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The Practical Logic of Judicial Decision Making

Discretion Under Pressure and Compromises at the Expense of the Defendant

Russian judges operate under high pressure resulting from structural limitations imposed by internal bureaucracy of the judicial system, combined with institutionalized interdependence with procuracy and law enforcement agencies, where the former have upper hand over the judiciary. In the absence of transparency and mechanisms for public

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Translated by Stephen D. Shenfield.

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or professional accountability, judges engage into opportunistic behavior seeking satisfactory performance indicators, avoiding conflicts with law enforcement bodies, and economizing their own effort and time. This results in an accusatorial bias in Russian courts: they acquit not more than 1 out of 500 defendants. Within these structural limitations, though, the judges look for the opportunities to exercise some degree of judicial discretion to avoid unnecessary harm to the defendants who might be prosecuted unfairly, or investigated negligently. Where possible, they use termination of the cases on grounds of active repentance or reconciliation with the victim, and suspended sentences (probation) as substitutes for acquittals.

Keywords: *judges, criminal justice system, Russia, unrule of law, bureaucracy, accusatorial bias*

The accusatorial bias of Russian courts in criminal cases has long been both a commonplace in discussion of the defects of the judicial system and a cause of serious public concern. Thus, of the 1,244,458 criminal cases heard by the courts in 2008 only 8,377 (0.67 percent) ended in the acquittal of the defendants. Moreover, 5,698 of the acquittals were in cases of private prosecution, that is, in cases where the prosecution is represented by a private person and not by the procuracy on behalf of the state. Excluding these cases, we find that only 2,679 of the 1,120,290 cases of public or private–public prosecution[*] heard in 2008 ended in an acquittal—that is, 0.2 percent (see Table 1). Were we to take this figure at face value, we would have to acknowledge that the court disagrees with the state prosecution in only two out of every thousand cases and that the precision of the work of investigators and procurators in Russia, at least insofar as identification of the guilty is concerned, might well be the envy of users of high-precision measuring instruments. An error margin of 0.2 percent is better than the notorious "three sigmas";[1] if these figures

[*]Cases that are only to be opened on the victim's claim; also, it is mandatory to dismiss the investigation, if the victim revokes the complaints. At the same time, unlike private prosecution cases that are not required to (although can) be investigated by law enforcement at all and can be filed by a victim in court directly, these cases are investigated by law-enforcement agencies and presented in courts by state prosecutors.

Table 1

Number of Acquittals in Cases of Private–Public and Public Prosecution

Year	Total number of cases received by the courts	Number of cases of public and private–public prosecution received by the courts	Number of acquittals in cases of public and private–public prosecution	Proportion of acquittals in cases of public and private–public prosecution, %
2008	1 244 458	1 120 290	2679	0.24%
2009	1 181 890	1 063 969	1821	0.17%
2010	1 126 143	1 011 479	1649	0.16%

reflected the true proportion of conclusively proven charges then we could say that statistically the procuracy never makes a mistake.

In practice, of course, these outstanding results are achieved not through irreproachable work on the part of the procuracy but by means of various strategies for exerting pressure on the court and ensuring that the judge cooperates with the state prosecution.[2] These strategies, which enable the state prosecutor to dominate court proceedings, may be divided into three groups:

1. Participating in the selection of judges. The Procuracy exercises an informal right of veto over the appointment of a judge when a procuracy official decides whether or not to countersign the candidate's documents at the stage of preparation for the competition. One of the results is that former defense attorneys and lawyers with experience of working in private companies or public organizations rarely become judges, while former procurators constitute the second largest group among judges (17 percent) after former court staff (29 percent), with former law enforcement officers other than procurators in third place (16 percent). Furthermore, the proportion of judges specializing in criminal cases (I will return to the problem of specialization in the courts

later) that is constituted by people from the procuracy is higher than the average for the corps of judges as a whole: in allocating cases court chairmen take former work experience into account, and of course most former procurators have more experience of participation in criminal than in civil proceedings.[3]

2. Manipulating the appeals process. The chief criteria of the successful work of a judge in the eyes of the court chairman (who is in reality his direct superior, despite the formal provision for the independence of judges) are: the number of cases heard (taking into account, of course, their size); the number of decisions annulled or changed by higher courts, the proportion of appealed decisions that are annulled or changed, and compliance with procedural time limits. Between 2002 and 2015 Russia had two forms of review of trial court decisions in criminal cases: cassation for verdicts from district courts and appeals for those from the justices of the peace.[*] The former requires return of the case for retrial, and the latter does not. Annulment of a decision is regarded as a sign of poor work and is viewed in an extremely negative manner. There is an unwritten norm according to which the procuracy, unlike a private person, tries to appeal in one form or another against any acquittal. Thus, in 2008 appeals were filed (in most instances by the procuracy—it is quite rare for a victim to initiate such an action) against 41 percent and cassation complaints against 44 percent of acquittals, while against convictions appeals are fifteen times and cassations are three times less common (see Figure 1). In addition, acquittals are annulled by higher courts much more often: almost every fourth acquittal was annulled or changed (9.5 percent on appeal and 15.1 percent on cassation protest add up to 24.6 percent, but in practice the total must be a little less because there exist rare instances in which the same verdict is changed a number of times at each level). The proportion of

[*]Pursuant to a 2013 law verdicts rendered in district courts as of 2016 were reviewed by oblast courts through appeal rather than cassation.

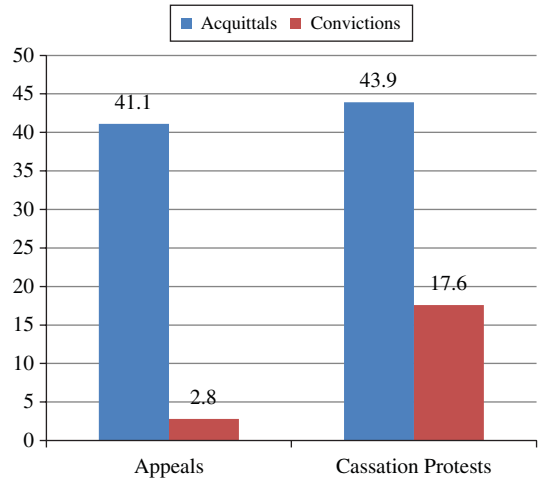

Figure 1. **Appeals and Cassation Protests Filed in 2008 by Type of Verdict** (as a percentage of all verdicts of that type issued)

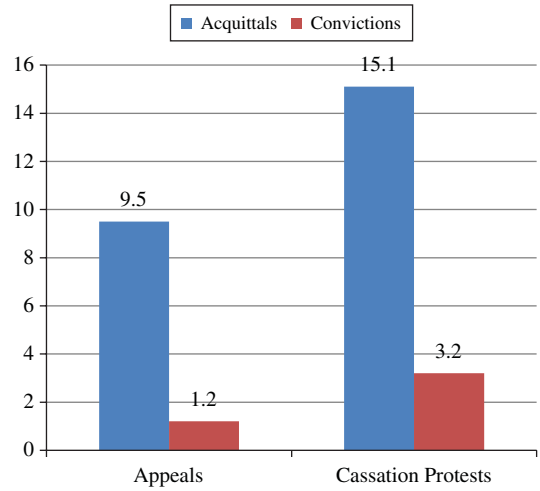

Figure 2. **Percentage of All Verdicts Issued in 2008 That Were Changed or Annulled**

convictions that are annulled or changed by higher courts does not exceed 4.5 percent (see Figure 2). There are also subtler methods of manipulating the number of appeals (e.g., "false" appeals that enable a judge to obtain a larger number of decisions upheld by a higher court on appeal, thereby improving the figure for the proportion of appealed decisions that are annulled).

3. Ensuring regular interaction. A district (*raion*) court and a *raion* procuracy serve the same territory. Both in the court and in the procuracy there exists specialization by areas of work (not always but usually—in the courts not as often as in the procuracies, because in the courts one also encounters different criteria for allocating cases among judges), so that there are about as many judges constantly engaged in hearing criminal cases in a court as there are assistant procurators regularly presenting state indictments in the same court. This is not an absolute rule. There is no formal division of official duties by areas of work in the courts and procuracy offices, and when necessary specialists readily "substitute" for one another. A judge who specializes in civil law may be assigned a criminal case; similarly, an assistant procurator mainly engaged, let us say, in oversight of operational-detective and investigative work (see Titaev, this issue) may in some situations present an indictment. This is, however, a perceptible tendency. Thus, the same few procuracy officials and judges meet one another over and over again in different criminal trials. They are in fact colleagues—they meet several times a week. Moreover, the procuracy makes special efforts always to send a given judge, if at all possible, the same assistant procuracy—one who maintains "good relations" with him—at least for cases involving an experienced judge who handles the more difficult and important cases. In this situation close social ties between judge and procurator do not even have to be explained in terms of their similar social origin, education, and class position; they are simply a matter of personal acquaintanceship and the awareness of the judge

that he will have to continue working with this person for a long time to come.

A more detailed description of the strategies by which the procuracy exerts pressure on the court (and of the structural conditions that compel it to exert this pressure) merits a separate article.[4] The purpose of this article, however, is to examine those strategies by means of which judges can resist such pressure. Even though acquittals entail no small risk for the judge, the court does not turn into a machine for the rubberstamping of verdicts: judges seek and find discretion in applying and manipulating the law. One of the parameters of a case with respect to which one might expect differences in the use of judicial discretion is the seriousness of the charge. For instance, it might be conjectured that the judge will feel more apprehensive about issuing an unjust conviction on a more serious charge that entails severe punishment—a real and long term of imprisonment. But we cannot exclude the possibility that despite the presumption of innocence the judge will treat the evidence of the procurator with less rigor in the most serious cases, considering it impermissible to let a dangerous criminal—a murderer or rapist—"walk the streets" while insisting on a more rigorous standard of proof in less serious cases, where the stakes for society are not so high. However that may be, the hypothesis is that judicial discretion may take different forms in relation to charges of different degrees of seriousness.

In Russia, though, there are four formal categories of crime by seriousness ('non-serious'; 'moderately serious'; 'serious', and 'especially serious'); they are tried under slightly different formal procedures, and allow different final decisions. Moreover, the formal structure of options available to the judge for each category presents a kind of a natural experiment that helps to uncover judges' structure of incentives. From now on I will use parenthesis to refer for formal categories of seriousness, to distinguish them from substantial use of the term.

Table 2 presents all the options available to the judge in cases grouped by the formal degree of seriousness of the charge.

Table 2

Outcomes of Criminal Cases Heard in 2008

Maximum term of imprisonment, years	Total number of cases	Conviction	Incarceration	Suspended Sentence	Monetary sanction (fine, obligatory or corrective labor)*	Termination on grounds of reconciliation with victim	Termination on grounds of active repentance	Termination on grounds of absence of the corpus of a crime, absence of an event, or nonparticipation in the crime	Acquittal
All crimes	1244458	919149	308285	357056	248588	231870	16168	23136	8377
0 (excluding cases of private prosecution)	99402	83844	193	1831	81146	8439	4630	109	211
All 1	7352	5125	357	1394	3323	1208	722	15	34
All 2	304350	194127	36495	89518	67260	82592	6544	4679	565
All 3	90525	72457	20724	38612	12981	15101	880	97	185
All 4	49458	38210	15400	19168	3380	8872	714	49	193
All 5	268093	200949	68505	89268	42145	56861	1892	259	366
All 6	78567	76415	33166	39925	2988	115	81	83	245
All 7	67900	66812	29422	35524	1648	19	21	70	120
All 8	43970	43077	22860	18893	1296	0	2	22	80
All 9	0	0	0	0	0	0	0	0	0
All 10	42940	41928	25095	16341	362	1	5	52	259
Over 10	60499	58033	53697	4207	41	4	3	86	398
Cases of private prosecution	131402	38172	2371	2375	32018	58658	674	17615	5721

*Including suspended monetary sanctions.

The Criminal Code assigns articles to one or another group ('non-serious'; 'moderately serious'; 'serious', and 'especially serious') in accordance with the upper limit of the punishment specified in the article concerned (Article 15 of the Criminal Code). The principle that punishment should be commensurable with the act committed also enables us to suppose that, ideally, in setting the same upper limit of punishment for different crimes, the legislator assesses these crimes as being of equal seriousness. Thus here we permit ourselves to make a certain assumption: by grouping the crimes defined in different parts of articles of the Criminal Code in accordance with the upper limit of punishment (as in law, the degree of seriousness is assigned not to an article but to a part thereof, which describes a specific crime), we have constructed a sort of scale of seriousness of the crimes imputed to convicted persons and can then compare the seriousness of the crime with the severity of the punishment actually set. Thus, the discretion of the judge manifests itself in the choice of a specific punishment within—or in exceptional instances outside—the limits of the range specified in law. All punishments that do not entail incarceration are here considered less serious than incarceration even for a few months—this conclusion is drawn on the basis of expert interviews and opinions. Cases of private prosecution are also excluded from consideration. Thus, we can be confident that in all the cases included in this analysis the prosecution was represented by an official of the procuracy. Table 3 shows the same judicial decisions as a percentage of all decisions of cases of the same seriousness.

Besides the degree of seriousness of crimes, there is another important aspect to the judge's discretion in cases of various degrees of seriousness: for 'non-serious' crimes (two years of incarceraton as the upper limit of punishment) or of a 'medium' degree of seriousness (five years as the upper limit), the judge can terminate the case on grounds of reconciliation between the parties or active repentance. For a case to be terminated on the former grounds, the defendant must admit his guilt and the victim give his consent; for a case to be terminated on the latter grounds, the defendant must admit his guilt and the investigator and

Table 3

Outcomes of Criminal Cases Heard in 2008 As Percentage of Total Number of Verdicts of Corresponding Degree of Seriousness

Maximum term of imprisonment, years	Total number of cases	Conviction (%)	Incarceration (%)	Suspended Sentence (%)	Monetary sanction (fine, obligatory or corrective labor) (%)*	Termination on grounds of reconciliation with victim (%)	Termination on grounds of active repentance (%)	Termination on rehabilitating grounds (%)	Acquittal (%)
All crimes	1244458	73.86	24.77	28.69	19.98	18.63	1.30	1.86	0.67
0 (excluding cases of private prosecution)	99402	84.35	0.19	1.84	81.63	8.49	4.66	0.11	0.21
All 1	7352	69.71	4.86	18.96	45.20	16.43	9.82	0.20	0.46
All 2	304350	63.78	11.99	29.41	22.10	27.14	2.15	1.54	0.19
All 3	90525	80.04	22.89	42.65	14.34	16.68	0.97	0.11	0.20
All 4	49458	77.26	31.14	38.76	6.83	17.94	1.44	0.10	0.39
All 5	268093	74.95	25.55	33.30	15.72	21.21	0.71	0.10	0.14
All 6	78567	97.26	42.21	50.82	3.80	0.15	0.10	0.11	0.31
All 7	67900	98.40	43.33	52.32	2.43	0.03	0.03	0.10	0.18
All 8	43970	97.97	51.99	42.97	2.95	0.00	0.00	0.05	0.18
All 9	0	–	–	–	–	–	–	–	–
All 10	42940	97.64	58.44	38.06	0.84	0.00	0.01	0.12	0.60
Over 10	60499	95.92	88.76	6.95	0.07	0.01	0.00	0.14	0.66
Cases of private prosecution	131402	29.05	1.80	1.81	24.37	44.64	0.51	13.41	4.35

*Including suspended monetary sanctions.

Table 4

Configuration of Forces in the Trial by Category of Decisions

Possible decisions	Limits of application	Procurator in the trial	Interests of the procurator
Acquittal or termination of the case on rehabilitating grounds	—	Loses the case	Poor work of investigator and procurator exposed, reprimand at work practically unavoidable
Reconciliation with victim	Upper limit of punishment five years or less	Consent of procurator not required	Interests satisfied: criminal has admitted guilt
Active repentance	Upper limit of punishment–five years or less	Consent of procurator required	Interests satisfied on the whole, but has to report reason for petition to superior
Conviction	—	Procurator wins the case	Interests satisfied
Private prosecution	Part 1 of Article 115, Part 1 of Article 116, Part 1 of Article 129, and Parts 1 and 2 of Article 130 of the Criminal Code of the RF	Usually absent	No interests

procurator give their consent (by filing a petition noting that the defendant's behavior satisfies the criteria of active repentance). The table 4 represent a configuration of forces shaped by these formal limatations.

How judges make decisions when a case is heard without the obligatory participation of a procurator is clear from cases of private prosecution (the overwhelming majority of such cases are heard without a procurator, although in a number of circumstances, state prosecutors do take part in such trials). The proportion of acquittals in such cases is considerably higher: 4.35 percent as compared with 0.24 percent in cases of public and private–public prosecution. Nor are judges afraid to terminate cases on rehabilitating grounds—the outcome in 13.41 percent of cases. Another 44.64 percent of cases end with reconciliation between the parties. Thus, the outcome of the trial is favorable for the defendant in well over half of all instances.

In this kind of cases, judges consider reconciliation the most successful outcome and insist upon it.

> Q: And what is your own attitude toward these situations?
>
> A: I think that this is right, if only because in principle, after all, for a citizen to have a conviction on his record affects both himself and members of his family. Very often there are consequences of some sort: say, when a youngster fills in a questionnaire or applies for a job somewhere and has to reveal that Dad has a conviction. . . . Naturally, we try to avoid that. In principle, when we issue an order to initiate a criminal case by way of private prosecution we always write that reconciliation was proposed but not achieved. That is, when we receive a statement, when we hand it to the defendant and the victim, we always explain to the defendant that he has the right to seek reconciliation. Well, we try to explain all this. In principle they can do this at any stage of the trial, but it sometimes happens that literally at the last moment, just before the last word, he says: "OK, I'm willing to reconcile." This too, fortunately, happens—just before we retire to decide the verdict. (Justice of Peace)

Only 29.05 percent of cases of private prosecution end with conviction of the defendant. Fewer than 2 percent of defendants in such cases receive a real term of imprisonment, despite the fact

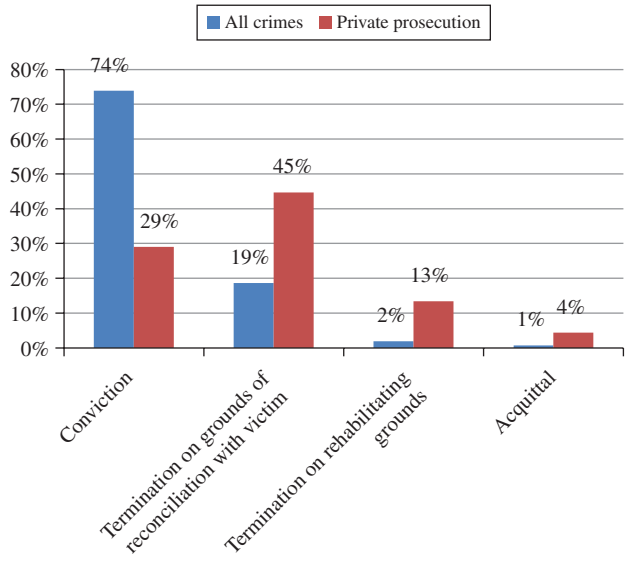

Figure 3. **Verdicts in Cases of Private Prosecution in Comparison with General Statistics, 2008**

that the maximum punishment for these crimes is two years of incarceration. Figure 3 shows how the verdicts on private prosecution cases compare to general picture. Of course, here we are talking about the lightest crimes, but it must be acknowledged that in the absence of a procurator judges hardly display behavior that deserves the label "accusational bias."

However, even if we consider only crimes of comparable seriousness, the presence of a state prosecutor has a big impact. In cases of private–public and public prosecution for the lightest crimes—those not punishable by incarceration at all—84 percent of defendants are convicted; the sole fact of the presence of a procurator reduces the probability that the defendant will leave the courtroom without a conviction by almost four-fifths. Perhaps judges are so willing to make concessions with regard to the charge because hardly any of those convicted in this category of cases (just 0.2 percent) are sentenced to a real term of

imprisonment. Apparently (this also emerges from the interviews) judges regard only incarceration as a real punishment.

> Yes, we give him a suspended sentence. Judges have now got their bearings. They give out [suspended] terms of imprisonment as though they were doing it for real. And if a judge can give just two months then that is what he gives. He doesn't give three years, because we know that during the probationary period this person may take a false step, especially if he is a minor, and when he takes a false step and commits some sort of crime, or sometimes a number of crimes, that seem trivial to the man on the street. Well, so what if he struck someone on the face and grabbed his ruler? But this is robbery with violence and often it has the signs of a crime of higher than average seriousness, and then I have to annul the suspended sentence and send him away for real. (Judge)

Perhaps they simply see no need to "bargain" with the procuracy for trivia such as the monetary penalty (a fine, corrective labor, etc.) with which the majority of such cases end.

Conversely, as I show below, cases involving a real term of incarceration are examined with a much more critical eye and judges do everything within their power to avoid sending someone to prison if they do not consider it necessary to sentence him to a real term. Judges are fully aware both of the cruelty of this measure of punishment and of the fact that it is counterproductive in terms of prevention.

> When you are sent to prison you land in the company of criminals. Now you learn something altogether different, and you get buggered. And you know that here you will earn nothing by honest means, you have to steal from this sucker. In prison you steal even from your own buddies. It's a completely different way of life in there. (Judge)

Unfortunately, as I show below, even here judges do not have unlimited discretion: when all possibilities for compromise with the procuracy have been exhausted, judges still prefer to convict a petty accomplice rather than enter into conflict with the state prosecutor. In cases involving imprisonment the discretion of the judge is inversely proportional to the seriousness of the charge and therefore to the severity of the punishment facing the defendant.

Procurators have less success in upholding charges in less serious cases involving imprisonment. For articles specifying an

upper limit of one year's or two years' incarceration, procurators achieve a conviction rate of 70 percent or 64 percent, respectively (Table 3). This would seem not altogether logical: theoretically procurators should take more care with the proof of more serious charges, while judges should deal more strictly with people charged with more serious crimes. However, while here too the number of acquittals and the number of cases terminated on rehabilitating grounds are negligible,[5] in more serious cases judges, as we see, are considerably less inclined to issue convictions. Many more such cases are terminated on grounds of active repentance or reconciliation with the victim: 26 percent of cases punishable by up to one year's incarceration and 29 percent of cases punishable by up to two years' incarceration are terminated on nonrehabilitating grounds (active repentance or reconciliation with the victim). This, of course, is not 44 percent, as in cases of private prosecution, but it is still a quite impressive

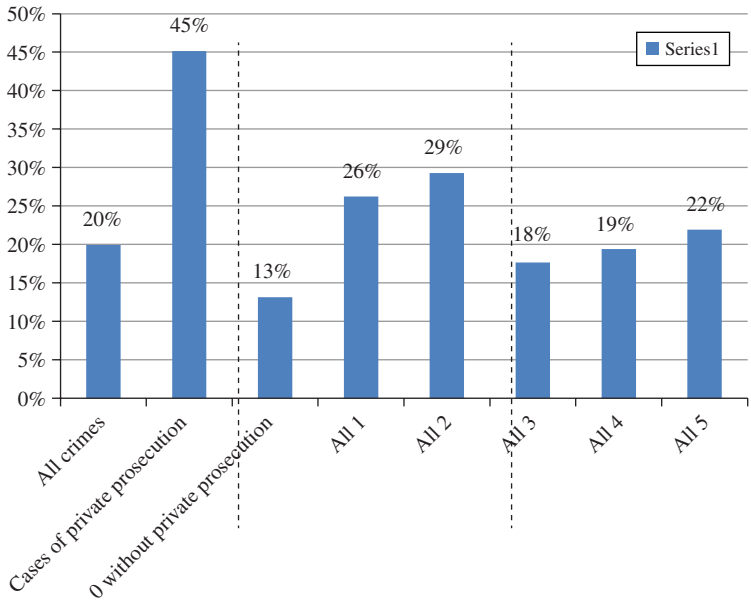

Figure 4. **Proportion of Cases Terminated on Grounds of Reconciliation Between the Parties by Degree of Seriousness of the Charge**

proportion of all cases—between a quarter and a third. Paradoxically, moreover, the percentage of cases terminated on nonrehabilitating grounds does not fall but rises within each category ('non serious', 'a medium seriousness') as the charge becomes more serious (see Figure 4). Were judges to show indulgence toward criminals who admit their guilt, guided by purely humane considerations, one would expect the opposite: the more serious the crime the weaker the judge's impulse to release the criminal from punishment. Here we find a different logic: the greater the guilt admitted by the defendant the more inclined the judge to spare him punishment altogether (see Figure 5).

We know from the interviews that judges insist on reconciliation between the parties, even going so far as to put pressure on the victim.

This outcome is often advantageous to all trial participants: the procurator obtains the defendant's admission of guilt and can consider himself the winner, and is also insured against suits claiming illegal indictment; the defendant avoids not only a term of imprisonment but also a conviction on his record; the victim,

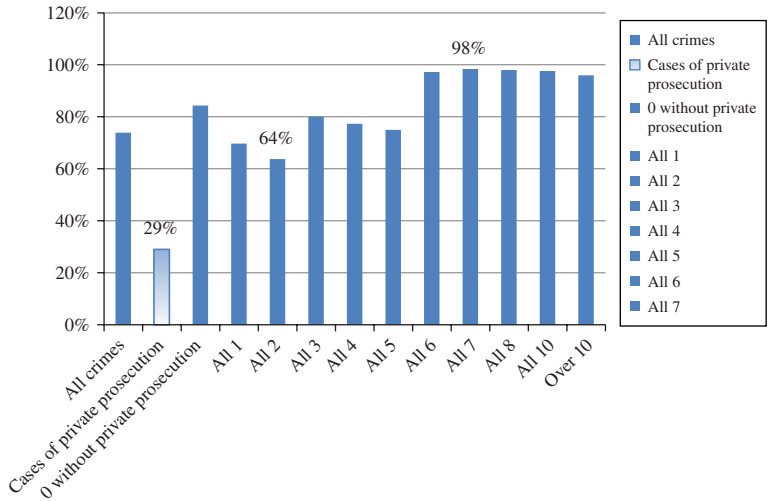

Figure 5. **Proportion of Cases Ending with a Conviction: The More Serious the Charge the Poorer the Chances of the Defendant**

in exchange for his consent, is able to demand material or other compensation for harm caused (often this gives him a better chance of real compensation than anything he might obtain from the defendant in the event of a conviction). As for the judge, he can be sure that neither of the parties will file an appeal against the result of the trial. There is another trifle that informants mentioned many times—it is much less laborious to write an order to terminate a case than it is to write a conviction (and this in turn is much simpler and quicker for the judge to write than an acquittal—but more on this later).

For cases of a 'medium' degree of seriousness, the proportion of defendants convicted is higher: 75–80 percent; surprisingly enough, however, so is the proportion of suspended sentences. While just 12 percent of defendants charged with the more serious of 'non-serious' crimes, punishable by a maximum term of 1–2 years, receive a real term of imprisonment and 29 percent receive suspended sentence (with monetary measures of punishment accounting for the rest), at the next higher level of seriousness—the lightest of crimes of a 'medium' degree of seriousness, punishable by a maximum term of 2–3 years—23 percent of defendants receive a real term and 43 percent a suspended sentence. The probability of termination of a case of a 'medium' degree of seriousness on nonrehabilitating grounds is smaller than the corresponding probability for a 'non-serious' case for three reasons. First, this category contains a high proportion of "victimless crimes"—above all, drug-related crimes—and the very absence of a victim excludes the possibility of reconciliation with him. Second, procurators are much less inclined to give their consent to the termination of cases in this category on grounds of active repentance. "Active repentance" is usually part of a deal in which the defendant assists the investigation and besides a petition for termination of the case receives a milder classification of the charge that places it in the 'non-serious' category. In other words, the very fact of "active repentance" often reassigns a case to the 'non-serious' category. A judge who is prevented from terminating a case even though he doubts that a petty accomplice

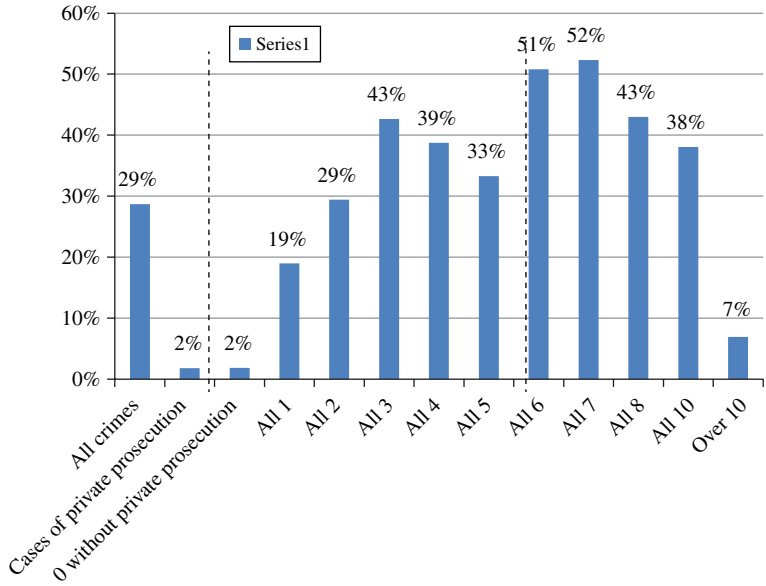

Figure 6. **Proportion of Suspended Sentences by Degree of Seriousness of Charge**

is guilty or that the charge has been proven resorts to the next "softest" option—suspended sentence (Figure 6).

When the defendant is charged with a 'serious' crime, the judge is no longer able to terminate the case on nonrehabilitating grounds, and it is precisely at this transition—from cases of crimes punishable by up to five-year terms to cases of crimes punishable by up to six-year terms of incarceration—that there is another sharp increase in the proportion of suspended sentence: from 33 percent to 51 percent (Figure 6). It is hard to explain such a sharp difference in the outcomes of cases of quite similar seriousness by reference to any objective factors. (In fact the great majority of those sentenced to incarceration—77 percent in the first category and 72 percent in the second—receive terms of 1–3 years, reflecting the fact that in the eyes of judges their crimes do not differ very much; see Table 5.) Probably the quality of the evidence presented by the state prosecution is fairly similar in these categories of cases, and the roughly 20 percent of cases with

Table 5

Percentage Distribution of Defendants Sentenced to Incarceration in Each Category Defined by Degree of Seriousness of Charge (upper limit of punishment specified in relevant part and article of Criminal Code) by Actual Term Set, 2008

Actual term set	Up to 1 year	Over 1 year up to 3 years	Over 3 years up to 5 years	Over 5 years up to 8 years	Over 8 years up to 10 years	Over 10 years up to 15 years	Over 15 years up to 20 years	Under the lower limit
Upper limit to term (degree of gravity)								
Up to 1 year	100.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Up to 2 years	75.30	24.68	0.02	0.00	0.00	0.00	0.00	0.01
Up to 3 years	51.98	47.74	0.18	0.09	0.01	0.01	0.00	0.20
Up to 4 years	30.50	64.33	5.16	0.01	0.01	0.00	0.00	0.05
Up to 5 years	19.85	**72.16**	7.98	0.01	0.00	0.00	0.00	0.03
Up to 6 years	4.76	**76.83**	16.41	1.99	0.01	0.00	0.00	3.57
Up to 7 years	6.30	69.44	21.59	2.67	0.00	0.00	0.00	4.27
Up to 8 years	3.69	44.75	44.64	6.85	0.07	0.00	0.00	8.50
Up to 9 years	–	–	–	–	–	–	–	–
Up to 10 years	1.75	27.91	45.19	23.71	1.43	0.00	0.00	8.89
Over 10 years	0.42	5.11	19.13	44.68	20.76	8.78	1.11	8.67

charges of a 'medium' degree of seriousness that judges, had they unlimited discretion, would terminate, end with a suspended sentence as the nearest available surrogate for acquittal in "adjacent" cases with 'serious' charges. In such cases, however, it is practically impossible to obtain a real—as opposed to surrogate—acquittal. The overwhelming majority of cases in this category (97–98.5 percent) end with a conviction; the proportion of acquittals is negligible—even less than average. By contrast, the proportion of acquittals of defendants charged with the 'especially serious' category of crimes—those punishable by terms of ten years or more—is almost three times the average for cases of public prosecution: 0.6 percent compared to 0.2 percent. But even in the category of 'serious' cases (crimes punishable by up to ten years' incarceration) the proportion of suspended sentences is surprisingly high—38 percent. Apparently this figure should be regarded as a minimum estimate of the percentage of defective output in the work of the procuracy. While for less serious crimes the majority of terminated cases, suspended sentences, and like phenomena can be attributed not to the judge's doubts concerning the guilt of a petty accomplice but to ordinary considerations of humanity required of a judge by law, for such serious offenses a suspended sentence can hardly be considered a normal option applicable in almost half of all instances[6] (thus, the category of crimes punishable by up to seven years' incarceration has the highest proportion of convictions—98.4 percent—but also the highest proportion of suspended sentences—52.3 percent). Only in the category of 'especially serious' cases does the proportion of suspended sentences fall from dozens of percentage points to 7 percent; on the other hand, it is precisely in this category that there suddenly appears an atypically high proportion—3 percent—of defendants deemed legally incompetent (in the general population this proportion is about 1 percent; in the "adjacent" group of defendants charged with crimes punishable by up to ten years' incarceration it is also 1 percent). This is probably the last option available to judges for avoiding conviction in cases where a suspended sentence will look extremely strange. It is also very clear that it is precisely in

these cases of the most serious crimes—and not in cases of the lightest crimes—that judges make wide use of their right to set punishments milder than the lower limit (Table 5). This may be yet another manifestation of judicial discretion in those cases where the judge does not consider the charge adequately proven but does not want to risk entering into conflict with the procuracy.

It seems to me that the behavior of judges as described above, though at first glance somewhat paradoxical, can be explained with the aid of a model of discretion under pressure. Such a model is consistent neither with the portrait of the judge as an ideal type—an independent and impartial professional guided only by the law and by professional values—nor with the image of the judge as an obedient cog in the machinery of prosecution—in effect, an official of the repressive system whose position is essentially no different from that of an investigator or procurator and whose apparent independence and impartiality in assessing the arguments of the prosecution are of a purely decorative character.[7] The real situation is probably more complicated.

The data show that judges are indeed under structural pressure—pressure strong enough to compel them to take into account the interests of the state prosecution even when in their own minds they consider the arguments of the prosecution insufficiently weighty to support a conviction. The mechanisms of this pressure were briefly described above; as I said, a detailed account merits a separate article.

The norms and values shared by the community of judges set the interests of "the state" and of "society" above those of the law and judicial impartiality. Moreover, state interests are understood as requiring most favorable treatment of the law enforcement bodies in the fight against crime (without due regard for compliance with proper procedure, let alone for the interests of the defendant).

> We stand with the procurators. That is not to say that we are friends with them, or on bad terms either. It's just that we and they stand together on guard for the state. We are equally interested in ensuring that the criminal should not go scot-free. And we are equally

> interested in ensuring that he should not just sit in prison waiting to get out. (Judge)

The interests of society are understood as requiring isolation of "the criminal element," even in violation of strict legality.

> Yes, there are gaps in the investigation. Sometimes you want just to… Well, you see such scum sitting there. Excuse me, I'm putting it mildly. Yes, not to put too fine a point on it. And so you give him a term just in order to isolate him somehow, because the rest of it cannot be proven… And so this accusatorial bias sometimes has quite objective causes. Objective. In order to give a chance to other people, to his relatives, to his old mother, who this son of a bitch beats and laughs at and steals her pension. At least to give her three years, [pause] to give her some relief. In one way this used to be bad. When a man was jailed they took away his living space. They struck his name off the register and he lost the right to living space. But now, however long you are put in jail you keep the right to this living space. And you go back. And again you make life hell for your relatives and your friends. And for your own children, who have nowhere to escape from you. (Judge)

At the same time, judges place a very high value on legality and justice, on punishment being proportionate to the crime. In the absence of pressure—structural pressure and normative pressure—they act in accordance not with a repressive logic but with a logic of elimination and prevention of harm. In particular, they attach much greater importance to restitution than current Russian legislation does. They factor the interests of the victim "into the equation" and consciously aim at reconciliation of the parties with compensation for damages as an option preferable to repression.

The humanitarian standard of Russian judges is also rather higher than required by current legislation. They view the measures stipulated by law, insofar as real incarceration is concerned, as excessively cruel (in particular, because unlike legislators they take into account the real conditions of life in places of imprisonment many of them can evaluate in person while dealing with parole petitions). This prompts them to set

milder punishments in numerous cases and to avoid real terms when isolation of the criminal as such does not seem to them beneficial and when the rigid structural constraints imposed by pressure from the procuracy so permit.

> When the defendant is not so very socially dangerous and his actions did not involve violence against the person, in general, of course, we always consider giving him a punishment not involving incarceration, because the goal, after all, is rehabilitation. Well, what sort of rehabilitation does a labor camp provide, for God's sake? Well, we have our best camp to the northwest—our Yablonevka. But it's a horror—what they do there. We travel out there periodically to release prisoners on parole. Well, it's a labor camp—what can I say? It means not only depriving him of everything now but also taking away his future. We have practically no rehabilitation in this country. That is OK if he has someone to help him get back on his feet when he gets out. So the question of punishment is a very serious one. (Chairman of a court)

While other things being equal, judges demonstrate by their conduct that they have the humanistic and legalistic values required by their profession (and they also declare the legalistic values),[8] at the same time they clearly demonstrate the "weakness" of their values, an unwillingness to sacrifice very much in order to uphold them in practice. If I may put it this way, the values of Russian judges are "exchanged" for benefits (avoiding sanctions, keeping their position, even just saving effort and maintaining a comfortable psychological atmosphere at work) at a very low exchange rate. The logic of judicial decision making that has taken shape among post-Soviet judges is an art of practical compromises (mostly at the expense of defendants) between the interests of the state prosecution, embodied in a system of constraints on the independence of judges, and their professional duty to judge in accordance with law and justice. The social distance between the judge and the average defendant (and, indeed, the average victim) in a criminal trial is so great that the judge is able to neglect his interests. Similar social position, shared experience, and repeated contacts with the state prosecutor make the judge extremely sensitive to the interests of the latter, even in the absence of direct

pressure. Thus, the criminal trial turns into interaction between two strong players guided by interests that are essentially bureaucratic and departmental in character: the judge and the procurator. The defendant, the victim, and even the defense attorney play this game from a weak position: not only are they not endowed with resources to influence the decision made, but they are also separated from the strong players by social inequality. Even more important, perhaps, they are one-time players in someone else's repeated game. As is well-known, repeated interaction stimulates cooperation.[9] In the absence of structural constraints or normative barriers designed to prevent such behavior, repeated interaction may also stimulate a successful search for mutually advantageous compromises at the expense of the incidental one-time players. Within this structural framework the interests of the people who should be the central figures in the trial—the defendant, whose fate is at stake, and the

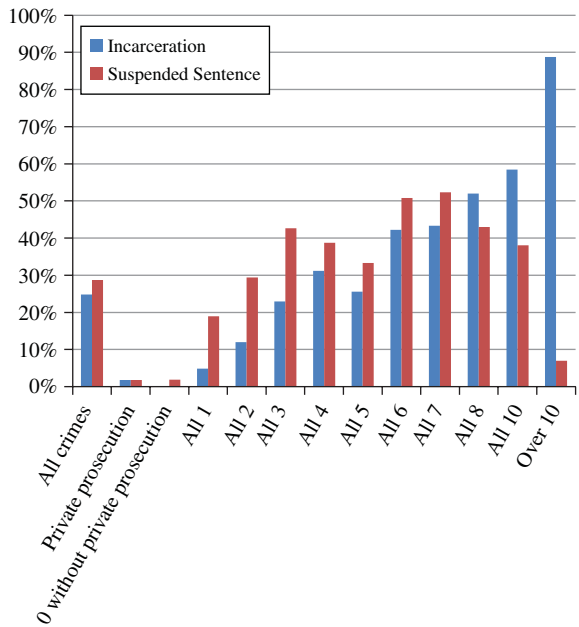

Figure 7. **Ratio Between Suspended Sentences and Real Sentences to Incarceration by Degree of Gravity of Charge**

victim, whose violated rights need to be restored—"weigh" much less than the interests of the judge and the procurator, and they themselves are relegated to the role of bit players. These compromises, however, create a normative conflict for the judge—a conflict that he tries to settle without hurting the interests of the only player with whom he needs to cooperate—the procurator.

As a result, the judge is constantly in search of discretion that will be "free of charge"—that is, ways to realize his values without having to risk anything. Not being prepared to uphold his position and impartially assess the arguments of the prosecution, the judge, seeing before him a defendant who is innocent or faces too serious charge, chooses the most "inoffensive" of the "free-of-charge" options available to him—the one that in his opinion will cause least harm to the defendant. He may terminate the case on nonrehabilitating grounds, or if this option is not available he may set a suspended sentence or another punishment unconnected with incarceration or even declare the defendant legally incompetent.

The enormous number of suspended sentences for 'serious' crimes, in many categories exceeding the number of sentences to real incarceration terms (Figure 7), is evidently an indicator of judges' actual assessment of the quality of the charges presented to them by procurators and investigators. Taking into consideration that perceptions of public and state interests demand that the judge ignore procedural flaws in situations where he is convinced that the defendant really is guilty, it must be admitted that this assessment is a very poor one.

Notes

1. A confidence interval of three standard deviations ("sigmas") encompasses 99.7 percent of the values of a normally distributed random variable. Measuring instruments often have a precision of "up to three sigmas"; measurement error in the social sciences is usually much greater.

2. E. Paneyakh, The Trajectory of a Criminal Case and Accusatorial Bias of Russian Courts [Traektoriia ugolovnogo dela i obvinitel'nyi uklon rossiiskikh sudov], in *Pravo i pravoprimenenie v Rossii: mezhdistsiplinarnye issledovaniia*, ed. V. Volkov (Moscow: Statut, 2011).

3. According to the results of a survey of judges conducted by the Institute for the Rule of Law, judges recruited from the procuracy are 14 percent less likely to specialize in civil cases and 5 percent more likely to specialize in criminal cases than judges who were previously members of the bureaucracies attached to the courts.

4. For a partial description of the situation, see E.L. Paneyakh, K.D. Titaev, V.V. Volkov, and D.Ia. Primakov, Accusatorial Bias in Criminal justice: Procuracy Factor [*Obvinitel'nyi uklon v ugolovnom protsesse: faktor prokurora]* (St. Peterburg: IPP EU SPb, 2010).

5. A single article wholly accounts for the loss of the 1.54 percent of cases terminated on rehabilitating grounds—Part 1 of Article 158 "Theft" without aggravating circumstances, with an unusually high (over 3 percent) proportion of cases terminated because there was no event or no corpus of a crime; this is due to the special characteristics of this corpus rather than to any special attitude on the part of judges.

6. An alternative explanation of this phenomenon that suggests itself—a high level of corruption in the courts—not only contradicts the information obtained from the interviews but also does not withstand the test of reality, at least insofar as criminal trials are concerned: in light of the social status of defendants, who mainly belong to the lowest income groups, the proportion of criminal cases that at least theoretically might be of interest to a corrupt federal judge can hardly exceed 10 percent.

7. See the article by M. Pozdniakov—"Meaning and Ambiguity of the Accusatorial Bias" [Smysl i dvusmyslennost' obvinitel'nogo uklona]. in *Kak sud'ii prinimaiut resheniia: empiricheskie issledovaniia prava* (Moscow: Statut, 2012).

8. See the article by V. Volkov and A. Dmitrieva—"Russian Judges as a Professional Group: Norms and Values" [Rossiiskie sud'i kak professional'naia gruppa: normy i tsennosti] in *Kak sud'ii prinimaiut resheniia: empiricheskie issledovaniia prava* (Moscow: Statut, 2012).

9. R. Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).