

Commentary:

Khodorkovsky Dangling between Conviction and Release: Is there a Solution?



Mikhail Khodorkovsky during his court case on 30 July 2004.

Source: [Fotki](#)

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The second trial against the former Yukos owners, Mikhail Khodorkovsky and Platon Lebedev, is coming to an end. The trial has been going on in Moscow since March 2009. Before long, the hearing of the evidence will finish. Then the cases for the prosecution and the defence will be heard before the court has to pass its verdict. The verdict can still be appealed, but even given an appeal hearing, there will most likely be a legally binding verdict by the end of this year or the beginning of next year.

But what is so important about the outcome of this trial? After all, both of the accused have now spent just under seven years in prison. In their first trial, both were convicted of tax evasion and each was sentenced to eight years in a prison camp. On the basis of ill-founded pretexts, both were denied a legally possible early release on parole after having served half of their sentence. The initially agitated public reactions in the country and beyond its borders have long since faded into a resignation that is only rarely challenged, and then only by a small number of people, mostly those who do not hold much power. In brief, one might think that it does not matter how the trial turns out, as it has become politically meaningless. But this conclusion is wrong. On the contrary, the trial and its outcome are extremely political. I will try to explain why this is so, and why it could be worthwhile making some efforts to influence the outcome (although it is clear to me that the chances of doing so are very slight.)

Guilty or innocent?

In Russia, but also in the West, there are definitely different opinions on whether Khodorkovsky and Lebedev were guilty or not in terms of the allegations of the first trial. Personally, since an intensive seminar with Khodorkovsky's lawyer, Yuri Schmidt, a human right lawyer of excellent repute, I tend towards the latter, although I have to admit that I did not completely understand some of the total of 13 allegations due to my limited knowledge of economics and accountancy. However, at the same time, even in

Russia it is remarkably widely agreed that neither were sentenced because of this, but rather because they had dared to refuse a deal suggested by the then president, Vladimir Putin, at the start of his term of office with the so-called “oligarchs”, that is, with those who ran large parts of the Russian raw materials, industrial and financial companies. The terms of the deal were that the “oligarchs” would be allowed to keep and increase the vast assets that they had acquired during the 1990’s, mostly in close cooperation with the public authorities, if they simultaneously abstained from politics. “You look after the economy, we’ll do the politics,” was Putin’s offer. Khodorkovsky refused. As a result, his business partner Platon Lebedev was arrested first in the summer of 2003. Khodorkovsky was arrested himself at the end of October. The Yukos concern was smashed. Following scarcely concealed procedures, Yukos’ most important components ended up in state concerns such as Gazprom and Rosneft, which are still controlled by Putin and his circle today.

The arrest, trial and harsh sentence to eight years’ imprisonment were understood as a signal to all other sufficiently rich people in Russia. Something similar could happen to them if they tried to engage in political activities without being sanctioned to do so by the Kremlin. In hindsight, there is some justification for interpreting the Yukos case as a key event in Russia’s development towards an authoritarian political system. With this case, it became clear (and was made clear) that there was only one pole of power in the country, that is, the Kremlin or more precisely, Vladimir Putin, and no more checks and balances. The results of this development were a significant demotion of almost all state institutes (parliament, the court system, security organs and the education system), a creeping re-nationalisation of the most important economic sectors, parasitic state corporations, the deterrence of foreign investors, and a generation of restricted, “fearful” entrepreneurs. President Medvedev described all of these problems rather aptly in his article, “Onward, Russia”, which was published last autumn in the internet newspaper, gazeta.ru.

When it comes to the charges in the second trial – the theft of a large part of the oil produced by the Yukos concern over a period of five years and money laundering – things are more straightforward. According to the testimony by Minister Viktor Khristenko and ex-Minister German Gref, which they gave to the court, the allegations are simply absurd.

Which signal? For what?

All of this has thus led to a situation in which hardly anyone doubts the political nature of the second trial against Khodorkovsky and Lebedev. For the political consequences of the trial, regardless of how it turns out, it is therefore not actually important if the accused are guilty or not. The verdict is regarded as political by all of the relevant actors and will therefore have political consequences. It will send a signal, especially because everyone is expecting it to do so.

Hardly anyone doubts that the decision on which verdict is passed in the Khodorkovsky trial will be made by the highest-ranking political leaders. It is also widely agreed that it is more likely to be Prime Minister Putin rather than President Medvedev who will have the last word on this strategic decision. So far, two scenarios have been primarily discussed: guilty or not guilty.

For those who have to decide, choosing between them is difficult. Either the accused will be acquitted, or they will be sentenced to very long new terms of imprisonment. From the viewpoint of the Russian leaders, acquitting them seems to be impossible. An acquittal would be generally regarded as an admission of political motives for the trial, but even worse, it would be construed as a sign of weakness, with correspondingly negative consequences for Putin and Medvedev's political renown. However, a conviction would be understood as the end of the cautious opening of the past year, and more so as an end to the hope that there could be something to the liberal signals, particularly on Medvedev's part, and consequently to the seriousness of the modernisation endeavours. It is hoped that this is based on the realisation that Russia needs money and expertise for the modernisation of the country – money and expertise that cannot be found elsewhere in this combination. And, more audaciously, there is the realisation that this modernisation cannot merely be technical and administrative, but that it will only have a chance of succeeding if the political system is also included.

Is there a solution to this dilemma?

So what is to be done? Is there a way for Putin and Medvedev to release Khodorkovsky and Lebedev without it looking like a victory for the prisoners? In the opinion of Khodorkovsky and Lebedev's lawyers, there certainly is a way to do so. What might a face-saving solution look like? First of all, I would like to give three assessments:

- (1) The prison sentences (eight years each) of the two accused from their first trial will end next year. Without a new conviction, they will have to be released. Neither Medvedev nor Putin need do anything about this. The state would simply do its duty under the rule of law. No one could be accused of having become "weak" or of having suffered a defeat.
- (2) Part of the accusations from the second trial, the alleged money laundering, already expired under the statute of limitations in November 2008. The court could determine this by referring to existing legislation and overturn this point of the charges.
- (3) Lawyers are of the opinion that the main charge of stealing oil from their own Yukos concern and selling it illegally can certainly be interpreted as a repetition of the charge from the first trial. The court could have acquired this insight over the course of the trial, which has now been going on for over a year (and thus explain the long duration of the trial). Russian law is naturally also aware of the principle that no one can be convicted twice of the same crime.

In summary, the accused have (almost) completed the first sentence and a second conviction would not be legal according to this assessment. However, the first conviction would remain valid for the political leaders and the public prosecutor. They could therefore continue to tell the public, as Putin has repeatedly done, that Khodorkovsky and Lebedev are offenders who were rightfully convicted under the rule of law of crimes committed by them, not for political reasons. They would not have to take anything back and no one could accuse them of lying (or slander) on this basis.

Clearly, this is a very rudimentary scenario, which only gives an initial direction for a solution. Furthermore, it contains many small pitfalls, which can be found in the details.

I would like to mention just two of them briefly, without being able to expand subsequently on them here:

Firstly, several cases against the Russian state in the Yukos affair, which were not initiated by Khodorkovsky or Lebedev, are pending at international courts, including the European Court of Human Rights. As a result, they would not be able to withdraw their claims there as part of a deal for their release. At least one of these cases, the lawsuit by non-Russian Yukos shareholders on the bankruptcy of parts of the concern, which occurred under dubious circumstances, and the equally dubious sales of its subsidiaries, threaten to become a disaster to the tune of up to US\$ 100 billion for Russia.

Secondly, there still seems to be fear among the Russian leadership of having Mikhail Khodorkovsky at liberty in Russia. At any rate, previous negotiations on a release apparently failed in part because of Khodorkovsky's unwavering refusals to leave the country after his release. The Kremlin and the Russian "White House" apparently do not trust his assurances that he will not get involved in the oil business in any way and not be politically active.

Is there still a chance? And who could do something to achieve it?

No domestic political pressure for the release Khodorkovsky and Lebedev worth speaking of can be expected in Russia. No one can say exactly if there are differences of opinion or not among the Russian leaders, between Medvedev and Putin, on how the case should be dealt with. However, attempts could be made from abroad to make clear to Russian interlocutors that releasing both prisoners would yield political dividends, while a new conviction would lead to significant problems.

Even if the chances are very slight, there is at least one other reason why no stone should be left unturned in the attempt to convince the decision-makers (that means Putin, as far as I can tell) to release Khodorkovsky and Lebedev. If they are convicted again, they face up to 20 further years in a prison camp. And, unlike the first trial, there is no doubt whatsoever in this second trial about the purely political nature of the allegations. However, one must try to help political prisoners using political means.

There is yet another reason for political action. Depending on how it turns out, the verdict will have wide-ranging political consequences for Russia, but also for its relations with the West. The verdict will show whether Russia will continue on the "Medvedevian" or the "Putinesque" path. To put it more precisely, it will provide an answer to the question of whether the modernisation rhetoric of the past year and the cautious rapprochement with the USA and the EU are more than economy-driven, tactical games.

How could this work in practice? Based on the hypothesis that the final decision will be personally made by Putin, it would make the most sense to try to influence him directly. As many western politicians as possible would need to try to make clear to him (and to Medvedev, for the sake of appearances) in direct talks that a release would only have benefits for all sides. This could probably only be done by those who hold more or less the same rank, such as other presidents or heads of government who are regarded by Putin as being well-disposed towards Russia. For example, German Chancellor Angela Merkel together with French President Nicolas Sarkozy. Or Poland's Prime Minister,

Donald Tusk. At a pinch, the Italian Prime Minister, Silvio Berlusconi. The former German Chancellor, Gerhard Schroeder, would certainly also be a good candidate for this job. Of course, whether or not these individuals are willing to do so is another matter entirely. Putin has apparently already reacted very strongly and even offensively on several occasions in a very small group of official guests to references to Khodorkovsky's case. This would indicate that he takes the matter very personally, regardless of whether or not there are political or other reasons for this. This does not give much cause for hope. But in the light of the importance of the case for Russia and relations between Russia and the West, and the chance to save two innocent people from many more years in a labour camp, a rebuff should be seen as a minor, and above all, bearable evil. But it would also be worth a try because there are no other options.

*This commentary was first published in the current edition of [Russland-Analysen](#).
The German version of the commentary can be found [here](#).*