— appellate judges who made their careers by deferring to the Procuracy in Soviet times. This is why the jurisdiction of jury trials, which produce an unusually high acquittal rate, is slowly shrinking. And this is why judges appear to show no accusatorial bias — they acquit more than convict — in the cases of private prosecution where procurators do not participate.

Legal innovations, like closing criminal cases of public prosecution based on the reconciliation with the victim of crime, take root because they suit well both the incentives of the criminal justice system and demands from private actors who are involved in criminal proceedings. On the one hand, reconciliation makes the job of investigators, prosecutors and judges easier since they secure criminal record for the defendant — the most preferred outcome for these officials. On the other hand, it allows much more autonomy to defendant (who is guaranteed a guilty sentence) and victim in deciding the outcome of the prosecution. This in a stark contrast with the lack of reconciliation in the criminal cases of private prosecution, where the outcome of a trial tends to be in favor of defendants, who, therefore, have no incentive to reconcile. Kazakhstan’s experience shows that legacies determine that the rule-of-law innovations are likely to take root in the criminal justice system as long as they reinforce or do not hurt the amicable relationship between judges and prosecutors.