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The Price of Compromise

The article discusses the mechanisms used by appeals courts when reviewing cases. The empirical data shows that there are discrepancies between the annulment of convictions and the annulment of acquittals. When looking at database that encompass a six-year period before and after introducing the new Criminal Procedure Code we show how law enforcement system urges the counter-reform in applying the new Criminal Procedure Code and results in developing of different policies in treating convictions and acquittals by appellate courts.

Keywords: *appeals courts, law enforcement system, Criminal Procedure Code, review of sentences*

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An important special feature of the Russian criminal process is the significant and sometimes even dominant role played by the bodies of preliminary investigation. Despite the difference in their functions, all participants in the preliminary investigation—the detective (operativnyi sotrudnik), the inquiry official (doznavatel), the investigator (sledovatel), the head of the investigation body, the supervising procurator, and the procurator supporting the charge in court—are united in their willingness to do all within their power to prevent an acquittal. This unites them and creates unity of the law enforcement bodies. An acquittal is an emergency occurrence for the entire law enforcement system. The whole system of stimuli within the law enforcement system is aimed at excluding the possibility of acquittal.

According to the doctrine reflected in legislation, the court is a main link in the criminal procedure chain and has no formal connection with the evaluation procedures of law enforcement bodies. By law the court has a choice: it can either enter into conflict with law enforcement officials (when, for instance, it is necessary to issue an acquittal) or it can go along with the law enforcement system and rubberstamp convictions. Study of the practice of the appeals courts enables us to describe the interaction between the courts and the law enforcement system.

In this article I use data on the work of the Judicial Collegium for Criminal Cases of the Krasnoyarsk Krai Court over the six-year period 1999–2004. The conclusions indicate the existence of a special mechanism that is actively applied to reverse acquittals. Comparison of the grounds adduced shows significant differences between the reversal of convictions and the reversal of acquittals. A special feature of the tactic used to annul acquittals is the choice of a mechanism that allows for unlimited discretion. Although second instance (review) courts can apply this mechanism to any kind of lower court decision, in nine cases out of ten it is applied to annul an acquittal. In only one case out of ten is it used to annul a conviction. Such a large difference in the behavior of second instance courts in reviewing the two types of verdict is attributable to different degrees of pressure exerted on the courts by the law enforcement system.

Acquittal As an Extraordinary Happening for the Law Enforcement System

In the course of a comprehensive investigation conducted by the Institute for the Rule of Law,[1] it was established that the functioning of the Russian law enforcement system resembles the motion of a conveyer belt that must end in a conviction or other outcome that is "painless" for the system. A "painless" outcome is any outcome that does not cast doubt on the justifiability of the criminal prosecution of the accused (reconciliation of the parties, termination of the case as a result of active repentance, termination of criminal prosecution in connection with expiration of the period of limitations). All these outcomes belong to the category of nonrehabilitative circumstances; that is, they do not contain the assertion that the accused is not guilty. Instances in which procedural documents contain this assertion may be regarded as interruptions in the motion of the conveyer belt.

At the stage of the preliminary investigation, functions are distributed among participants in the chain along which the criminal case is passed; conflicts are possible among them, flowing from different departmental interests and from discrepancies between systems of departmental reporting, but they all have an ultimate interest in the same outcome. An acquittal is an extraordinary happening for the entire law enforcement system. The undesirability of an acquittal for all personnel of the law enforcement system finds clear expression in the interviews. "If there is an acquittal, then that is a minus for this whole law enforcement system of ours. I have in mind investigators, detectives, procurators—it makes a minus for the whole law enforcement system."[2]

The whole system of stimuli within the law enforcement system is aimed at excluding the possibility of acquittal. If a specific official is found responsible for the issuance of an acquittal, a disciplinary penalty may be imposed on him with all the consequences flowing therefrom: he may be denied a bonus or his next promotion in rank.[3]

The judge is not part of the law enforcement system and formally he has no reason to be guided by its interests. However, the law enforcement system has a sufficiently wide range of methods at its disposal. A judge who openly disregards the interests of the law enforcement system puts his career at risk. The mere fact of an acquittal may give rise to rumors about corruption in the courts, and this may have a negative impact on the judge's subsequent career. When a qualifying collegium considers any personnel decision, it is possible that information lacking documentary confirmation will be used. This may be completely unconfirmed information such as anonymous denunciations and rumors. The rarity of acquittal and the availability of many kinds of palliative outcomes (a mild punishment or termination of the case on nonrehabilitative grounds) encourage people to conjecture that the judge may have had a special motive to acquit, perhaps a corrupt motive. Farfetched as such suspicions may be, it has to be acknowledged that they play an important role and constrain the independent action of judges.

Every judge understands that if he issues an acquittal he will come under pressure from the law enforcement system and every judge has cause to be apprehensive about issuing an acquittal. An additional constraint on the judge is the undesirability of a verdict being annulled. Acquittals are annulled three to four times more frequently than convictions (see Table 1). As an acquittal is a rare event and attracts heightened attention from the law enforcement system, it has become customary practice within the judicial system to set higher requirements for documentation in support of acquittals.

Within the judicial system there are no formal prohibitions on issuing acquittals that might incline judges toward the values of the law enforcement system. But judges are restrained by the need to "pass the examination" in higher courts. The near certainty that an appeal or protest [henceforth, "appeals" should be understood as including "protests"—Trans.] will be filed against an acquittal and the higher likelihood that it will be annulled deter judges from

Table 1

Proportions of Verdicts Annulled on Appeal by Oblast Courts in Russia over the Period 2007–2012 (according to data from the Judicial Department)

	2007	2008	2009	2010	2011	2012
Convictions appealed (number of persons)	163953	162425	152184	145115	137648	126920
Acquittals appealed (number of persons)	4522	3708	2772	2533	2379	1755
Convictions annulled (number of persons)	15646	13554	12137	10520	8988	8682
Acquittals annulled (number of persons)	1555	1273	981	827	756	550
Proportion of convictions annulled (%)	9.5	8.3	8.0	7.2	6.5	6.8
Proportion of acquittals annulled (%)	34.4	34.3	35.4	32.6	31.8	31.3

Note: All “appeals” here were requests for review in cassation, so that annulments of verdicts lead to the return of the case for retrial in the lower court rather than the higher court substituting its own verdict.

issuing acquittals. Thus *the work of the judge is determined to a large extent by a higher judicial instance*. In order to uncover the methods used in the control of criminal justice it is necessary to examine the mechanism that guides the work of the higher (regional) courts.[4]

Levels of the Judicial System

If we look back at any trial that has caught the attention of the mass media, we see that the media and public focus their attention almost exclusively on the court of first instance (trial court). Television and the film industry contribute to this tendency: all movies and broadcasts that feature a judicial investigation place it in a court of first instance. The news coverage of controversial trials exhibits the same bias. Thus everyone remembers the name of the judge who issued the second verdict against Mikhail Khodorkovsky and even tiny details about the hearing of this case in the court of first instance, but no one remembers either the names of the judges who heard the appeals against this verdict or the course of the appeal itself. But it was precisely their decree that determined the entry of the verdict into force or, to put it more simply, brought the verdict to life. The higher court always dominates the court of first instance and determines its activity. The law and legal doctrine unambiguously assert that the view of the higher court supersedes that of the court of first instance. There is always a legal norm that makes the instructions of the higher court binding (Part 3 of Article 389.18 and Part 6 of Article 401.16 of the Criminal Procedure Code of the RF). The domination of the higher court is one of the crucial principles ofthe administration of justice. It is not enunciated at the beginning of the code and not a great deal is written about it. Nevertheless, it is precisely this principle that shapes the administration of justice.

The boundary between levels of the judicial system is more important than it may appear at first glance. The figure of the judge in the court of first instance is only one element of this

system, even though as the most public element it is assigned the chief role by the public. However, a judge views any case as a set of typical situations for which the correct practice has already been established for him, so in the course of routine work he is customarily guided by similar cases heard in the past. The most recent practice of case considereation is especially important under conditions of rapidly changing legislation and highly dynamic social processes. This implies that it is impossible to learn all legal positions once and for all. This knowledge must be constantly renewed and brought up to date. The judge in the court of first instance therefore always focus attention on the guidelines of the higher court. Court proceedings are adjusted by providing judges with summaries of the most significant judicial practice, so there is no reason to speak of direct administrative pressure. The higher courts guide the work of judges in the lower courts. The methods in most common use are to publish explanations and present models of judicial practice. Experience shows that this is quite effective. In a survey of judges conducted by the Institute for the Rule of Law, 57.4 percent of respondents said that directives of the Plenum of the Supreme Court of the RF are very important for their work; this is comparable with the corresponding figures for legal positions of the Constitutional Court of the RF (65.1 percent) and the letter of the law (52.4 percent).[5]

All supervision of the work of courts of first instance is concentrated at the level of the regional courts. Supervision is exercised through procedural mechanisms in the form of the two stages of appeal—appeal and cassation at the higher court (up to 2013 they were called cassation and oversight (nadzor)), and also through the use of powers to determine all judicial recruitment policy in the region.[6] The right to make personnel decisions is complemented by procedural supervision.

Now we shall examine the very first stage of appeal against judicial acts that have not entered into legal force. Up to 2013 this was called the cassational stage; now it is called the appellate stage.

Different Approaches of Higher Courts to Convictions and Acquittals

According to the official statistics published by the Judicial Department, out of all verdicts reviewed on appeal regional courts annul over a third of acquittals but only 6–9 percent of convictions (Table 1). This allows us to conclude that *in the regional courts—the main level for the review of verdicts—there are two different approaches: a laxer approach for convictions and a more rigorous approach to the review of acquittals*. There are additional arguments in favor of this conclusion, for it is known from the interviews that judges are always more painstaking in presenting their reasons for an acquittal because they know that each acquittal will be studied more carefully than a conviction. In other words, it may be said that from a technical point of view the presentation of an acquittal is always of higher quality than that of a typical conviction. So even if convictions and acquittals were annulled at an equal rate there would still be cause to suspect bias on the part of the higher courts.

From the data presented it is clear that over the period 2007–2012 there took place a relative decline in annulments of all verdicts. But the significance of this number is quite different for convictions and for acquittals. The proportion of convictions that are annulled declined over this period by almost a third—from 9.5 percent to 6.8 percent. For acquittals the change in the proportion of annulments does not even reach five percentage points—the proportion fluctuates in the region of one-third. This suggests different tendencies for the two types of verdict. While annulments of convictions show a clear downward trend, the proportion of acquittals that are annulled is consistently high.

The decline in the proportion of convictions that are annulled is attributable to the rise in the proportion of cases that are heard in accordance with the special procedure (a form of guilty plea introduced in Chapter 40 of the Criminal Procedure Code of the RF).[7] The data for 2012 show that the special procedure was used in 61.4 percent of all cases heard on their merits and to review 68

percent of all appealed convictions. Use of the special procedure reduces the likelihood of annulment of a conviction.

The stable rate of annulment of appealed acquittals at a level of one-third over a period of six years allows us to conclude that the attitude of the regional courts toward acquittals is based on criteria that differ from those used in reviewing convictions.

Official statistics do not enable us to peer any deeper into these different approaches toward the review of convictions and acquittals. If we wish to obtain more detailed information, then we need to take into account important parameters that are not presented in official statistics. In particular, we need to assess the reason why each verdict was annulled or changed. My database helps us answer this question. I assembled the database by processing the texts of cassational decrees to annul or change judicial decisions on appeal. The database encompasses all judicial decisions that were annulled or changed over the period 1999–2004. Table 2 shows the size and structure of this general population, which enables us to draw conclusions concerning the rare and even unique instances in which a court of second instance reviews an acquittal.

The New Criminal Procedure Code As a Shock

The period covered by the database straddles an important turning point—the entry into force of a new Criminal Procedure Code in

Table 2

Types of Judicial Decisions Annulled or Changed by the Judicial Collegium for Criminal Cases of the Krasnoyarsk Krai Court over the Period 1999–2004

	Numbers			Proportions (%)		
	1999–2002	2002–2004	Total	1999–2002	2002–2004	Total
Resolutions	951	1507	2458	16.8	29.8	23
Acquittals	65	61	126	1.4	1.2	1.2
Convictions	4636	3487	8123	82	69	75.9
Total	5652	5055	10707	100	100	100

July 2002. This divides the database into two parts. The first part encompasses the last three and a half years of application of the old 1960 Criminal Procedure Code of the RSFSR. The second part encompasses the first two and a half years of application of the new Criminal Procedure Code of the RF. The designers of the new code intended it to make a substantial change to the work of the courts. The presence of this turning point enables us to assess whether there have been any changes in the work of the regional appeals court. Table 2 presents a general description of the database.

In order to obtain answers to the question that interests us it is necessary to single out only 8,169 verdicts—126 annulled or changed acquittals and 8,043 annulled or changed convictions. The next step is to exclude all cases in which there was an outcome other than annulment. Although this entails a substantial contraction of the empirical base, from about 8,000 observations to 2,300, it also makes the base more adequate to solution of the set task. It enables us to compare the actions of trial participants and the court in reviewing different types of verdict. As convictions greatly outnumber acquittals, two-thirds of the activity of the appeals court of Krasnoyarsk krai is devoted to the review of convictions. This activity is hardly comparable to the approach taken toward acquittals. Very rarely are changes made to acquittals; almost always it is a matter of annulment. Over the six-year period only five acquittals (4 percent) were changed in Krasnoyarsk krai, while the remaining 121 acquittals (96 percent) were all annulled. During the same period only 25 percent of convictions were annulled and 75 percent changed. To change an acquittal means only to make insignificant adjustments to it, and from the point of view of the interests of the law enforcement system, which is the main "client" for appeals against acquittals, this amounts to a loss. So in these instances the appeal is in effect denied. The Judicial Department does not even keep track of changes to acquittals, but counts only annulments in its statistics.

Table 3 shows the distribution of annulled verdicts by year. For the sake of clarity there is a column that includes changed as well as annulled convictions. There is no corresponding column for

Table 3

Verdicts Annulled by the Judicial Collegium for Criminal Cases of the Krasnoyarsk Krai Court over the Period 1999–2004

	Convictions annulled or changed	Convictions annulled	Acquittals annulled
1999	1181	396	21
2000	1374	445	18
2001	1398	458	15
First half of 2002	674	203	9
Second half of 2002	568	123	11
2003	1415	298	34
2004	1433	299	13
Total	8633	2222	121

acquittals because the differences between it and the annulled-only column would be too small (just five cases over six years).

If we consider only annulled verdicts, then we see that acquittals account for a rising proportion of them; this makes our comparison of the policy of the krai court regarding the two different types of verdict more reliable. While acquittals constitute 1.5 percent of all verdicts annulled or changed over the six-year period, when we single out annulled verdicts this figure rises to 5.2 percent. Changes from year to year also become clearer. From Figure 1 we see that in the second half of 2002 and throughout 2003 (the first year and a half of operation of the new Criminal Procedure Code) there was a surge in annulments of acquittals. If we look at other parameters like the total number of cases reviewed or the number of convictions that were annulled or changed (see Table 3), then we see that these parameters did not undergo such wide fluctuations.

It may therefore be conjectured that the surge in annulments of acquittals has its own unique causes. One possibility is that it occurred solely because judges in courts of first instance (trial courts) began to issue more acquittals while the higher court sought to annul them in accordance with its customary practice.

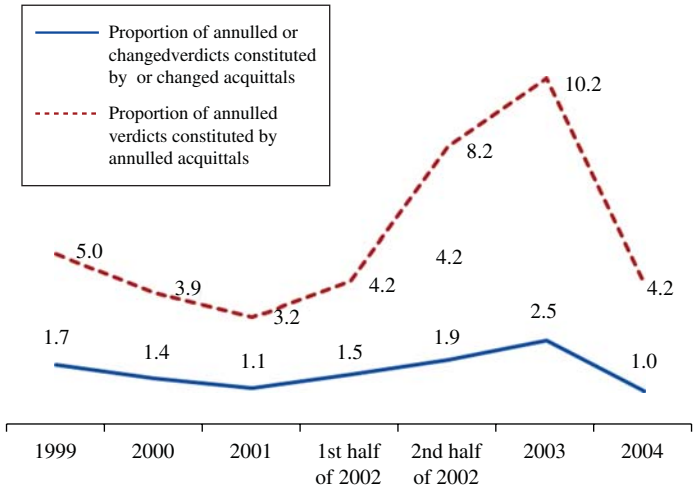

Figure 1. **Comparison of the Proportions of Annulled or Changed Verdicts and of Annulled Verdicts Constituted By Acquittals Annulled by the Judicial Collegium for Criminal Cases of the Krasnoyarsk Krai Court over the Period 1999–2004**

Another possibility is that the appeals court was engaging in a sort of prophylaxis, exerting preventive pressure on the courts of first intance by annulling a higher than usual proportion of acquittals.

It is possible to put forward the thesis that the surge in annulments of acquittals during the first year after the new Criminal Procedure Code was introduced was a reaction to an attempt to entrench a new model in which the court occupies a more independent position. In order to adopt this thesis we need to turn to the first version of the new code and consider the tone of the discussions about its conception. The drafting of the new code was accompanied by vigorous public debate. Every legal expert found confirmation in the text of the new code of the intention of legislators to enhance the role played by the courts. The authors of the new code themselves openly spoke of this.[8] All these ideas were actively discussed and the public did indeed place great hopes in the new code. Quite naturally, judges spoke out as a group that felt a special professional responsibility for bringing about change in criminal court proceedings.

Table 4

Numbers of Persons Acquitted by Courts in the Russian Federation over the Period 1999–2007 (with proportions of persons acquitted or convicted constituted by persons acquitted)

	Persons convicted	Persons acquitted		Persons acquitted in cases of public prosecution		Persons acquitted in cases of private prosecution	
Year	Number	Number	Proportion (%)	Number	Proportion (%)	Number	Proportion (%)
1998	1148092	3690–4650	0.36				
1999	1183600	3735–4797	0.36				
2000	1180756	4890					
2001	1244211	5298					
2002	997870	8500–8950	0.87	5375	0.53	3350	0.33
2003	958900	9360–9800	0.99	5080	0.52	4500	0.46
2004	815700	7700	0.94				
2005	904000	8200	0.90				
2006	937667	8700	0.92				
2007	931057	10216	1.09	4438	0.47	5778	0.61
2008	941936	10027	1.05	3489	0.37	6538	0.69
2009	915843	9179	0.99	2524	0.27	6655	0.72
2010	879234	9152	1.03	2380	0.27	6772	0.76
2011	806728	8855	1.09	1970	0.24	6885	0.84
2012	764263	5164	0.67	1653	0.21	3511	0.46

Unfortunately, we do not have complete statistical data available that would enable us to categorically answer the question of the role played by the appeals courts (courts of second instance). Only since 2007 have detailed statistics been published about the work of the courts. There are no data on the number of acquittals issued by courts in Krasnoyarsk krai over the period under examination. We have to rely on available data for all courts in Russia. Table 4 presents figures collected from various sources (statistical reports and surveys of judicial practice) about the numbers of persons acquitted by all courts in Russia. What is important for us here is the trend, so data on convictions are not cited. In some instances there are small discrepancies between corresponding figures from different sources, so a range is shown.

In interpreting these figures we must take into consideration that official statistics cover only verdicts that have entered into legal force.[9] Official statistics do not tell us how many verdicts have been "cut down" by appeals courts. From Table 4 it is clear that the number of acquittals in cases of public prosecution peaked in 2002–2003.

According to figures in the statistical handbook on the results of the work of courts of general jurisdiction, the proportion of verdicts issued by the Krasnoyarsk Krai Court that were annulled or changed rose from 18.4 percent in 2002 to 22.2 percent in 2003. Thus official statistics indirectly confirm that the regional appeals court became more active.

From the available data the conclusion may be drawn that the introduction of the new Criminal Procedure Code was indeed a blow against the positions of the law enforcement system and that acquittals became more likely. Various methods were probably applied to minimize the increased independence of judges in courts of first instance. Legislative action was undertaken to go back to the legal norms of the model embodied in the old RSFSR Criminal Procedure Code and recommendations were made to continue previous practice even where this clearly conflicted with the new legal norms.[10] The fall in the proportion of annulments in 2004 is consistent with the sharp fall in the number of persons acquitted in 2004 by all courts in Russia.

Undoubtedly the shock produced by adoption of the new Criminal Procedure Code led to the activation of all methods for the control of court proceedings. By 2004 positions on the most controversial provisions had been worked out and this brought the situation into balance. As the data below make clear, this was not a static balance: the situation continued to change but more smoothly. There were no more surges.

Strategies of Trial Participants

A special feature of the appeals procedure as one of the elements in the inner mechanics of the administration of justice is that it is derivative from the action of trial participants. Although it is the court of second instance (appeal court) that determines the practice of lower courts, it does not act on its own initiative. In order for the appeals court to apply its powers to annul or change a judicial decision, that decision must be appealed. Only then does it go to the higher court for review. So the outcome of a specific case depends above all on which judicial decisions are appealed by trial participants.

Each participant has a specific goal that determines his tactics. Guided by this goal, he decides what to appeal, in what respect, and what arguments to adduce. If we consider the entire population of verdicts reviewed in courts of second instance, then we see that the main participant is the defendant. Appeals by defendants account for two-thirds of the work of courts of second instance. All other trial participants either challenge judicial decisions together with the defendant or appeal against the remaining third of reviewed verdicts. Moreover, it should be taken into account that the statistics now show only successful appeals. The proportion of appeals filed by defendants is probably even higher in comparison with other participants.

A number of appeals by different trial participants may be filed against a single judicial decision, so we have the phenomenon of overlap between the figures for the numbers of appeals by different participants. This means that the total number of appeals lodged with a higher court by various trial participants exceeds

the total number of appealed verdicts. If we consider only annulled verdicts (Figure 2), then we see that in the period following the entry into force of the new Criminal Procedure Code, despite the high level of participation by defendants, the main driver of annulments of verdicts was the procurator. Although appeals by defendants are numerous, they usually lead to change rather than to annulment of the judicial decision.

In the context of the question of the behavior of the appeals court, it should be noted that acquittals are annulled only on the basis of appeals by the procuracy or by the victim. This is readily explained. The procuracy upholds the interests of the law enforcement system, while the victim demands punishment of the person who in his opinion is guilty of committing the crime.

If we track the participation level of trial participants over time, then we see a clear surge in the participation level of the procuracy following the introduction of the new Criminal Procedure Code. This is consistent with the understanding of the new code as a shock to the law enforcement system that

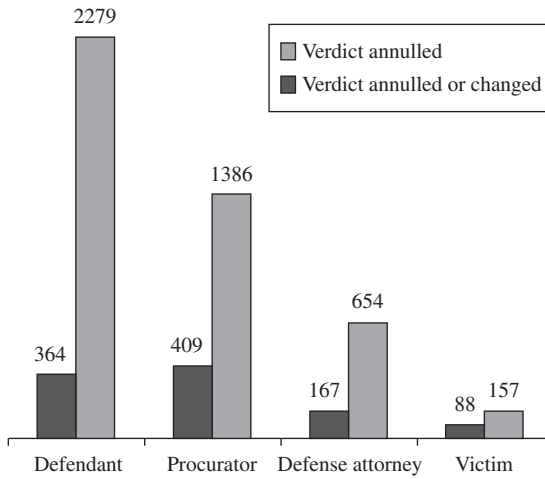

Figure 2. **Comparison of Number of Appeals Filed by Different Trial Participants That Led to Annulment of the Verdict with Number That Led to Annulment or Change of the Verdict (during the period of the first two and a half years of operation of the new Criminal Procedure Code from mid-2002 to the end of 2004)**

manifested itself in an attempt by judges in courts of first instance to revise the rules of the game.

Before the introduction of the new code, the proportion of annulled verdicts that were based on appeals by the procuracy was steadily falling—from 46 percent in 1999 to 38 percent in the first half of 2002. In 2003 this number jumped up to 58 percent. The corresponding figure for appeals by defendants fell by twelve percents (Figure 3). In view of the fact that we are dealing with a general population and there is no sampling error, these are significant fluctuations.

The change in the participation level of the procuracy after the introduction of the new Criminal Procedure Code is consistent with the surge found in the proportion of acquittals annulled. With regard to acquittals there was no increase in the number of appeals; there was a qualitative change in the work. However, an important clarification must be made: in the first half of 2002, when the proportion of acquittals annulled had already risen

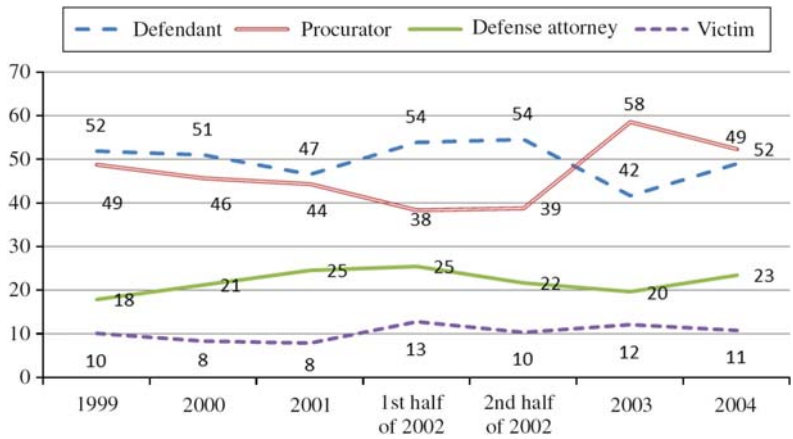

Figure 3. **Proportions of Appeals Against Verdicts Annulled by the Judicial Collegium for Criminal Cases of the Krasnoyarsk Krai Court over the Period 1999–2004 Filed by Main Trial Participants[9]. *Note:* A hundred percent represents all annulled verdicts, but in a single case there may be a number of appeals filed by different trial participants. The proportions shown in the graph therefore reflect the activity level of a specific participant but do not exclude activity on the part of other participants.**

sharply and doubled, no change is observed in the participation level of the procuracy. It remains stable throughout 2002 and changes only in 2003. This enables us to conclude that *the increase in the proportion of acquittals annulled in the second half of 2002 has its source in the position of judges in appeals courts*, and that the change in the participation level of the procuracy was only superimposed on this tendency.

As we are now looking at a specific region, we can use additional information to explain the switch in the focus of the procuracy's activity that followed not immediately after introduction of the new code but half a year later. The point is that at the end of 2002 there was a change in the leadership of the regional procuracy: Viktor Yakovlevich Grin' became procurator of Krasnoyarsk krai. He remained in this post until 2006, after which he was appointed a deputy procurator-general of the Russian Federation. The appointment of a new chief in the law enforcement system is always accompanied by a shakeup, a review of results achieved, and an intensification of efforts. In this instance, it took place during the period of assimilation of the new Criminal Procedure Code and there was a clear change in the practice of filing appeals against verdicts. We must also bear in mind that the procuracy is a strictly centralized system. Practice is uniform within it and like any large structure it is slow to react. No one was able to predict how judges in courts of first instance would respond to the new code, so no systematic preparations were made. For a while the procuracy continued to function as before. The sharp change in the practice of the courts in the form of a sharp increase in the number of acquittals inevitably prompted the law enforcement system to search for countermeasures. This search resulted in the elaboration of a position within the procuracy system that became fully evident in the course of 2003. The increased independence of courts of first instance was probably an unexpected development and the procuracy needed time to reorient itself and change its style of work. Therefore the intensified activity of the procuracy observed in 2003 in Krasnoyarsk krai is not a regional phenomenon but reflects a change in the work of the procuracy throughout the country.

In light of the fact that in the second half of 2002 the annulment of acquittals proceeded without clear change in the activity of the procuracy, we may put forward the hypothesis that *the criteria guiding the appeals court in reviewing acquittals to a large extent derive from the values of judges as a corporation*. We may say that these criteria to some degree coincide with the goals of the law enforcement system. It must also be acknowledged that the values of judges in appeals courts differ from the position of judges in courts of first instance.

Procedural Mechanics

To fully describe the functioning of the regional court as an appeals court, it is necessary to take into account all the nuances of its work. The first thing that must be emphasized concerning the foundations of procedural mechanics and therefore also the principles guiding the work of the appeals court is that the new Criminal Procedure Code, though an ambitious bid to strengthen the courts, had no effect on the mechanics of the functioning of the appeals court. All the important mechanisms of procedural mechanics that developed during the period when the old Criminal Procedure Code was in force have remained unchanged.

Despite the attempts of the authors of the new code to create a new theoretical model of criminal court proceedings, a number of the most fundamental innovations were ignored in practice. Theoretical propositions elaborated during the period when the old code was in force continued to be applied. In part these propositions have already been reincorporated into the text of the law, in part they are implicitly present, and their legalization is under discussion.[11] This bears witness not only to the conservatism of law enforcement but also to the opinion of law enforcement officials who believe that the text of the old code embodied a deeper understanding of the essence of criminal court proceedings. Let us dwell briefly on the phenomenon of the ultra-potency of the old code, which finds expression in the practical domination of fundamental propositions of a code that is no longer in force. The attempted reform of the Criminal Procedure

Code has turned out to be no more than a new camouflage that leaves the essence of criminal court proceedings untouched.

A basic feature of the appeals stage that originated in the period when the old Criminal Procedure Code was in force is the lack of boundaries to the review of a case: any circumstance may be deemed a serious violation, even if no one has complained about it. It must be emphasized that the appeals court is not in fact confined to the arguments in the appeal. This is a very strong instrument of power over lower courts. As explained above, the attempts of the authors of the new code to change the situation have led to nothing; if anything they have made it even vaguer. The appeals court no longer has the obligation to go beyond the arguments in the appeal but it still has the right to do so. Its discretion has been broadened. At the same time, the court has no clear goals in relation to criminal court proceedings. In theory the court as an organization has no preference for acquittal or conviction. The choice depends on individual judgment and is not connected with the interests of the court as an organization. Nor do we observe a persistent striving by regional courts to constantly go beyond the arguments in appeals and use their powers to make lower courts "listen to reason." In the majority of instances, the relations between higher and lower courts are stable and there is no goal of intervening in a large number of verdicts. But the law enforcement system does have specific goals in relation to the criminal process: in appealing against a specific decision it actually sets the court the task of using its broad powers to obtain a desired result. Then the appeals court has a choice: it can pay attention to one thing and ignore another.

During the period when the old Criminal Procedure Code was in force, a unique construction was worked out that made it possible to combine refusal to examine evidence in the appeals courts with their very wide powers. The essence of the construction boils down to interpreting assessment of the factual circumstances of the case (whether the guilt of the defendant has been proven) as assessment of the fulfillment of procedural norms, thereby replacing factual circumstances as the basis for

annulment by a group of procedural violations. This makes it possible at the appeals stage to evade the principle of the direct examination of evidence. In the absence of clear criteria for these principles, it suffices for the judge, by referring to a legal norm and without adducing any proof, to deem that criminal procedure law has been violated and assert that the verdict is illegal and ungrounded.

In the first half of the period under study, the krai court as an appeals court was able to rely on the list of grounds for annulment presented in the old Criminal Procedure Code. It contained five points.

Since 2002, with the introduction of the new code, one point has been removed from this list. As a result, incompleteness of the preliminary investigation or inquiry is now interpreted in terms of violations of criminal procedure law, while incompleteness of the judicial investigation is transmuted into inconsistency between the conclusions drawn by the court and the factual circumstances of the criminal case.

If we wish to compare how judges in appeals courts use these rules, then in addition to the step that we have already taken in examining annulled acquittals we must single out those instances of annulment that do not arise from the review of an acquittal. Violations of the criminal law constitute half of the reasons for changing or annulling convictions. Due to the specific features of an acquittal, it is practically impossible for the court reviewing it to establish violations of the criminal law, because the court of first instance did not establish the defendant's guilt, classify the act under an article in the special part of the Criminal Code, or set a punishment. It will therefore be correct to compare reasons for the annulment of convictions and acquittals on two grounds: established violations of criminal procedure law and inconsistency between the conclusions drawn by the court and the factual circumstances of the criminal case. The difference between these two grounds is that if the appeals court annuls a verdict in connection with a violation of criminal procedure law then it must indicate this violation and the violation must be a really serious one. For a violation to be deemed serious or

important the verdict must be subject to annulment in all other instances in which that violation has occurred, thereby limiting the discretion of the court.

Annulment in connection with an important violation of criminal procedure law fits a pattern that is well-known to judges and trial participants. It is possible to extend the list to include new important violations of criminal procedure law, especially at times when legislation is undergoing rapid change or our courts are under pressure from the European Court for Human Rights. One way or another, however, the list is generally known. When the appeals court is required to apply its powers in an arbitrary manner—for example, when it has to annul a verdict in the absence of clear violations of criminal procedure law—it cannot use this pretext to justify the annulment. The best solution is to make use of the provisions of Article 344 of the Criminal Procedure Code of the RSFSR (Article 380 of the Criminal Procedure Code of the RF), which contain no clear criteria. It suffices for the appeals court to declare that it is persuaded of the erroneous nature of the conclusions drawn by the court of first instance. Of course, there may be genuine grounds for annulment in the form of inconsistency between the conclusions of the court and the factual circumstances of the case. But here the important thing is that such grounds are significantly more effective in untying the hands of the court of second instance. In the absence of clear violations by the court of first instance it is much easier to justify annulment of the verdict by referring to inconsistency between its conclusions and the circumstances of the case than to seek out a violation of generally known rules of procedure. The choice of a specific mechanism ultimately depends on the discretion of the judge, but if we are dealing with a general population and assume a relatively even distribution of cases among all judges then we can see how the grounds for annulling convictions and acquittals differ.

We know from the interviews that each acquittal is written out with much greater care and that the judge pays more attention to observing all the formalities. This means that the proportion of annulments of acquittals that are justified by establishing

violations of criminal procedure law must be equal to or even smaller than the proportion of annulments of convictions that are justified in this way. If this is not so, then we can claim confirmation of the hypothesis that two strategies for different types of verdict coexist in the regional courts. Table 5 shows the relative frequency of different grounds for annulling acquittals and convictions; Figure 4 presents the same data in the form of a diagram.

From these data it is clear that acquittals are annulled mainly when the appeals court perceives a violation in the form of inconsistency between the verdict and the factual circumstances of the case. If the logic expounded above is correct, this means that the cases concerned do not contain as many procedural violations as are established when convictions are being reviewed.

But, as shown above, this ground for annulment is itself a very convenient means of justifying the court's own judgment that it is necessary to annul the verdict. If we take a detailed look at the violations of criminal procedure law that are given as reasons for the annulment of acquittals, then it becomes obvious that these too are discretionary annulments. To quote the annulment decrees verbatim, acquittals are annulled because the rules for formulating the verdict were violated or because the reasons given for the verdict were inadequate. Only two acquittals over the six-year period were annulled in connection with violation of the right to a defense. In all other instances classified as violations of criminal procedure law, the higher court took the view that there had been such a crude violation of the rules for formulating the verdict as to require its annulment. As no break had occurred in the tradition established by the old Criminal Procedure Code, there was a quite natural evolution from use of the complicated rationale embodied in Articles 380 and 389.16 of the Criminal Procedure Code of the RF to the simpler rationale in terms of violation of the rules for formulating the verdict.

Figure 4 clearly shows how the use of different grounds for annulment differs depending on the type of verdict.

Table 5

Comparison of Grounds for Annulment of Convictions and Acquittals by the Judicial Collegium for Criminal Cases of the Krasnoyarsk Krai Court over the Period 1999–2004

	1999–First half of 2002				Second half of 2002–2004			
	Inconsistency between conclusions of the court and factual circumstances of the criminal case or incompleteness of the judicial or preliminary investigation or inquiry (Articles 343–344 of CPC* of RSFSR)		Important violation of the law of criminal procedure (Article 345 of CPC of RSFSR)		Inconsistency between conclusions of the court and factual circumstances of the criminal case (Article 380 of CPC of RF)		Violation of the law of criminal procedure (Article 381 of CPC of RF)	
	Number	proportion (%)	Number	proportion (%)	Number	proportion (%)	Number	proportion (%)
Acquittals	58	92.1	5	7.9	50	86.2	8	13.8
Convictions	355	39.5	544	60.5	154	42.3	210	57.7

*CPC—Criminal Procedure Code.

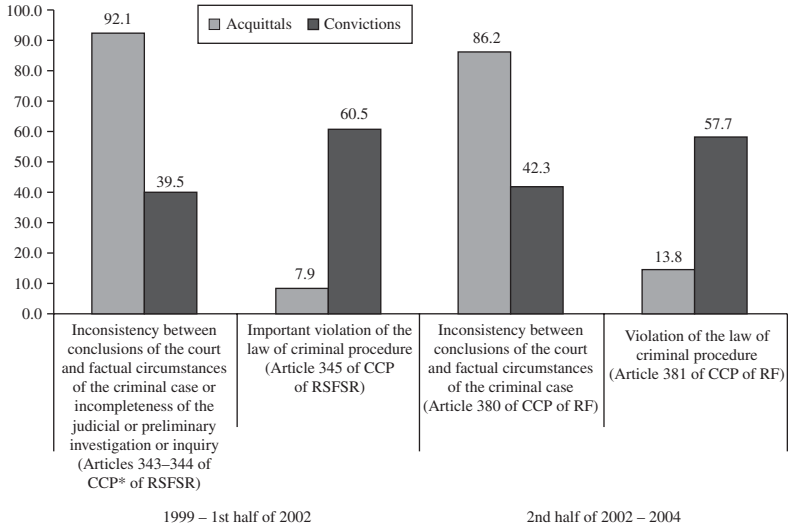

Figure 4. **Relative Numbers of Annulments of Convictions and Acquittals on Different Grounds by the Judicial Collegium for Criminal Cases of the Krasnoyarsk Krai Court over the Period 1999–2004 (100% = all annulments on the grounds indicated over the period specified) *CPC—Criminal Procedure Code.**

Conclusions

It has been established that when annulling acquittals, appeals courts resort to discretionary judgment nine times as often as they do when annulling convictions. Were the same approach taken to annulling acquittals as is taken to annulling convictions, there would be only one-tenth as many annulments of acquittals.

A significant role has been played by the counterreform of the Criminal Procedure Code lobbied by the law enforcement system. But without support from the regional courts, the situation would hardly have remained under control. The surge in annulments of acquittals from 4 percent to 8 percent in the second half of 2002 and 10 percent in 2003 must be linked to change in the behavior of judges in courts of first instance, who had begun to issue more acquittals, but this tendency was cut short by the conservative position of judges in courts of second instance.

Based on this study it is possible to draw the conclusion that the judicial system is heterogeneous. Regional courts and courts of first instance have different attitudes toward the option of issuing an acquittal. The appeals courts have the last word. They take into account the interests of the law enforcement system and annul one-third of appealed acquittals, even though these contain fewer clear procedural violations than annulled convictions do. A uniform approach to all types of judicial decision would reduce the number of annulled acquittals by almost 90 percent. It is important to emphasize that we have here a dialogue between individuals (judges in courts of first instance) and a structure (the appeals court). The outcome of this dialogue to a large extent depends on the combined potentials of all informal participants in the dialogue. The increased proportion of annulments of acquittals is a sort of price of compromise "paid" by the judicial system. The appeals court, although it has the power to annul any number of acquittals, halts at a certain level. This indicates that the position of judges in appeals courts cannot be attributed solely to their desire to respond positively to the demands of law enforcement officials. They search for a compromise between the demands of the law enforcement system and the intention of judges in the courts of first instance to issue acquittals. The regional court may be said to perform a political function as the structure responsible for establishing a balance with powerful external players whose interests it is difficult to ignore.

Notes

1. See *Pravookhranitel'naia deiatel'nost' v Rossii: struktura, funktsionirovanie, puti reformirovaniia*. *Chasti 1 i 2*, ed. V. Volkov and E. Paneyakh (St. Petersburg: IPP at the EU SPb, 2012).

2. Ministry of Internal Affairs (MVD) investigator, St. Petersburg.

3. See *Pravookhranitel'naia deiatel'nost'*, p. 62.

4. By a "higher court" I mean a court at the level of a subject of the federation (an oblast or krai court or court of equivalent status).

5. See *Rossiiskie sud'i kak professional'naia gruppa: sotsiologicheskoe issledovanie*, ed. V. Volkov (St. Petersburg: IPP at the EU SPb, 2012), p. 41.

6. For further explanation of the forms of protest and review of trial outcomes at higher courts, see the Paneyakh article in this issue, pp. 138–163.

7. Special procedure – is a form of plea bargaining that includes admission of guilt.

8. See D.N. Kozak, "Vstupitel'naia stat'ia," in *Kommentariia UPK RF*, ed. D.N. Kozak and E.B. Mizulina (Moscow, 2002), pp. 45–48.

9. According to point 2.8.4. III. Formation of Statistical Reporting of a Conviction, "Instructions Concerning the Keeping of Judicial Statistics" (adopted by Decree of the Judicial Department of the Supreme Court of the RF No. 169 of December 29, 2007): "In instances of partial annulment, change, or other adjustment of a verdict (decree in a case), the values of indicators in the sections 'Information About the Verdict (Decree),' 'Punishment Set Under the Main Article of the Verdict,' and 'Total Punishment for the Conviction' inserted by the court of first instance shall be crossed out, and values inserted in the squares and on the lines provided for completion by higher courts."

10. The rules for compiling the court document in support of a conviction are a clear example. According to points 5–6 of Part 1 of Article 220 of the Criminal Procedure Code, it was necessary to present a list of items of evidence. The practice of writing such documents without a detailed assessment of the evidence began to spread immediately. However, this practice was suppressed and there was a return to the previous practice of detailed assessment of all evidence. Only in 2010, however, was the Criminal Procedure Code amended (Federal Law No. 19-FZ of March 9, 2010).

11. Examples are the principles of being multilateral, complete, and objective (Article 20 of the Criminal Procedure Code of the RSFSR) or the principle of objective truth. Discussions about restoring these provisions to the Criminal Procedure Code have been initiated by scholars and practitioners, including officials of the Investigations Committee.