

12-1-2008

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### Recommended Citation

Dina M. Bernardelli, *Russian Rule-Ette: Using Khodorkovsky's Criminal Trial to Assess the State of Russia's Judiciary*, 31 B.C. Int'l & Comp. L. Rev. 85 (2008),  
<https://lawdigitalcommons.bc.edu/iclr/vol31/iss1/4>

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# RUSSIAN RULE-ETTE: USING KHODORKOVSKY'S CRIMINAL TRIAL TO ASSESS THE STATE OF RUSSIA'S JUDICIARY

DINA M. BERNARDELLI\*

**Abstract:** The criminal trial of Russian oligarch and oil tycoon Mikhail Khodorkovsky in connection with Yukos Oil has been one of the most publicized and controversial trials in the history of the Russian Federation. Khodorkovsky's conviction in the Russian courts has raised grounds for appeal to the European Court of Human Rights on both procedural and substantive grounds. This Note discusses the failures of judicial reform in Russia since the founding of the Russian Federation that have been brought to light by Khodorkovsky's trial, and assesses the causes of these failures and the prospects for judicial reform.

## INTRODUCTION

The controversial proceedings in the criminal case against former Yukos Oil executive Mikhail Khodorkovsky have put the judiciary of the Russian Federation in the spotlight.<sup>1</sup> Although many feel that the charge and conviction of one of the nation's youngest oligarchs was politically motivated, few doubt his guilt; what they do doubt is the process the State used to convict him.<sup>2</sup> From the State's utilization of unorthodox discovery methods to the deportation of his defense attorney, potentially sabotaging his appeals process, the historic trial has left Russians and the international community wondering whether the Russian Federation met the due process burdens to which it is committed through its constitution and international treaties.

This Note first addresses the socio-political background of the rise and fall of Mikhail Khodorkovsky. Part II discusses Russia's case against Khodorkovsky and his opportunities for appeal in light of the international right of due process as set forth by the United Nations

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<sup>1</sup> See Artyom Liss, *Yukos Trial Raises New Questions*, BBC NEWS, June 1, 2005, <http://news.bbc.co.uk/2/hi/business/4598239.stm>.

<sup>2</sup> See *id.*

International Convention on Civil and Political Rights (CCPR), the European Convention on Human Rights, and the laws of the Russian Federation. Finally, Part III looks at Khodorkovsky's imminent appeal to the European Court of Human Rights (Eur. Ct. H.R.) as a litmus test for judicial reform in the Russian Federation as a whole, and addresses factors contributing to reform failure.

## I. BACKGROUND

Mikhail Khodorkovsky had humble beginnings in a time of political upheaval and rising economic opportunity in the Soviet Union.<sup>3</sup> In 1985, Mikhail Gorbachev became General Secretary of the Communist Party, putting him at the helm of the Soviet Union.<sup>4</sup> Gorbachev sought to reform and revitalize the Communist Party by giving greater freedom to the Soviet people through *glasnost* (openness), and to jumpstart the economy through radical economic reforms known as *perestroika* (restructuring) that ultimately permitted and encouraged private ownership.<sup>5</sup> It was during *perestroika* that entrepreneurs such as Khodorkovsky were able to build businesses in the service industry and take advantage of foreign investment.<sup>6</sup> These radical reforms, however, signaled the beginning of the end of the Soviet Union.<sup>7</sup>

The Soviet Union dissolved in 1991, and Boris Yeltsin emerged from the tumult as the first democratically elected president of Russia.<sup>8</sup> Yeltsin launched an aggressive privatization campaign, popularly referred to as "shock therapy," to jolt the stagnant Russian economy into a capitalist market by divesting formerly lucrative state-run industries in public auctions.<sup>9</sup> A combination of forces stemming from high inflation and investor uncertainty resulted in only a few bidders obtaining large holdings in lucrative industries such as energy and telecommunications from the state for minimal rates.<sup>10</sup> The men who prof-

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<sup>3</sup> Jeremy Scott-Joynt, *Khodorkovsky: An Oligarch Undone*, BBC NEWS, May 31, 2005, <http://news.bbc.co.uk/2/hi/business/4482203.stm>.

<sup>4</sup> MARY McAULEY, *SOVIET POLITICS 1917–1991* 87 (1992).

<sup>5</sup> *See id.* at 90–91.

<sup>6</sup> *See* DAVID E. HOFFMAN, *THE OLIGARCHS: WEALTH AND POWER IN THE NEW RUSSIA* 116–18 (2002).

<sup>7</sup> *See* McAULEY, *supra* note 4, at 95.

<sup>8</sup> *Id.* at 110.

<sup>9</sup> *See* NICHOLAS SPULBER, *RUSSIA'S ECONOMIC TRANSITIONS* 303–04, 309 (2003).

<sup>10</sup> *See* HOFFMAN, *supra* note 6, at 40. Khodorkovsky, recalling the vast opportunities and the limited population taking advantage of them during privatization, stated:

I talked with people and asked them, why didn't you start doing the same thing? Why didn't you go into it? Because any head of an institute had more

ited most from privatization became known as the Russian oligarchs.<sup>11</sup> They had the connections, capital, and confidence to take advantage of the sale of state enterprises in the early and mid 1990s.<sup>12</sup> The concentration of so much wealth and media control in the hands of so few also gave these men political power.<sup>13</sup> Yeltsin, in need of support as leader of the new Russian Federation, bargained with the oligarchs for their monetary and political support to stave off competing parties from overturning the young democratic government.<sup>14</sup> After Yeltsin was re-elected in 1996, the oligarchs in turn received economic incentives and influence over government policies as appointees to positions in the Kremlin.<sup>15</sup>

During this time, Khodorkovsky used his political connections and capital generated from earlier privatization endeavors to purchase Yukos Oil, the first fully privatized oil company in Russia, at the extremely low cost of \$300 million.<sup>16</sup> He was now in control of the second-largest oil company in what was the leading oil producing country in the world.<sup>17</sup> Khodorkovsky also acquired political power by supporting President Boris Yeltsin, becoming his Deputy Fuel and Oil Minister.<sup>18</sup> His wealth and the support of the Kremlin made Khodorkovsky the model oligarch.<sup>19</sup>

In the late 1990s, Khodorkovsky's role began to change.<sup>20</sup> No longer the strong, silent supporter of the Kremlin, he began making

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possibilities than I had, by an order of magnitude. They explained that they had all gone through the period—the Kosygin thaw—when the same self-financing system was allowed. And then, at best, people were unable to succeed in their career and, at worst, found themselves in jail. They were all sure that would be the case this time, and that is why they did not go into it. And I—I did not remember this! I was too young! And I went for it.

*Id.* at 107.

<sup>11</sup> See *id.* at 4–7. “Oligarch” was a term used to represent their elite status as the ruling few who used their wealth and control of the media to gain great political power. See *id.*; SPULBER, *supra* note 9, at 311.

<sup>12</sup> See HOFFMAN, *supra* note 6, at 4–7.

<sup>13</sup> See SPULBER, *supra* note 9, at 311; Scott-Joynt, *supra* note 3.

<sup>14</sup> See HOFFMAN, *supra* note 6, at 324; SPULBER, *supra* note 9, at 311.

<sup>15</sup> See HOFFMAN, *supra* note 6, at 358–62. These incentives included opportunities to buy shares of state industries before their initial public offering and government investment in their private businesses, which provided the capital necessary for expansion. See *id.*

<sup>16</sup> See *id.* at 205; see also Scott-Joynt, *supra* note 3 (noting that Yukos, at height of its wealth, was valued at \$20 billion).

<sup>17</sup> Hurbert B. Herring, *Who Produces the Most Oil? Not Who You Think*, N.Y. TIMES, Sept. 17, 2006, at 3–2 (noting that Russia topped Saudi Arabia in at least the first half of 2006).

<sup>18</sup> Scott-Joynt, *supra* note 3.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

public donations to diverse Russian political parties.<sup>21</sup> He also planned to run for a seat in the lower house of the State Duma in Moscow in December 2005—a move made impossible by his imprisonment.<sup>22</sup> President Vladimir Putin took office in 2000 and the political inactivity of many of the oligarchs coupled with the imprisonment of Khodorkovsky during his time in office have many in Russia and abroad questioning the lengths to which he would go to eliminate any political opposition from this privileged class.<sup>23</sup>

In October 2003, Khodorkovsky was arrested on charges of embezzlement, tax evasion, and fraud.<sup>24</sup> The investigation into Yukos finances occurred amidst Khodorkovsky's opposition to proposed tax hikes on Russian oil companies.<sup>25</sup> A State review of the same books they had approved the year before resulted in \$3 billion in back-taxes and fines for one year alone.<sup>26</sup> Khodorkovsky has been found guilty on all but one charge, but many Russians believe that an oligarch not guilty of economic crimes would be the exception to the rule.<sup>27</sup> Furthermore, Khodorkovsky's recent political aspirations cause concern as to whether the trial and convictions were politically motivated.<sup>28</sup> A study of Khodorkovsky's criminal trial may give insight to judicial independence in post-communist Russia by examining the validity of alleged violations in the Eur. Ct. H.R. and whether the violations, or lack thereof, mark judicial reform compared to past violation of due process that have reached the Court.<sup>29</sup>

## II. DISCUSSION

Mikhail Khodorkovsky has been tried and convicted of violating six articles of the Criminal Code of the Russian Federation.<sup>30</sup> The first

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<sup>21</sup> See *id.*

<sup>22</sup> *Court Rejects Khodorkovsky Appeal*, BBC NEWS, Sept. 22, 2005, <http://news.bbc.co.uk/2/hi/business/4270718.stm>.

<sup>23</sup> See *Taming the Robber Barons*, ECONOMIST, May 22, 2004, at 5.

<sup>24</sup> *Court Rejects Khodorkovsky Appeal*, *supra* note 22; *Yukos: Has a Deal Been Done?*, TIMES ONLINE (U.K.) (Mar. 29, 2004), available at <http://www.timesonline.co.uk/article/0,,1-1055668,00.html>.

<sup>25</sup> *Yukos: Has a Deal been Done?*, *supra* note 24.

<sup>26</sup> Marsha Lipman, *The Taming of a Tycoon—and of Russia*, WASH. POST, June 16, 2004, at A27.

<sup>27</sup> See Liss, *supra* note 1.

<sup>28</sup> See *Court Rejects Khodorkovsky Appeal*, *supra* note 22.

<sup>29</sup> See PHILIP LEACH, *TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS* 774–75 (2d ed. 2005).

<sup>30</sup> *Id.*; see Ugolovnyi Kodeks [UK] [Criminal Code] arts. 160, 165(3), 198(2), 199(2), 199(3), 315 (Russ.).

three counts relate to the acquisition of Apatit, a bankrupt fertilizer company, from the State in 1994 during privatization.<sup>31</sup> Apatit was sold at a reduced price, but with performance conditions attached as part of the contract of sale.<sup>32</sup> The buyer was to invest \$283 million in developing Apatit in the remote town of Kirovsk and in the town itself over a period of two years in exchange for future stock options in the company.<sup>33</sup> Khodorkovsky never satisfied these conditions, however, and was found guilty of grand theft of property by an organized criminal group.<sup>34</sup>

Apatit engaged in successful international business from 2000–2002, but operated with little profit because the company would sell fertilizer at greatly reduced rates to international buyers who would then re-sell the product at twice the price.<sup>35</sup> The government found that this caused Russian national investors, including the State, to lose proceeds paid in the form of shareholder dividends, and Khodorkovsky was found guilty of damage to assets through fraud committed by an organized criminal group.<sup>36</sup> This was not the first time the breach of the Apatit contract had reached Russian courts.<sup>37</sup> In November 2002, Khodorkovsky and his business partners settled the dispute with the State for a sum based on estimates of Apatit's value.<sup>38</sup> The State found that these estimates were based on misleading and unreliable data.<sup>39</sup> Khodorkovsky was held accountable for submitting the unreliable and undervalued assessments of Apatit's worth and charged with malicious non-compliance with a court ruling by representatives of a commercial organization.<sup>40</sup>

Khodorkovsky was also convicted on three violations related to his involvement with Yukos.<sup>41</sup> He was found guilty of multiple counts of conspiracy to evade corporate tax obligations by an organized

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<sup>31</sup> See Peter L. Clateman, *Summary and Analysis of Report on Criminal Case #18/41-03*, Dec. 10, 2003, at 3–7, <http://www.cdi.org/russia/johnson/indictment.pdf>.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> UK art. 159(3); see Peter L. Clateman, Clateman: *Review of the Criminal Sentence and Appeal*, Mar. 29, 2006, at 1–2, 6, <http://www.cdi.org/russia/johnson/Yukos-VII-Sentence-and-Appeal.pdf>.

<sup>35</sup> See Clateman, *supra* note 34, at 13.

<sup>36</sup> UK art. 165(3); See Clateman, *supra* note 314, at 1–2, 13.

<sup>37</sup> See Clateman, *supra* note 31, at 6–7.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.* at 7.

<sup>40</sup> UK art. 315; see Clateman, *supra* note 31, at 1–2.

<sup>41</sup> See Clateman, *supra* note 31, at 1–2.

group.<sup>42</sup> This included involvement in a tax evasion scheme by creating dummy entities with preferred tax status, and payment of these taxes with corporate bonds instead of cash to avoid further taxation.<sup>43</sup> In some areas, Yukos did not pay its taxes in cash as required by the Tax Code, but rather paid local officials in the form of promissory notes.<sup>44</sup> Yukos then filed for tax refunds on these payments—another form of tax evasion.<sup>45</sup> Additionally, Khodorkovsky was convicted on charges of embezzlement of property for siphoning over 2.5 billion rubles from various Yukos corporate accounts.<sup>46</sup>

Finally, Khodorkovsky was convicted of evasion of personal tax and social security obligations by an individual.<sup>47</sup> The Russian tax system allows for simplified filing and lower taxes for small entrepreneurial businesses.<sup>48</sup> Khodorkovsky attempted to claim salary and other benefits paid by Yukos and other companies as income derived from “independent entrepreneurial activity” by drafting private consulting contracts with off-shore entities of businesses he already owned.<sup>49</sup> This structure allowed him to take advantage of the simplified tax system and qualified him for tax breaks that he was not legally due during 1998 and 1999.<sup>50</sup>

Khodorkovsky was arrested in October 2003 and detained as a flight risk without bail on charges of embezzlement, fraud, and tax evasion until his sentencing in May 2005.<sup>51</sup> His trial, which began in June 2004, lasted for eleven months and culminated with the reading of a 600-plus page sentence over the course of twelve days in Judge Irina Kolesnikova’s Meschansky District Court.<sup>52</sup> Khodorkovsky was sentenced to nine years imprisonment—only one year under the maximum penalty for these offenses.<sup>53</sup> If unsuccessful in his appeals,

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<sup>42</sup> UK art. 199(2).

<sup>43</sup> *Id.* art. 199(3); see Clateman, *supra* note 31, at 16–18.

<sup>44</sup> See Clateman, *supra* note 31, at 16–18.

<sup>45</sup> UK art. 199(2); see Clateman, *supra* note 31, at 16–18.

<sup>46</sup> See Clateman, *supra* note 31, at 19. See generally UK art. 160 (enumerating criminal violations and their penalties).

<sup>47</sup> UK art. 198(2); see Clateman, *supra* note 31, at 1–2.

<sup>48</sup> See Clateman, *supra* note 31, at 14.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Court Rejects Khodorkovsky Appeal*, *supra* note 22.

<sup>52</sup> See Clateman, *supra* note 31, at 1; Liss, *supra* note 1.

<sup>53</sup> See *Court Rejects Khodorkovsky Appeal*, *supra* note 22; see also GENNADY DANILENKO & WILLIAM BURNHAM, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 498 (2d ed. 2000) (detailing that in the Russian Federation, “Minor Crimes” are punishable by up to two years in prison, “Moderately Serious Crimes” are punishable up to five years in prison,

Khodorkovsky will serve seven and a half years in a medium-security Siberian prison.<sup>54</sup>

Khodorkovsky's trial team brings to the forefront alleged civil rights violations, claiming that "Mr. Khodorkovsky, and those caught up in the campaign against him, have been denied due process in every sense of the word," under both Russian and international standards.<sup>55</sup> First, Khodorkovsky contends that the State's October 2003 search of defense attorney Anton Drel's office, the seizure of materials therein related to Yukos, and Drel's summons for questioning by the Prosecutor General were in violation of attorney-client privilege and a breach of the rules of advocacy.<sup>56</sup> Second, Khodorkovsky's pre-trial detention from October 2003 through the end of his trial in 2005 was arbitrary and a sign of presumption of guilt before trial.<sup>57</sup> Finally, Khodorkovsky argues that the State engaged in improper search methods including searching without a warrant and in the absence of parties subject to the search.<sup>58</sup>

These alleged due process violations have support in both the laws of the Russian Federation and international law.<sup>59</sup> The Russian Federation is a party to the CCPR and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms

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"Serious Crimes" are punishable up to ten years in prison, and "Very Serious Crimes" are punishable by over ten years in prison to life or even death).

<sup>54</sup> See *Yukos Ex-Chief Jailed for 9 Years*, BBC NEWS, May 31, 2005, <http://news.bbc.co.uk/2/hi/business/4595289.stm>. Khodorkovsky's total stay in prison reflects the nine year sentence less the time spent in state detention before trial. *Id.*

<sup>55</sup> Robert Amsterdam & Charles Krause, *Constitutional and Due Process Violations in the Khodorkovsky/Yukos Case: A White Paper Prepared on Behalf of Mikhail Khodorkovsky, Platon Lebedev, & Alexei Pichugin* 1 (2005), available at [http://www.khodorkovsky.info/docs/133826\\_Download\\_the\\_YUKOS\\_White\\_Paper.pdf](http://www.khodorkovsky.info/docs/133826_Download_the_YUKOS_White_Paper.pdf) [hereinafter *White Paper*].

<sup>56</sup> *Id.* at 2.

<sup>57</sup> See *id.* at 3.

<sup>58</sup> *Id.*

<sup>59</sup> See KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [Constitution] art. 15(4) (Russ.) stating:

The universally recognized principles and norms of the international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those established by the law, the rules of the international treaty shall apply.

*Id.*; see also Alexander Severance, Note, *Old Habits Die Hard: Aleksandr Nikitin, the European Court of Human Rights, and Criminal Procedure in the Russian Federation*, 25 B.C. INT'L & COMP. L. REV. 177, 185 (2002) (providing background and illustrations of interplay between Russian Constitution and the then newly-adopted international treaty obligations).



(ECPF).<sup>60</sup> Thus Khodorkovsky's civil rights are protected not only by the Russian Constitution and Russian Criminal Procedure Code, but may also be appealed to the Eur. Ct. H.R., which has jurisdiction under ECPF.<sup>61</sup> His case may also be reviewed by the United Nations for human rights violations.<sup>62</sup> The State must meet the due process standards set forth by these international bodies insofar as they differ from the laws of the Russian Federation.<sup>63</sup>

Chapter 13 of the Russian Code of Criminal Procedure protects against arbitrary detention.<sup>64</sup> A suspect may be placed in pre-trial detention if there are sufficient grounds to believe that the accused will flee, continue the criminal activity, threaten witnesses or participants, or destroy evidence or interfere with proceedings on the criminal case in any other way.<sup>65</sup> Any measure of pre-trial restraint of a suspect must be a matter of "exceptional circumstances."<sup>66</sup> Full pre-trial detention is only available for those accused of committing a crime that carries a sentence longer than two years, and can only be imposed by a judge after reviewing a request from the prosecutor or investigation officer specifying the circumstances that have rendered other measures of restraint impossible.<sup>67</sup> Khodorkovsky argues that no such "exceptional circumstances" existed to warrant full detention, the harshest restriction.<sup>68</sup> Furthermore, in his appeal, or *cassation*, to the Moscow City Court, Khodorkovsky stated that he was illegally held before trial because his detention was not motivated by a court decision and thus could not exceed two months.<sup>69</sup> Even if the extension was authorized by a judge, Khodorkovsky's nineteen month detention from October 2003 until May 2005 is illegal under article 109 of the Russian Code of Criminal Procedure, which allows extensions of detention over one year, but not exceeding eighteen months, if sought with the consent

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<sup>60</sup> See generally Statute of the Council of Europe, May 5, 1949, 1949 Europ. T.S. No. 1 (listing Russia as a member State and listing obligations of member States).

<sup>61</sup> European Convention for the Protection of Human and Fundamental Freedoms art. 34, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECPF].

<sup>62</sup> International Convention on Civil and Political Rights art. 17, Mar. 23, 1976, 1 U.N.T.S. 999 [hereinafter CCPR].

<sup>63</sup> KONST. RF art. 15(4).

<sup>64</sup> See generally Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedure Code] art. 13 (Russ.) (prohibiting arbitrary detention).

<sup>65</sup> *Id.* art. 97.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* art. 108.

<sup>68</sup> See *White Paper*, *supra* note 55, at 9.

<sup>69</sup> *Id.*; see UPK art. 109(1).

of the Procurator General in “exceptional cases” involving “serious or very serious offenses.”<sup>70</sup>

Article 182 of the Code of Criminal Procedure lays out the grounds and procedures for making a search.<sup>71</sup> All searches of living quarters must be done with the authority of a court decision and should be executed with an idea of what is being searched for, and probable cause to believe that the item(s) may be there.<sup>72</sup> An examination or search and seizure may be performed without a judicial decision only in exceptional cases in which the search cannot be delayed.<sup>73</sup> In such situations, however, a judge must rule on the legality of the search within twenty-four hours of its commencement.<sup>74</sup> If the search is found to have been illegal, all evidence obtained during the investigation is inadmissible.<sup>75</sup> Khodorkovsky argues that the searches made of defense attorney Drel’s office, the seizure of documents within, as well as the search and seizure of evidence from Yukos’ offices may have been concluded without a warrant and should have the protection of article 182.<sup>76</sup>

The Constitution of the Russian Federation stipulates that “arrest, detention, and retention in custody are admissible only on the basis of a court order,” and gives teeth to Khodorkovsky’s protests against his pre-trial detention.<sup>77</sup> Without a court order, a person may not be detained for a period of more than forty-eight hours.<sup>78</sup> Additionally, any suspect or defendant is presumed innocent until proven guilty.<sup>79</sup>

The Russian Constitution also protects attorney-client privilege and the rules of advocacy.<sup>80</sup> The interrogation of defense attorney Anton Drel and search and seizure of documents from his office was in direct violation of article 56(3), which forbids interrogating an advocate about facts obtained during his representation of clients in criminal proceedings.<sup>81</sup> As an attorney for Anton Lebdev in his role

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<sup>70</sup> *White Paper*, *supra* note 55, at 9.

<sup>71</sup> UPK art. 182.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* art. 165.

<sup>76</sup> *See White Paper*, *supra* note 55, at 3.

<sup>77</sup> KONST. RF art. 22(2).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* art. 49.

<sup>80</sup> *Id.* art. 56(3).

<sup>81</sup> *Id.*

with Yukos, Drel acquired knowledge about Khodorkovsky's criminal trial to which he would not otherwise have had access.<sup>82</sup>

The Eur. Ct. H.R. also lays out standards for pre-trial detention and search and seizure.<sup>83</sup> Anyone who has been lawfully detained is to be brought promptly before a judge and is entitled to either trial within a reasonable time or release pending trial.<sup>84</sup> The right to a fair trial includes the right to a public hearing with few exceptions and the presumption of innocence.<sup>85</sup>

Khodorkovsky's claims may be addressed through the Russian appeals process.<sup>86</sup> Within ten days of the ruling issued by the Meshchansky District Court, Khodorkovsky filed his first *cassation* to the Moscow City Court in accordance with articles 354–56 of the Russian Code of Criminal Procedure.<sup>87</sup> The Moscow City Court must begin review of the case within one month and can uphold the ruling of the District Court or overturn the ruling by complete dismissal of charges, change of the sentence, or initiation of a new trial.<sup>88</sup> If the District Court's ruling is upheld, it achieves official legal status the moment the decision is announced in the Moscow City Court, making the sentence immediately enforceable.<sup>89</sup> Khodorkovsky's cassation was brought before the Moscow City Court, and after only an hour of deliberation the 600-page sentence was upheld.<sup>90</sup> Either party may at any time appeal the Moscow City Court's ruling by requesting a supervisory review with the Presidium of the Moscow City Court.<sup>91</sup> These requests are reviewed by a court-appointed *Judge Rapporteur* who will review the case and recommend to the Presidium whether the case should be reviewed.<sup>92</sup> If supervisory review is denied, or if the review is granted and the earlier ruling upheld, either party may appeal the decision to the Chair of the Moscow City Court within one year.<sup>93</sup>

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<sup>82</sup> See *White Paper*, *supra* note 55, at 2.

<sup>83</sup> ECPE, *supra* note 61, arts. 5, 6, 8.

<sup>84</sup> *Id.* art. 5(3).

<sup>85</sup> See *id.* art. 6(1).

<sup>86</sup> UPK arts. 354–356.

<sup>87</sup> *Id.*; *Court Rejects Khodorkovsky Appeal*, *supra* note 22.

<sup>88</sup> Press Center for Mikhail Khodorkovsky, *Appeals: Russian Appeals Process*, available at [http://www.mbktrial.com/updates/appeals/appeals\\_overview.cfm](http://www.mbktrial.com/updates/appeals/appeals_overview.cfm) (last visited Jan. 24, 2008) [hereinafter *Appeals: Russian Appeals Process*].

<sup>89</sup> UPK art. 391.

<sup>90</sup> Clateman, *supra* note 31, at 1; *Khodorkovsky in European Appeal*, BBC NEWS, Sept. 23, 2005, <http://news.bbc.co.uk/2/hi/business/4274742.stm>.

<sup>91</sup> *Appeals: Russian Appeals Process*, *supra* note 88.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Although there is one higher court, the Supreme Court of the Russian Federation, for many cases an appeal to the Chair ends the process, exhausting intra-state legal remedies.<sup>94</sup> A case will only be heard by the Supreme Court upon the recommendation of a hearing by the *Judge Rapporteur* and a decision by the Presidium of the Moscow City Court accepting the recommendation.<sup>95</sup> If the Supreme Court reviews the case and upholds the lower court decisions, a final appeal may be made to the Presidium of the Supreme Court.<sup>96</sup> Khodorkovsky will be serving his term in prison during the entire appeals process.<sup>97</sup>

Khodorkovsky is not limited to the Russian legal system, and his claims that the Russian authorities “violated several articles of the European Convention on Human Rights” may be directed to the Eur. Ct. H.R.<sup>98</sup> Appeals to this court must be raised within six months of the final domestic ruling, and will only be considered after all domestic remedies have been exhausted.<sup>99</sup> The Eur. Ct. H.R. will not accept applications that are substantially related to decisions already made in the Eur. Ct. H.R. with no new information, claims that are ill-founded, or any application that has already been submitted to another international resolution mechanism without new information.<sup>100</sup> The procedure includes submission and acceptance of an application, communication to the respondent state, submissions of observations by both parties, an admissibility hearing, supplementary observations, and a hearing on the merits.<sup>101</sup> In addition to the facts of the case, the procedural history, and the observations submitted by the applicant and respondent state, the Eur. Ct. H.R. will often also accept supplementary submissions from independent sources and NGOs.<sup>102</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Appeals: Russian Appeals Process*, *supra* note 88.

<sup>97</sup> *See Yukos Ex-Chief Jailed for 9 Years*, *supra* note 54.

<sup>98</sup> KONST. RF art. 46(3) (“Everyone in conformity with the international treaties of the Russian Federation has the right to turn to international organs concerned with the protection of human rights and freedoms if all the means of legal protection available within the state have been exhausted.”); *see* ECPF, *supra* note 61, art. 34; *Khodorkovsky in European Appeal*, *supra* note 90.

<sup>99</sup> ECPF, *supra* note 61, art. 35(1).

<sup>100</sup> *See* LEACH, *supra* note 29, at 153.

<sup>101</sup> ECPF, *supra* note 61, arts. 31–46.

<sup>102</sup> LEACH, *supra* note 29, at 64.

## III. ANALYSIS

The review of Khodorkovsky's appeal to the Eur. Ct. H.R. may be an important indication of the success of judicial reform in the Russian Federation.<sup>103</sup> Although Khodorkovsky has avenues of appeal through both the Eur. Ct. H.R. and the United Nations, the former has more case law regarding violations of due process in criminal trials by member states.<sup>104</sup>

Through the ECPF and case law, the Eur. Ct. H.R. has created a positive obligation for States to grant detainees bail unless there are public interest grounds justifying their continued pre-trial detention under article 5(3).<sup>105</sup> Persisting suspicion that the person arrested has committed an offense is a condition for the lawfulness of the detention, but after a certain lapse of time suspicion alone no longer suffices.<sup>106</sup> Grounds must be relevant, sufficient, and the court "must also be satisfied that the national authorities displayed 'special diligence' in investigating the continued need for withholding bail set out in their decisions on the application for release."<sup>107</sup>

Mikhail Khodorkovsky was detained without bail for nineteen months from the time of his arrest until his conviction.<sup>108</sup> He claims that the domestic court did not document the factors and reasoning supporting his detention.<sup>109</sup> Furthermore, although the domestic court considered Khodorkovsky a flight risk, there are less severe methods of detention under Russian law, such as house arrest, that could have equally prevented this risk.<sup>110</sup> The Eur. Ct. H.R. would likely find Khodorkovsky's pre-trial detention unreasonable under article 5(3) because the domestic court did not meet its burden of demonstrating the relevance of Khodorkovsky's detention or diligent investigation showing the dangers to public policy that would be posed by his release.<sup>111</sup>

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<sup>103</sup> See *id.* at 774–75.

<sup>104</sup> See Report of the International Court of Justice: 1 August–30 July 2006, U.N. Doc. A/61/4 (Oct. 26, 2006).

<sup>105</sup> See LEACH, *supra* note 29, at 222.

<sup>106</sup> A.R. MOWBRAY, *THE DEVELOPMENT OF POSITIVE OBLIGATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS* 80 (2004).

<sup>107</sup> *Id.*

<sup>108</sup> See *Court Rejects Khodorkovsky Appeal*, *supra* note 22.

<sup>109</sup> *White Paper*, *supra* note 55, at 3.

<sup>110</sup> Ugolovno-Protsessual'nyi Kodeks [UPK][Criminal Procedure Code] art. 108 (Russ.).

<sup>111</sup> See LEACH, *supra* note 29, at 222.

The Eur. Ct. H.R. preserves the right to a fair and public trial as an essential civil right in article 6.<sup>112</sup> A trial must be conducted in public unless special interests such as public order, national security, or circumstances where publicity may “prejudice the interests of justice” exist.<sup>113</sup> In reviewing if the domestic court met its burden of providing a fair hearing, the Eur. Ct. H.R. looks at whether the proceedings as a whole were fair, rather than focusing only on whether the formal requirements set out in domestic law were met.<sup>114</sup> The Eur. Ct. H.R. will readily regulate the preservation of the privilege against self-incrimination and the right to silence, equality of access and questioning for both prosecution and defense, and the right to a hearing within a reasonable time.<sup>115</sup> The areas of admissibility of evidence and the right to a public hearing and judgment, conversely, are seen primarily as areas for domestic regulation and will only be viewed as part of the overall trial.<sup>116</sup> Where the Eur. Ct. H.R. finds that the right to a fair hearing has been violated, it increasingly recommends that the domestic proceedings be re-opened.<sup>117</sup>

Khodorkovsky has alleged that the State used evidence rendered inadmissible because of its means of collection.<sup>118</sup> The Eur. Ct. H.R. sees this as a matter of domestic law and will not issue a ruling on the use of inadmissible evidence, but rather will consider it in its assessment of the totality of the elements of the trial.<sup>119</sup> An overall analysis of the fairness of the trial, therefore, must take into consideration whether the State has violated its own laws, resulting in an unfair advantage over the defense.<sup>120</sup> The forceful deportation of one of Khodorkovsky’s defense attorneys, Robert Amsterdam, from Russia may also factor into the Eur. Ct. H.R.’s review of the overall fairness of the proceedings as a violation of article 6(3).<sup>121</sup> This is not likely, however, to be a substantial factor in the totality test because the deportation occurred after the trial and only affects the appeals process.<sup>122</sup>

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<sup>112</sup> ECPF, *supra* note 61, art. 6(1).

<sup>113</sup> *Id.*

<sup>114</sup> See LEACH, *supra* note 29, at 253.

<sup>115</sup> See *id.* at 255–57, 259–60.

<sup>116</sup> See *id.* at 254, 257–59.

<sup>117</sup> See *id.* at 242.

<sup>118</sup> *White Paper*, *supra* note 55, at 3.

<sup>119</sup> LEACH, *supra* note 29, at 254.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 273; see also *Khodorkovsky in European Appeal*, *supra* note 90 (stating that Russian officials took the Canadian national’s passport and revoked his visa on September 22, 2005 informing him that he had twenty-four hours to leave the country).

<sup>122</sup> See LEACH, *supra* note 29, at 253.

Khodorkovsky's case does not demonstrate significant improvement in the preservation of human rights by the judiciary, but it does mark a more independent, less politicized judiciary than when Putin came to power in 2000.<sup>123</sup> In the 1998 case *Kalashnikov v. Russia*, the Eur. Ct. H.R. struck down as unreasonable a four-year pretrial detention without bail for an appellant who had obstructed the investigation into his alleged criminal conduct of misappropriating a large number of shares in his role as the president of a bank.<sup>124</sup> The court ruled that after evidence had been collected, there was no relevant reason for denying the plaintiff bail, and therefore insufficient grounds for continued pre-trial detention.<sup>125</sup> The Eur. Ct. H.R. was hopeful that the new Code of Criminal Procedure would put an end to most article 5 and article 6 claims.<sup>126</sup> The Code provides for more specificity as to when pre-trial detention is allowed, the length of detention, and timetables to achieve speedy trial and appeals.<sup>127</sup> Despite the implementation of the Code, however, the Eur. Ct. H.R. continues to receive applications for due process violations under article 6 at rates similar to other states that have not undergone recent reform in this area.<sup>128</sup>

The State also has not had significant improvement in preventing unlawful pre-trial detention under article 5 since the 2001 case of *Gusinskiy v. Russia*.<sup>129</sup> Some important distinctions, however, may be made between Khodorkovsky's allegations and *Gusinskiy*, which indicate improvement in the independence of the judiciary.<sup>130</sup> Although the State may have violated Khodorkovsky's civil rights by not composing a formal opinion regarding his pre-trial detention and therefore not showing how it was reasonable, this failure in procedure stands in sharp contrast to the substantive failures of the judiciary to operate justly and independently from political pressures in *Gusinskiy*.<sup>131</sup> Vladimir Gusin-

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<sup>123</sup> See, e.g., *Gusinskiy v. Russia*, App. No. 70276/01, 2004-IV Eur. Ct. H.R.; *Kalashnikov v. Russia*, 2002-IV Eur. Ct. H.R. 93.

<sup>124</sup> *Kalashnikov*, 2002-IV Eur. Ct. H.R., at ¶¶ 114-118.

<sup>125</sup> MOWBRAY, *supra* note 105, at 81.

<sup>126</sup> LEACH, *supra* note 29, at 774-75.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.* at 455.

<sup>129</sup> See generally *Gusinskiy*, 2004-IV Eur. Ct. H.R., at ¶¶ 73-78 (finding Russia in violation of article 18 in conjunction with article 5).

<sup>130</sup> See generally *id.* at ¶¶ 9-44 (detailing Gusinskiy's arrest, detention, and trial); *White Paper*, *supra* note 55.

<sup>131</sup> See HOFFMAN, *supra* note 6, at 476-82. The former media mogul and oligarch Vladimir Gusinskiy owed a significant debt to the state-owned Gazprom. The debt had been negotiated under the Yeltsin Administration as a reward for political support through his television stations and newspapers. Under Putin Administration, however, the govern-

sky was a fellow oligarch detained by the Russian authorities in 2000 on charges of fraud.<sup>132</sup> Authorities arrested Gusinsky and used his detention and charges against him to coerce him to sign away his media company to secure his freedom.<sup>133</sup> The Eur. Ct. H.R. found that Russia had violated article 5 by detaining Gusinsky for a reason other than or in addition to committing a crime.<sup>134</sup>

According to a 2002 national survey of the Russian Federation “an overwhelming majority of Russians do not think that they live under a rule-of-law state.”<sup>135</sup> In Russian society, a common view seems to be that Khodorkovsky may be guilty of the criminal charges brought against him, but that he is a political prisoner because he alone among the oligarchs has been held accountable for his crimes.<sup>136</sup> This, however, is partly mistaken since Khodorkovsky is only one of a number of the oligarchs the Kremlin has sought to investigate for criminal activities.<sup>137</sup> Furthermore, although Khodorkovsky received nearly the most severe sentence for crimes of this nature, such severity is on par with contemporary sentencing of economic crimes in the United States.<sup>138</sup>

What, then, contributes to this view of a politically motivated judiciary and why does judicial reform fail? The ineffectiveness of judicial reform in Russia is largely the product of a young democracy, the gap between codified law and its implementation, and corruption in law enforcement bodies.<sup>139</sup>

The Russian Federation is still a young democracy.<sup>140</sup> The rapid change from communism, much like the rapid “shock therapy” eco-

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ment decided to collect on this debt, attempting to bankrupt Gusinskiy and force him to sign over Media-Most conglomerate to Gazprom. *See id.*

<sup>132</sup> *Id.* at 479.

<sup>133</sup> *Id.* at 477, 482–83.

<sup>134</sup> *Gusinskiy*, 2004-IV Eur. Ct. H.R., at ¶¶ 73–78.

<sup>135</sup> Richard Rose, Neil Monroe & William Mishler, *Resigned Acceptance of an Incomplete Democracy: Russia's Political Equilibrium*, 20 POST-SOVIET AFF. 195, 200 (2004).

<sup>136</sup> *See Court Rejects Khodorkovsky's Appeal*, *supra* note 22; Hugh Fraser, *Russia's Oligarchs: Their Risky Routes to Riches*, BBC NEWS, July 27, 2004, <http://news.bbc.co.uk/2/hi/business/3927523.stm>.

<sup>137</sup> *See SPULBER*, *supra* note 9, at 313.

<sup>138</sup> *See* Carrie Johnson, *End of Enron's Saga Brings Era to a Close: Corporate Crime Enforcement Shifts Focus*, WASH. POST, Oct. 25, 2006, at D1. In September 2006, former Enron CEO Jeffrey Skilling was sentenced to twenty-five years for fraud and conspiracy leading to the company's collapse. Bernard Ebbers, former CEO of WorldCom, is serving twenty-five years for securities fraud—a virtual life sentence for the sixty-six year old southern tycoon. *See id.*

<sup>139</sup> *See* M.C. MIROW, *LATIN AMERICAN LAW* 235–37 (2004); Jeffrey Kahn, *The Search for Rule of Law in Russia*, 37 GEO. J. INT'L L. 353, 392–94 (2006).

<sup>140</sup> *See* MCAULEY, *supra* note 4, at 95.



conomic transition, instantly laid a new, democratic ideology over a society that had for the greater part of a century operated as a communist state.<sup>141</sup> The all-controlling executive of the Soviet system created an enduring perception of the judiciary as politically influenced, even as the new government and constitution were implemented.<sup>142</sup> In Khodorkovsky's case, this lapse of perception of the transition to democracy strongly biases the people against the political independence of the court when prosecuting high-profile officials.<sup>143</sup>

How the judicial system is perceived by the people and local governments plays a part in the effectiveness of its actual enforcement.<sup>144</sup> Where citizens do not have faith in the rule of law, as in Russia, courts and their adjudication of the law lose legitimacy.<sup>145</sup> This creates a gap between the written law and its actual practice within the State.<sup>146</sup> The inability to enforce laws exacerbates this problem, reducing the incentive of the public to play by the rules set in written law.<sup>147</sup> The failure to follow the Code of Criminal Procedure in the Khodorkovsky case, regardless of the findings in the Eur. Ct. H.R., cuts at the legitimacy of the court.<sup>148</sup> When the State does not enforce its own laws, especially in a highly-publicized case, people lose trust that they will be protected by the laws of the court, and lower courts receive the message that enforcement of the written law is only partly necessary.<sup>149</sup>

Finally, corruption in the legal system undermines the ability of the judiciary to prosecute criminals.<sup>150</sup> In a recent scandal known as "Three Wales" it was revealed that President Putin's efforts to stop economic crimes have, in part, been thwarted from within.<sup>151</sup> The Prosecutor General's office announced the recent dismissal and investigation of high-ranking officials in offices related to economic regulation throughout Russia for their involvement in suppressing a case in 2000

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<sup>141</sup> See *id.*

<sup>142</sup> See Kahn, *supra* note 139, at 390, 392–94.

<sup>143</sup> See Liss, *supra* note 1.

<sup>144</sup> See Kahn, *supra* note 139, at 392–93.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See Liss, *supra* note 1.

<sup>149</sup> See *id.*

<sup>150</sup> See MIROW, *supra* note 139, at 238; Kahn, *supra* note 139, at 403.

<sup>151</sup> See generally Victor Yasmann, *Russia: Corruption Scandal Could Shake Kremlin*, RADIO FREE EUROPE, Sept. 26, 2006, available at [http://www.rferl.org/features/features\\_Article.aspx?m=09&y=2006&id=33CC2719-2AD5-4A45-A326-72828B9BAF64](http://www.rferl.org/features/features_Article.aspx?m=09&y=2006&id=33CC2719-2AD5-4A45-A326-72828B9BAF64) (detailing the Three Whales corruption scandal and the high-ranking officials in Putin's government who were involved).

against high profile businessmen.<sup>152</sup> This demonstrates that the effectiveness of the judiciary may still be elusive because deep-seated corruption in investigation and law enforcement impedes the development of a strong rule of law.<sup>153</sup>

#### CONCLUSION

Khodorkovsky's criminal trial highlights Russia's lack of judicial reform since the fallout of the Soviet Union and the establishment of a democratic form of government. In comparing Khodorkovsky's case to other Russian cases that have come before the Eur. Ct. H.R., it is apparent that although there are improvements in the separation of the judiciary from the executive, the State still violates the right of due process. This stagnation in judicial reform is the product of a young democracy still working against the deep roots of the former Soviet culture, the gap between codified law and its implementation, and corruption in law enforcement bodies—three factors which must be addressed for improvements to take hold.

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<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

