Plea Bargaining Russian Style

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Abstract: In 2001 Russia introduced a type of plea bargaining, known as "special procedure court hearings," that is now widely used. Just why this form of plea bargaining became so popular is not clear, since the benefits that accused persons obtain from the procedure appear to be limited. Only a minority of them receive more lenient sentences as a result. The procedure has increased court efficiency, but has not helped the 2001 Criminal Procedure Code's larger goal of making the criminal judicial process more adversarial.

The Russian criminal justice system has been transformed over the past decade through the widespread application of a kind of plea bargaining practice known as "special procedure court hearings."[1] Less than ten years after its introduction in the 2001 Criminal Procedure Code, 63.9 percent of convicted persons used the procedure in 2010. The procedure allows defendants not to contest charges, in effect admitting their guilt and waiving an evidentiary trial review.[2] The absorption of this special

[1] This article is based on a presentation made at the International Conference "Kak sud'i prinimaiut resheniia: Rossiiskaia sudebnaia sistema v kontekste sotsiologii prava," May 13-14, 2011, organized by the Institute for the Rule of Law (in Russian Institut problem pravoprimeneniia) of European University in St. Petersburg. The author would like to thank Anton Ovrutsky, Alena Roshko, Clea Amundsen, and especially Aleksei Trochev and Olga Schwartz for assistance in research. Helpful comments on an earlier draft of the article were provided by Cynthia Alkon, Tom Firestone, and Todd Foglesong. Stephen Thaman shared his recollections of the drafting process.

[2] Unless otherwise indicated, all statistical data in this article come from the website of the

procedure into Russia's formerly neo-inquisitorial criminal justice system happened as part of a reform to make the system more adversarial.[3] Ironically, the realization of an adversarial trial with lawyers presenting the evidence orally is less advanced than the special procedure aimed at efficiency, a practice seen as inquisitorial by some observers.[4]

The riddle is how and why this special procedure has become the most common way of handling criminal charges in Russia. The rules in the Criminal Procedure Code (Chapter 40, Articles 314-317) do not by themselves make the option attractive. The defendant, in consultation with a lawyer and in his presence, must accept the charges in writing, petition for conviction without trial, and waive the right to appeal based on the facts of the case. Opting for the procedure normally takes place at the end of a pretrial investigation (when the defendant first sees the dossier prepared by the investigator), but the accused has the right to make the choice at a later stage, such as during the preliminary hearing or at the start of the trial. Both a procurator (after reviewing the file) and the victim must consent to the special procedure. Finally, the judge must review the motion, ensure that the defendant understands what he or she is doing and has acted voluntarily, and verify that the charges are supported by the evidence in the file. If the judge agrees, there will be no trial on the evidence; instead, there will be a short hearing on sentence, with the exclusion of the upper third of the normal sentencing range.[5] Under these circumstances, the federal government covers the cost of defense counsel provided by the police or the courts if the accused elects to rely on such services.

To be clear, this special procedure in Russia does not by definition

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Judicial Department, www.cdep.ru.

[3] While pure inquisitorial criminal procedure involves only an office review by the judge of the case file (what Tsarist Russia had before 1864 and Chile until the early 2000s), neo-inquisitorial procedure includes a judge-led trial, whose purpose is not to establish the evidence but to do a selective check on evidence in the dossier. This was the system used in the USSR and early post-Soviet Russia.

[4] Stephen C. Thaman. 2010. "A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial." In World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial, edited by Stephen C. Thaman. Durham, North Carolina: Carolina Academic Press. 297-396, at 327; Michele Panzavolta. 2005. "Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System." North Carolina Journal of International Law & Commercial Regulation 30 (Spring). 577-623.

[5] D.N. Kozak and E.B. Miziulina, eds. 2003. Kommentarii k ugolovno-protsessualnomu kodeksu Rossiiskoi Federatsii. Moscow: Iurist. 540-544; Iu. Ia. Makarov. 2010. Osobyi poriadok rassmotreniia ugolovnykh del: Prakticheskoe posobie. Moscow: Prospekt; Postanovlenie Plenuma Verkhovnogo Suda RF ot 5 dekabria 2006 No.60 "O primeneniia sudami osobogo poriadka sudebnogo razbiratelstva ugolovnykh del." See also William Burnham and Jeffrey Kahn. 2008. "Russia`s Criminal Procedure Code Five Years Out." Review of East European Law 33:1, 1-94; and Stanislaw Pomorski. 2006. "Modern Russian Criminal Procedure: The Adversarial Principle and Guilty Plea." Criminal Law Forum 17, 129-148.

involve explicit plea negotiations, but resembles what criminologists call "implicit plea bargaining."[6] Opting for the special procedure and agreeing not to contest the charge (the functional equivalents of confessions or guilty pleas) by themselves lead to the avoidance of a trial and structural concessions in sentencing. This does not preclude deal making in the form of explicit agreements about charges, sentences, or sentencing recommendations, but such practices are not inherent to the procedure itself.

In Italy, where procedural options similar to those adopted in Russia became available in the early 1990s, the initial response of lawyers and accused was restrained, and the percentage of defendants using the procedure was limited to single digits. Since then there has been some growth in its use following a change in the procedure for one option in 2000 and a broadening of eligibility for another in 2001. In 2005, 25 percent of accused persons used one of the shortened procedure forms and by 2010 as many as 35 percent.[7] But this is still a small share compared to Russia's.

The Russian data raise questions. Why has popularity of this special procedure increased? Is it in a lawyer's interest to advise a client to use the procedure? What are all the benefits the defendant? Perhaps defendants use the special procedure to:

1) receive a suspended sentence ("conditional judgment") instead of real time in jail. Such logic is likely in individual cases, but the overall use of suspended sentences has not risen during the period of special procedure growth; it remains around 40 percent of all dispositions. Nor has there been a decline in the share of custodial sentences in the past seven years: it remains around 33 percent. But lawyers may still tell defendants that agreeing to the special procedure is the best way to ensure a suspended sentence;[8]
2) get out of pretrial detention early. This option would affect both repeat offenders who are sure to get custodial sentences and the smaller group of persons in detention who may get suspended sentences—in 2011 the number was around 20,000 persons including, especially, businesspeople);

[6] On distinctions among types of plea bargaining, see Milton Heumann. 1978. Plea Bargaining. Chicago: University of Chicago Press and Albert W. Altschuler. 1979. "Plea Bargaining and its History." Law and Society Review 13:2, 211-246.

[7] William T. Pizzi and Mariangela Montagna. 2004. "The Battle to Establish an Adversarial Trial System in Italy." Michigan Journal of International Law, 25: 429-466; Panzavolta, "Reforms and Counterreforms"; Marco Fabri. 2008. "Criminal Procedure and Public Prosecution Reform in Italy: A Flash Back." International Journal for Court Administration (January), 3-15.

[8] A judge from Mosgorsud commented on the connection. See the interview with Vladimir Usov on radio station Ekho Moskvy, November 8, 2010 www.echo.msk.ruéprogramsécourté724121-echo.phtml. See also I. N. Alekseev. 2007. Uslovnoe osuzhdenie v ugolovnom prave. Rostov na Donu: Feniks.

3) significantly change the length of a custodial sentence; or of a suspended sentence; or of the probationary period associated with suspended sentence; and
4) increase the likelihood of a case being stopped following reconciliation with the victim or restitution.

On a personal level, the defendant can avoid degradation if friends or family members are slated to be called as witnesses. Whether any of these benefits results from explicit promises from investigators or procurators, that is, real "bargaining," is another empirical question.

A related matter connected to the growth of this special procedure in Russia involves incentives for lawyers, especially court-appointed ones in the provinces. Payments and fees potentially drive their decision-making. One notion is that perhaps lawyers get a flat fee for one "court day" as long as a short hearing takes place. The chances of a short hearing taking place are decent because judges often cannot agree to the request for a special procedure before the preliminary hearing, when the first chance to gain the consent of the victim occurs. There are also "pocket lawyers," who work with police investigators and are known to cooperate with their needs. It could be that the guaranteed payment by the federal government makes plea bargaining more attractive to these lawyers. Another possibility is that lawyers who are working for little or no compensation while fulfilling the obligation to do some legal aid work find the special procedure lucrative.[9]

The appeal of special procedure to accused persons and their advocates may also relate to the unlikelihood of victory in regular trials, where the frequency of acquittal in cases argued by the state or its functional equivalent is less than one percent.[10] When there is little chance that evidence will unravel (say the accused was caught with drugs or stolen goods), there are weak incentives for sticking with a full trial, and this may be a consideration for some accused. That is, the special procedure may be attractive precisely because the alternative of a general procedure seems in practice to offer so little, although experienced Russian lawyers can improve outcomes for the accused at trial. Even if there is only a chance of a tangible benefit from using a special procedure, there is at least hope.[11]

It may well be that countries, or jurisdictions within countries, that have high rates of acquittal also have relatively low rates of plea bargaining or, at least, plea bargaining that is more likely to deliver concessions. Some observers claim that the level of plea bargaining in Italy is held back

[9] Komu nuzhna gosudartsvennaia advokatura,`` Advokat, 2006, no.10.
[10] E.L. Paneakh, et al. 2010. Obvinitelnyi uklon v ugolovnom protsesse: faktor prokurora. Analiz statistiki. St. Petersburg: Institut prava i pravoprimeneniia, 8.
[11] Thus, in commenting on an earlier version of this paper, Tom Firestone ventured that the question was not why many accused in Russia chose special procedure, but why more of them did not do so.

by the fact that many cases end in acquittals because of the disintegration of evidence after lengthy delays.[12]

It is also likely that investigators and procurators find that special procedures contribute to the efficient resolution of cases and positive assessments of their performance. It appears that, for the most part, investigators play the greater role in decisions about special procedure, for it is they, along with the lawyers, who first explain the option to the accused and they who receive the most requests for the special procedure. For their part, procurators are supposed to review the proposals, and they may have a larger role in the minority number of situations when agreements are reached later in the process, such as at the preliminary hearing.[13]

Judges may favor the special procedure. If nothing else, it helps them fulfill the statistical norms imposed on them from above. First, it increases the chances for high rates of conviction that include very few acquittals or cases stopped for cause. Second, it virtually excludes cassation or appellate review for convictions via special procedure. Although there can still be complaints about sentences, the procedure contributes to good records of sentence stability. Finally, using special procedure decreases the likelihood of multiple remands and delays, helping judges meet the norms on sentencing and backlogs.[14]

With these questions in mind, we start with an account of the history of plea bargaining in Russia and reflections on comparative experience, in particular the growth of plea bargaining of various kinds in European neo-inquisitorial systems and post-communist countries. After that, we examine the practice of special procedure in the Russian Federation, including how it affects sentencing practices.[15]

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[12] Pizzi and Montagna, "The Battle to Establish an Adversarial Trial"; Panzavolta, "Reforms and Counterreforms"; Marco Fabri, "Criminal Procedure and Public Prosecution Reform in Italy."

[13] On the importance of incentives for prosecutors and advocates for the success of simplified procedures like plea bargaining, see Nuno Garoupa and Frank H. Stephen. 2008. "Why Plea-Bargaining Fails to Achieve Results in So Many Criminal Justice Systems: A New Framework for Assessment." Maastricht Journal of European and Comparative Law, 15: 323-358.

[14] Peter H. Solomon, Jr. 2007. "Informal Practices in Russian Justice: Probing the Limits of Post-Soviet Reform," in Russia, Europe, and the Rule of Law, edited by Ferdinand Feldbrugge. Leiden: Martinus Nijhoff: 79-92.

[15] The establishment and early development of plea bargaining in Russia (through 2005) has been the subject of thoughtful legal analysis by Stanislaw Pomorski. See his articles "Consensual Justice in Russia: Guilty Pleases under the 2001 Criminal Procedure Code," in Public Policy and Law in Russia: In Search of a United Legal and Political space: Essays in Honor of Donald D. Barry edited by Robert Sharlet and Ferdinand Feldbrugge (Leiden: Martinus Nijhoff, 2005), 187-198; "Modern Russian Criminal Procedure," (2006); and "Modern Russian Criminal Procedure: The Adversarial Principle and Guilty Plea," in Russia and its Constitution: Promise and Political Reality edited by Gordon B. Smith and Robert Sharlet (Leiden: Martinus Nijhoff, 2008), 123-140. A first attempt to explore the practice of plea bargaining in Russia is provided in Olga Semukhina and K. Michael Reynolds, "Plea Bargaining Imple-

History of Plea Bargaining

Plea bargaining was not one of the options included by specialists in the draft criminal procedure codes of the 1990s.[16] The proposal to include a form of plea bargaining came later and from the leaders of the Russian judiciary. Concerned about the strain on judges produced by rising caseloads and, uncertain whether the establishment of a justice of the peace system would come fast enough to help, in 1998 the Council of Judges began discussing simplified procedures. The Council went on to approve resolutions asking that such procedures be added to the new Criminal Procedure Code in both 1998 and 1999, a position that was further endorsed in the fall of 2000 by the Fifth Congress of Judges.[17] In addition, from 1998 until the adoption of the new Code in 2001, the appropriateness of a form of plea bargaining in Russia became the subject of discussion in the legal journals, especially *Rossiiskaia iustitsiia.* Objections were registered by Professor of Criminal Procedure Igor Petrukhin, who argued that "plea deals were foreign to the Russian mentality," and by a judge from Leningrad region who said that "deals were not in the interests of the accused."[18] Underlying the objections of these scholars and other jurists was concern that full, even adversarial, proceedings were necessary to protect the accused from pressure to confess, a syndrome associated with Stalinism, as well as Russian jurisprudence before 1864. Among those providing support for introducing plea deals to Russia was Samara-based scholar V. Lazareva, whose knowledge of judicial practice helped her offer important insights. She argued that, in effect, Russia already had plea bargaining, both the implicit and explicit varieties. On the one hand, Article 62 of the Criminal Code excluded the upper quarter of the sentencing range for any accused person

mentation and Acceptance in Modern Russia: A Disconnect between the Legal Institutions and the Citizens," International Criminal Justice Review, 19:4 (December 2009), 400-432. Their research included both an examination of cases that were heard in special procedure during 2008 in one district court and one regional court and a public opinion survey mounted in 2006. The latter revealed that the general public was not yet aware of plea bargaining.

[16] Peter H. Solomon, Jr. 2005. "The Criminal Procedure Code of 2001: Will It Make Russian Justice More Fair? in Ruling Russia: Law, Crime, and Justice in a Changing Society, edited by William Alex Pridemore. Lanham, et al.: Rowman and Littlefield: 77-100; V. Makhov and M. Peshkov. 1998. "Sdelka o priznanii viny," Rossiiskaia iustitsiia, no.7, 17-19; Stiven Teiman, "Sdelki o priznanii viny ili sokrashchennye formy sudoproizvodstva: po kakomu puti poidet Rossiia?" Rossiiskaia iustitsiia. no.10, 35-37 and no.11, 35-37; S. Militsin, "Sdelki o priznanii viny: vozmozhen li rossiiskoi variant?" Rossiiskaia iustitsiia. no.12, 41-42.

[17] Militsin, "Sdelki;" "Sovet sudei golosuet za sdelki o priznanii viny," Rossiiskaia iustitsiia, 1998, no.6, 4-5; Postanovlenie Soveta Sudei RF ot 2 aprelia 1999g, no. 10, www.ssrf.ru; A.E. Lebedev and E.B. Miziulina, eds. 2007. Uroki reformy ugolognogo pravosudiia v Rossii (po materialam raboty Mezhvedomstvennoi rabochei gruppy po monitoring UPK RF i v sviazi s piiatiletiem so dnia ego priniatiia i vvedeniia v deistvie). Moscow: Norma: 670.

[18] I. Petrukhin. 2001. "Sdelki o priznanii viny chuzhdy rossiiskomu mentalitetu." Rossiiskaia iustitsiia. no.5, 35-37; P. Mikhailov, "Sdelki o priznanii viny—ne v interesakh poterpevshikh," Rossiiskaia iustitsiia: 37-38.

who voluntarily disclosed guilt (*iakva s povinnoi*) or cooperated with the police in uncovering the crime. On the other hand, in practice, there were many instances of agreements reached between the sides in criminal cases about admission of guilt to some charges in exchange for dropping other charges and sentencing concessions—that is, what were known in Soviet times as "compromise decisions."[19] To Lazareva the introduction of some form of plea bargaining into the Criminal Procedure Code represented the "legalization of plea deals" rather than a new practice.[20]

While public discussions of plea bargaining among scholars gave the issue visibility, judges were still responsible for placing it on the agenda of potential initiatives for inclusion in the new Criminal Procedure Code. Within the new drafting group established in 2000 under State Duma Member Elena Mizulina (Yabloko) and the Presidential Administration's Mikhail Paleev, the key supporters of plea bargaining were two judges from the Russian Supreme Court, Vladimir Demidov (secretary of the Plenum) and Stanislav Razumov. In response to their suggestions, Mizulina asked her colleagues from the American Bar Association to explain plea bargaining. As a result, St. Louis University's Stephen Thaman wrote a memorandum and later a draft section of the Code. A specialist in comparative criminal procedure who earlier had helped introduce the jury system to Russia, Thaman explained the range of options, including the simplified procedures used in Germany, Spain, and Italy, and in the draft articles borrowed two institutions from Italian practice, a blend of which became the basis for the Russian special procedure. Thaman appeared at Duma hearings in January and April 2001, and supported Demidov's initiative.[21] The draft discussed at the final set of hearings on April 23 made the special procedure available for charges that brought up to seven years imprisonment, and provided for an actual sentencing discount of one third–the judge was to follow normal sentencing procedure and then subtract one third.[22] Although no objections to this plan were expressed at the Duma hearings, the working group drafting the Criminal Procedure Code later decided to reduce eligibility to less serious crimes (up to five years) and to exclude the upper third of the sentencing range. This seems to have happened in June 2001 on the basis of the reactions of Dmitry Kozak's judicial reform committee.[23] At the same time, an official commentary co-edited by

[19] On the use of compromise decisions in Soviet judicial practice, see Peter H. Solomon, Jr. 1987. "The Case of the Vanishing Acquittal," Soviet Studies, 39:4 (October): 531-555.

[20] V. Lazareva. 1999. "Legalizatsiia sdelok o priznanii viny," Rossiiskaia iustitsiia. no.5, 40-41.

[21] Lebedev and Miziulina, Uroki reformy ugolognogo pravosudiia, 757, 482-518; 664-724. Correspondence with Prof. Stephen Thaman, St. Louis University, May 1, 2011, and June 7, 2011.

[22] Lebedev and Miziulina, Uroki reformy ugolognogo pravosudiia, 768.

[23] E.B. Mizulina and V.N. Pligin, eds. 2006. Uroki reformy ugolovnogo pravosudiia v Rossii.

Mizulina and Kozak stressed that judges retained the right to give more lenient penalties.[24]

In July 2003, after only a year of operation, eligibility for the special procedure was expanded so that it covered crimes bringing up to ten years imprisonment, that is to say all but the most serious crimes. The actual use of the procedure also grew quickly to 30 percent of decided cases in 2005, 37.5 percent in 2006, 56.7 percent in 2007, 50 percent in 2008, and 48.9 percent in 2009; in 2009, 53.9 percent of convicted offenders used special procedure, and 63.6 percent in 2010, including 69.2 percent of thieves and 59 percent of drug offenders.

In 2009, the government adopted another version of the special procedure to be used when a defendant agreed to cooperate with an investigation, for example to expose superiors in a drug ring. This novelty realized an idea proposed in 2001 by Demidov during the drafting of the Criminal Procedure Code. The new procedure promises even greater benefits to the defendant. Rather than eliminate the upper third of the sentencing range, the law allows the judge to assign a punishment below the legal limit for the crime, or a suspended sentence, or simply no punishment at all.[25] Moreover, the provisions on cooperation agreements openly invite negotiations over the plea. Data for the first half of 2011 show that accused persons who adopt this procedure represent only a small share of the total number of accused (1.3 percent, or 5,192 persons).[26]

International Comparisons

Russia is far from alone in its effort to develop simplified court procedures and avoid full trials where possible. There is considerable comparative experience with simplified procedures and plea bargaining across Europe and the post-Soviet space, but relatively little empirical study. Concern with the efficiency of courts led many countries to fashion alternatives to full trials.

Italy, Spain, and Portugal have versions of plea bargaining procedures and sentencing concessions associated with not contesting a charge.

Sbornik statei i materialov.Moscow: Iurist. 763-4.

[24] Kozak and Mizulina, Kommentarii k Ugolovno-protsessualnomu kodeksu: 514.

[25] See Glava 40.1 "Osobyi poriadok priniatiia sudebnogo resheniia pri zaliuchenii dosudebnogo soglasheniia o sotrudnichestve," vvedena v UPK Federalnym zakonom ot 29 June 2009 N 141-Z.; S. Zuev. 2009. "Iuridicheskaia priroda instituta dosudebnogo soglasheniia o sotrudnichestve." Zakonnost, no. 9, 14-18; I. Tkachev and O. Tisen. 2011. "Primenenie instituta dosudebnogo soglasheniia o sotrudnichestve," Zakonnost., no.2, 12-16. For guidance to investigators on how to make deals with cooperating accused, see N.Iu. Reshetova and Zh. K. Koniarova. 2011. Dosudebnoe soglashenie o sotrudnichestve po ugolovnym delam o prestupleniiakh korruptsionnoi napravlennosti. Posobie. Moscow: Akademiia Generalnoi Prokuratury,on the website of the Procuracy`s Academy.

[26] Data supplied by the Judicial Department on its website.

Germany has developed in practice rather than in law what it calls "confession agreements" between judges and defense counsel, while in France lesser charges are often cancelled entirely when the accused confesses through the practice of diversion bargaining.[27]

In the post-communist world there have been attempts to follow U.S. models, often with encouragement from the source. Georgia and Moldova have introduced versions of U.S.-style plea bargaining, as have Bulgaria and Bosnia, but with mixed results. In Georgia, where in 2008 52.2 percent of criminal convictions were based on plea deals, much of the public assumes that there is a close connection between the practice and bribes paid to judges.[28] While U.S.-style explicit plea bargaining can be done without coercion and involve an honest appraisal of the evidence by counsel, it is also open to abuse when it is not transparent and does not involve judicial supervision. The literature on plea bargaining in the United States suggests that for many accused persons avoiding the hassles of a full trial and getting their court experience concluded quickly is sufficient reason for making a plea, apart from the possibility of a lenient sentence.[29]

The comparative experience most likely to provide insights relevant to Russia is that of Italy, to which we have already referred. In the 1990s, the use of special procedures (introduced into the Criminal Code in 1988) was around 8 percent—partly because it was limited to less serious crimes and partly because long delays before trial often led to acquittals based on the deterioration of evidence. In 2000 and 2001, changes in the law extended eligibility for special procedures to more serious crimes, and as a result their use expanded. As of 2008, 23 percent of convictions were based on a negotiated plea (with crimes bringing a maximum of 7.5 years imprisonment eligible) and another 12 percent on abbreviated procedure (available with confession for any crime at the initiative of the defense and requiring a written verdict and more careful review of the file by the judge). The negotiated pleas (*pataggiamento*) involve agreement on what sentence is appropriate and then following the accused's acceptance of the charge(s) the application of a further one third discount. This two-stage procedure can lead in practice to discounts of as much two thirds of what the prosecutor considers normal for the offense. In the Italian case prosecutors have a

[27] Maximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure," in Thaman, ed., World Plea Bargaining: 3-80.

[28] Cynthia Alkan. 2010-11. "Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?" Transnational Law and Contemporary Problems, 19: 355-418; Jenia I. Turner. 2009. Plea Bargaining across Borders. Frederick, Maryland: Aspen.

[29] Peter H. Solomon, Jr. 1983. Criminal Justice Policy, From Research to Reform. Toronto: Butterworth's. Chapter 3; Malcolm Feeley. 1979. The Process is the Punishment: Handling Cases in a Lower Criminal Court. New York: Russell Sage.

lot of discretion, and the accused sometimes do very well.[30]

The Italian experience demonstrates how easy it is to move from implicit or structural plea bargaining, where not contesting the charges leads to automatic concessions, to explicit deals, where negotiations between the sides are part of the process. As we shall see, this development has occurred also in Russia, but apparently not to the same extent as in Italy.

The Practice of Criminal Justice in Russia

Special procedures are used almost twice as much in Russia as in Italy, and we still do not know why. One place to start gaining insight is the practice of sentencing. Overall, the Russian Criminal Code gives judges considerable discretion in choosing punishments for most crimes, although the Code does provide some guidance. There are lists of circumstances that aggravate responsibility and of mitigating circumstances (Articles 61-63). As we have already seen, some of those mitigating circumstances (voluntary disclosure of complicity and cooperation with the investigation) called for elimination of the upper quarter of the sentencing range. The same rule applies as well to crimes that are not completed (Article 66). The weight to be given to other mitigating circumstances on the list in sentencing is up to the judge, who is also allowed to consider factors not enumerated on the list. Judges may also decide to sentence below the legal limit set for a particular crime (Article 64), an option that goes back to the first Soviet criminal code of 1922.[31]

The question then arises of how judges are to proceed when the adoption of special procedure is added to the calculation of sentences. Would judges be expected to apply both the exclusion of the upper third of the sentencing range required by the Criminal Procedure Code and the mitigating circumstances listed in the general part of the Criminal Code? From the start some commentators, like Justice Demidov, said yes, and those judges who failed to act in this way received clear direction from the Supreme Court of the Russian Federation. In two resolutions of the Supreme Court's Plenum dealing with how judges handled special procedure in December 2006 and February 2007, the Court stated that in calculating punishments for a particular offense, judges must take into account all possible discounts and mitigating circumstances.[32] Thus, in the case of an incomplete crime,

[30] Panzavolta, "Reforms and Counterreforms;" Fabri, "Criminal Procedure;" materials supplied by Prof. Daniella Piana, University of Bologna.

[31] V.N. Radchenko, ed. 2007. Kommentarii k ugolovnomu kodeksu Rossiiskoi Federatsii. St. Petersburg: Piter press, articles 61, 62, 63, 64 and 66; Peter H. Solomon, Jr. 1996. Soviet Criminal Justice under Stalin. N.Y.: Cambridge University Press, chapter one.

[32] V. Demidov. 2003. "Nekotorye voprosy primeneniia osobogo poriadka sudebnogo razbiratelstva," Rossiiskaia iustitsiia, no.4, 25-27; "O primenenii sudami osobogo poriadka

judges would first apply the discount from Article 66 (of one quarter), then take off one third of this due to the special procedure, already reducing the maximum punishment to one half, and finally consider the impact of all the possible mitigating circumstances listed in Article 61. In line with the Supreme Court's directions, a recent book about special procedure devotes seven pages to various mathematical computations that the author claims that judges should perform.[33]

One must stress that the calculation of discounts and reductions from the maximum stipulated in the Criminal Code for a particular charge produces only a maximum punishment for the particular offense and offender, not necessarily the actual sentence, which may be even lower. There is no reason to assume that judges would calculate their sentences from the maximum allowed for a particular offense, at least for most offenses and offenders. Whenever they did, however, the concession turned out to be an actual discount of one third, rather than the mere exclusion of the upper third of the sentencing range. This was a result of the Supreme Court's resolutions on the role of special procedure in sentencing. Moreover, if there were a number of aggravating circumstances involved, such as a long criminal record (recidivism) or a crime of exceptional cruelty, then the judge might well give the maximum allowed, and the one third discount provided by the special procedure might turn out to be the only discount provided. However, for occasional and, especially, first time offenders, there were many grounds for leniency without a discount from special procedure. After all, first offense was already a mitigating circumstance.

In fact, first time offenders charged with non-serious and less serious crimes were also eligible to have their cases stopped entirely, whenever they showed heartfelt remorse or reconciled with the victim, both of which were often associated with making restitution.[34] The stopping of cases for

sudebnogo razbiratelstva ugolovnykh del," Postanovlenie Plenuma Verkhovnogo Suda RF ot 5 dekabria 2006, no.60 g., and the Postanovlenie Plenuma Verkhovnogo Suda RF ot 6 fevralia 2007 revising and updating its Postanovlenie ot 29 aprelia 1996, no.1 "O sudebnom prigovore," both on the website of the Supreme Court and reprinted in Iu Ia. Makarov. 2010. Osobyi poriadok rassmotreniiu ugolovnykh del: prakticheskoe posobie. Moscow: Prospekt: 43-61.

[33] A. N. Chashin. 2011. Osobyi poriadok sudebnogo razbiratelstva v ugolovnom protsesse. Moscow: Delo i Servis: 40-48. Further explanation on performing sentencing calculations was provided by the Supreme Court in a determination (Opredelenie) on August 19, 2008, no.53-D08-13 and its application explained in Vikulovskii raionny sud Tiumenskoi oblasti—Naznacheniie nakazanii po delam rassmatrivaemykh v osobom poriadke," on the website of Vikulovskii Court: http://barishinskiy.uln.sudrf.ru/modules. See also the overview provided in A.A. Tolkachenko. 2011. "Osobyi poriadok sudoproizvodstva--mezhditsiplinarnyi insitutut." Rossiiskaia iustitsiia, no.8: 36-39.

[34] The criteria for heartfelt remorse (deiatelnoe raskaianie), a novelty in the Criminal Code of 1996, and the conditions under which it should produce a lenient punishment or even the stopping of a case were matters of controversy among legal scholars. Although the Supreme Court declared in 1999 that the presence of any one of the four criteria (voluntary disclosure,

such "non-rehabilitative reasons" is still allowed when special procedure takes place. In the first half of 2011, 13 percent of the individuals (36,385 people) using the special procedure had their cases dropped.[35] It may well be that some accused are led to believe that the effective admission of guilt in the adoption of special procedure may be taken by the victim and/or the judge as a sign of remorse, so that the anticipation that a case would be stopped supplied a motive for the pursuit of special procedure for some offenders. But it is not possible to say what difference the choice of special procedure made, for the rate of stopping cases for non-rehabilitative reasons vis-a-vis offenders in general in the same time period stood at 20.4 percent.

Stopping cases is especially common at the Justice of the Peace (JP) courts, which hear less serious crimes than other courts. Not surprisingly, a report on how one JP handled special procedure cases in 2010 (in Barysh, a small city in Ulianovsk region) revealed that out of 11 plea bargained criminal cases (out of 37 cases overall), the judge stopped three cases and gave non-custodial sentences in the rest. Unfortunately, the report does not provide data on the cases heard using the general procedure, or any comparison of the two categories.[36] Neither a display of heartfelt remorse that could lead to the stopping of a case, nor the admission of guilt implied in the adoption of a special procedure constituted a mitigating circumstance listed in the criminal code, but it is plausible that judges might have treated either or both in this way in actual sentencing.[37]

It is clear that even without activating the plea bargaining procedure, the sentencing of offenders in Russia involved many considerations

cooperation with the investigation, restitution, or righting the wrong) was sufficient to count as a mitigating circumstance in punishment, some scholars believed that there should be multiple criteria present before a case was stopped on this basis. At the same time, a survey of legal officials conducted in 2002 found that almost all believed that the decision to stop a case on the basis of heartfelt remorse was a discretionary one, whatever indicators were present. V.A. Kushnarev. 2001. "Problemy tolkovaniia norm ugolovnogo prava o deiatelnom raskaianii." Rossiiskii sledovatel. no.1, 12-16; A.V. Savkin. 2003. "Sotsialno-pravovoe znachenie deiatelnogo raskaianiia v prestuplenii i ego rol v preduprezhdenii prestupnosti," Rossiiskii sledovatel, no.10, 20-26.

[35] Radchenko, Kommentarii k ugolovnomu kodeksu, articles 75 and 76; data from the website of the Judicial Department.

[36] "Oboshchenie sudebnoi praktiki rassmotreniiu mirovym sudei sudebnogo uchastka No.2 Barishinskogo administrativnogo raiona Paiginnoi O. K. Ugolovnykh del v poriadka osobogo sudebnogo razbiratelstva za 2010 god," on website of Barishsinskii gorodskoi sud. http://barishinskiy.ulu.sudrf.ru/modules

[37] One Russian commentator claims that in the Russian language a plea of nolo contendere (the acceptance of charges) was the same as a confession. Iu. K. Orlov. 2009. "Osobyi poriadok sudebnogo razbiratelstva: uproshchennaia forma ili sdelka o priznanii viny?" Rossiiskaia iustitsiia, no.11: 48-49. His argument reinforces the earlier claims of some scholars that confession is necessary for the application of special procedure. N. Androsenko. 2007. "Priznanie viny v sovershenii prestupleniia kak uslovie priniatiia protsessualnykh reshenii po UPK RF," Rossiiskii sledovatel, no.23, 6-7.

and more often than not produced verdicts well below two thirds of the maximum. It was also clear that judges had the legal discretion to reward offenders for choosing the special procedure with sentences that were more lenient than what they would otherwise have received. How special procedure affected actual sentences remains a key question.

One source that might help us answer this question is the official statistics on the administration of justice. Overall, the data available on the website of the Judicial Department are impressive and meet world standards. The data include how often special procedures are invoked for particular crimes and the pattern of dispositions for special procedure cases (e.g., convictions, cases stopped). They do not, however, provide data on sentencing in cases using the special procedure or a way to compare those sentences with sentences given after full trials, either overall or for particular crimes. Moreover, they do not include the length of suspended sentences or of their associated probationary terms, let alone compare these for convictions based on special versus general procedure use. There are longitudinal data on the length of terms of imprisonment, but these are given not by months but only by longer blocks of time, namely the number and share of sentences of one to three years, three to five years, or five to ten years. Initial examination of the data indicate that over the past few years there has been a modest decline in three to five year terms and a rise in one to three, suggesting that the average length of terms itself has declined, perhaps by as much as six months. This trend seems to have begun before any possible impact of recent changes in criminal policy initiated by President Dmitry Medvedev (including the removal from the Criminal Code of many minimum penalties in March 2011), but whether or not it is connected to the growth in special procedure is not clear.

Another source of insight into the dynamics of plea bargaining in Russia is interviews with (and surveys of) participants in criminal cases, including lawyers, procurators, and judges. For his *kandidat* dissertation, St. Petersburg jurist Dmitry Glukhov studied two hundred cases that used the special procedure in three of the city's district courts, interviewing the judges involved as well. In the summary of findings provided in the *avtoreferat* he states that most defendants in his sample received a real discount in their sentences, and not just the avoidance of the upper third of the sentencing range. A small share of defendants who used the special procedure did not get a lenient outcome, a finding that led Glukhov to favor changing the law to require an actual discount of one third below the sentence that would normally be assigned. The research Glukhov has conducted in St. Petersburg needs to be replicated in other parts of the Russian Federation.[38]

[38] Dmitry Viktorovich Glukhov. 2010. "Sovershenstvovanie instituta osobogo poriadka sudebnogo razbiratelstva v Rossiiskoi Federatsii," Avtoreferat dissertatsii na soiskanie uchenoi stepeni Kandidata Iuridicheskikh Nauk. St. Peterburgskii gosudarstvennyi universitet.

Moreover, my talks with lawyers in St. Petersburg revealed that lawyers, investigators, and procurators discuss the outcomes of cases and reach informal agreements at least from time to time, especially with regard to serious charges. According to data from 2009, the use of suspended sentences is especially common for serious offenses, and these situations are often ones where explicit plea deals occur.[39]

The provision in St. Petersburg of real sentencing discounts to some persons who agreed to go with the special procedure may not have been common in other parts of the Russian Federation. According to Aleksei Kolegov, a lawyer from Kurgan region who is an active blogger,[40] agreement to using the special procedure does not normally lead to sentencing concessions. To begin with, he stresses, the upper third of the sentencing range is used rarely even for offenders who have a full trial, if only because in setting punishment, judges must take into account mitigating circumstances. Moreover, Kolegov opines, "If they tell you that in agreeing to special procedure you will automatically get a conditional sentence or some other non-custodial option, this is deception! They give what they give and rub their hands with joy because the sentence is almost impossible to cancel in cassation."[41]

The limited evidence now available does not allow the researcher to say which is more common, the situation in St. Petersburg uncovered by Glukhov or Kolegov's experience in Kurgan.[42] But Kolegov's article produced a slew of comments, mainly from lawyers based in Kemerova, Tiumen, Tambov, Novosibirsk, Khabarovsk, and St. Petersburg. Their comments on the realities of the administration of criminal justice are nuanced, suggesting that Glukhov and Kolegov's portraits of special

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Sad to say, most of the dozen or more kandidat dissertations on special procedure in recent years do not include an empirical component. The exceptions are Glukhov's work (see above) and Marina Dneprovskai (2009. "Ósobyi poriadok priniatiia sudebnogo resheniia pri soglasii obviniaemogo s pred'iavlennym emu obvineniem." Irkutsk) who interviewed 250 judges and judicial assistants with a questionnaire and studied hundreds of cases, but the avtoreferat does not indicate that the author used her research to answer any of the questions we are posing.

[39] The statistical analysis connecting suspended sentences to serious crimes was performed by Ella Paneyakh and presented at the Conference, "Kak sud'i prinimaiut resheniia", St. Petersburg, May 13-14, 2011.

[40] http://advokat-ko.ru/

[41] Aleksei Valerevich Kolegov. 2011. "Osobyi poriadok sudebnogo razbiratelstva." Pravorub. 10 September, http://pravorub.ru/artciles/13196.html. Another version of the same text was printed two weeks later. Kolegov, "Komu vygoden osobyi poriadok sudebnogo razbiratelstva?" www.yurclub.ru/print.php.

[42] Semukhina and Reynold's study of the practice of the Krasnoobtiabrskii district court, Volgograd region, for 2008, found that two thirds of cases decided in special procedure led to sentences under half of the maximum, but without a comparison to similar cases heard in regular procedure, they could not determine whether special procedure had led to a discount, that is a lower sentence than the accused would have received without it. Semukhina and Reynolds, "Plea Bargaining Implementation," 411.

procedure could both be correct, even at the same place and time.

While three of the commentators registered full agreement with Kolegov, most of the rest disagreed at least in part. Their common message was that each case is unique and that for some cases special procedure does bring major benefits, especially, in the words of one of them, "if the stars in the sky line up right." "Why be so categorical?" wrote another. A sincere confession can and does make a difference, especially when there are other mitigating circumstances. Yet another confirmed that with enough discounts, including for using the special procedure, the punishment could end up below the minimum. Some commentators told stories about individual cases, which often involved actual deal making. A lawyer from Tambov reported a case where an employee in sales had been skimming off part of the money received. The accused wanted special procedure but the victim (his boss) initially refused, until at the prompting of his lawyer the accused agreed to pay back the money he had taken. The victim then agreed to special procedure, and the judge delivered a suspended sentence.

One of the lawyers from Kemerovo opined that the special procedure was especially useful to accused persons when the evidence was firm and they did not have the money to pay for a lawyer. For this group, he observed, special procedure offered a resolution that was "fast, lenient, and free." The handling of the case would be shortened, as would the length of pretrial detention. There was a chance of getting the minimum punishment possible and the defendants would be spared paying for the court-appointed lawyer. The same advocate added that sometimes he was able to negotiate a reduced charge in exchange for his client's opting for special procedure, which in turn could lead to a suspended sentence. In other words, this lawyer found in the special procedure a tool to be used for explicit negotiations over charges (another form of plea bargaining). His main example resembled the negotiations that characterized "compromise decisions" in the last decades of Soviet power (as Lazareva had predicted). In fall 2011, a high procuracy official also confirmed that bargaining and compromises took place in individual cases.[43]

As of spring 2012, we can add to the discussion the results of a statistical study of sentencing in a large random sample of convictions for three of the most common crimes: assault (inflicting serious injury), theft (significant), and use of narcotics. The study found that most of the sentencing gains registered for persons who opted for special procedure disappeared when two controlling factors were introduced—the use of pretrial detention and the presence of a criminal record (recidivism). For the most part, these factors explained whether or not offenders received

[43] "Kommentarii k statiu Kolegova, http://pravorub.ru/articles/13196.html. Murashkin, "Rol prokurora pri rassmotreniiu ugolovnykh del," 37.

prison terms and the length of prison terms.[44] But there were still differences in sentencing for defendants who used the special procedure. Prison terms for them averaged a few months less than for their counterparts who went to trial. Moreover, first time offenders who were not held in detention got more lenient outcomes (usually non-custodial sanctions) when they used special procedure.

A further limitation on the findings is the fact that large statistical patterns do not speak to what happens in individual cases, especially of more serious crimes (which were not included in the study). The authors of the study chose to give it the title, "Special Procedure—The Usual Sentence," which is one way to interpret their data. There is also another way to understand what the study results mean. In Russia, like in the United States, once a majority of accused persons plead guilty, then their fate becomes the statistical norm. If it turned out that convicts who went to trial received consistently more severe sentences, one could speak of a penalty for contesting trials rather than a benefit (or deal) from confession. One would not want to discover that in Russia contesting one's guilt had perverse consequences.

Conclusions

The more that one explores the use of special procedure in Russian criminal justice, the more questions arise. There is enough evidence now to hypothesize that accused persons have multiple and varying reasons for using this form of plea bargaining. Sometimes they receive extra benefits that they expected or hoped for, but the overall structure of sentencing and punishment has not changed much with the advent of the procedure. In contrast, it is hard to say whether the plea process in Russia is fair, how often there are coercive elements, how often the well-designed rules are observed (there is the usual stream of criticism of judges who fail to so do), and the nature and frequency of informal promises and deals.

A fuller understanding of Russian plea bargaining requires in-depth sociological and ethnographic research, including interviews with the players (defense counsel, investigators, procurators, judges, accused and victims) in many parts of the Russian Federation. The research should focus on what inducements, discussions, and deals prompt the accused to adopt special procedure and how its use affects the outcome of cases, especially sentencing. Empirical studies of how judges sentence more generally, in regular and special procedure, would also be useful.

The results of empirical research on the dynamics of plea bargaining

[44] K.D. Titaev and M.L. Pozdniakov. 2012. "Poriadok osobyi—prigovor obychnyi: praktika primeneniia osobogo poriadka sudebnogo razbiratelsva (gl.40 UPK RF) v rossiiskikh sudakh," Analiticheskaia zapiska Instituta Problem Pravoprimeneniia. St. Petersburg. Available at www.enforce.spb.ru.

in Russia will help determine its fairness and whether the institution makes good public policy. But there remain philosophical questions about the meaning of plea bargaining for the transition to adversarialism. From the 1991 Conception of Judicial Reform to the new Criminal Procedure Code of 2001, reformers sought to correct defects in Russia's neo-inquisitorial system by making it more adversarial. While some radical reformers wanted to replace Soviet criminal justice with full adversarialism at the pretrial as well as trial stage, moderates and conservatives preferred partial changes. Compromise ruled the day, and as a result, the main change was the introduction of a version of an adversarial trial, where, at least in theory, evidence would be established orally (not via dossier) and there would be ample opportunity to challenge and test the evidence.[45]

If, because of the special procedure, nearly two thirds of criminal cases in the Russian Federation no longer have trials on the evidence (even of the Soviet neo-inquisitorial variety), then this represents a substantial return to inquisitorialism.[46] In these cases the judge has the obligation to check the strength of the evidence, not through oral argument but by reviewing the case file, and the short trial that remains concerns only sentencing. This is in many ways reminiscent of the practice of ordinary trials during the last decades of the Soviet era, where the dossier was introduced at the trial as evidence and checked only selectively or little at all when the accused confessed. The main contribution of the advocate was to bring out mitigating factors that might soften the sentence (the plea in mitigation). For legal officials in Russia, including judges, the special procedure not only saves work time and avoids the complications of reviews by higher courts, but is also comfortable and familiar. While appearing to be a novelty, the special procedure actually represents a return to an older comfort zone, especially for judges.

At the same time, special procedure places Russia in the company of modern states worldwide, where some kind of simplified plea bargaining procedure is the norm, because full scale trials are too complicated and expensive to be used for most cases.[47] In this context, the Russian return to the inquisitorial mode for resolving criminal charges that are not in dispute is not necessarily a bad thing. In American plea bargaining, the main review of the evidence usually takes place during informal (and non-transparent) discussions among prosecutors and defense counsel rather than in the courtroom. At least the Russian version of plea bargaining

[45] See Solomon, "The Criminal Procedure Code of 2001." On later amendments to the Criminal Procedure Code that diluted the adversarial trial (for example by making it easier to introduce testimony from the case file), see William Burnham and Jeffrey Kahn. 2008."Russia's Criminal Procedure Code Five Years Out," Review of Central and East European Law 33:1, 1-94.

[46] Thaman, "A Typology of Consensual Criminal Procedures."

[47] Thaman, World Plea Bargaining.

requires the judge to review the case file and agree that the evidence is sufficient and clear, a requirement that is typically absent in common law countries. However, there is now a danger in Russia that the quality of case files available to the judge in special procedure cases will deteriorate. A proposed new law in March 2012 promises to allow investigators of crimes to reduce paperwork, if not also inquiries, when the accused admits guilt and opts for using the special procedure.[48]

The future evolution of plea bargaining in the Russian Federation from 2012 may also be influenced by recent changes in the punishments that judges can award. Changes in the criminal code from March 2011 removed the lower limits on the length of imprisonment for many charges, including common ones like theft and robbery, and analogous changes were made for non-custodial alternatives too. The use of imprisonment was actually forbidden for first time offenders for non-serious offenses, whose definition was extended to comprise all crimes with a maximum sentence of three years imprisonment (up from two).[49] The changes increased greatly the already considerable sentencing discretion of judges, which they could use in rewarding persons who admitted guilt and opted for the special procedure.

In sum, plea bargaining in Russia reduces caseload pressure not only on judges but also for investigators and procurators, while at the same time offering some advantages to the accused. Overall, it may well represent a worthwhile addition to Russian criminal justice, as long as, firstly, those cases that do go to trial are handled in a fully adversarial way and with reduced accusatorial bias, and secondly, the special procedure process is fair. Ironically, as of 2012, the second condition seems closer to fulfilment than the first.

[48] "Medvedev predlozhil izmenit poriadok rassledovaniia ugolovnykh del," RAPSI, March 7, 2012.

[49] "O vnesenii izmenenii v Ugolovnyi kodeks RF," Russian Federal Law, March 7, 2011