

## Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts

Alexei Trochev

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# Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts

Alexei Trochev†

The criminal justice system in Kazakhstan is full of contradictions: Soviet-era accusatorial bias in pre-trial detention and sentencing goes hand in hand with the pro-defendant bias in closing criminal cases. This paradoxical co-existence of seemingly contradictory biases fits well within the informal power map of the criminal justice system. The major reform—reducing prison population to decrease recidivism and minimize international shaming—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 have been achieved only through 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 proliferated in Kazakhstan because this matched both the incentives of the key actors in the criminal justice system and demands from private actors who are involved in criminal proceedings. In contrast, other types of public participation, such as jury trials, which implement the right to a fair trial, give teeth to adversarial proceedings, and cultivate judicial independence—requirements of the Constitution of Kazakhstan—have rarely been used because they disrupt existing power relationships within the law-enforcement system.

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## Introduction

How and why do some legal reforms take root while others fail? This is an important question for legal scholars, social scientists, and policy-makers given the recent proliferation of interest in achieving good governance through law supported by international organizations and implemented by the burgeoning rule-of-law industry at the expense of the Western taxpayers.<sup>1</sup> This Article argues that the success of legal reforms is crucial to the existing power map within the legal system—law-enforcement agencies, including courts, formal and informal relationships among and within these agencies, and the incentives and traditions that shape these relationships. More specifically, it examines the continuity and change in how Kazakhstan’s criminal justice system has been processing criminal cases in the past twenty-five years since its independence in late-1991. Kazakhstan’s criminal justice reforms have not been seriously studied. Like many other non-democratic regimes, the country’s criminal justice system has been known for its lack of judicial independence, torture cover-ups, politicized criminal trials of political opponents, rogue government officials and journalists, and judicial corruption.<sup>2</sup> Yet these cases, while visible, only constitute a tiny share of all criminal cases.<sup>3</sup> The bigger picture shows that Kazakhstan has drastically

1. LINN A. HAMMERGREN, JUSTICE REFORM AND DEVELOPMENT: RETHINKING DONOR ASSISTANCE TO DEVELOPING AND TRANSITIONAL COUNTRIES 210–11 (2014); RACHEL KLEINFELD, ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM 26, 27 (2012); UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL 4 (2008); Vera Axyonova, *Promoting Justice Reforms in Central Asia: The European Union’s Rule of Law Initiative as Part of a Comprehensive Democratization Strategy?*, CEN. ASIAN AFFAIRS 3, 29–48 (2016); Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3, 4 (Thomas Carothers ed., 2010).

2. AMERICAN BAR ASSOCIATION’S CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, JUDICIAL REFORM INDEX FOR KAZAKHSTAN 2 (Feb. 2004), <http://www.americanbar.org/content/dam/aba/directories/roli/kazakhstan/kazakhstan-jri-2004.authcheckdam.pdf> [https://perma.cc/474N-GBHB]; Maksat Kachkeev, *Judicial Independence in Kyrgyzstan and Kazakhstan: A Legislative Overview*, in JUDICIAL INDEPENDENCE IN TRANSITION 1255, 1268 (Anja Seibert-Fohr et al. eds., 2012); Daniyar Kanafin, *Criminal Justice Reform in Kazakhstan and OSCE Commitments*, 20 SECURITY & HUM. RTS. 56, 57 (2009); see MARTHA BRILL OLCOTT, KAZAKHSTAN: UNFULFILLED PROMISE? 214, 218 (2010); Cynthia Alkon, *The Increased Use of “Reconciliation” in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?*, 8 PEPP. DIS. RESOL. L.J. 41, 58–59 (2007–2008); Kyle W. Davis, *Purging the System: Recent Judicial Reforms in Kazakhstan*, 8 U.C. DAVIS J. INT’L L. & POL’Y 255, 269–70 (2002); Marina Shin et al., *Implementation of Judicial Independence in Uzbekistan and Kazakhstan in the Rule of Law Context*, 46 MANAGERIAL L. 86, 90–94 (2004); Gulnar Suleimenova, *Sudebnaia Reforma v Respublike Kazakhstan: Obzor Osnovnykh Etapov [Judicial Reform in the Republic of Kazakhstan: A Review of Main Phases]*, ZAKON (2010), [https://online.zakon.kz/Document/?doc\\_id=38412079](https://online.zakon.kz/Document/?doc_id=38412079) [https://perma.cc/6FBC-3HTF]; Iskander Tugelbaev, *Kazakhstan Slammed Over Torture Claims*, TRANSITIONS ONLINE (Mar. 4, 2016) <http://www.tol.org/client/article/25656-kazakhstan-slammed-over-torture-claims.html> [https://perma.cc/6RLQ-ER33].

3. E.g., Bakhyt Nurgaliyev et al., *Police Corruption in Kazakhstan: The Preliminary*

reduced its prison population without using amnesties, while enforcing total registration of crimes and practicing zero-tolerance policing.<sup>4</sup> It has abolished the Soviet-era supervisory review of final court judgments and return of criminal cases for supplementary investigation, which gave an unfair advantage to the prosecution. It has no overcrowded jails and is closing down empty ones due to the lack of detainees. It has also introduced probation, including pre-trial probation, for the first time in Central Asia.<sup>5</sup> Its judges and prosecutors have many more closed cases than cases resulting in indictment and conviction, and thus, appear to have exercised a great deal of discretion.<sup>6</sup> Kazakhstan remains the only Central Asian country that has functioning trials by mixed juries—ten lay judges and one professional judge—which have been producing an unusually high proportion of acquittals in the past decade.<sup>7</sup> Finally, according to the World Justice Project and World Economic Forum, Kazakhstan's judiciary rankings have been gradually improving.<sup>8</sup> According to the business confidence survey, Kazakhstani businesses report higher confidence in courts—a stark contrast to a public that largely distrusts the judiciary.<sup>9</sup> This Article suggests that

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*Results of the Study*, 7 REV. EUR. STUD. 140, 142 (2015). On average, since 2013, there are 360,000 criminal cases registered annually. Official crime statistics are available at the official website of the Committee of Legal Statistics and Special Accounts (CLS) of the General Procuracy of the Republic of Kazakhstan. PRAVSTAT [OFFICIAL COURT STATISTICS], <http://service.pravstat.kz/portal/page/portal/POPPageGroup/Services/Pravstat> [<https://perma.cc/X372-YJ9N>] (last visited Mar. 30, 2017).

4. See *Kazakhstan*, WORLD PRISON BRIEF, <http://prisonstudies.org/country/kazakhstan> [<https://perma.cc/5HNV-RHVL>] (last visited Mar. 30, 2017); Baubek Konyrov, *Kazakhstan President Calls to Zero Tolerance for Crime*, TENGRI NEWS, [https://en.tengrinews.kz/politics\\_sub/Kazakhstan-President-calls-to-zero-tolerance-for-crime-22298/](https://en.tengrinews.kz/politics_sub/Kazakhstan-President-calls-to-zero-tolerance-for-crime-22298/) [<https://perma.cc/2ULT-DV5H>] (last visited Nov. 14, 2016).

5. Talgat Isenov, *This Year Kazakhstan Closes 7 Prisons*, KAZAKHSTANSKAIA PRAVDA (Mar. 30, 2016), <http://www.kazpravda.kz/en/news/society/this-year-kazakhstan-closes-7-prisons/> [<https://perma.cc/FR7N-S79U>]; *Kazakhstan to Close Prisons*, B NEWS (Aug. 19, 2016), [http://bnews.kz/en/news/obschestvo/kazakhstan\\_closing\\_its\\_prisons-2016\\_08\\_19-1286879](http://bnews.kz/en/news/obschestvo/kazakhstan_closing_its_prisons-2016_08_19-1286879) [<https://perma.cc/X2F8-WMEM>]; Dmitry Lee, *Kazakhstan Significantly Reduces Prison Population*, ASTANA TIMES (Nov. 23, 2016), <http://astana.times.com/2016/11/kazakhstan-significantly-reduces-prison-population> [<https://perma.cc/MB4E-33FH>]. On probation, see EUROPEAN UNION PROJECT: ENHANCING CRIMINAL JUSTICE IN KAZAKHSTAN, DEVELOPMENT OF PROBATION IN KAZAKHSTAN, [https://www.eucj.kz/application/files/3014/7546/5284/Development\\_of\\_the\\_probation\\_in\\_Kazakhstan\\_ENG\\_RU.pdf](https://www.eucj.kz/application/files/3014/7546/5284/Development_of_the_probation_in_Kazakhstan_ENG_RU.pdf) [<https://perma.cc/99TL-TNA8>] (last visited May 30, 2017); *Law of the Republic of Kazakhstan*, CIS LEGISLATION (Dec. 30, 2016), <http://cis-legislation.com/document.fwx?rgn=92581> [<https://perma.cc/CGY9-77SK>].

6. See Alkon, *supra* note 2, at 84–85.

7. See NIKOLAI KOVALEV, CRIMINAL JUSTICE REFORM IN RUSSIA, UKRAINE AND THE FORMER REPUBLICS OF THE SOVIET UNION 231 (Edwin Mellen Press 2010); John D. Jackson & Nikolai Kovalev, *Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury*, 6 OÑATI SOCIO-LEGAL SERIES 368, 376 (2016).

8. See KLAUS SCHWAB, THE GLOBAL COMPETITIVENESS REPORT 2016–2017, WORLD ECONOMIC FORUM 223 (2016), [http://www.nmi.is/media/338436/the\\_global\\_competitiveness\\_report\\_2016-2017.pdf](http://www.nmi.is/media/338436/the_global_competitiveness_report_2016-2017.pdf) [<https://perma.cc/8THA-X9FG>]; WORLD JUSTICE PROJECT, RULE OF LAW INDEX (2016), [http://worldjusticeproject.org/sites/default/files/media/wjp\\_rule\\_of\\_law\\_index\\_2016.pdf](http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf) [<https://perma.cc/5EU7-NP5Z>].

9. *Among All State Bodies the Kazakhstan People Mostly Trust President and His Administration*, DEMOSCOPE (Apr. 3, 2013), <http://www.demos.kz/eng/index.php?>

while maintaining a low level of repression, Kazakhstan's criminal justice reforms have expanded the participation of private actors in criminal justice proceedings to the extent that the participation does not disrupt the existing amicable relations among detectives, investigators, state prosecutors, and judges. Part I lays out Kazakhstan's changing terrain of law-enforcement agencies and courts, relationships among and between them, and incentives and traditional modes of interactions within the criminal justice system. Part II examines how this structure of incentives and mutually-reinforcing informal relationships result in a remarkable continuity of pre-trial detentions, indicating the failure in introducing the adversarial proceedings at the pre-trial stage through the judges' powers to detain. Part III explores how these informal relationships and incentives help the Soviet-era avoidance of acquittals persist in handling grave criminal cases of public prosecution, in contrast to cases of private prosecution and those decided by jury trials. Part IV explains that the change in incentives, without disrupting cooperation among law-enforcement agents and judges, results in the skyrocketing of less serious criminal cases closed on the basis of reconciliation between the defendant and the victim of crime.

In sum, private persons are allowed to participate in processing criminal cases in three ways. First, individuals may file cases of private prosecution like libel and battery, in which judges show no accusatorial bias and acquit more often than convict. Second, victims of minor- and medium-gravity crimes are permitted to reconcile with defendants, often with encouragement or pressure from law-enforcement officials. Third, lay judges may take part in jury trials of the defendants charged with grave crimes, but the criminal justice system resists jury trials and tends to convict in single-judge trials. To understand these differing dynamics, one must first understand how this participation improves or disrupts the existing power relations within the criminal justice system.

### **I. Mapping the Criminal Justice System in Kazakhstan: Legacies, Incentives, Practices, and Outputs**

What if someone fell asleep in a courtroom of the Kazakh Soviet Socialist Republic in the late 1980s and suddenly woke up today, in a courtroom of an independent Kazakhstan? Would she notice any continuity? The answer is, yes and no. On the one hand, Kazakhstani judges would behave in some very familiar ways. In addition to keeping trials quick, boring, and strictly-controlled, judges would also be systematically biased in favor of the state prosecution in the criminal justice system.<sup>10</sup> Similar to the period of "developed socialism," the first twenty years of post-Soviet

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article=10. *But see Life in Kazakhstan*, IPSOS-MORI, <https://www.ipsos.com/sites/default/files/migrations/en-uk/files/Assets/Docs/Polls/life-in-kazakhstan-tables-2015.pdf> [<https://perma.cc/64AZ-EVLX>] (last visited May 18, 2017) (referencing pages 14, 41, 43, 62, 88, and 90 of downloadable PDF).

10. Peter H. Solomon, Jr., *Post-Soviet Criminal Justice: The Persistence of Distorted Neo-Inquisitorialism*, 19 THEORETICAL CRIMINOLOGY 159, 159 (2015).

Kazakhstan demonstrate that judges consistently show Soviet-era “accusatory bias,” and side with the state prosecution in both pre-trial and trial stages of criminal proceedings.<sup>11</sup> Though there has been an increase in judicial discretion and an introduction of some adversarial features in 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.<sup>12</sup> Judges in Kazakhstan have the newly-acquired exclusive power to release the accused, yet they consistently approve 95% detention requests and nearly all requests for extension of detention proposed by state prosecutors.<sup>13</sup> It is extremely rare for judges to acquit defendants in criminal trials of public prosecution (with no higher than a 1% rate of acquittal)—much like socialist-era judges did in the 1980s when they acquitted about 1% of defendants.<sup>14</sup>

On the other hand, Kazakhstani judges and, most recently, police investigators and state prosecutors, behave very differently when processing less-serious crimes. Instead of proving the guilt of the accused, sending cases to trial and convicting, these law-enforcement officials are busy closing criminal cases due to reconciliation between the defendants and victims of crimes. Soviet-era criminal codes did not allow closing criminal cases of public prosecution on this basis.<sup>15</sup> But in 2013, Kazakhstani state prosecutors closed some 40,000 cases, or one out of every three criminal cases, on the basis of reconciliation, while judges managed to reconcile the accused and the victim in four out of every ten tried cases.<sup>16</sup> These numbers, and the proportion of reconciled cases to unreconciled cases, are much higher than in other post-Soviet states. In 2016, Uzbekistani courts heard some 62,000 criminal cases against 84,118 defendants, acquitted not a single person, and closed a record high number of cases against 14,811 defendants (18%) on the basis of reconciliation with the victim.<sup>17</sup> In Russia, with its two million annually registered criminal cases, prosecutors and judges closed cases against 2,100 defendants on average every year between 2011 and 2015.<sup>18</sup> In

11. *Id.*

12. Alexei Trochev, *How Judges Arrest and Acquit: Soviet Legacies in Postcommunist Criminal Justice*, in HISTORICAL LEGACIES OF COMMUNISM IN RUSSIA AND EASTERN EUROPE 152, 152–53 (Mark Beissinger & Steven Kotkin eds., 2014).

13. *See infra* Table 2.

14. Trochev, *supra* note 12, at 168.

15. UGOLOVNIYI KODEKS RESPUBLIKI KAZAKHSTAN [UK RK] [Criminal Code] art. 67 (1997) (Kaz.), translated in [http://adilet.zan.kz/eng/docs/K970000167\\_](http://adilet.zan.kz/eng/docs/K970000167_) [<https://perma.cc/DH5V-LA98>] [hereinafter Criminal Code (1997)].

16. *See infra* Table 8.

17. *V Proshlom Godu v Uzbekistane Bylo Rassmotreno Okolo 62 Tys. Ugolovnykh Del [About 62 Thousand Criminal Cases Have Been Heard in Uzbekistan Last Year]*, PODROBNOSTI (Feb. 7, 2017), <http://podrobno.uz/cat/obchestvo/v-proshlom-godu-v-uzbekistane-bylo-rassmotreno-okolo-62-tys-ugolovnykh-del/> [<https://perma.cc/WBZ7-Z299>].

18. *Official Statistics on the Number of Defendants in Criminal Cases Closed in Non-Exonerating Grounds*, EMISS, <https://fedstat.ru/indicator/41837> [<https://perma.cc/MY39-FPH9>] (last visited May 30, 2017). Criminal cases closed on the basis of reconciliation constitute about 80% of all closed cases.

Belarus, closing criminal cases on the basis of reconciliation has been increasingly unpopular. The trend is the opposite of Kazakhstan: Belarusian judges closed, on the basis of reconciliation, a total of 2,703 criminal cases in 2011, 1,755 in 2012, 1,193 in 2013, and 479 cases in the first six months of 2014.<sup>19</sup> Meanwhile, Belarusian investigators and prosecutors closed a total of 523 criminal cases against 704 accused persons in the first ten months of 2014.<sup>20</sup>

Why do Kazakhstani judges almost always rule in favor of the state prosecution in criminal cases the same way they did under late socialism, while, at the same time, encourage 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 has processed criminal cases since gaining independence in late 1991, this Article argues that the answer to these questions lies in a mix of relationships based on the Soviet legacy and post-communist incentives. Like they did 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.<sup>21</sup> As President Nazarbayev admitted in March 2015, “[w]e need to move away from the Soviet judicial system, and raise new judges.”<sup>22</sup> Indeed, Kazakhstani 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.<sup>23</sup> This type of legacy is formally entrenched in the legal framework of criminal proceedings, the Criminal Procedure Code,<sup>24</sup> and

19. *Will Criminals Be Allowed to Amicably Negotiate with the Victims? Legislative Draft and Opinions of Experts*, INTERFAX (Nov. 11, 2014), <http://www.interfax.by/news/belarus/1172690> [<https://perma.cc/55KB-BZUU>].

20. *Id.*

21. See *Summaries of the Chairmen of the Supreme Court of Kazakhstan*, SUP. CT. REPUBLIC KAZ., <http://sud.gov.kz/eng/content/chairmen-supreme-court-kazakhstan> [<https://perma.cc/VK6D-YQFD>] (last visited May 30, 2017). The last six chairmen have been appointed during the post-Soviet period and yet all made their careers in law during the Soviet period. See *id.*

22. Indira Kaumetova, *N. Nazarbaev, Oboznachil Chetyre Napravleniia Uspeshnogo Dvizhenia k Svobode i Demokratii* [N. Nazarbayev Outlined Four Directions of Successful Movement towards Freedom and Democracy], KAZ. 2050 (Mar. 6, 2016), <https://strategy2050.kz/ru/news/19022> [<https://perma.cc/X9SL-CDSB>].

23. See, e.g., Peter H. Solomon, Jr., *The Case of Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice*, 39 SOVIET STUDIES 531, 536–37 (1987).

24. Dmitri Nurumov, *Has the New Kazakhstani Criminal Procedure Code Already Fallen Short?*, FAIR TRIALS (Feb. 24, 2015), <https://www.fairtrials.org/guest-post-has-the-new-kazakhstani-criminal-procedure-code-already-fallen-short/> [<https://perma.cc/RG58-X5C4>]. See generally UGOLOVNO-PROTSESSUAL'NYI KODEKS RESPUBLIKI KAZAKHSTAN [UPK RK] [Criminal Procedural Code] (1997) (Kaz.), translated in [http://adilet.zan.kz/eng/docs/Z970000206\\_](http://adilet.zan.kz/eng/docs/Z970000206_) [<https://perma.cc/WBH3-79AT>] [hereinafter Criminal Procedural Code (1997)]; UGOLOVNO-PROTSESSUAL'NYI KODEKS RESPUBLIKI

various guiding explanations of the Supreme Court.<sup>25</sup> 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.<sup>26</sup> According to the former Supreme Court Judge Rauf Toimatov, statistics of the overturned sentences were the “face of our Themis that may not be spoiled.”<sup>27</sup> State investigators and state prosecutors remain the key actors in the criminal justice system that still view denials of arrests and acquittals as unacceptable failures. They do their best to overturn them on appeal and often succeed, as explained in Part III. Appellate judges, most of whom received training in the Soviet period, overturn a much higher proportion of acquittals than convictions and themselves acquit a very small number of defendants.<sup>28</sup> 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. It is also clear that any meaningful criminal justice reform would have to focus on the discretion of prosecutors as well as appellate judges—those who oversee the functioning of the criminal justice system.

The second type of Soviet legacy, an embedded way of thinking and behaving, is less formal. It is clearly present in Kazakhstan’s criminal justice system and remains a backbone of the informal mechanism of conserving and reproducing judicial deference to political bosses and law-enforcement agencies. Even as a new generation of judges and prosecutors that never worked in the Soviet-era enter the scene, old habits of mutual agreements and cover-ups among them persist. In part, they persist because of well-entrenched impunity for violating formal criminal procedure. As one former judge, who had spent about forty years working in all rungs of the judiciary, in the Procuracy and presidential administration, recently lamented: “Not a single government official had been held liable for telephone law.”<sup>29</sup> He defined “telephone law”—a Soviet-era practice and a corruption mechanism—as an illegal abuse of power by higher-ups giving orders to

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KAZAKHSTAN [UPK RK] [Criminal Procedural Code] (2014) (Kaz.), translated in 50 STATUTES & DECISIONS, issues 2–6 (2015), <http://www.tandfonline.com/toc/mrstd20/50/2> [<https://perma.cc/WBG7-H9HB>] [hereinafter Criminal Procedural Code (2014)].

25. See generally *Normative Edicts*, SUP. CT. REPUBLIC KAZ., <http://sud.gov.kz/eng/legislation/CAT01> [<https://perma.cc/9BC4-XAW3>] (last visited May 30, 2017).

26. Solomon, *supra* note 23, at 536.

27. Rauf Toimatov, Advokat, Eks-Sud’ia Verkhovnogo Suda RK [Attorney, Ex-Judge of the RK Supreme Court], *Nado by Kak-To Napomnit’ Vsem Iuristam, A Sud’iam – v Pervuiu Ochered’ - Chto Slovo ‘Iusticiia’ Perevoditsia Kak ‘Spravedlivost’* [One Needs Somehow to Remind All Jurists, and Particularly Judges That the Word ‘Justice’ Is Translated As ‘Fairness’], KAZTAG (May 31, 2011), <https://zonakz.net/articles/34879> [<https://perma.cc/VM2Z-JD43>].

28. Trochev, *supra* note 12, at 168.

29. Oleg Gubaidulin, *Ni Odnogo Chinovnika v Kazakhstane ne Privlekli k Otvetstvennosti za Telefonnoe Pravo - Pakirdinov* [Not a Single Government Official Had Been Held Liable for Telephone Law - Pakirdinov], KARAVAN (Feb. 7, 2017), <https://www.caravan.kz/gazeta/ni-odnogo-chinovnika-v-kazakhstane-ne-privlekli-k-otvetstvennosti-za-telefonnoe-pravo-pakirdinov-389962/> [<https://perma.cc/YVM3-6D2X>].

subordinates on how to decide cases. He admitted that he received and gave such orders to his subordinates on the bench and in the Procuracy on how to handle cases. According to him, telephone law continues to exist because, in part, state functionaries rarely report these illegal requests, despite the fact that the law requires them to report.<sup>30</sup>

Additionally, while judges frequently and openly criticize the poor quality of the work of state prosecutors, when it comes to deciding criminal cases, judges tend to cover it up or give law-enforcement officials a second chance.<sup>31</sup> Defense attorneys, who, in theory, could expose the cover-ups have no real incentives to do so. As in the Soviet period, they are still low in numbers (4,500 attorneys in 2015, up from 3,870 attorneys in 2009) and most of them depend on the approval of law-enforcement officials to receive their payments from the state budget for providing legal aid to the low-income suspects. This dependency often leads to the corrupt deals between investigators and the attorneys instead of high quality legal defense.<sup>32</sup>

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. And lastly, 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.<sup>33</sup> These types of legacies are at work in most post-communist countries.<sup>34</sup>

Moreover, Kazakhstan's post-communist transformation added two new pro-accusation incentives to the mix. Both the priority of reducing the prison population while registering all crimes, and using the clearance rate as the key indicator of the law enforcement performance has resulted in the increased use of reconciliation to close criminal cases.<sup>35</sup> Under these policies,

30. *Id.* For more on “telephone law,” see Kathryn Hendley, ‘Telephone Law’ and the ‘Rule of Law’: The Russian Case, HAGUE J. ON RULE L. 241, 241–62 (2009); Tatiana Kyselova, *Dualism of Ukrainian Commercial Courts: Exploratory Study*, 6.2 HAGUE J. ON RULE L. 178, 178–201 (2014); Alena Ledeneva, *Telephone Justice in Russia*, 24.2 POST-SOVIET AFF. 324, 324–50 (2008); Peter H. Solomon, Jr., *Soviet Politicians and Criminal Prosecutions*, in *CRACKS IN THE MONOLITH: PARTY POWER IN THE BREZHNEV ERA* 3, 3 (James Millar ed., 1992). See generally MARIA POPOVA, *POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE* (2012).

31. See *infra* Part III.

32. Gulnar Suleimenova, *Model’ Ugolovnogo Protsessa Kazakhstana [The Model of Criminal Procedure of Kazakhstan]*, in *DAS STRAFPROZESSUALE VORVERFAHREN IN ZENTRALASIEN ZWISCHEN INQUISITORISCHEM UND ADVERSATORISCHEM MODELL* 160–61 (Friedrich-Christian Schroeder & Manuchehr Kudratov eds., 2012).

33. Lydia Muller, *Judicial Administration in Transitional Eastern Countries*, in *JUDICIAL INDEPENDENCE IN TRANSITION* 937, 949–50 (Anja Seibert-Fohr ed., 2012).

34. Aleksandr Khechumyan & Satenik Margaryan, *The Practice of Pretrial Detention in Armenia: An Examination of the Role of the Soviet Legacy*, 21 EUR. J. ON CRIM. POL’Y & RES. 117, 130–31 (2015); Trochev, *supra* note 12, at 154.

35. *Kazakh Deputy Prosecutor General Zhakyp Asanov: Kazakh Penitentiary System Needs Drastic Changes to Reduce the Number of Prison Population*, INTERFAX (May

investigators, prosecutors, and judges have a strong incentive to work together to convince the victim and the accused to reconcile. Reconciliation is less labor-intensive and risky than conducting a full-blown investigation or a trial. Additionally, if appellate courts cancel the reconciliation the careers of investigators, prosecutors, and judges, are not harmed.

Another pro-reconciliation incentive for judges is protecting their careers. Judgeship is now better paid and more prestigious. Judges often switched between professions in the Soviet era, but judges now receive generous salaries with retirement benefits that make it too attractive for them to change careers.<sup>36</sup> State prosecutors, however, may influence judges who disagree with them because they could bring charges of incompetence, suspicious leniency, and selling of judicial decisions, all of which are bases for potential dismissal, if judges disagree with the state prosecutors over detentions or convictions. Judges have little protection against unfounded accusations in the face of the public's distrust of the judiciary, the politicians' haste to blame them for corruption, and the media's sensational reports of judicial bribery. As a result, trial judges strengthen their existing relationships, loyalties, and friendships with state prosecutors and appellate judges.<sup>37</sup> The rest of this Article analyzes the remarkable continuity in the patterns of pre-trial detentions, demonstrates the impact of this mix of Soviet legacy and post-Soviet incentives on avoiding the acquittals (except for in fledgling jury trials), and explores how and why the new post-Soviet policy of closing criminal cases on the basis of reconciliation fits well with the existing relationships within the law-enforcement community.

## II. Wholesale Approval of Pre-Trial Detention: A Remarkable Continuity

The informal relationships between judges and state prosecutors during the first two decades of independent Kazakhstan have been 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 detaining and prosecuting accused persons, and supervising the judiciary's work) and the increasing role of appellate level courts in maintaining judicial discipline through career-related sanctions of local judges.<sup>38</sup>

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2014), [https://www.interfax.kz/?lang=eng&int\\_id=13&news\\_id=87](https://www.interfax.kz/?lang=eng&int_id=13&news_id=87) [<https://perma.cc/45UA-UGK2>]; *Kazakhstan President Calls to Zero Tolerance for Crime*, TENGRI NEWS (Sep. 2, 2013), [https://en.tengrinews.kz/politics\\_sub/Kazakhstan-President-calls-to-zero-tolerance-for-crime-22298/](https://en.tengrinews.kz/politics_sub/Kazakhstan-President-calls-to-zero-tolerance-for-crime-22298/) [<https://perma.cc/SD37-6DEK>]; *PRI Central Asia Hosts Roundtable on a Draft New Resocialisation Strategy in Kazakhstan*, PENAL REFORM INT'L (Sept. 6, 2016), <https://www.penalreform.org/news/pri-hosts-roundtable-draft-new-resocialisation-strategy-kazakhstan/> [<https://perma.cc/PFN5-MLYP>]; *Prison Population in Kazakhstan Reduced to 41,000*, KAZINFORM (Oct. 6, 2015), [http://www.inform.kz/en/prison-population-in-kazakhstan-reduced-to-41-000\\_a2825487](http://www.inform.kz/en/prison-population-in-kazakhstan-reduced-to-41-000_a2825487) [<https://perma.cc/C6V6-U8LT>].

36. Trochev, *supra* note 12, at 154.

37. *Id.*

38. See Todd Foglesong, *The Reform of Criminal Justice and Evolution of Judicial*

The collapse of both communism and the Soviet Union did little to break this structure of incentives—quantitative indicators inherited from the Soviet-era remain the key tools for assessing performance of law enforcement agencies and judges.<sup>39</sup> Until 2013, investigators—most of whom work in the police force—were rewarded based on the numbers of criminal cases sent to court.<sup>40</sup> Naturally, having the accused in custody makes investigating the crime and completing the criminal case much easier. At the same time, Kazakhstan faced the challenge of reducing its prison population, which included persons held in custody—a challenge that was made visible by international shaming.<sup>41</sup>

In the early 2000s, with 591 prisoners per 100,000 inhabitants, Kazakhstan was one of the top five countries with the highest number of prisoners per capita.<sup>42</sup> As of November 2016, Kazakhstan's prison population rate is the sixty-second highest in the world at 221 prisoners per 100,000 inhabitants (which is lower than the prison population rates of Turkmenistan, Russia, Belarus, Azerbaijan, Lithuania, Latvia, and Ukraine).<sup>43</sup> As Kazakhstan's then Procurator General Askhat Daulbayev proudly announced on January 15, 2016, Kazakhstan's prison population fell below 40,000 to 39,945 “for the first time,” and placed the country “on par with the leading European countries.”<sup>44</sup> One reason for this rapid decline of prison population from almost 85,000 in 2002 to less than 50,000 in 2014 is that pre-trial detention became less frequent. Table 1 shows the declining number of defendants held in custody before trial.

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*Dependence in Late Soviet Russia*, in REFORMING JUSTICE IN RUSSIA, 1864-1996: POWER, CULTURE, AND THE LIMITS OF LEGAL ORDER 282, 287–88, 303 (Peter Solomon, Jr. ed., 1997) (explaining that rates of reversal affect a judge's performance rating and that broad appellate review gave the higher courts considerable influence over lower courts).

39. *See id.* at 287.

40. *See infra* Part III; Khechumyan & Margaryan *supra* note 34, at 127 (noting that evaluations of law enforcement and prosecutors are based on clearance rates and convictions, but weak institutional capacity to solve crimes leads to overreliance on confessions and failure to register the more obviously unsolvable crimes).

41. *See* Edward Schatz & Elena Maltseva, *Kazakhstan's Authoritarian "Persuasion"*, 28 POST-SOVIET AFF. 45, 49–50 (2012) (explaining that the Organization for Security and Cooperation promotes Western democracy though human rights and election monitoring mechanisms, so when authoritarian Kazakhstan became their chair the other members demanded that Kazakhstan promote political liberalization reforms).

42. ROY WALMSLEY, GLOBAL INCARCERATION AND PRISON TRENDS, at 66–67, U.N. Sales No. E.04.IV.5 (2003).

43. *Highest to Lowest*, WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) [<https://perma.cc/84EA-C4X2>] (last visited Nov. 13, 2016).

44. Askhat Daulbayev, *Opening Remarks at the Enlarged Meeting of the Board of the General Prosecutor's Office*, GEN. PROSECUTOR'S OFF. REPUBLIC KAZ. (Jan. 15, 2016), <http://prokuror.gov.kz/rus/novosti/press-releasy/vstupitelnoe-slovo-generalnogo-prokurora-ashata-daulbaeva-na-rasshirennom-0> [<https://perma.cc/S3FD-YLBT>].

**Table 1. Pre-trial detainees in Kazakhstan, 2000–2015<sup>45</sup>**

| Year | Number in Pre-trial/Remand Imprisonment | Percentage of Total Prison Population | Pre-trial/Remand Population Rate (per 100,000 of national population) |
|------|---|---------------------------------------|---|
| 2000 | 16,498                                  | 21.1%                                 | 113   |
| 2005 | 8,324                                   | 15.8%                                 | 55  |
| 2010 | 7,903                                   | 12.5%                                 | 50  |
| 2014 | 6,601                                   | 13.2%                                 | 38  |
| 2015 | 5,775                                   | 14.1%                                 | 33  |
| 2016 | 5,680                                   | 14.5%                                 | 32  |

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.<sup>46</sup> On 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.<sup>47</sup> Not surprisingly, this limited discretion to detain did not result in change on the ground. In the remainder of 2008, Kazakhstani judges approved 98% of detention requests (6,928 accused) and denied 2% of detention requests (144 accused).<sup>48</sup> Between 2009 and 2014, judges consistently approved detention requests: 96% in both 2009 (24,137 detained) and 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).<sup>49</sup> As expected, the 2014 Criminal Procedure Code and the newly appointed investigative judges in charge of approving detention requests did not make a difference: 94.7% (11,528 detained) of detention requests have been approved in 2015, and 95.3% (11,632 detained) in 2016.<sup>50</sup>

By contrast, the change in incentives for procurators did make a difference in the patterns of pre-trial detention. As the falling numbers of detained defendants throughout the last decade clearly shows, procurators

45. *Kazakhstan*, WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/Kazakhstan> [https://perma.cc/K2SB-SD7K] (last visited Nov. 13. 2016).

46. Trochev, *supra* note 12, at 156.

47. *Id.*; Criminal Procedural Code (1997), *supra* note 24.

48. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

49. *Id.*

50. *Id.*

have been sending fewer detention requests to judges. For example, in 2012, procurators refused to support 10% (1,090) of detentions that investigators asked for and asked for bail or requested house arrest in less than 1% of all coercive measures.<sup>51</sup> The new Criminal Procedure Code in force since 2015 expanded discretion of procurators even further. In 2015, procurators denied support for 21% (2,306) of detention requests, released 74 wrongfully arrested persons from detention cells, and released 15,766 accused on bail. In 2016, they denied support for 31% (3,552) of detention requests, released 462 wrongfully arrested persons from detention cells, and released 13,421 accused on bail.<sup>52</sup> This trend indicates that procurators now scrutinize the work of investigators more attentively than they did ten years ago when procurators did not have to ask for a 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 judges for detention mostly comes from the top. The Procurator General has to report to the President on how his agency is helping to reduce prison population and insists on fewer detentions from his subordinates.

Another incentive that may work against requesting detention comes from corrupt deals struck between the prosecutors and defendants.<sup>53</sup> For example, one seasoned judge complained that he received many phone calls from the higher-ups demanding the release of one well-connected gangster from detention.<sup>54</sup> Importantly, in practice, neither judges nor procurators face any penalties for detaining someone who is subsequently released from custody due to closed criminal cases before the trial. For example, in 2010, three out of ten defendants held in pre-trial detention were released due to their criminal case being closed.<sup>55</sup> Then Supreme Court Chairman, Musabek Alimbekov, argued that judges should be held responsible for unjustified detentions—but only after empowering judges to obtain complete information about the accusations and the defendant and removing the procurator from the detention hearing.<sup>56</sup> 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, and 17% in Azerbaijan.<sup>57</sup>

Monitoring of detention hearings by domestic and international human rights observers showed that Kazakhstani judges agree to detain for reasons other than the existence of convincing evidence against the accused. In one out of three cases, law-enforcement officials did not even try to justify the

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51. *Id.*

52. *Id.*

53. GRAEME NEWMAN, 3 CRIME AND PUNISHMENT AROUND THE WORLD 114 (2010) (reporting that corruption “of prosecutors is a real concern in Kazakhstan”).

54. Viktoriia Shevchenko, *Glavnyi Kapital – Dobroe Imia* [Main Capital – Good Name], KAZAKHSTANSKAIA PRAVDA (Sep. 23, 2010).

55. Olga Semenova, *Na Pomoshch Femide Pridet Internet* [Internet Will Come to Help Themis], KAZAKHSTANSKAIA PRAVDA, at 4 (Jan. 15, 2011).

56. *Id.*

57. See *Highest to Lowest*, *supra* note 43.

necessity of arrests—judges approved them automatically.<sup>58</sup> In one out of seven cases law enforcement officials justified detention solely on the basis of the severity of crime—contrary to the standard of the Supreme Court holding that the severity of crime alone cannot be the grounds for approving detention.<sup>59</sup> As the chairman of the Pavlodar City Court No.2, Aslambek Mergaliev, confirmed at the end of 2013: “[I]n our work we sometimes face an opinion that someone who is accused of a grave crime will automatically be kept in custody.”<sup>60</sup>

Monitoring of detention hearings also showed that in nine out of ten cases, judges failed to ask the defendant if she or he suffered from illegal methods of investigation (procurators asked the same question in 1% of observed cases).<sup>61</sup> Judges openly admit that they approve detention requests if they contain falsified timing of the initial arrest (seventy-two hours is the maximum length of arrest without judicial approval), 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.<sup>62</sup> In these situations, judges issue formal warnings to the procurators, yet still approve the detention requests. In turn, procurators respond that “measures have been taken” to address these warnings, yet continue to falsify data in the detention requests and to fail to provide reasons for detention, and, in effect, violate the due process rights of the accused.<sup>63</sup>

The chairman of the Aktobe Province Court, Erlan Aitzhanov, revealed the reason for this wholesale approval: if the accused are later nowhere to be found, judges who release the accused are automatically punished via

58. JUDICIAL SANCTIONING OF ARREST IN THE REPUBLIC OF KAZAKHSTAN: ANALYTICAL REPORT 29 (2011), [http://www.bureau.kz/data.php?n\\_id=3010&l=ru](http://www.bureau.kz/data.php?n_id=3010&l=ru) [https://perma.cc/Z6K5-M8R8]; see also ASTANA BRANCH KAZAKHSTANI INT’L BUREAU HUM. RTS., SANCTIONING OF ARREST BY THE COURTS: REPORT OF THE RESULTS OF THE MONITORING CONDUCTED IN THE COURTS OF AQTAU, ALMATY, KOSTANAY, PAVLODAR, AND UST-KAMENOGORSK (2010), <https://bureau.kz/news/download/152.pdf> [https://perma.cc/JMZA-E2CT].

59. *Id.*

60. *Sanktsija ma Arest Dolzhna Byt’ Obosnovannoi* [Arrest Sanction Must Be Well-Founded], ZAKON (Dec. 3, 2013), <http://www.zakon.kz/4589614-sankcija-na-arest-dolzha-byt.html> [https://perma.cc/38XR-E3QM].

61. JUDICIAL SANCTIONING OF ARREST IN THE REPUBLIC OF KAZAKHSTAN, *supra* note 58, at 53; see ASTANA BRANCH KAZAKHSTANI INT’L BUREAU HUM. RTS., *supra* note 58, at 54.

62. See, e.g., Zhaksylyk Alanov, *Tol’ko v Iskluchitel’nykh Sluchaiakh. Pri Rassmotrenii Sudami Khodataistv Prokurora o Sanktsionirovanii Mery Presecheniia v Vide Aresta Dopuskaiutsia Otdel’nye Narusheniia Zakona* [Only in Exceptional Cases. Some Violations of Law Occur during Judicial Consideration of Procurator’s Detention Requests], IURIDICHESKAIA GAZETA (Apr. 5, 2013), [http://online.zakon.kz/Document/?doc\\_id=31355340](http://online.zakon.kz/Document/?doc_id=31355340) [https://perma.cc/6RZG-8BUG]; Diias Makhambetov, *Soglasno Bukve Zakona* [According to the Letter of the Law], IURIDICHESKAIA GAZETA (Mar. 20, 2013), <http://www.zakon.kz/4547881-soglasno-bukve-zakona.-osnovaniia-dlja.html> [https://perma.cc/E5V6-3ZKB].

63. *Id.*

disciplinary proceedings initiated by law enforcement officials.<sup>64</sup> This incentive is strong in the courts of his province, which disagreed with only 2% of pre-trial detention requests, as Table 2 shows. A former trial-level judge from the Pavlodar Province confirms that a judge who dares to deny a detention request is personally responsible for the 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 under Article 350 of the 1997 Criminal Code of Kazakhstan.”<sup>65</sup> Table 2 also shows a growing inter-provincial variation in wholesale approval of detention requests. This variation does not always depend on the numbers of requested detentions, which have been rising in the largest urban centers of Almaty and Astana. Data in Table 2 also provide no clear evidence to support the claim that procurators request fewer yet well-reasoned detentions. For example, judges in Atyrau, East Kazakhstan, and Karaganda provinces now receive fewer requests yet deny the same proportion (10%) of them.<sup>66</sup>

Figure 1. Map of Kazakhstan



64. Svetlana Merkulova, *Enough Producing the Arrested!*, OKO (Nov. 9, 2011), <http://www.oko.kz/uridicheskiy-klub/chvatit-plodit-arestantov>.

65. Interview with Former Judge, in Astana, Kaz. (Apr. 2014). Under Article 350 of the then in force Criminal Code of the Republic of Kazakhstan:

1. Knowingly illegal sentencing by a judge (judges) decision or another judicial act, shall be punished by a fine ranging from five hundred to seven hundred monthly calculation indices or with the deprivation of liberty for a period up to five years with the deprivation of the right to hold specific posts or to practice a specific activity for a period up to three years.

Criminal Code (1997), *supra* note 15, art. 350.

66. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

**Table 2. Pre-trial Detentions (Total Number and as a Percentage of All Detention Requests) in Kazakhstan, 2011–2015, by Province, in the Order of Declining Rate of Judicial Approval of Detention Requests in 2015<sup>67</sup>**

| PROVINCE                | 2011        | 2012        | 2013        | 2014        | 2015        |
|-------------------------|-------------|-------------|-------------|-------------|-------------|
| <b>North Kazakhstan</b> | 562 (93%)   | 495 (96%)   | 425 (93%)   | 396 (99%)   | 307 (100%)  |
| <b>Aktobe</b>           | 490 (98%)   | 419 (98%)   | 436 (98%)   | 460 (99%)   | 390 (98%)   |
| <b>Almaty Province</b>  | 1,336 (97%) | 1,147 (97%) | 981 (96%)   | 1,071 (98%) | 659 (97%)   |
| <b>Pavlodar</b>         | 423 (97%)   | 395 (95%)   | 398 (93%)   | 410 (93%)   | 419 (97%)   |
| <b>Kyzyl-Orda</b>       | 404 (97%)   | 411 (99%)   | 421 (95%)   | 358 (92%)   | 273 (97%)   |
| <b>West Kazakhstan</b>  | 405 (96%)   | 478 (95%)   | 477 (97%)   | 505 (91%)   | 496 (96%)   |
| <b>Kostanay</b>         | 707 (96%)   | 596 (97%)   | 537 (98%)   | 439 (97%)   | 499 (96%)   |
| <b>Almaty City</b>      | 1,949 (95%) | 1,697 (97%) | 2,392 (98%) | 1,833 (98%) | 2,283 (95%) |
| <b>South Kazakhstan</b> | 1,227 (95%) | 1,396 (96%) | 1,555 (95%) | 1,571 (98%) | 1,382 (95%) |
| <b>Karaganda</b>        | 1,281 (95%) | 1,219 (96%) | 1303 (94%)  | 1,120 (97%) | 895 (95%)   |
| <b>Mangistau</b>        | 333 (95%)   | 386 (93%)   | 384 (95%)   | 276 (93%)   | 419 (95%)   |
| <b>Akmola</b>           | 612 (94%)   | 602 (96%)   | 557 (97%)   | 454 (98%)   | 373 (94%)   |
| <b>Astana City</b>      | 774 (94%)   | 868 (90%)   | 929 (94%)   | 937 (95%)   | 1,006 (94%) |
| <b>Atyrau</b>           | 376 (93%)   | 353 (94%)   | 316 (95%)   | 258 (93%)   | 235 (93%)   |
| <b>East Kazakhstan</b>  | 1,477 (91%) | 1,511 (89%) | 1,624 (86%) | 1,253 (89%) | 1,262 (91%) |
| <b>Zhambyl</b>          | 987 (90%)   | 902 (90%)   | 777 (92%)   | 774 (97%)   | 659 (90%)   |

In short, the transfer of the 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 the former nor the latter are interested in attentively scrutinizing the work of detectives and investigators or paying serious attention to the arguments of defense attorneys. Now judges approve detention with the same frequency as procurators did in the past: processing detention requests instead of carefully scrutinizing them. Meanwhile, procurators no longer prioritize pre-trial detentions in order to follow the official line of reducing the prison population set by President Nazarbayev in response to international shaming. Kazakhstan's judicial chiefs seem to have learned from other post-communist countries, which introduced judicial arrest warrants prior to 2008, that judicial empowerment would not necessarily result in more serious checks of detention requests.<sup>68</sup> Indeed, as the outputs of criminal prosecution (closing cases, sending them back to the prosecutors, and issuing sentences) show, judges process criminal cases and remain junior partners in the criminal justice system.

67. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

68. See Trochev, *supra* note 12, at 164.

### III. Avoiding Exoneration and Acquittals as in the Soviet Period

Article 24 of the 1997 Criminal Procedure Code (much like its Soviet-era predecessor) required investigators, prosecutors, and judges to explore both incriminating and exonerating facts “fully, objectively[,] and in all-rounded manner.”<sup>69</sup> This requirement has been preserved in Article 24 of the 2014 Criminal Procedure Code.<sup>70</sup> In practice, however, investigators, prosecutors, and judges rarely seek out or pay attention to exonerating evidence. As one judge who 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.<sup>71</sup> The research on Soviet criminal justice during late socialism has documented the decline of acquittal rates from 9% in 1945 to less than 1% at the end of Soviet era.<sup>72</sup> Soviet judges, whose salaries and careers depended on the Justice Ministry and Communist Party bosses, were strongly expected to convict the accused or, in cases with shoddy evidence, 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.<sup>73</sup> A former judge from the city of Semipalatinsk Askar Mardanov describes what happened after he had acquitted four persons in late 1980s:

I presided in a trial against twenty-five 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 [said], “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.<sup>74</sup>

Judge Mardanov’s example, however, was very rare. Most often, cassation courts would overturn acquittals at the request of the procurators, who had a much stronger influence on Communist Party bosses.<sup>75</sup> Acquittals

69. Criminal Procedural Code (1997), *supra* note 24.

70. Criminal Procedural Code (2014), *supra* note 24.

71. Shevchenko, *supra* note 54.

72. Solomon (1987), *supra* note 23, at 539–40.

73. *Id.*

74. Farkhat Kinzhitaev, *Kogda Vershitsja Pravosudie [When Justice is Meted Out]*, INDUSTRIALNAIA KARAGANDA (Apr. 22, 2014), <http://inkaraganda.kz/articles/105715> [<https://perma.cc/2W5R-JGZ4>].

75. GORDON B. SMITH, REFORMING THE RUSSIAN LEGAL SYSTEM 107–13 (1996).

were extraordinary events and were considered equivalent to a failure of the prosecution, with potentially serious repercussions for the careers of procurators.<sup>76</sup> Acquittals were also extraordinary for judges, who, in the event of an acquittal, would be acting as whistleblowers in a closed law enforcement system.<sup>77</sup> 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.<sup>78</sup> Meanwhile, cassation courts acquitted extremely rarely.<sup>79</sup>

Fast-forward a quarter of a century. As Table 3 shows, until 2013, Kazakhstani procurators exonerated defendants in no more than 3% of criminal cases. Until 2012, the number of cases that resulted in conviction—the key criterion of Soviet criminal justice—was the only indicator of their job performance. In 2012, procurators began adding the number of cases they had closed before trial on non-rehabilitative ground (i.e., when the accused reconciled with the victim or actively repented) to the number of cases that resulted in conviction.<sup>80</sup> Procuracy chiefs did this in order to maintain a low prison population while insisting on total crime registration and zero tolerance for crimes. As a result, procurators on the ground began closing cases more frequently instead of sending them to courts for trial. In 2013, Procuracy chiefs went further and began rewarding their subordinates for closing criminal cases on exonerating grounds, or, in essence, for performing the first external and meaningful check of the job of police detectives and investigators. As Table 3 shows, in 2013 alone, state prosecutors closed 18,346 criminal cases on exonerating grounds—more than in the previous six years combined.<sup>81</sup> As shown below, this jump resulted in fewer cases closed on exonerating grounds by judges at the trial stage.

**Table 3. Procurators' Decisions in Criminal Cases in Kazakhstan, 2008–2016<sup>82</sup>**

| Criminal Cases | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|----------------|------|------|------|------|------|------|------|------|------|
|                |      |      |      |      |      |      |      |      |      |

76. Solomon (1987), *supra* note 23, at 533–34.

77. *Id.* at 537.

78. *Id.*

79. *Id.* at 546.

80. Trochev, *supra* note 12, at 153.

81. Bainur Baigeldi, *Prosecutor's Supervision of Human Rights Observance in the Republic of Kazakhstan*, 6 MEDITERRANEAN J. SOC. SCI. 217, 220 (2015); see PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

82. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3. For comparison, data for 2015 excludes criminal misdemeanors from the total number of crimes. Until 2015, misdemeanors were not criminal and were included in the Code of Administrative Offenses. The 2014 Criminal Code contains misdemeanors, which used to be included in the Code of Administrative Offenses.

|   |         |         |         |         |         |         |         |         |         |
|---|---------|---------|---------|---------|---------|---------|---------|---------|---------|
| <b>Total</b>                                | 140,249 | 131,548 | 132,183 | 204,212 | 306,898 | 386,710 | 377,330 | 362,089 | 363,222 |
| <b>Sent to Courts</b>                       | 73,351  | 72,299  | 69,700  | 63,893  | 58,607  | 65,318  | 59,532  | 50,376  | 56,050  |
| <b>Closed on Non-rehabilitative Grounds</b> | 9,262   | 7,619   | 6,782   | 9,974   | 26,134  | 34,153  | 47,772  | 55,243  | 64,383  |
| <b>Closed on Exonerating Grounds</b>        | 1,864   | 1,630   | 1,373   | 6,609   | 4,664   | 18,346  | 32,792  | 174,628 | 144,972 |

What sparked this approval of exonerations? Realization that the growing number of poorly-prepared criminal cases would lead to more convictions, obstructing the goal of reducing the prison population in the long term. As Presidential Human Rights Commission concluded at the end of 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.”<sup>83</sup> In January 2013, the then 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.”<sup>84</sup> According to Daulbayev, in 2012, procurators received over 100,000 complaints against the poor quality of criminal investigation.<sup>85</sup>

As in Soviet times, some members of the Kazakhstani government continue to consider acquittal and exoneration equivalent to failure, and such failure can result in denial of job-related bonuses or even demotion for investigators and procurators. The recently appointed Procurator-General Zhakyp Asanov publicly criticized this Soviet-era thinking. He complained that his subordinates were scared of acquittals: “Prosecutors have an old stereotype: we are scared of acquittals, when prosecutors and judges go easy on the defendants and hand out a minimal punishment [instead of acquitting].” He also scolded supervisors of prosecutors who pressure rank-and-file prosecutors and demand conviction at all costs by becoming hostages

83. REPORT ON THE SITUATION WITH HUMAN RIGHTS IN THE REPUBLIC OF KAZAKHSTAN IN 2011, at 142 (2012), <http://www.bureau.kz/news/download/337.doc> [<https://perma.cc/T8FL-KMVC>].

84. *Nazarbayev Conducted a Meeting with the Power Ministries: Procurator-General Criticizes Everyone*, VLAST (Jan. 30, 2013), [https://vlast.kz/politika/nazarbaev\\_provel\\_sovesshanie\\_s\\_silovikami\\_genprokuror\\_kritikuet\\_vseh-1190.html](https://vlast.kz/politika/nazarbaev_provel_sovesshanie_s_silovikami_genprokuror_kritikuet_vseh-1190.html) [<https://perma.cc/Ry3F-Q82J>].

85. *Id.*

to the prior pre-trial detention of the defendant and submission of the case to trial.<sup>86</sup>

Judges also often criticize the performance of investigators and procurators. Yet the former almost universally agrees with the conclusions of the latter when it comes to deciding criminal cases.<sup>87</sup> The performance of judges is assessed by the stability of sentences, an indicator inherited from the late-Soviet era—good judges have none, or very few, of their decisions reversed, while poorly performing judges have several overturned judgments.<sup>88</sup> As is shown below, acquittals have a much higher chance of being overturned on appeal. At the same time, judges have a general interest of reducing their caseload, and thus, approve the expansion of procurators' discretion in preventing shoddy criminal cases from being sent to courts. Indeed, as Table 4 shows, between 2010 and 2016, judges receive fewer criminal cases and convict fewer defendants.

To avoid both reversals and acquittals in cases with weak evidence, judges sometimes refused to decide cases and demanded supplementary investigations, and thus, shifted responsibility for handling shoddy investigations to procurators, who, in turn, quietly closed the cases.<sup>89</sup> 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), and, in effect, gave state prosecutors a second chance.<sup>90</sup> State prosecutors brought back for trial only half of those cases.<sup>91</sup> According to one former judge, such outcomes satisfied both judges and procurators because it minimized risks for both.<sup>92</sup> This proportion (1.2% sent for supplementary investigation and 1% returned cases to procurators) is similar to Soviet-era figures.<sup>93</sup> In the late 1980s, judges in the USSR returned some 4–5% of criminal cases for supplementary investigation instead of handing down acquittals.<sup>94</sup> In November 2011, the Chairman of the Supreme Court proposed to eliminate this Soviet-era judicial mechanism of avoiding

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86. *Genprokuror RK Vstal na Zashchitu Opravdatel'nykh Prigovorov* [*The RK Procurator—General Rose to Defend Acquittals*], B NEWS (July 22, 2016), [http://bnews.kz/ru/news/obshchestvo/genprokuror\\_rk\\_vstal\\_na\\_zashchitu\\_opravdatelnih\\_prigovorov-2016\\_07\\_22-1282677](http://bnews.kz/ru/news/obshchestvo/genprokuror_rk_vstal_na_zashchitu_opravdatelnih_prigovorov-2016_07_22-1282677) [<https://perma.cc/5KEX-YWUJ>]; *Zhakyp Asanov: Prokurory Boiatsia Opravdatel'nykh Prigovorov* [*Zhakyp Asanov: Procurators Are Afraid of Acquittals*], KAZINFORM (Nov. 9, 2016), [http://www.inform.kz/ru/zhakup-asanov-prokurory-boyatsya-opravdatel-nyh-prigovorov\\_a2967843](http://www.inform.kz/ru/zhakup-asanov-prokurory-boyatsya-opravdatel-nyh-prigovorov_a2967843) [<https://perma.cc/L7U6-9CZC>].

87. Trochev, *supra* note 12, at 154–55.

88. Solomon (1987), *supra* note 23, at 542.

89. Trochev, *supra* note 12, at 168.

90. I exclude cases that are returned to procurators on the grounds of the disappearance of the accused.

91. Trochev, *supra* note 12.

92. Askar Kishkembayev, *Is It Easy to Issue an Acquittal?*, IURIDICHESKAIA GAZETA (Mar. 16, 2006), [http://online.zakon.kz/Document/?doc\\_id=30048629](http://online.zakon.kz/Document/?doc_id=30048629) [<https://perma.cc/7RPT-ZATG>].

93. See Solomon (1987), *supra* note 23, at 541.

94. *Id.* at 552 (citing Arkadii Vaksberg, *Pravde v glaza*, LITERATURNAYA GAZETA 13 (1986)).

acquittals.<sup>95</sup> The 2014 Criminal Procedure Code eventually banned judges from sending criminal cases back to procurators for “supplementary investigation.” However, judges continued to return cases instead of deciding them.<sup>96</sup> The former Deputy Chief Procurator General, Nurmakhanbet Isaev, publicly complained that he had to have a special meeting with provincial judges and the Supreme Court at the end of 2015 to cease this practice. According to Isaev, “a person should leave the courthouse as either convicted or acquitted. There is no third option.”<sup>97</sup> His complaints clearly show his dissatisfaction with the unwillingness of judges to change their ways of handling sloppy cases and with amicable relationships among trial judges and prosecutors.

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.<sup>98</sup> The proportion of cases closed on exonerating grounds is unstable because it is often driven by the political mood of those on the top and by what judges receive from the procurators.<sup>99</sup> In 2010, most of the cases closed on exonerating grounds were group thefts. In 2011, drug-related and road traffic crimes. And in 2012, illegal business activity.<sup>100</sup> In 2012, the General Procuracy conducted a campaign, “Business Shall Be Defended against Wrongful Conviction!” that consisted of reviewing completed criminal cases against businesspersons. As a result, judges exonerated 290 businesspersons.<sup>101</sup> These kinds of campaigns reflect another late Soviet-era legacy of holding short-term propaganda campaigns. Local procurators and judges tend to view these campaigns as an additional burden imposed from the top in which judges still automatically approve prosecutorial decisions rather than an exercise fairness and attention to victims of wrongful prosecution. As Table 4 shows, in 2013 and 2014, during which no campaigns were waged, there was still a threefold jump in procurator-made exonerations, while judges exonerated only fifty people (nineteen of them in cases of private prosecution) in thirty-five criminal cases.<sup>102</sup> It is much easier and less risky for the judge to close a case than to issue a sentence.

95. *Courts of Kazakhstan Will Not Send Cases for Supplementary Investigation*, TENGRI NEWS (Nov. 11 2011), [http://tengrinews.kz/kazakhstan\\_news/201297](http://tengrinews.kz/kazakhstan_news/201297) [https://perma.cc/TC5M-56TE].

96. *Doverie Grazhdan—Prezhde Vsego* [The Trust of Citizens—Especially], KAZAKHSTANSKAIA PRAVDA (Jan. 12, 2016), <http://www.kazpravda.kz/articles/view/doverie-grazhdan—prezhde-vsego/> [https://perma.cc/973L-BX5B].

97. *Id.*

98. *See infra* Table 4.

99. *See, e.g.,* Andrea Schmitz & Alexander Wolters, *Political Protest in Central Asia: Potentials and Dynamics*, SWP 22 (2012), [https://www.swp-berlin.org/fileadmin/contents/products/research\\_papers/2012\\_RP07\\_smz\\_wolters.pdf](https://www.swp-berlin.org/fileadmin/contents/products/research_papers/2012_RP07_smz_wolters.pdf) [https://perma.cc/4ZV4-QK46].

100. *See* PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

101. Bulat Dembai, *Rol' Prokurora v Ugolovnom Protsesse* [The Role of the Prosecutor in Criminal Proceedings], GEN. PROSECUTOR'S OFF. REPUBLIC KAZ., <http://m.prokuror.kz/rus/o-prokurature/20-let-konstitucii-respubliki-kazakhstan/rol-prokurora-v-ugolovnom-protsesse> [https://perma.cc/6PZH-DR7S] (last visited Jan. 8, 2017).

102. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

**Table 4. Outcomes of Criminal Cases in Kazakhstan's Trial-Level Courts, 2010–2016**<sup>103</sup>

|   | 2010         | 2011         | 2012         | 2013         | 2014         | 2015*        | 2016*        |
|---|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| <b>Total Number of Cases with Sentence</b>  | 30,364       | 22,012       | 18,230       | 21,833       | 20,571       | 18,688       | 18,676       |
| <b>Convicted Defendants</b>   | 36,477       | 27,380       | 22,292       | 26,968       | 25,079       | 22,325       | 21,386       |
| <b>Acquitted Defendants</b>   | 705          | 482          | 400          | 507          | 478          | 357          | 369          |
| <b>Cases Returned for Supplementary Investigation (Defendants)</b>                                | 539<br>(819) | 540<br>(882) | 457<br>(768) | 446<br>(731) | 435<br>(690) |              |              |
| <b>Cases Returned to Procurators, Excluding Cases in Which the Defendant Has Disappeared</b>      | 481          | 421          | 520          | 797          | 1,131        | 884          | 861          |
| <b>Cases Closed</b>   | 21,490       | 22,293       | 21,257       | 20,922       | 18,649       | 10,564       | 9,938        |
| <b>Including Cases Closed on the Grounds of Reconciliation between the Accused and the Victim</b> | 18,701       | 19,764       | 17,001       | 19,392       | 16,639       | 9,974        | 9,298        |
| <b>Including Cases Closed on Exonerating Grounds (Exonerated Defendants)</b>                      | 45<br>(93)   | 701<br>(774) | 176<br>(185) | 21<br>(29)   | 14<br>(21)   | 362<br>(451) | 209<br>(331) |

As Table 4 shows, acquittal rates in Kazakhstan went up to 1.9% (478 tried persons) in 2014, 1.6% (357 tried persons) in 2015, and 1.7% (369 tried persons) in 2016. The absolute number of acquitted, however, did not change much since the early 2000s (423 acquitted persons in 2000, 383 in 2001, and 334 in 2002).<sup>104</sup> Indeed, 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.<sup>105</sup>

Indeed, in 2010, acquittals in cases of private prosecution, where the judge receives a written complaint from the victim directly or through the police or the local Procuracy office (in contrast to the criminal case file provided by the procurator), tripled and reached 85% of acquittals in all criminal cases, as compared to 29% of all acquittals issued between 2000 and

103. *Id.* For a comparison, data for 2015 and 2016 exclude criminal misdemeanors, introduced by the 2014 Criminal Code, which previously have been included in the 2001 Code of Administrative Offenses. Criminal misdemeanors constitute about one-third of all criminal cases handled by the courts in both 2015 and 2016.

104. *See, e.g., Kazakhstan: Executive Summary*, FREEDOM HOUSE, <https://freedomhouse.org/report/nations-transit/2005/Kazakhstan> [<https://perma.cc/NU8W-8FFN>] (last visited May 30, 2017).

105. *See Trochev, supra* note 12, at 169.

2002.<sup>106</sup> The entry in force of the new Criminal Code and Criminal Procedure Code in 2015 did not make much difference: the high share of acquittals in criminal cases of private prosecution remained at 93% in 2016.<sup>107</sup> As data on criminal cases of private prosecution makes clear, judges reject almost 90% of all received complaints, close more than a half of these cases,<sup>108</sup> 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 are not accountable to state prosecutors.

**Table 5. Criminal Cases of Private Prosecution in Kazakhstan, 2010–2016**<sup>109</sup>

| Year   | 2010  | 2011  | 2012  | 2013  | 2014  | 2015  | 2016  |
|--|-------|-------|-------|-------|-------|-------|-------|
| <b>Total Number of Cases</b>                                 | 5,077 | 3,073 | 2,105 | 1,956 | 2,928 | 5,301 | 7,041 |
| <b>Number of Cases Closed</b>                                | 2,962 | 1,832 | 1,370 | 1,110 | 1,671 | 3,897 | 5,197 |
| <b>Total Number of Cases with a Sentence</b>                 | 1,338 | 708   | 383   | 454   | 565   | 1,192 | 1,520 |
| <b>Persons Convicted</b>                                     | 968   | 408   | 178   | 184   | 238   | 867   | 845   |
| <b>Persons Acquitted</b>                                     | 599   | 388   | 318   | 436   | 437   | 581   | 729   |
| <b>Percentage of Acquitted Persons in All Criminal Cases</b> | 85%   | 80%   | 80%   | 86%   | 91%   | 67%   | 93%   |

Acquittals in cases of public prosecution (where the procurator represents the prosecution) continue to decline, as they did in the late Soviet-era: from 106 acquitted persons in 2010 to 71 in 2013, then 41 in 2014, 42 in 2015, 46 in 2016. Drug-related crimes, a category of crime that is often used by police to fabricate criminal charges, constituted the largest share of

106. See, e.g., Joanna Lillis, *Kazakhstan: Reporter Drug Case Acquittal Marks Rare Reprieve*, EURASIANET (Mar. 1, 2016), <http://www.eurasianet.org/node/77596> [<https://perma.cc/LW7M-2ARZ>]. For data support, see *infra* Table 5.

107. See *infra* Table 5.

108. If a victim recalls a complaint in the criminal case of private prosecution, the case is automatically closed.

109. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3. Data for 2015 and 2016 include criminal misdemeanors.

acquittals in 2010.<sup>110</sup> These crimes, together with white-collar crimes like fraud and abuse of power, composed the majority of acquittals in 2011 and 2012.<sup>111</sup> In 2016, the largest share of acquittals was made up of those accused of violating labor law and of fraud.<sup>112</sup>

Jury trials, which have been used in judging grave crimes like rape and murder since 2007, are responsible for about one-third of acquittals in criminal cases of public prosecution.<sup>113</sup> Leaving aside the debate about whether these trials are trials by real juries, quasi-juries, or a judge with the extended group of lay assessors, these trials show that it is possible to have an adversarial criminal procedure and overcome accusatorial bias.<sup>114</sup> This is because judges can shift the blame for acquitting to the jurors. As Table 6 shows, even though ten jurors deliberate the verdict together with a professional judge, until 2014, the acquittal rate in jury trials has never been below 6%. Until 2014, jury acquittals made up, on average, about one-third of all acquittals in criminal trials of public prosecution.<sup>115</sup>

**Table 6. Outcomes of the Jury Trials in Kazakhstan, 2007–2016**<sup>116</sup>

|  | 2007<br>(36) | 2008<br>(44) | 2009<br>(59) | 2010<br>(270)          | 2011<br>(355)         | 2012<br>(288)         | 2013<br>(190)         | 2014<br>(64)        | 2015<br>(42)        | 2016<br>(47)         |
|--|--------------|--------------|--------------|------------------------|-----------------------|-----------------------|-----------------------|---------------------|---------------------|----------------------|
| <b>Defendants Convicted</b>  | 57           | 72           | 101          | 334                    | 461                   | 355                   | 289                   | 118                 | 59                  | 67                   |
| <b>Defendants Acquitted</b>  | 5            | 6            | 15           | 43                     | 30                    | 24                    | 30                    | 3                   | 2                   | 8                    |
| <b>Percentage of Acquitted to the Total Number of Defendants Tried by Jury</b>                 | 8%           | 7.70%        | 12.90%       | 11.40%                 | 6.10%                 | 6.30%                 | 9.40%                 | 2.48%               | 3.28%               | 12.00%               |
| <b>Percentage of Acquitted to the Total Number of Acquitted in Cases of Public Prosecution</b> |              |              |              | 41%<br>(43 out of 106) | 32%<br>(30 out of 94) | 29%<br>(24 out of 82) | 42%<br>(30 out of 71) | 7%<br>(3 out of 41) | 5%<br>(2 out of 42) | 17%<br>(8 out of 46) |

110. See Trochev, *supra* note 12, at 169.  
 111. *Id.*  
 112. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.  
 113. *Id.*  
 114. See Jackson & Kovalev, *supra* note 7, at 373.  
 115. See *infra* Table 6.  
 116. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

Such a high acquittal rate in trials by jury is so unusual that in January 2013, then Procurator General Daubayev had to ask President Nazarbayev in public to intervene and order the conviction of Botabayev, who had been acquitted by jury in Astana on multiple charges of murder. The appellate court also confirmed his acquittal.<sup>117</sup> Botabayev was released and later accused of terrorism. The Procurator General complained that judges did not listen to the prosecution and had not been punished for that.<sup>118</sup> President Nazarbayev immediately ordered the then Supreme Court Chairman Bektas Beknazarov to hold a highly publicized trial (*gromkoe razbiratelstvo*).<sup>119</sup> Initially, judges resisted by saying that the acquittal was on the basis of the jury verdict, and that the prosecutors failed to provide evidence of guilt.<sup>120</sup> Later, however, the judges quietly reopened the case and sent it back for retrial by another jury, which promptly found Botabayev guilty *in absentia*.<sup>121</sup> Chairman 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 the internal investigation.<sup>122</sup> Both grounds, however, 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 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—all of which persuaded jurors to declare acquittal.<sup>123</sup>

This episode clearly demonstrates how the balance of power is maintained in the criminal justice system. Chairman Beknazarov stressed that most jury verdicts are lawful and well-grounded—based on the review by the appellate courts. Yet, in a clear nod to the security services, Chairman Beknazarov proposed that the jurisdiction of the jury trials should no longer include cases of extremism and terrorism because the accused could threaten the jurors.<sup>124</sup> Indeed, in July 2013, these cases have been removed from the

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117. *Nazarbayev Conducted a Meeting with the Power Ministries: Procurator-General Criticizes Everyone*, *supra* note 84.

118. *Id.*

119. *Id.*

120. *V Khode Rassmotreniya Dela v Otnoshenii Z.Botabaeva Narushenij Zakonnosti ne Dopuskalos’-B.Beknazarov* [During the Hearing of the Case Against Z. Botabayev Violations of Legality Were Not Allowed - B. Beknazarov], ZAKON (Apr. 1, 2013), <http://www.zakon.kz/4549313-v-khode-rassmotreniya-dela-v-otnoshenii.html> [<https://perma.cc/852E-PP7Y>].

121. *Id.*

122. *Id.*

123. *Zaslugoi Advokata Nazvan Opravdatel’nyi Verdikt po Delu Nyne Razyskivaemogo za Ubiystva v Ile-Alatauskom Natsparke Botabaeva* [Acquittal Verdict of Botabayev, Now Sought for Murder in Ile-Alatau National Park, Attributed to “the Lawyer’s Merit”], MOSKOVSKII KOMSOMOLET V KAZAKHSTANE (July 3, 2013), <http://mk-kz.kz/articles/2013/07/03/878758-zaslugoy-advokata-nazvan-opravdatelnyiy-verdikt-po-delu-nyine-razyiskivaemogo-za-ubiystva-v-ilealatauskom-natsparke-botabaeva.html> [<https://perma.cc/DJ5D-WPMY>].

124. *B.Beknazarov Schitaet, Chto Prisiazhnye Zasedateli Mogut Byt’ Neob’ektivnymi*

jurisdiction of the jury trials,<sup>125</sup> which explains the drastic decline in the number of jury trials in the last couple of years and the lower acquittal rate between 2014 and 2016.<sup>126</sup> In fact, between 2009 and 2015, the jurisdiction of jury trials has been changed several times, which led some observers to conclude that the scope of their jurisdiction depends on the “mood and caprices of legislators and law enforcement actors initiating and adopting the amendments to the Criminal Procedure Code.”<sup>127</sup>

Meanwhile, in the course of drafting the new Criminal Procedure Code, some Procuracy chiefs tried to trim the jurisdiction of jury trials even further by insisting that jury trials were useless in Kazakhstan, an effort that the Supreme Court judges vocally opposed.<sup>128</sup> As Kairat Mami, the current Chairman of the Supreme Court, argued in 2004, “jury trial should be judged not only from the point of view of convenience of investigators, procurators, attorneys and judges, but how well it protects rights and lawful interests of all participants of criminal proceedings.”<sup>129</sup> The 2014 Criminal Procedure Code, however, restricted the jurisdiction of the jury trials to only those crimes for which the Criminal Code imposes life imprisonment or the death sentence. In turn, in 2015, Chairman Mami managed to insert the expansion of the jury trial on President Nazarbayev’s “100 Steps” program of reforming Kazakhstan as Step #21: “Expansion of the sphere where jury trials are used.

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*pri Rassmotrenii Del, Sviazannykh s Terrorizmom [B. Beknazarov Believes That Jurors May Be Partial While Hearing Terrorism-Related Cases]*, ZAKON (Apr. 1, 2013), <http://www.zakon.kz/4549191-b.beknazarov-schitaet-chto-prisjazhnye.html> [<https://perma.cc/Z8H3-ZMNK>].

125. *O Vnesenii Izmenenii i Dopolnenii v Konstitutsionnyj Zakon Respubliki Kazakhstan i v Nekotorye Zakonodatel'nye Akty Respubliki Kazakhstan po Voprosam Iskluchenija Protivorechij, Probelov, Kollizii Mezhdru Normami Prava Razlichnykh Zakonodatel'nykh Aktov i Norm, Sposobstvuiushchikh Soversheniiu Korrupsionnykh Pravonarushenii [Constitutional Law of the Republic of Kazakhstan 121-V of July 3, 2013]*, KAZAKHSTANSKAIA PRAVDA (July 5, 2013), <http://adilet.zan.kz/rus/docs/Z1300000121> [<https://perma.cc/6K9K-UCUV>]; *Slova Merkelja o Problemakh s Kollegiami Prisiazhnykh Oprovergli v Verkhovnom Sude Kazakhstana [Merkel's Words About Problems with Jury Panels Have Been Disconfirmed by Kazakhstan's Supreme Court]*, TENGRI NEWS (Nov. 8, 2013), [https://tengrinews.kz/kazakhstan\\_news/slova-merkelya-problemah-kollegiyami-prisyajnyih-oprovergli-245136/](https://tengrinews.kz/kazakhstan_news/slova-merkelya-problemah-kollegiyami-prisyajnyih-oprovergli-245136/) [<https://perma.cc/CMR6-5QHL>].

126. See *supra* Table 6.

127. Nikolai Kovalev, *Reforms of Court Proceedings with Participation of Jurors in Kazakhstan in the Previous Ten Years*, in ANNUAL CONSULTATIONS OF THE LEGAL POLICY RESEARCH CENTER ON THE CRIMINAL JUSTICE ISSUES “EXPANSION OF JURISDICTION OF COURTS WITH PARTICIPATION OF JURORS IN LIGHT OF THE PLAN OF NATION ‘100 STEPS’”, at 8 (Dec. 9, 2016) (on file with author).

128. *Due to National Peculiarities of Kazakhstan a Reduction of Jury Trials is Planned*, TENGRI NEWS (Oct. 31, 2013), [https://tengrinews.kz/kazakhstan\\_news/iz-zanatsionalnyih-osobennostey-kazahstane-planiruyut-244632/](https://tengrinews.kz/kazakhstan_news/iz-zanatsionalnyih-osobennostey-kazahstane-planiruyut-244632/) [<https://perma.cc/F55E-C7W8>]; *Merkel's Words about Problems with Jury Panels Have Been Disconfirmed by Kazakhstan's Supreme Court*, *supra* note 125.

129. Kairat Mami, *Institut Prisiazhnykh Zasedatelej: Problemy Teorii i Praktiki Vnedreniia [Institution of Jurors: Problems of Theory and Practical Implementation]*, 2 VESTNIK KARAGANDA L. INST. MINISTRY INTERNAL AFF. REPUBLIC KAZ. 3–19 (2004), <http://www.law.edu.ru/doc/document.asp?docid=1202568> [<https://perma.cc/4KSZ-7GFJ>].

Legislative definition of the category of criminal cases where the jury trial is mandatory.”<sup>130</sup> In the wake of the President’s approval, in May 2015, the Supreme Court Judge Abai Rakhmetulin enthusiastically announced: “We propose to have mandatory jury trials in cases of all especially grave crimes, except those against constitutional foundations of the state.”<sup>131</sup> However, the October 2015 amendments to the Criminal Procedure Code did not introduce mandatory jury trials. Instead, these amendments slightly expanded the jurisdiction of jury trials by including cases of aggravated kidnapping, human trafficking and involvement of minors in crime to be tried by jury—crimes that rarely enter the criminal justice system in Kazakhstan.<sup>132</sup> In January 2017, the senior official of the General Procuracy proposed to expand the jury trials to all cases causing death.<sup>133</sup> These haphazard trajectories of jury trials and disagreements among the top law-enforcement officials showcase the dissatisfaction with the current ways of convicting and acquitting.

In Kazakhstan, acquittals, including acquittals by the jury, 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 twenty-five defendants (8% of all acquittals) were overturned, in 2008, thirty-six (11%), and in 2009, nineteen defendants (5%).<sup>134</sup> Compare this to the 0.5% of overturned sentences during these three years.<sup>135</sup> Then Procurator General Daulbaev proudly reported that between 2010 and 2012, procurators successfully appealed acquittals of seventy-one defendants.<sup>136</sup> In 2013, acquittals of thirty-five defendants, or 8% of all acquittals that year, were overturned on appeal.<sup>137</sup> Meanwhile, in 2014, acquittals of twenty-one defendants (or of every other defendant) in cases of public prosecution have been overturned.<sup>138</sup> Higher courts exonerate and acquit very few defendants themselves: twenty-seven in 2008, fifteen in 2009, nineteen in 2010, forty in

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130. *President Nazarbayev Unveils 100 Concrete Steps to Implement Five Institutional Reforms*, KAZINFORM (June 2, 2015), [http://www.inform.kz/en/president-nazarbayev-unveils-100-concrete-steps-to-implement-five-institutional-reforms\\_a2782614](http://www.inform.kz/en/president-nazarbayev-unveils-100-concrete-steps-to-implement-five-institutional-reforms_a2782614) [<https://perma.cc/PG57-43BB>].

131. *Sferu Primeniia Suda Prisiazhnykh Snova Rasshiriat v Kazakhstane [The Sphere of Application of the Jury Trials Will Be Again Expanded in Kazakhstan]*, ZAKON (May 12, 2015), <https://www.zakon.kz/4710677-sferu-primeniija-suda-prisjazhnykh.html> [<https://perma.cc/UL3L-LMP4>].

132. Dmitrii Nurumov, *On Further Democratization of Court Proceedings with Participation of Jurors in the Republic of Kazakhstan*, in ANNUAL CONSULTATIONS OF THE LEGAL POLICY RESEARCH CENTER ON THE CRIMINAL JUSTICE ISSUES “EXPANSION OF JURISDICTION OF COURTS WITH PARTICIPATION OF JURORS IN LIGHT OF THE PLAN OF NATION ‘100 STEPS’”, at 17 (Dec. 9, 2016) (on file with author).

133. Bulat Dembaev, *Sud s Uchastiem Prisiazhnykh [Court with Participation of Jurors]*, ZAKON (Jan. 17, 2017), <http://www.zakon.kz/4839666-sud-s-uchastiem-prisjazhnykh-b.-dembraev.html> [<https://perma.cc/N44M-VRJ8>].

134. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

135. *Id.*

136. *Nazarbayev Conducted a Meeting with the Power Ministries: Procurator-General Criticizes Everyone*, *supra* note 84.

137. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

138. *Id.*

2011, forty-two in 2012, forty-six in 2013, and forty in 2014.<sup>139</sup> In 2015, appellate courts reviewed cases of 6,810 persons in cases of public prosecution and overturned sentences against 221 persons, acquitted twelve persons, and overturned acquittals of ten persons.<sup>140</sup> Data in Table 7 demonstrates the reluctance of the appellate courts to confirm acquittals and exonerations. As explained above, the Procuracy-initiated campaigns resulted in the unusually high numbers of acquitted and exonerated in 2011 (357 in drug-related cases) and 2012 (156 in illegal business activity cases).

**Table 7. Acquitted and Exonerated Defendants in the Cases of Public Prosecution in Kazakhstan, 2011–2016**<sup>141</sup>

| Year  | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|---|------|------|------|------|------|------|
| <b>Acquitted and Exonerated by Trial Courts</b>               | 680  | 250  | 81   | 48   | 88   | 99   |
| <b>Acquitted and Exonerated by Trial and Appellate Courts</b> | 78   | 229  | 26   | 47   | 47   | 59   |

There are negative repercussions on judges whilst deciding on acquittals. Monthly monitoring of judges introduced in 2009 uses three overturned sentences in a year as an indicator of failed judge's performance that may result in the dismissal from the bench.<sup>142</sup> The former Supreme Court Judge Raif Toimatov explained that appellate courts conduct regular monitoring of trial judges: if a judge has five overturned sentences in a year, he is automatically dismissed from the job.<sup>143</sup> According to Toimatov, trial judges seek advice of the appellate judges, who are likely to review the cases on the appeal. And many judges believe that such consulting is legal.<sup>144</sup> Meanwhile, appellate judges consult with the chair of their court if they consider cancelling or changing the sentence: "Without his approval, not a single reversal of the sentence or change of judgment happens. And nobody hides this practice."<sup>145</sup> As one judge put it, "the most important concern for a judge

139. *Analysis of Facts of Violating of Legality by Courts of the Republic Related to the Wrongful Convictions*, BULLETIN SUP. CT. REPUBLIC KAZ., no. 5, 80–85 (2010). Figures for 2010–2014 are author's own calculations (the total number of acquitted persons by the courts of appellate instance and of supervision, *Nadzor*, instance) based on the PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3. It is possible that these numbers double count the same defendants.

140. *Id.*

141. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3. For a comparison, data for 2015 and 2016 exclude criminal misdemeanors, introduced by the 2014 Criminal Code, which previously have been included in the 2001 Code of Administrative Offenses.

142. Trochev, *supra* note 12, at 169; see Kishkembayev, *supra* note 92 (arguing that judge may be disciplined or dismissed from the bench for several reversed sentences).

143. Toimatov, *supra* note 27.

144. Suleimenova, *supra* note 32.

145. Toimatov, *supra* note 27.

is that his decision not be overturned.”<sup>146</sup> Some judges view this fear of reversal as a real threat to the individual independence of judges yet receive little approval from their superiors.<sup>147</sup>

Judges who dare to exonerate or acquit have to prove that the defendant was not guilty instead of simply interpreting doubts in favor of the defendants.<sup>148</sup> These judges also have to justify their decisions personally in front of appellate courts and the Supreme Court. For example, in 2012, Judge Aliya Zhumashova from the Pavlodar Province received a reprimand from the Judicial Disciplinary Tribunal for acquitting two persons in the case of a stolen refrigerator.<sup>149</sup> 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.<sup>150</sup> In her three-year career on the bench, she issued two acquittals and was eventually dismissed from the bench in July 2013 for this “disciplinary” offense.<sup>151</sup> The then Chairman of the Supreme Court confirmed her complaints: “Unfortunately, there are judges who unconditionally trust the prosecution.”<sup>152</sup> Yet none of judges faced any negative consequences because procurators have amicable relations with judges. As former Supreme Court Judge Toimatov, who had been dismissed from the bench for exonerating two police officers in 1999, described, “it is no secret for anybody that the decision in a case is agreed between the procurator and the judge prior to trial, procurator can freely enter the judge chambers.”<sup>153</sup> Table 8 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 a declining range of variation among provinces. This is in contrast to a growing variation in approval of pre-trial detention, as shown on Table 2 above. There is still a slight variation among provinces: obtaining an acquittal in the Mangistau and Kyzyl-Orda Provinces is nearly impossible,

146. Trochev, *supra* note 12, at 169.

147. See, e.g., Kishkembraev, *supra* note 92; Baian Toktarova, *O Sudebnom Monitoringe i Ego Vliianii na Pravovoi Status Sudi'i* [*On Court Monitoring and Its Influence on the Legal Status of a Judge*], ZAKON (Nov. 20, 2013), [http://online.zakon.kz/Document/?doc\\_id=31615230](http://online.zakon.kz/Document/?doc_id=31615230) [<https://perma.cc/HE3W-WKHF>].

148. Kishkembraev, *supra* note 92.

149. *V Astane Sud'ia, Proivavshaya Nezavisimyj Kharakter, Dala Press-Konferentsiju v Svoju Zashchitu* [*In Astana, a Judge Who Displayed Independent Character Gave a Press Conference in Her Own Defense*], URALSKAIA GAZETA (Oct. 19, 2012), <http://www.uralskweek.kz/2012/10/19/v-astane-sudya-proyavivshaya-nezavisimyj-xarakter-dala-press-konferenciyu-v-svoju-zashchitu/> [<https://perma.cc/TN23-2XGN>]; see also *Kazakhstan: Disciplinary Action Against Judge Zhumasheva Is an Attack on Judicial Independence*, INT'L COMM'N JURISTS (Oct. 30, 2012), <https://www.icj.org/kazakhstan-disciplinary-action-against-judge-zhumasheva-is-an-attack-on-judicial-independence/> [<https://perma.cc/L62D-L2FA>].

150. *Id.*

151. *Id.*

152. Bektas Beknazarov, *Trevozhit Tot Fakt, Chto Reviziia Osnovnoj Massy Del Segodija Provoditsia na Urovne Verkhovnogo Suda* [*The Fact That the Supreme Court Reviews Most Cases Is Alarming*], ZAKON (July 7, 2011), <https://www.zakon.kz/223151-223151-bektas-beknazarov-trevozhit-tot-fakt.html> [<https://perma.cc/FLR5-WJDF>].

153. Toimatov, *supra* note 27.

while acquittal is rare yet possible in the neighboring Aktobe Province due mostly to the jury trials. The caseload of courts does not seem to affect this pattern. The entry in force in 2015 of the new Criminal Code and Criminal Procedure Code appears to have resulted in higher numbers of sentenced defendants in all but one province (Atyrau) and confirmed the decline of acquittals and exonerations in criminal cases of public prosecutions. For example, judges in the North Kazakhstan Province did not acquit and exonerate anyone (and did not refuse a single pre-trial detention requests, as shown in Table 2) tried in the criminal cases of public prosecution in 2015. Meanwhile, judges in the city of Almaty and Karaganda Province acquitted and exonerated more than a dozen persons tried for minor crimes in 2015. The fact that this jump in acquittals and exonerations occurred only in two places casts doubt on the thesis that the entry in force of the both Codes changed the decision-making of judges. The trend of disappearing acquittals and exonerations at the trial stage in most provinces over last four years is similar to the trend in late socialism, but now it is a product of the decline of jury trials discussed above, and the growth of procurator-made exonerations at the pre-trial stage discussed below. In summary, if the late Soviet-era judicial chiefs saw statistics on convictions in modern Kazakhstan, they would approve internal dependence of judges on their superiors, award bonuses to judges for the low number of acquittals and exonerations, and the high rate of stability in sentences.

**Table 8. The Ratio of Exonerated and Acquitted Defendants to Convicted Defendants in the Cases of Public Prosecution in the Trial-Level Courts in Kazakhstan, 2011–2015, by province, in the order of declining ratio in 2015<sup>154</sup>**

| Province         | 2011     | 2012     | 2013     | 2014     | 2015     |
|------------------|----------|----------|----------|----------|----------|
| Karaganda        | 70/2,142 | 29/1,823 | 4/2,022  | 2/1,755  | 16/2,247 |
| Atyrau           | 12/1,002 | 7/799    | 1/1,109  | 4/1,027  | 6/1,005  |
| Aktobe           | 19/1,175 | 25/969   | 15/1,115 | 2/1,111  | 8/1,701  |
| Almaty City      | 63/2,452 | 1/2,135  | 3/2,756  | 2/2,778  | 14/3,115 |
| Pavlodar         | 37/1,369 | 16/1,009 | 4/1,143  | 1/1,096  | 5/1,389  |
| Almaty Province  | 44/2,408 | 40/1,878 | 3/2,281  | 2/2,173  | 8/2,226  |
| West Kazakhstan  | 33/1,027 | 13/805   | 13/1,102 | 4/1,053  | 5/1,506  |
| South Kazakhstan | 78/2,147 | 5/2,348  | 10/2,849 | 10/2,773 | 8/2,841  |
| Kostanay         | 51/1,955 | 57/1,584 | 1/1,826  | 6/1,465  | 4/2,113  |
| Kyzyl-Orda       | 14/908   | 0/781    | 0/964    | 0/931    | 2/1,137  |
| Akmola           | 65/1,532 | 8/1,162  | 7/1,215  | 3/973    | 2/1,441  |
| Astana City      | 28/1,250 | 15/1,143 | 2/1,635  | 0/1,837  | 3/2,291  |

154. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

|                  |          |          |         |         |          |
|------------------|----------|----------|---------|---------|----------|
| Zhambyl          | 51/1,790 | 1/1,663  | 3/1,635 | 1/1,551 | 2/1,688  |
| Mangistau        | 25/1,102 | 8/780    | 1/887   | 2/815   | 1/1,1051 |
| East Kazakhstan  | 58/2,988 | 3/2,550  | 5/2,792 | 4/2,251 | 2/2,641  |
| North Kazakhstan | 28/1,375 | 20/1,005 | 4/928   | 5/865   | 0/1,052  |

## V. Closing Cases Based on Reconciliation between the Victim and the Accused—A Dramatic Expansion

Unlike the rarely used powers to exonerate or acquit, which Kazakhstani judges had preserved from the Soviet-era, the power to close<sup>155</sup> 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 since the early 1990s, yet it has not been codified in actual criminal codes. This is due, in part, to the collapse of the 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 offense 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.”<sup>156</sup> 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 for the crime.<sup>157</sup> In theory, closing cases on the grounds of reconciliation centers on the interests of the victim: repairing the harm and preventing re-victimization.<sup>158</sup> If the judge or the investigator agrees to dismiss the case due to the reconciliation, the defendant’s record still reflects the criminal charges.<sup>159</sup>

Over objections of procurators, judges slowly but steadily expanded the use of reconciliation and applied it to juvenile defendants and to cases of criminal negligence, such as deaths caused by traffic accidents.<sup>160</sup> In 2001, the Supreme Court confirmed this broadened application of reconciliation as a basis for closing cases.<sup>161</sup> The December 2002 amendments to the Criminal Code further expanded the application of reconciliation. The amended

155. Closing, dismissing, or terminating a criminal case mean the same throughout the Article.

156. Criminal Code (1997), *supra* note 15, art. 67.

157. *Id.*

158. Alkon, *supra* note 2, at 66–67.

159. *Id.* at 85.

160. Batyrzhan Ashitov, *Expansive Interpretation of Reconciliation with the Victim Is Not Allowed*, 22 VASHE PRAVA 289, 289 (June 2, 1999).

161. *O Sudebnoi Praktike po Primeneniiu Stat'i 67 Ugolovnogo Kodeksa Respubliki Kazakhstan* [Normative Edict of the Supreme Court of the Republic of Kazakhstan No. 4 “On Judicial Practice of the Application of Article 67 of the Criminal Code of the Republic of Kazakhstan”], KAZAKHSTANSKAIA PRAVDA (July 21, 2001), [http://adilet.zan.kz/rus/docs/P01000004S\\_](http://adilet.zan.kz/rus/docs/P01000004S_) [<https://perma.cc/HQ4K-B8EW>].

wording of Article 67 *required* closing criminal cases on these grounds of crimes of lesser gravity (such as theft and joyriding) committed multiple times and of crimes of medium gravity (such as robbery), committed for the first time and without the grave harm to health or death of the victim. It also permitted closing criminal cases for repeated crimes of medium gravity:

1. A person who committed an offence of a lesser gravity or for the first time committed an offence 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.<sup>162</sup>

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, Kazakhstani courts most often dismissed reconciled cases involving offenses of larceny, robbery, fraud, rape, and reckless driving.<sup>163</sup> Over objections of procurators, Kazakhstani judicial chiefs actively lobbied for expanding the use of reconciliation.<sup>164</sup> In 2005, the share of cases closed on the basis of reconciliation constituted 95.5% of all criminal cases closed by judges on non-rehabilitative grounds.<sup>165</sup> At the end of 2009, when judges closed every third criminal case on this basis (see Table 9), the then Chairman of the Supreme Court, Musabek Alimbekov, argued that wider use of out-of-trial reconciliation would allow the courts “slowly to move away from mandatory punitive principles” of administering criminal justice and “to compensate victim for the damages—then justice will be done.”<sup>166</sup> As a result of these lobbying efforts to both humanize and reduce the 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.

162. Criminal Code (1997), *supra* note 15, art. 67.

163. Alkon, *supra* note 2, at 87.

164. D. Dzhanuzakov, *Slaboe Zveno. Nechetkaia Pozitsiia Verkhovnogo suda RK v Nekotorykh Voprosakh Igraet na Ruku Prestupnikam* [Weak Link. Unclear Position of the RK Supreme Court on Some Issues Helps Criminals], IURIDICHESKAIA GAZETA (Jan. 9, 2002), [http://online.zakon.kz/Document/?doc\\_id=1027181](http://online.zakon.kz/Document/?doc_id=1027181) [<https://perma.cc/9M62-D9SV>].

165. Arstan Akhpanov & Sergei Pen, *Posrednichestvo Kak Instrument Pravosudiia* [Mediation as an Instrument of Justice], IURIDICHESKAIA GAZETA (Dec. 27, 2006), [http://online.zakon.kz/Document/?doc\\_id=30082780](http://online.zakon.kz/Document/?doc_id=30082780) [<https://perma.cc/4JWN-XBTP>].

166. *The Head of the SC RK Calls for the Majority of Disputes to Be Resolved on the Basis of the out of Court Reconciliation of the Parties*, ZAKON (Nov. 5, 2009), <https://www.zakon.kz/152533-152533-glava-vs-rk-ratuet-za-to-chtoby.html> [<https://perma.cc/7785-FUWR>].

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.<sup>167</sup>

**Table 9. Criminal Cases Resolved by Reconciliation after Charges Filed in Court<sup>168</sup>**

| Year | Cases Heard | Cases Resolved by Reconciliation | Percentage of Cases Resolved by Reconciliation after Charges Filed in Court |
|------|-------------|----------------------------------|---|
| 2000 |             |                                  | 5%  |
| 2001 |             |                                  | 6%  |
| 2002 |             |                                  | 8%  |
| 2003 |             |                                  | 22%   |
| 2004 |             |                                  | 25%   |
| 2005 |             |                                  | 22%   |
| 2008 | 47,246      | 15,097                           | 32%   |
| 2009 | 48,358      | 15,334                           | 32%   |
| 2010 | 46,844      | 18,701                           | 39%   |
| 2011 | 40,844      | 19,764                           | 48%   |

167. Criminal Code (1997), *supra* note 15, art. 67.

168. VERKHOVNYI SUD RESPUBLIKI KAZAKHSTAN GENERAL'NAIA PROKURATURA RESPUBLIKI KAZAKHSTAN MINISTERSTVO IUSTITSII RESPUBLIKI KAZAKHSTAN [MINISTRY OF JUSTICE OF THE REPUBLIC OF KAZAKSTAN, CONCEPT OF PROJECT "BITIMGERSHIRLIK – RECONCILIATION" (IN CRIMINAL AND CIVIL PROCEEDINGS)], <http://kazmediation.kz/files/2013/docs/2.pdf> [<https://perma.cc/HF2F-63GZ>]; Alkon, *supra* note 2.

|      |        |        |     |
|------|--------|--------|-----|
| 2012 | 36,029 | 17,001 | 47% |
| 2013 | 47,466 | 19,392 | 41% |

Again, these amendments to the Criminal Code 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 exercised discretion in deciding whether to close the case or continue the trial.<sup>169</sup> Some courts even have templates of reconciliation forms posted on their websites.<sup>170</sup>

As Table 10 shows, until 2013, judges closed about 70% of all reconciled cases while investigators closed the remaining 30%. In 2013, however, this proportion diametrically reversed when the Procuracy chiefs began insisting on registration of all criminal cases while reducing the prison population and counting the number of closed cases to evaluate the performance of prosecutors.<sup>171</sup> Judicial chiefs also gave a clear signal that prosecutorial discretion was more important than the discretion of judges by warning that reduction of the prison population could be achieved only when the law-enforcement agencies would limit the number of criminal cases sent to overloaded courts.<sup>172</sup> This reversal shows that bureaucratic incentives drive the decision-making of law-enforcement officials on the ground and that investigators take an active part in convincing the victim and the accused to reconcile. Convincing may take the form of sharing the spoils of compensation with the victim or pressuring the victim to reconcile. The then Deputy Prosecutor-General, Zhakyp Asanov, admitted that problems with law-enforcement officials pressuring the victims and the defendants to reconcile exist.<sup>173</sup> 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.<sup>174</sup> Paradoxically, pressure on the victim to reconcile may bring perverse adversariality into the inquisitorial criminal proceedings: law-

169. MINISTRY OF JUSTICE, *supra* note 168.

170. See, e.g., *Samples of Claims and Other Court Appeals*, URAL CITY CT. W. KAZ. PROVINCE, <http://zko.sud.kz/rus/sub/zkogor/obrazcy-iskovyh-zayavlenii-i-drugih-obrashcheniy-v-sud> [<https://perma.cc/33L9-J3GG>] (last visited Jan. 8, 2017).

171. See *infra* Section III.

172. See MINISTRY OF JUSTICE, *supra* note 168.

173. *Kazakh Deputy Prosecutor General Zhakyp Asanov*, *supra* note 35.

174. *Na Nameki Sud'i o Primirenii Pozhalovalis' Rodnye Pogibshego pod Kolesami Avto eks-Pomoshchnika Prokurora v Astane* [Relatives of the Deceased under the Wheels of Car of Ex-Assistant Procurator in Astana Complained against the Judge's Hints about Reconciliation], MATRITCA (Apr. 17, 2014), <http://www.matritca.kz/news/9064-na-nameki-sudi-o-primirenii-pozhalovalis-rodnye-pogibshego-pod-kolesami-avto-eks-pomoschnika-prokurora-v-astane.html> [<https://perma.cc/9XRY-MZE6>].

enforcement officials work together with the defendant to force the victim to agree to reconciliation. In 2014, procurators closed cases of 62,603 defendants and sent to court criminal cases against 44,479 defendants.<sup>175</sup> The entry in force of Criminal Code and Criminal Procedure Code did not change this proportion much: in 2015 procurators closed cases of 54,032 defendants and sent 32,796 to court; in 2016, the numbers were 60,393 and 33,461 respectively.<sup>176</sup>

**Table 10. Closing Reconciled Cases at the Pre-trial and Trial Stages of the Criminal Process**<sup>177</sup>

| Year | Closed Reconciled Cases, Total | Closed Reconciled Cases at the Pre-trial Stage % | Closed Reconciled Cases by Judges at the Trial Stage % |
|------|--------------------------------|--|--|
| 2008 | 21,412                         | 6,315 30%  | 15,097 70%   |
| 2009 | 21,201                         | 5,867 27%  | 15,334 73%   |
| 2010 | 23,948                         | 5,247 22%  | 18,701 78%   |
| 2011 | 27,197                         | 7,433 27%  | 19,764 73%   |
| 2012 | 27,038                         | 10,037 37%                                       | 17,001 63%   |
| 2013 | 59,392                         | 40,000 67%                                       | 19,392 33%   |

What explains the attractiveness of reconciliation procedures? Alkon, who studied the this practice extensively on the basis of official statistics and interviews with the law-enforcement officials in the mid-2000s, argues that corruption and reducing caseloads and decreasing the responsibility of the criminal justice professionals (such as detectives, investigators, procurators, and judges) to fulfil job performance indicators serve as the prime motivators

175. Data for 2015 and 2016 exclude defendants convicted of criminal misdemeanors. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

176. *Id.*

177. MINISTRY OF JUSTICE, *supra* note 168; *Kazakh Deputy Prosecutor General Zhakyp Asanov*, *supra* note 35.

behind the increased use of reconciliation procedures.<sup>178</sup> Reducing caseloads 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 the legacy of late socialism: judges continue to cover-up the shoddy work of the state prosecution. The prosecution still secures a conviction since the defendant receives a criminal record, albeit without a court sentence. Until 2013, investigators and procurators clearly shirked responsibility for closing cases by sending such cases to trial and hoping to secure convictions based on sloppy investigation,<sup>179</sup> and because they were rewarded for a higher number of cases sent to courts, they misled the defendants and victims that reconciliation could only be done in the cases of private prosecution or was to be done only by judges.<sup>180</sup> Table 11 demonstrates that judges in different provinces vary greatly in terms of closing cases on this basis, as procurators do not seem to insist on convictions that carry the risk of expanding the prison population—a process that the country’s leadership discourages. This wide inter-provincial variation is in stark contrast with the lack of variation in acquitting or refusing to detain discussed above. This variation exists because of different patterns of relationships among the criminal justice professionals on the ground who exercise discretion without the real risk of appellate review and monitoring from above.<sup>181</sup> As shown in Table 11, there is no direct relationship between the caseload and frequency of reconciliation, though courts with the lightest caseloads on the bottom of Table 11 tend to have the lowest share of closed cases. Until 2015, courts in the top four rows of the Table 11 used to close every other criminal case through 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 caseloads and appear to close more cases via reconciliation now than they did four years ago. Comparisons between 2014 and 2015 show that the new Criminal Code and Criminal Procedure Code seem to have led to the decline in reconciled criminal cases in absolute numbers and in the proportion of all cases handled for all provinces except Almaty Province, and the cities of Almaty and Astana. Finally, province-level data in Table 2 on pre-trial detentions, Table 8 on exonerations and acquittals, and Table 11 on reconciliations show that courts in the same province may perform differently in processing these three categories of judicial business. Principles of legality, fairness and humanism do not seem to drive judges in processing criminal cases.

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178. Alkon, *supra* note 2, at 103.

179. *Id.*

180. MINISTRY OF JUSTICE, *supra* note 168; Akhpanov & Pen, *supra* note 165.

181. Akhpanov & Pen, *supra* note 165.

**Table 11. Criminal Cases of Public Prosecution Closed by Judges via Reconciliation in 2011–2015, by Province, in the Order of Declining Share of Closed Cases (Percentage of All Criminal Cases Handled) in 2015<sup>182</sup>**

| Province         | 2011        | 2012        | 2013        | 2014        | 2015        |
|------------------|-------------|-------------|-------------|-------------|-------------|
| Almaty Province  | 770 (26%)   | 575 (23%)   | 1,306 (36%) | 1,458 (40%) | 1,487 (39%) |
| Aktobe           | 1,630 (59%) | 988 (50%)   | 1,358 (56%) | 1,110 (51%) | 996 (38%)   |
| Pavlodar         | 1,170 (45%) | 1,283 (49%) | 1,294 (49%) | 1,220 (50%) | 860 (36%)   |
| Kyzyl-Orda       | 948 (53%)   | 765 (50%)   | 945 (50%)   | 739 (46%)   | 547 (34%)   |
| Akmola           | 1,805 (53%) | 1,336 (49%) | 1,211 (50%) | 681 (43%)   | 731 (33%)   |
| Karaganda        | 2,082 (50%) | 1,674 (46%) | 2,004 (49%) | 1,547 (48%) | 1,068 (33%) |
| South Kazakhstan | 1,148 (34%) | 1,312 (35%) | 1,622 (37%) | 2,518 (46%) | 1,782 (31%) |
| Almaty City      | 676 (24%)   | 494 (19%)   | 1,287 (33%) | 1,351 (33%) | 1,372 (30%) |
| North Kazakhstan | 1,561 (55%) | 1,357 (55%) | 891 (51%)   | 389 (34%)   | 408 (28%)   |
| Kostanay         | 2,007 (51%) | 1,876 (50%) | 2,271 (56%) | 1,605 (54%) | 764 (27%)   |
| Astana City      | 363 (23%)   | 454 (25%)   | 652 (28%)   | 674 (26%)   | 669 (21%)   |
| West Kazakhstan  | 510 (61%)   | 450 (33%)   | 482 (32%)   | 603 (38%)   | 346 (19%)   |
| Mangistau        | 360 (28%)   | 346 (35%)   | 446 (37%)   | 336 (32%)   | 225 (19%)   |
| East Kazakhstan  | 3,408 (52%) | 3,152 (49%) | 2,505 (46%) | 1,454 (38%) | 618 (19%)   |
| Atyrau           | 559 (72%)   | 375 (32%)   | 555 (35%)   | 438 (29%)   | 151 (12%)   |
| Zhambyl          | 496 (33%)   | 413 (20%)   | 392 (21%)   | 248 (15%)   | 101 (6%)    |

From the point of view of the defendant, reconciliation is the best opportunity to avoid being sentenced. This is in the context that there is a high probability of serving a real prison sentence and a miniscule chance of being exonerated and acquitted. Indeed, avoiding a sentence is the main priority for defendants because the risk of imprisonment is high. Between 2006 and 2014, the share of prison sentences among all sentences has been consistently high even though it has gradually declined from 52% to 37%.<sup>183</sup> For victims, reconciliation may be the only viable option to recover any kind of compensation, which usually takes monetary form. What goes 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 the negotiation skills of the parties and the social status of the offender. For example, when a drunken son of the member of Kazakhstani Parliament shot a security guard in Astana

182. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3.

183. MINISTRY OF JUSTICE, *supra* note 168.

in 2007, the criminal case against him was closed through reconciliation after his father paid for the medical treatment and presented a one-bedroom apartment to the victim.<sup>184</sup>

Alkon also argues that investigators, who preserved the Soviet-era monopoly on recognizing someone as a victim of crime, and judges are heavily involved in this process and receive kickbacks from the accused for persuading the victim to reconcile.<sup>185</sup> For example, investigators and procurators could lessen criminal charges 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.<sup>186</sup> Akhpanov and Pen note that investigators and inquiry officials often

serve as intermediaries between the victim and the suspect, persuade[.] and, in some cases, openly blackmail the suspect (defendant) to pay a certain sum to the victim as compensation for harm caused by crime. The investigator or inquiry official pre-negotiates with the victim that part of the amount paid will be transferred to the investigator as a reward for mediation and assistance.<sup>187</sup>

These tricks have been successfully, yet controversially, used by local VIPs and their family members in high-profile traffic accidents involving deaths. The public controversy surrounding these cases eventually resulted in the April 2014 amendments to Article 67 of the Criminal Code that banned reconciliation as a basis for closing cases in which criminal negligence resulted in the death of one or more persons.<sup>188</sup> In practice, however, given that eight out of ten convicted persons are jobless (80% in 2014, 82% in 2015, and 83% in 2016), working-age adults, it is less likely that the defendants have sufficient wealth to offer attractive bribes to law-enforcement officials.<sup>189</sup> 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 of closing criminal cases based on reconciliation works in Kazakhstan because it aligns well with three types of demands and incentives:

- 1) political incentives of conducting a “zero tolerance” criminal justice system, yet reducing prison population;

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184. Aydar Yakubov, *Son of Senator Oralbay Abdykarimov Stand Trial for “Hooliganism”*, AZZATYQ (Mar. 4, 2010), [http://rus.azattyq.org/a/Kairat\\_Abdykarimov\\_Oralbai\\_Abdykarimov/1973626.html](http://rus.azattyq.org/a/Kairat_Abdykarimov_Oralbai_Abdykarimov/1973626.html) [<https://perma.cc/4E5D-WQWE>].

185. Alkon, *supra* note 2, at 103.

186. *Id.*

187. Akhpanov & Pen, *supra* note 165.

188. Criminal Code (1997), *supra* note 15, art. 67, *as amended* on April 23, 2014 by the Law # 200-V.

189. PRAVSTAT [OFFICIAL COURT STATISTICS], *supra* note 3. Data for 2015 and 2016 exclude those convicted of criminal misdemeanors.

- 2) bureaucratic incentives for law-enforcement officials and judges (lighter workload and less responsibility for the same output, without disrupting the working relationship among criminal justice professionals); and
- 3) demands 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 through reconciliation, either by judges or procurators in Kazakhstan, defendants face a choice between being sentenced or released based on reconciliation with the victim, with higher social status and affluence helping certain defendants avoid being sentenced. Meanwhile, judges process, and most likely approve, the decisions of procurators (when reconciliation was not possible) and the monetary bargains when defendants and the victims achieve reconciliation.

### Conclusion

The critics of the Kazakhstani criminal justice system usually point out the pliance, corruption, and accusatorial bias of judges.<sup>190</sup> However, as this Article shows, a majority of criminal cases do not reach judges, and when the remaining cases get to the judge's docket, there is a 50% chance of the case being terminated rather than decided on the merits and resulting in conviction. Prosecutors decide the fate of the majority of criminal cases as prepared by detectives and investigators, and they increasingly close cases on the basis of reconciliation between defendants and victims, often working on the side of the defendants. Thus, any serious criminal justice investigation is influenced by the discretion of detectives, investigators, prosecutors, and judges. It is this exercise of discretion that allowed Kazakhstan to reduce prison population in parallel with the more recent drives for the total registration of crimes and a zero tolerance approach to combating crime. 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 among criminal justice system professionals. In administering criminal justice, Kazakhstani judges 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) in criminal trials when they succeed in avoiding acquittals and exonerations; and
- 3) in appellate proceedings when they have their appeals against denied detentions, lenient sentences, or acquittals confirmed at a much higher success rate than defense attorneys.

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

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190. See, e.g., Suleimenova, *supra* note 32.

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. 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 the surprisingly stable detention and acquittal rates, lies in the blend of trust, mutual understanding, and fellowship between judges and law-enforcement officials, who exert occasional pressure against recalcitrant judges, or 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 cases of private prosecution where procurators do not participate.

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