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Series**

**THE COMPLEXITY
OF SUCCESS:
THE U.S. ROLE
IN RUSSIAN
RULE OF LAW
REFORM**

Matthew J. Spence

**Democracy and
Rule of Law Project**



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MIXED RESULTS FROM THE PROLIFERATION OF WESTERN RULE OF LAW assistance over the past twenty years has taught us much about what efforts do not work. Criminal justice reform in Russia offers a different type of lesson; it is a rare success story of rule of law promotion. In the 1990s, the U.S. government sought to promote the rule of law in many parts of the former Soviet Union and beyond, but few of these efforts outside Russia produced concrete results. Instead, lawlessness became a primary symptom of the apparent failure of many attempted rule of law reforms in the former Soviet Union.

Against this backdrop of disappointment, in 2001 Russia adopted a liberal new Criminal Procedure Code and introduced jury trials after nearly a decade of U.S. rule of law assistance that supported precisely these reforms. U.S. policy makers considered these reforms a major success. Because problems with criminal procedure—arbitrary arrests, overzealous prosecutors, sham trials, and other due process violations—lay at the heart of some of Russia’s worst human rights violations, the new code represented an important advance. On paper and increasingly in practice, the code protects the accused from procedural abuses and defines and institutionalizes many of the civil rights expected of a liberal democracy.

In addition, as the most liberal criminal procedure code in the former Soviet Union, the new Russian code can serve as a model for protecting human rights to the rest of the region. That jury trials—a defining characteristic of the U.S. legal system—took root in an inhospitable Russian legal culture underscores the magnitude of the reform. To top things off, the Russian legislator who sponsored the new Criminal Procedure Code even thanked U.S. government-funded advisers in a speech on the floor of the Russian parliament, thereby supporting the proposition that the U.S. government did, in fact, positively influence rule of law reform in a transition country.

But how, if at all, did U.S. policy actually contribute to this legal reform? Why did these particular reforms succeed while others failed? The Russian story highlights the complex interaction of textual design, legal culture, and political coalitions in producing legal change. This is in part a story of the limits of U.S. influence. The Russian government drove the political process to pass the code, with U.S. policy makers contributing ideas only when asked. U.S. actors were only able to claim success once the Russian government independently decided to introduce legal reforms in 2000. Much of the substance of the reforms came from Russia’s own legal history, and some criminal procedure reform would have likely happened regardless of what the U.S. government did.

Yet this is also a story of U.S. influence in subtle but significant ways. U.S.-funded efforts shaped the Russian reform process in several meaningful respects: They expedited a process already under way to take advantage of the political window for reform, strengthened the political position of Russia’s judicial reformers, and introduced several substantive and politically controversial changes that made the resulting law more liberal and more likely to be implemented in Russian daily life. Among the most significant of these changes, U.S. involvement introduced to Russia the concept of

plea bargaining, a small but potentially critical logistical prerequisite for widespread jury trials. Russia had other opportunities for legal reform in the 1990s, which reformers were unable to exploit. U.S. assistance helped Russian reformers take advantage of the political opening in 2000 to pass the new code. The Russian story thus teaches how the West can influence rule of law reform abroad by catalyzing domestic energy for legal change to shape the timing and substance of reforms.

THE ROCKY PATH TO RUSSIAN CRIMINAL PROCEDURE REFORM, 1989–2001

The Seeds of Criminal Procedure Reform in the Soviet Union

Although much has been said about the novelty of Russia holding Western-style jury trials, the ideas upon which the liberal 2001 Criminal Procedure Code was based were not actually alien to Russia. Rather, the key principles came from three domestic sources: Russia's own nineteenth century legal reforms and the right to jury trials under Czar Alexander II; general ideas present in the Russian legal community about Western legal systems; and legal reforms from perestroika that build on czarist and Western traditions.

Although Russia's legal reformers were not starting from scratch, they confronted a hostile legal landscape. Under the 1960 Soviet Criminal Procedure Code, prosecutors, not independent judges, dominated the process and ruled on the rights of the accused. Coerced confessions, false and politically motivated prosecutions, and falsifications of evidence were commonplace. Defendants had few rights and were rarely acquitted. Until the passage of the new Criminal Procedure Code of 2001, Russia had long had the largest per capita prison population in the world. Rather than jury trials, a professional judge, or a judge and two lay assistants, decided verdicts—and they rarely sided against the prosecutor. Nearly all of Russia's lawyers and judges had been trained and promoted within this system. Soviet-trained prosecutors controlled the administration of criminal justice in their regional fiefdoms stretching across Russia's eleven time zones and were reluctant to cede any power.

Despite Russia's weak legal culture, a strong movement for judicial reform gained strength in the late years of perestroika and the early years of Russia's independence—without direct U.S. involvement. As early as 1989, Mikhail Gorbachev called for the introduction of jury trials in a speech to the Soviet parliament. The Congress of People's Deputies and the parliament's upper chamber passed a resolution calling for jury trials as part of a package of criminal justice reforms. Two months before the collapse of the Soviet Union, on October 21, 1991, the Russian parliament went even further and unanimously passed the "Concept of Judicial Reform," a resolution containing a detailed statement of principles for rule of law reform. It was the most direct model for the new Criminal Procedure Code.

Western lawyers, who had no involvement in drafting the concept, later praised it as a model blueprint for legal reforms. It called for creating an independent judicial branch with lifetime tenure, introducing an adversarial process in the courts, and transferring authority from the prosecutor to judges over criminal investigations and intrusions into violations of citizens' rights. This resolution also cataloged specific provisions that Russians would later use to draft their new Criminal Procedure Code, including expanded rights for defense attorneys, reduction of maximum length of pretrial detention, and jury trials for all crimes punishable by "the deprivation of liberty" for one year or more.

The domestic sources of Russian criminal justice reform became instrumental in the eventual passage of the code. Several of the authors of the concept became intellectual driving forces behind Russian legal reform throughout the 1990s, helping to draft legislation, providing general expertise, and keeping some movement for legal reform alive. The basic idea for jury trials and legal reform was not implanted in Russia by Western advisers; it grew from within.

An Early Victory: Liberal Criminal Procedure Protections in the Russian Constitution

The momentum for legal reform in the early 1990s delivered admirable protections for the accused in Russia's constitution. On April 21, 1992, the Russian parliament incorporated a declaration of rights into the 1978 Brezhnev-era constitution of Russia that required judicial approval for arresting a suspect, searching a private home, intercepting mail, eavesdropping, or telephone tapping. Likewise, Russia's post-Soviet constitution, passed in December 1993 (nearly two years after the Soviet Union formally dissolved), provided for this same panoply of liberal rights. Most were of the sort that would be familiar to Americans: the presumption of innocence; protection against double jeopardy; right to remain silent; right to exclude evidence gathered illegally; right to defense counsel upon arrest or detention; prohibition against ex post facto laws; right to trial by jury to the extent provided by law; and requirement of a jury trial for death penalty cases. In a sharp departure from the peripheral role courts played in the Soviet Union, the new constitution provided that the Russian judiciary—and even international judicial bodies—would guarantee protection of these far-reaching civil liberties.

This victory was limited, however, because most of these legal reforms in the amended Brezhnev-era and new 1993 Russian constitutions required additional federal legislation to come into effect. In 1991, the Supreme Soviet passed a proviso suspending the enforcement of these rights until the passage of implementing legislation. In a similar vein, the 1993 constitution delayed the enactment of jury trials and used other Soviet-era procedures for criminal prosecutions—which, in particular, did not require judicial authorization for pretrial detentions, searches, and wiretaps—until the passage of a new Criminal Procedure Code. The reason for the delay was in part political compromise to opponents of the reforms. The constitutional provisions glossed over the controversies of what these rights would actually mean in practice, which threatened to derail the passage of any reforms at all. This compromise reflected the limits of the momentum for legal change in Russia and the underlying weak support for these reforms.

The other reason for delaying the enactment of these constitutional rights until the passage of implementing legislation also came from the recognition by the drafters of the constitution that the details of implementation were too lengthy and intricate to include in the actual text of the founding document. This illustrates a fundamental obstacle to rule of law reform. Even political agreement to guarantee constitutional rights does not answer the problems of resource constraints and logistical complexities, obstacles that can easily prevent these rights from becoming realities.

Some provisions—such as the presumption of innocence, protection against double jeopardy, and prohibition against ex post facto laws—presumably were simple enough not to need detailed implementation plans, so the constitution nominally made these provisions immediately self-executing. But even Russia's most zealous advocates for reform acknowledged that the Russian constitution could not simply achieve by decree a system of jury trials, free access to counsel, and other elements of the revolution in criminal procedure they sought. For example, where would the money and enough trained attorneys come from for the state to provide “the right to qualified legal counsel” for those who

could not afford it? Jury trials alone would require millions of rubles to remodel courtrooms to add jury boxes, remove the bars behind which defendants sat, and pay jurors for their service.

Leaving these provisions vague in the constitution let reformers sidestep the unappealing debate over whether the new Russian government could afford such exotic legal reforms. At the precise moment that the International Monetary Fund (IMF) and Western governments were urging the Russian government to cut the bloated state budgets inherited from the Soviet Union to stave off economic collapse, Russian and Western legal reformers were urging the government to spend money on new reforms. Even though the cost of these reforms was a pittance compared with the other budget issues the government faced, calling for the government to spend more money on anything other than unpaid pensions and salaries was still an unpopular demand. Russian legal reformers faced a Hobson's choice that few in the West understood. Requiring the Russian government to offer these legal protections immediately, when no resources yet existed to provide them, would put the government in a position of violating the constitution. That would be an inauspicious beginning to inculcate a new culture of constitutionalism in Russia.

Ironically, the decision by Russia's constitutional drafters to suspend the implementation of criminal procedure protections until resource questions were resolved may have ultimately strengthened these rights. Contrast these protections of criminal procedure to the constitutional guarantees of free provision of health care, education, housing, and even "the right to rest and leisure"—none of which the government could afford to provide to all Russian citizens. In practice, the government has ignored these positive rights and rendered these constitutional protections essentially meaningless.

Momentum for Legal Reform Stalls

Soon after the passage of Russia's post-Soviet constitution, the heady perestroika-era momentum for rule of law reform stalled, starkly illustrating the disconnect between the political coalition required to put liberal provisions into a constitution and the broader consensus needed to put those liberal rights into practice. The slowdowns also underlined the time and budgetary constraints that reformers face even when "political will" exists for a given policy. And this window of opportunity for reform closed more quickly than reformers expected it would.

After legal reformers successfully wrote their provisions into the Russian constitution, advocates of democratic change breathed a temporary sigh of relief and devoted their efforts to other projects. They mistakenly failed to devote the same energy to the more difficult task of *implementing* constitutional rights as they did to ensuring those rights were constitutionalized. A small, dedicated group of legal reformers still focused on implementing legislation, but they became internally divided and increasingly marginalized, as Yeltsin's team focused on economic and other political reforms instead of legal change.

Although Yeltsin personally backed legal reforms, Russia's dispersed decision-making structures—namely, opposition in the Duma, the Ministry of Justice, and regional prosecutors and judges—undermined the passage of the needed implementing legislation. This gridlock was ironically a direct consequence of Russia's democratic reforms. Namely, the same liberalizing forces that led to the collapse of Soviet rule also bequeathed Yeltsin weakened and chaotic administrative structures. Yeltsin's own democratic reforms empowered interest groups to stall policy. Moreover, Russia's separation of powers between the parliament and president led to a stalemate over reform legislation.

Implementation also proceeded slowly because legal reformers faced several bureaucratic obstacles that kept them from taking advantage of the quickly disappearing opportunity for legal reform. To be sure, a pilot law led to the first jury trial in Russia since the Bolshevik revolution; on December 15, 1993, a jury in Saratov acquitted the defendant in a capital murder case. In 1994 legislation expanded jury trials to nine regions in Russia, including Moscow. But legislation to extend jury trials to Russia's other eighty regions failed, and the regions that officially did have jury trials held them only sporadically. Moscow, for example, did not hold its first jury trial until 2003. Implementation stalled because jury trials were expensive, exotic, and short on domestic support. Opinion polls showed that the public was uneducated about their benefits. Although some legal experts described jury trials as a key forum for citizen participation in the political process, few Russians viewed the introduction of jury trials as a "democratic" reform. Thus, Russian politicians spent their scarce resources on other reforms.

While Russian advocates of criminal procedure reform took care in drafting legislation to implement these complicated reforms, the political situation rapidly changed around them. Namely, skyrocketing inflation from Yeltsin's economic shock therapy engendered a backlash against Yeltsin and Western policy makers considered to be reformist allies. Yeltsin's approval ratings sank into single digits, and the Russian parliament opposed his further reform agenda, which included criminal procedure reform. The political window that had allowed a radical change in the Russian constitution in favor of a liberal criminal justice system had closed, at least for the immediate future, faster than anyone expected. This setback would later serve as a reminder to the legal reformers of 2001 to seize the moment for reform when it presented itself.

By the mid-1990s, criminal justice reform in Russia seemed dead. Yeltsin had fired his top advocate for legal reform, the Russian parliament elected in 1995 was increasingly unsupportive of legal change, and no significant Russian political figures seemed to support criminal procedure initiatives or other types of rule of law reform. Rising crime and lawlessness in Russia created little public demand for giving more rights to accused criminals. Advocates of Russian criminal procedure reform split into warring camps, at one point working on at least three competing drafts of a criminal procedure code. The Duma held hearings on draft versions of the Criminal Procedure Code, but few believed that it had any serious chance of passage. With legal reform stalled, many Russians felt that little had changed since the end of the Soviet Union. Russia was still using the 1960 Soviet Criminal Procedure Code, and protection of the rights of the accused in the first decade of postcommunist Russia was hardly any improvement over Soviet-era horror stories. A poll in late 1997 found that only 23 percent of Russians had confidence in the judicial system. Only one in ten believed there had been even a fair amount of progress in establishing the rule of law since 1991.

At the end of 1999, prospects for reform were so bleak that many in the U.S. government argued for ending U.S. assistance to criminal procedure reform altogether. In early 2000, the Russian presidential administration would not even return phone calls from the Russian legislator seeking to promote criminal procedure reform.

An Unexpected Opening: Liberal Reform from an Illiberal Source

In early 2000, however, three changes at the top of Russian politics created space for legal reform, and Russia had a new Criminal Procedure Code eighteen months later. First, President Vladimir Putin, who had just been appointed to office by President Boris Yeltsin (who resigned unexpectedly

on December 31, 1999) made legal reform a priority. Putin and the head of his presidential administration, Dmitri Kozak, created a commission on judicial reform—the Russian Working Group on the Criminal Procedure Code—to focus on criminal procedure. This working group benefited from the fact that Putin was popular and threw his support behind the process. Another positive element was that the forty-person working group involved all stakeholders: Duma members, radical reformers, and representatives from the Procuracy (the prosecutor’s office), Interior Ministry, Justice Ministry, internal security services, and presidential administration. Unlike in previous efforts to pass reform legislation, the working group included both those who supported and opposed judicial reform, in itself a significant accomplishment. Including potential spoilers on the committee undermined their power to derail the process. The logic was that if the reformers could convince the working group, then Russia would have a new Criminal Procedure Code.

Surprisingly, democracy’s traditional allies—namely, Russia’s liberal Yabloko Party—joined with the Communists in an odd alliance to water down elements of the Criminal Procedure Code as it neared passage. The expected allies of criminal procedure reform—the public and defense lawyers—played little role in the process. Thus, the Criminal Procedure Code stands as an example of the unexpected coalitions that supported Western reforms and the difficulty in identifying them.

Second, Putin’s move to centralize decision-making power—which many criticized as undemocratic—ironically made democratic reform of the criminal justice system possible. Namely, the December 1999 elections delivered a Duma that was not necessarily more inclined toward legal reform but was more loyal to the president than any other since the collapse of the Soviet Union.

The third ingredient was a “policy entrepreneur,” in the form of Duma Deputy Elena Mizulina. Mizulina chaired the working group and made it her mission to pass the new Criminal Procedure Code at breakneck speed. She had written her doctoral thesis on modernizing the Russian criminal justice system, and U.S. advisers considered her very progressive and personally invested in legal reform. Other members of the working group cited Mizulina’s influence as key to the code’s passage.

The importance of Mizulina as a driving force to take advantage of a larger political opening for reform cannot be overstated. Under Mizulina’s leadership, the working group completed more work on the code in seven months than other Duma committees had over the past seven years. Mizulina pushed the working group to review hundreds of amendments in a matter of weeks and made the code the primary item on her legislative agenda. After the working group produced a draft months ahead of schedule, some even criticized her for rushing a drafting process that, in comparison with similarly complex Russian legislation, should have taken at least another year to complete.

As the code moved through its first and second readings in the Duma and neared its final reading required for passage in the fall of 2001, Mizulina and Kozak successfully fought off the attempts by the Procuracy and other opponents to defeat it. Mizulina and her staff worked tirelessly to sort through the flood of amendments to the code and update the draft so that opponents could not use the logistical process of revising the draft as an excuse to delay its passage. At the level of political deal making, Kozak used the political power of the presidential administration to pressure and strike critical bargains with the code’s opponents. Finally, on November 22, 2001, the Russian Duma ratified the code, and shortly thereafter Putin signed the bill into law.

Of course, good laws on the books in Russia are not always enforced. However, in a rare event in Russian legislation, the working group became an “implementation group” after the code passed. The group continued to work until January 2004, traveling throughout Russia to build consensus and introducing amendments to the code that would facilitate implementation. After over a decade of struggle, criminal procedure reforms were becoming a reality in Russian daily life.

WHERE U.S. EFFORTS MADE A DIFFERENCE

What impact did U.S. assistance efforts have in the abortive reform efforts during the 1990s and the ultimately successful passage of the Russian Criminal Procedure Code in 2001? The U.S. government primarily sought to influence the process by stimulating demand for criminal procedure reform in the hope that such demand would create a political opening for change and by providing administrative and design assistance to the drafters. U.S. government efforts had little effect on the alignment of political interests that created the possibility in Russia for some type of criminal procedure reform in 2000 or 2001. However, once the political conditions created a window for opportunity for reform in 2000, U.S. assistance contributed to a quicker passage of the law and the introduction of several substantive changes to the code. The U.S. government subsidized the code from behind the scenes, which made the reforms appear much more attractive to Russian politicians.

Little U.S. Influence on Creating the Political Conditions That Made Reform Possible

When efforts in the mid-1990s stalled and failed to implement the liberal protections contained in the Russian constitution, U.S. policy makers felt they could do little to get reform moving again, at least in the short term. Facing a nonresponsive central government, U.S. policy makers adopted the strategy that would become popular in democracy assistance in the late 1990s: Go grass roots. The U.S. government launched a “large-scale lobbying operation” to try to build a constituency for criminal procedure reform among the groups that would benefit most from a new code: lawyers, judges, and civil society groups. As part of this effort, the U.S. government paid for Russian judges and lawyers to watch jury trials in the United States, printed and distributed manuals about how to preside over a jury trial, and hosted seminars for Russian judges and lawyers with U.S. law professors to explain how a modern criminal procedure code would save the courts and government time and money. U.S. officials claimed that such efforts created a constituency of “hundreds, if not thousands, of judges and lawyers who became advocates of reform” and were essential to the passage of the new code.

In reality, these U.S.-funded seminars and conferences had little demonstrable role in changing the political conditions for passing the new code. Some type of criminal procedure reform probably would have happened in 2000 or 2001 regardless of U.S. efforts. Further, most lawyers and judges opposed the new Criminal Procedure Code until its passage. And even if they supported the code, they had little political power to push for a new reform. Rather, they were part of the chorus that opposed reform. Moreover, powerful interest groups arrayed in opposition to the code—prosecutors, the Ministry of Internal Affairs (MVD), the police, and many Russian lawyers—still opposed criminal procedure reform as firmly as they had earlier, or had public demand had emerged for criminal procedure reform.

Instead, a second opportunity for reform only became possible in 2000 because of elite political dynamics—the dedication of Elena Mizulina, Putin’s popularity and desire for legal reforms, and a strong pro-presidential majority in parliament—elements over which U.S. policy makers had little influence. Why did Putin—best known as a former KGB operative—prioritize legal reforms? It is difficult to attribute this to direct Western prodding, especially because Putin’s crackdown on the media and brutal pursuit of the war in Chechnya (and unresponsiveness to Western entreaties to end both) had left top U.S. policy makers pessimistic about Putin’s reformist colors and acceptance of Western democratic values.

But it is difficult to rule out indirect Western influence in Putin’s likely cost-benefit analysis. Putin calculated that allowing criminal justice reforms could signal his support for liberal Western ideas and contribute to his administrative reforms, both at little cost to his power. Putin could also present these reforms as part of his law and order platform, even though the nuance of providing *more* rights for the accused typically is not a familiar part of the pledge to crack down on criminals. To most Russians, jury trials symbolized little more than some exotic Western practice, not a fundamental democratic right. But to U.S. officials, jury trials were as central a feature of democracy as elections or a free press. The critical difference was that jury trials did not directly threaten Putin’s power; they were a relatively low-cost form of citizen participation in the government. Thus, while Putin raised Western ire by waging a devastating war in Chechnya and indirectly closing down independent newspapers and television stations, he signaled his democratic bona fides—and came closer to receiving some of the benefits of joining the West—by adopting criminal procedure reforms. At the same time, such reforms could reinforce Putin’s attempts to streamline the Russian administration and reverse the governmental chaos he inherited from Yeltsin. Some Russians involved in the process attributed Putin’s conception of legal reform as disciplining the Russian bureaucracy to Putin’s own training as a lawyer. At the very least, introducing a new criminal procedure code could give Putin an opportunity to assert control over the fiefdoms that regional courts, police, and prosecutors had built.

Yet, although Putin calculated that it was in his interest to allow legal reforms, the benefits were likely neither powerful nor immediate enough for Putin to spend precious political capital on enacting them if they proved to be too costly. As discussed below, U.S. influence became important in keeping the costs of enacting this reform low to Putin, thereby changing the cost-benefit calculation in favor of criminal procedure reform.

Limited, Hands-Off U.S. Assistance in the Early 1990s

In the early- to mid-1990s, Western governments and aid organizations did not help Russia’s legal reformers take advantage of the quickly closing window for reform or offer resources that might have made criminal procedure reform cheaper to enact and thus appear more attractive. Granted, the U.S. government offered some \$15 million in assistance over three years, mostly for training seminars and logistical help for the courts. Yet U.S. officials did not offer help that some Russian drafters later claimed might have made a difference. Namely, U.S. advisers were not closely involved in the drafting process (in part due to the difficulties U.S. assistance projects faced in getting started in a new country); the U.S. government would not consider funding salaries for jurors (cited by Russians as a significant obstacle to reform, given the shortfalls in the Russian government budget, but U.S. policy did not allow paying the salaries of employees of foreign governments); and some U.S. government officials felt that lobbying Yeltsin to make criminal justice a greater priority was inappropriate interference in Russian domestic politics.

Would deeper U.S. involvement in the drafting and passage of the Russian implementing legislation in the early 1990s have made a difference? It is difficult to say. To be sure, the window of opportunity in the early 1990s was smaller than in 2000. Putin was at the height of his popularity and dominated his parliament, whereas Yeltsin's political capital was quickly disappearing by mid-1992 in the face of an increasingly intransigent parliament and plunging approval ratings. Likewise, Elena Mizulina was an elected member of parliament, whereas the leaders of legal reform in the early 1990s were unelected judges and academics.

At the same time, however, contrast the U.S. government's hands-off approach to rule of law reform with its concerted effort to pass economic reforms in the early 1990s. U.S.-funded economic advisers famously sat in Russian government ministries helping to draft key portions of privatization and macroeconomic reform legislation. The IMF conditioned the receipt of massive economic assistance on the passage of specific key reforms. Senior U.S. policy makers stressed the importance of specific economic reforms in private meetings and public statements. Whatever the limits of the U.S. government's success in prompting the Russian government to implement economic reform in the 1990s, these concerted U.S. government efforts kept economic liberalization on the Russian political agenda in a way that criminal justice reform was not. U.S. policy makers felt that this type of aggressive assistance on legal reforms was improper and did not attempt it.

Deeper U.S. Collaboration with the Drafters of the Code After 2000

The style of U.S. assistance in criminal procedure reform after 2000 was fundamentally different from earlier efforts and from other U.S. rule of law assistance efforts. U.S. efforts played a greater role in 2000 due in equal part to the good fortune of the arrival of a Russian policy entrepreneur who sought Western assistance and the willingness of U.S. policy makers to become deeply involved in the drafting and passage of the code, in the form of collaboration and involvement in the domestic politics of the transition country others in the U.S. assistance community considered improper.

To the surprise of U.S. officials who had previously encountered little receptiveness to criminal justice reform in the Russian government, Elena Mizulina welcomed direct U.S. help upon becoming the head of the Russian Working Group on the Criminal Procedure Code. Her group needed resources to pass the Criminal Procedure Code on her ambitious timeline, and the U.S. government was eager to provide them. The U.S. Embassy Law Enforcement Section and the U.S.-funded American Bar Association's Central Eastern European Legal Initiative (ABA/CEELI) provided the two parts of U.S. assistance: logistical support to help the working group pass a code and expert advice on needed changes in the code.

Beginning in the spring of 2000, U.S. advisers collaborated closely with Mizulina's working group. The Moscow-based U.S. Department of Justice representative spoke with Mizulina at least once a month. Two U.S.-funded American experts on comparative criminal procedure "effectively became ex-officio members of the working group," provided model language for parts of the code, and testified at Duma hearings. Parts of the U.S. advisers' language made it into the final code. In fact, before the second reading of the law in the Duma, U.S. embassy officials retained the working group's only master working draft of the law. The U.S. government also sponsored several conferences for the working group and trips to the United States to meet with American judges, which resulted in several substantive changes in the code, not just "technical" fixes. After several of the U.S.-sponsored conferences, Mizulina went to her laptop and immediately incorporated the

concrete suggestions from the conference into the draft law. Because the working group had little money of its own, it is unlikely that these conferences would have happened without U.S. assistance.

But U.S. policy makers stayed clear of offering their Russian counterparts any specific incentives—such as more foreign aid or meetings with the U.S. president or secretary of state—in exchange for passing the code. Significantly, U.S. advisers also intentionally remained in the background of the policy-making process to let Russia’s politicians claim credit for the reform and to avoid any potential backlash from perceived U.S. interference in Russia’s internal affairs. As the U.S. embassy coordinator for the U.S. effort said:

We’re not here to lobby for Russian legislation. We’re here to provide technical assistance. If we’re asked for help, we’ll give it. Usually the approach I tried to take is to offer things, such as model statutes and concepts, not to say ‘You have to do this or we’re leaving.’ Ultimately, I don’t think that would be politically effective in Russia.

Even though U.S. advisers did not see all the reforms they would have wanted in the final law, in their eyes, they won their most important victory: the passage of the code itself and a concerted effort by the Russian government in the years after the code’s passage to ensure it would be put into practice.

In fact, the United States exerted even more influence in the implementation stage than it did in the drafting stage. The U.S. government provided both funding (\$1.2 million for criminal procedure work in 2002 alone) and logistical support to the implementation group’s efforts. Some Russians involved with drafting the code considered U.S. support to the implementation group its most important contribution. Because an implementation group for a newly passed law was an innovation in Russian policy making, domestic funding was not readily available. U.S. assistance allowed the group to avoid fighting the bureaucratic battle to secure funding and instead focus immediately on working with local courts and prosecutors to implement the law.

U.S. Influence on the Substance and Timing of the Code

Given that the Russian government drove the process to pass the code and U.S. support appeared to be primarily administrative and behind-the-scenes, would things have been different without U.S. involvement? Yes. One change was that some specific ideas—such as plea bargaining and five other concrete protections of defendant’s rights, described in greater detail below—would not have made it into the final bill without U.S.-funded advisers.

Direct Western influence was far more important to the design of legal texts at the stage of implementing legislation than it was in the drafting the constitution itself. Although they praised the progressive provisions of the Russian constitution, Western lawyers had little involvement in drafting them. The immediate inspiration for the liberal provisions of the Russian constitution came from the Concept of Judicial Reform, which the Russian parliament passed before the collapse of the Soviet Union. The closest that Americans came to influencing the design of this early legal text, and thus the foundations for the 2001 Criminal Procedure Code, came from a general diffusion of Western ideas. For example, one of the authors of the concept had written her doctoral dissertation in the 1970s on the U.S. Criminal Procedure Code. Yet in contrast to the presence of Western lawyers who rushed into Hungary, Poland, and elsewhere in Central Europe after the fall of the Berlin Wall, Russian drafters did not meet with any foreign advisers. Only two of the seven co-authors of the concept spoke English, and even they were not known as America-philes (nor were they eager to work with Western advisers). Few Americans, both in and outside of the government, even knew

about the resolution and the other legal reforms that the Soviet parliament was passing. Russians drafted good laws on their own, but this alone did not legal reform make.

Drafting assistance did, however, make a difference at the stage of second-order implementing legislation, once Russian political coalitions had aligned to create a space for U.S. influence. Plea bargaining was the most significant provision that made it into the code *only after* U.S. involvement. The introduction of this provision illustrates how U.S. assistance helped Russian reformers overcome specific practical and political obstacles that might have derailed the legislation. Plea bargaining is an essential requirement for American jury trials, to ensure that courts are not overwhelmed with full trials. But Russian drafters had not seriously considered it before the American suggestion, and its introduction was a heated political fight. Although jury trials without plea bargaining would have overwhelmed Russia's already overextended court system, many Russians felt that confessions before trial in plea bargaining smacked too much of the forced confessions of Stalin's show trials. U.S. experts helped explain the concept, offered ideas about how to make it happen, and eased fears about the confessions' Stalinist overtones. The plea bargaining system Russia finally adopted was very similar to the U.S. system. Plea bargaining also neutralized a critical argument of opponents of introducing jury trials—namely, that jury trials would either cause a greater backlog in Russia's criminal justice system or, worse, put criminals back on the streets.

Some members of the working group credited U.S. influence for the inclusion of other provisions about rules of evidence and other protections of the rights of the accused. These provisions were in Russia's 1993 constitution but not in the actual drafts of the code before U.S. involvement began.

More broadly, U.S. advisers helped Russian drafters update the czarist-era nineteenth-century concept of jury trials to twenty-first-century Russia. For example, the author of Russia's jury trial provisions, Sergei Pashin, recalled the influence of a U.S. government-funded trip to Harvard Law School that he took while drafting the law. Pashin drew on the American interpretation of the right of a citizen to obtain a writ of habeas corpus as a protection against illegal imprisonment and borrowed the procedures for the selection and preemptive challenging of jurors from the U.S. federal court system. Moreover, U.S. advisers convinced the drafters of the jury trial laws that certain practices of Russian courts—such as bringing defendants before a jury in shackles or seating them throughout the trial in a cage—had to change. Russian judges even paraphrased certain parts of standard American jury instructions.

U.S. efforts contributed in a second way by securing the code's timely passage both by providing logistical support, and external validation to help Russian reformers defeat the opposition to the code. Whereas a political window for criminal procedure reform had opened and closed in the early 1990s due to bureaucratic delays, U.S. involvement in 2000 helped Russian politicians overcome these same obstacles to ensure that the opportunity for reform would not pass again. Such help included organizing the working group, maintaining various drafts, and keeping track of proposed changes. Russians working on the code said that it passed a year to eighteen months faster than it would have had the United States not been involved. Of course, it is highly probable that *some* reform would have passed eighteen months later. Yet it is worth remembering how quickly the political window of opportunity for reform closed in the early 1990s. While advocates of jury trials struggled in those years to overcome logistical obstacles to putting a good piece of legislation together, Russia elected a new parliament that was much more hostile to legal reforms. Yeltsin's popularity also fell, which made him a less effective patron of reform.

Likewise, consider the counterfactual of what would have happened if the Criminal Procedure Code had been delayed until 2003. In that year the Russian parliament faced reelection, and the code's champion, Elena Mizulina, might not have even kept her seat. Moreover, Putin faced reelection in 2004 and would have focused his energy on campaigning, not undertaking bold new reforms. With many Russians fearing that jury trials might lead to freeing more criminals, introducing jury trials was hardly a populist move.

On the substance and the timing of the code, one of the coordinators of the U.S. effort from Moscow described the pathway of U.S. influence as follows:

It's kind of like the MacArthur Grants. You find people who are good, focused, and committed, and you support them. But the will needs to be indigenous. The ideas that underpinned what they were trying to do were already consistent with what the U.S. would support, and consistent with European norms. It was more that the Russians didn't have the resources to do what they wanted to do.

U.S. assistance provided external validation for the proposed reforms and helped the Russian reformers defeat the arguments of their opponents. One of the Russian drafters explained how U.S. assistance was "more than a computer for information. America helped us defend our ideas. It let us say to our opponents, 'You can see the democratic system working abroad.'" Traveling to the United States and seeing the proposed reforms in practice converted some to support the new cause. Mizulina said that U.S. commentaries on the draft laws "helped set the mindset for the drafters, so they started with a perspective of having a reformist law."

In doing so, U.S. influence was part of, and supported by, a concert of other Western efforts. Experts funded by the British, German, Dutch, and French governments all offered ideas, and it is difficult to trace the parentage of many of the concepts that made it into the final code. In fact, the most specific Western influence was not a U.S. document at all, but the European Convention on Human Rights. U.S. advisers used Russia's desire to conform to the European Convention on Human Rights and the Council of Europe's standards to persuade Russians to change the Criminal Procedure Code.

The European Convention was so powerful in this case, because it provided a set of concrete, enduring, and widely accepted standards of behavior. U.S. advisers felt this was a more legitimate vehicle through which to urge Russia to change its behavior, rather than simply asking the Russian government to follow U.S. advice. After the collapse of the Soviet Union, Russia had actually signed the European Convention as a requirement to join the Council of Europe. Although the council conferred on its members few of the concrete benefits that the European Union or the North Atlantic Treaty Organization did, membership still implied respect and recognition of Russia from the West, which Yeltsin and Putin sought in varying degrees to strengthen their legitimacy at home. Moreover, although Russia could and often did ignore provisions of the European Convention without facing any real sanctions from the council, disregarding the council's recommendations for the draft of the code would have undercut Putin's ability to use the code as a symbol of Russia's embrace of Western values.

Although European norms and the advice of Western governments helped shape particular provisions of the law, it was U.S. involvement that carried these European norms into the Russian policy-making process. The U.S. government funded the translation of Council of Europe recommendations for the code. In a more ongoing way, U.S. advisers used their close collaboration

with the working group to bring principles from the European Convention into the drafting process. Members of the working group cited the U.S. government as the most directly engaged foreign government in the process. Offering logistical help to make reform cheaper to the Russian government was thus a way for U.S. advisers to exert influence over the substance of the final law.

LESSONS FOR RULE OF LAW PROMOTION

Although it is important not to draw overly broad conclusions from a single case, the story of criminal procedure change in Russia suggests tempering expectations for what constitutes “successful” rule of law reform, calls into question conventional explanations for how legal reform happens, identifies an alternative approach for understanding how to promote the rule of law abroad, and suggests where practitioners might focus future efforts.

The Outcome: A Good, but Imperfect Law

Russia’s experience shows that even a rule of law success does not imply that the final law completely reflects the preferences of Western advisers. To be sure, U.S. policy makers rightly considered the passage of the Criminal Procedure Code as one of the major successes of U.S. rule of law promotion in the former Soviet Union. Amnesty International praised the Code, and ABA/CEELI representatives called it the “most progressive Criminal Procedure Code in the NIS [Newly Independent States].” U.S. Ambassador to Russia Alexander Vershbow proclaimed the code to be “the most important legal reform in Russia” in a century and a half. Just six months after the code went into effect in July 2002, the number of criminal cases opened by the Procuracy declined by 25 percent, the number of suspects placed in pretrial detention declined by 30 percent, and the courts rejected 15 percent of requests for arrest warrants. By February 2003, the number of arrests was down 33 percent, and the acquittal rate fell from one case per 270 to one in five for jury trials. The code will also expand jury trials from a handful of “experimental” regions throughout the 1990s to all eighty-nine of Russia’s regions by 2007. Yet this case also shows that few outcomes in democracy promotion can be placed unambiguously in the win or loss column. Several problems remain in the code. First, it does not address some important issues, such as falsification of evidence or police torture. Some Russian liberals criticized the code for not going far enough in protecting the rights of the accused, but members of the working group countered that they did as much as Russian political realities allowed. Second, even members of the working group admitted that the final code contains some technical mistakes and poorly explained procedures because it was passed so quickly. U.S. policy makers readily admit that the law has shortcomings but argue that a new, flawed law is better than no law at all. To the extent that Russia’s criminal procedure reforms are a victory for post-Soviet legal reform, even successful reforms have significant flaws. Accordingly, both critics of and crusaders for rule of law promotion should adjust their expectations of what constitutes success to the realities of what the political process produces.

A New Approach to Rule of Law Promotion: Catalyzing Reform

More broadly, the story of Russian criminal procedure reform suggests a different strategy for supporting legal change abroad than the two prevailing approaches. One conventional view favors a

“top down” approach, in which building the rule of law is primarily about crafting the right laws and institutional arrangements, which can be informed by international best practices. Critiques of this approach point to an alternative: a “bottom up” strategy of providing foreign technical assistance to different players in a transition country’s legal and political community—such as training lawyers and judges in Western practices—to build both a culture of respect for the law and a constituency that will demand legal reforms from their government.

To be sure, these approaches are not mutually exclusive. Yet neither theory would have predicted the emergence of criminal procedure reform in Russia. First, Russia’s successful criminal procedure reforms did not come from top-down design, the domain where rule of law promoters focus most of their efforts today. Constitutional design was, in itself, a relatively unimportant explanatory factor. The Russian constitution guaranteed extensive rights of criminal procedure and jury trials for over a decade before they became a functioning reality in Russian society. The design assistance that made a difference came in the second-order implementing legislation. The technical expertise that helped Russian drafters came at a level of detail that required an intimate knowledge of the practical problems facing the Russian government, not generic expertise that could be provided with model legislation or brief visits by foreign experts, the forms of assistance where much effort is directed today.

Nor did legal reforms come from the sources that the “bottom-up” approach expects. U.S. assistance providers sought to educate Russian lawyers and judges about the virtues of legal reform because they recognized that these key implementers fiercely opposed any changes that might take away their own power. Yet the lawyers and judges still largely opposed the code right up to its passage. The efforts of the U.S. government to reach out to these groups and build a constituency for reform—which some U.S. policy makers later identified as the *primary* channel of U.S. influence—had little impact on the substance or timing of the code. Even if these lawyers or judges had changed their minds, they were not major players in the passage of the new code. Not only did grass roots demand *not* produce the reforms Western policy makers expected, but, as described below, criminal procedure reforms were neither popular with nor supported by Russia’s traditional allies of democratic reform. Majoritarian democracy was in tension with deepening protections of civil liberties and the rule of law in Russia.

Instead, legal change came from a third source: a coalition of Russian political elites over whose initial emergence the U.S. government had little direct influence. Ironically, one of Russia’s most significant liberal legal reforms was only possible under Russia’s former KGB operator president, Vladimir Putin, who is known more for his illiberal tendencies than any democratic stripes. Putin unexpectedly made legal reform a priority of his first administration, and his centralization of power in Russia opened a political window to pass controversial changes in the criminal justice system. An enterprising Russian legislator sought to take advantage of this opportunity for reform, without any prodding from the U.S. government. Legal change in Russia came from the top, not from grass roots demand.

Russian criminal procedure reform thus illustrates a third pathway for Western assistance to influence legal reform—what I term *catalyzing reform*—a strategy that has received comparatively little attention to date. This approach suggests that Western efforts can influence legal reform when two conditions are present: first, a policy entrepreneur who favors reform and some domestic political space to make her efforts a reality; and second, the need for legislation or a plan to implement reforms that are already part of the policy debate. When those conditions hold, the West can help bring about reforms by offering logistical and monetary support, without claiming credit.

The Centrality of Domestic Policy Entrepreneurs

Although the U.S. government was deeply involved in Russian domestic politics, U.S. efforts had little influence over the presence of the first necessary condition for Russian legal reform. The driving political and intellectual forces behind Russia's criminal procedure reforms were domestic "policy entrepreneurs," who arose independent of any U.S. involvement. Policy entrepreneurs, in a combination of ideology and self-interest, want policy change as much as, if not more, than their Western supporters.

Russian domestic policy entrepreneurs supplied the core ideas for criminal procedure reform. One of the U.S. advisers to the drafters explained, "It's not like we drafted a law, and they picked it up and translated it." Russian members of the working group resisted calling the U.S. role "influence." The right to a jury trial, stronger defendants' rights, and the other landmark provisions of the Criminal Procedure Code had deep roots in Russia's perestroika reforms from before the collapse of the Soviet Union and in czarist legal reforms from a century before. Ideas from Western legal systems helped inspire those criminal justice reforms, but it was a much more diffuse Western influence than any direct U.S. involvement. To claim parentage for these broader concepts would be to grossly overstate U.S. influence.

Having an existing group of domestic "policy entrepreneurs" who were dedicated to reforms, even if larger political obstacles frequently undermined their efforts, was critical in giving U.S. policy makers partners to work with and creating a channel for U.S. influence. The political opening for legal change in 2000 would have closed without notice if Elena Mizulina and her colleagues had not fought to take advantage of it.

It is through these domestic policy entrepreneurs that foreign efforts are able to catalyze reform. Policy entrepreneurs who choose to undertake reforms still face budgetary constraints in the form of scarce time, money, and other bureaucratic resources that can delay and, as political conditions change, ultimately undermine a given reform. Western efforts can subsidize a country's policy-making process—namely, by providing infrastructure support and assistance in drafting legislation to implement constitutional provisions—to make a given reform cheaper for a transition government. As politicians choose which reforms to pursue once a political window opens, such third-party assistance can make politicians an offer they cannot refuse: lowering the costs of undertaking a given reform, while still letting the politicians claim the credit. As described below, this is the type of influence that the U.S. government successfully supplied in Russia to influence the timing and nature of the Criminal Procedure Code.

A Question of Politics Not Just Assistance

The type of U.S. effort required to catalyze reform calls for deeper involvement in a country's domestic politics than conventional wisdom suggests. U.S. assistance after 2000 made a difference not because of its extent but because of its form: It was influence at a bargain. The U.S. government spent less than \$1 million on this work from 1999 to 2002, the period when the United States had the most influence on the code. Compared with most other U.S. rule of law promotion efforts, however, the U.S. government was far more deeply involved in the Russian legislative process for the passage of the Criminal Procedure Code. In contradiction to the development community's technical assistance credo of avoiding interactions that support particular politicians or are otherwise partisan,

such external support was necessarily political and at times even entailed surprisingly direct U.S. involvement in the politics of the host country. Some USAID officials even felt it was improper that the U.S. Department of Justice and ABA/CEELI played such a visible role in the passage of the code.

This case suggests a middle ground between the “top down” and “bottom up” approaches to rule of law assistance. Constitutional engineers tend to devote inadequate attention to the extensive second-order legislation required to implement even the most detailed and well-designed constitutional provisions. Harnessing the energy for reform demands much deeper, longer (in years, not just months), and more subtle involvement than the focus of the top-down approach on a country’s founding document. Likewise, the “bottom up” approach of providing general support to constituencies across society is unlikely, at least in the short term, to affect those who are driving a particular reform. Supporters of the bottom-up approach respond that such criticisms are premature; the grass roots strategy is intended to produce results in decades, not years. Even assuming that such a strategy will eventually produce results, it still falls to its defenders to be much more explicit about just how long transition countries can expect to wait for change. Moreover, the short-term electoral incentives of U.S. politics make it difficult to sustain a domestic political constituency for foreign aid. In seeking to build domestic support in the United States for rule of law promotion abroad, is it wise to rely primarily on a rule of law promotion strategy that will only produce results in decades?

Fundamentally, the Russian example shows that the passage of important legal reforms is a *political* process. To exert influence, Western assistance providers must work with the politicians driving the process. U.S. influence was only possible because U.S. advisers built unusually close relationships with key Russian decision makers. Such “collusion” was a necessary condition for U.S. influence, not a form of corruption as some critics of Western assistance have alleged.

Reform from Unexpected Sources

Finally, Russia’s experience illustrates the difficulty of identifying the opportunities for Western political influence, because legal reform often comes from unexpected sources. “Democratic reforms” do not necessarily come from “democrats.” Russian legal reform came neither from a “democratic” leader and open policy-making procedures, nor from demand from the public, defense lawyers, or other expected constituencies for legal reform. To the contrary, leaders who have centralized power, even to an undemocratic degree, may have greater ability to carry out legal reforms. That rule of law reform stalled under Yeltsin and proceeded under Putin suggests tensions between rule of law and democratic reforms. A more optimistic conclusion is that at least some meaningful legal reforms may be possible under seemingly illiberal governments.

This paradox challenges the model used by Western policy makers, who often speak of democracy and the rule as law as a single, mutually reinforcing package. But the tension between majoritarian democracy and the protection of civil rights is less surprising to students of constitutionalism. Campaigning to limit the government’s power to arrest and convict criminals was unlikely to find widespread support in a Russian society confronting rising crime. Interest groups in Russia were already weak and unlikely to develop first for “criminals.” It is precisely for this reason that democracies turn to antimajoritarian courts to protect civil liberties. This case suggests not only that democracy and the rule of law must be thought of as related but intellectually distinct concepts, but also that *strategies* for promoting democracy and the rule of law cannot be assumed to be the same.

The unexpected sources of Russian criminal procedure reform offer another sobering conclusion

about the idiosyncratic factors of legal change that make external influence possible at all. At the end of 1999, prospects for reform were so bleak that many in the U.S. government argued for ending U.S. assistance to criminal procedure reform altogether. In fact, many of the “lessons learned” from Western rule of law assistance would have prescribed precisely that: Western assistance projects should only continue when the central government shows clear interest in undertaking reforms. That recommendation seemed unassailable, because, no one with any influence in the Russian government seemed to have any interest in criminal procedure reform. Yet, had the U.S. government diverted its resources to support reform that seemed more likely at the time, it would have missed an opportunity to influence the passage of the Criminal Procedure Code. In short, the idiosyncratic and unpredictable domestic political coalitions that make reforms possible pose a dilemma for U.S. policy makers seeking to allocate scarce resources in support of reforms.

Top U.S. policy makers now point to Russia’s adoption of jury trials as the result of successful U.S. influence, and it is true that U.S. efforts contributed to a meaningful rule of law reform. However, the method of U.S. influence—catalyzing the energy for reform—requires either luck or very intimate knowledge of potential political openings in the host government to identify those with whom to work.

Practitioners have imperfectly dubbed the conditions under which Western assistance can make a difference as “political will.” Yet this term is analytically imprecise and operationally unhelpful. Political will is too often defined tautologically: It is assumed to have existed once a reform passed. Further research should seek to understand more precisely what political will means. Russia’s experience indicates that political will does not necessarily depend on the presence of a “democratic” leader (itself a problematic term). Assessing political will requires a more sophisticated understanding of local decision-making structures that make implementing reforms possible. Although this understanding is difficult, criminal justice reform in Russia illustrates that catalyzing reform is possible.

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