

Dissenting consciousness: a socio-legal analysis of Russian migration cases before the European Court of Human Rights.

Agnieszka Kubal,¹ UCL, UK

Abstract: This paper conceptualizes dissenting consciousness based on a qualitative case study of migrants' and human rights lawyers' everyday experiences of pursuing claims before the European Court of Human Rights (ECtHR) from Russia. Dissent as a theoretical concept is traced to judicial literature and modern social conflict theories. Dissenting consciousness heuristically captures a degree of agency rooted in the critique of law as illegitimate, yet short of active resistance. Drawing on recent developments around 'under the law' legal consciousness, disempowerment, and legal alienation, this perspective comes useful to unpack the 'negative diagonal' between 'isolation/fatalism and the dissenting collectivism', as core to this orientation of legality. Dissenting consciousness of migrants-litigants airs voices of challenge to the mainstream just as the subversive stories told by the past applicants and lawyers before the Strasbourg Court inject subtle heterodoxy into the legal process.

Keywords: dissent, legal consciousness, Russia, ECtHR, migration, human rights

Introduction

In the aftermath of Russia's expulsion from the Council of Europe and the jurisdiction of the European Court of Human Rights (ECtHR) as a result of its military attack on Ukraine (2022), many question the actual power of human rights and human rights litigation from Russia. While the structural disintegration from the Council of Europe institutions is of undisputable significance, questions about value commitment to human rights and human rights litigation as a vehicle for dissent in Russia have always been present in the debates around the country's relationship with the ECtHR (Fura and Maruste 2017). Given the current state of world geopolitics, I believe it is important to return to these questions in the spirit of embracing the heterodoxy..

What does embracing heterodoxy mean in the context of researching human rights litigation from Russia? I grapple with this question drawing on a qualitative case study of migrants' and human rights lawyers' everyday experiences of pursuing claims before the ECtHR from Russia, interrogating the

¹ Corresponding Author: Agnieszka Kubal, School of Slavonic and East European Studies (SSEES), UCL, 16 Taviston Street, London, WC1H 0BW, United Kingdom, email: a.kubal@ucl.ac.uk

analytical utility of dissenting consciousness based on the everyday legal narratives of ordinary people. Translating heterodoxy means acknowledging how in producing and reproducing knowledge certain voices are systematically silenced because of lack of conceptual tools to frame them. The purpose of this paper therefore is to explain how migrants and their legal representatives who pursued claims before the ECtHR from Russia and came up against the limits of the law, made sense of their experiences in their life-stories and narratives. Their dissent was often marked by a sense of rejection of state law's authority and fatalism about the law's potential to achieve social change – features of 'under the law' legal consciousness (Fritsvold 2009; Haddeland 2021; Halliday and Morgan 2013). Legal consciousness is a concept widely used by socio-legal scholars to examine 'the way in which people experience, understand and act in relation to the law' (Chua and Engel 2019: 336) – my research in Russia innovates upon this concept demonstrating that it is equally about what people say as well as what they do *not* do. Embracing heterodoxy means that I look at the periphery of human rights litigation in Russia and use this localized knowledge to better understand and frame the intangible and less visible processes of dissent, that might currently emerge at different places in the world.

Migrants, refugees, and asylum seekers from the former USSR republics of Central Asia (Uzbekistan, Tajikistan, Kyrgyzstan) were some of the main claimants before the ECtHR from Russia during the time of its allegiance to the European Convention (1996-2022) and given that Russia is the second largest migrant destination globally after the United States (Schenk 2018, Anonymized). While every litigation before the ECtHR is always to a certain extent unique given the facts of the case, the alleged violations of human rights predominantly concerned core articles of the European Convention – usually Articles 3 and 5 (freedom from torture, prohibition of inhuman and degrading treatment, and right to freedom). The charges, in turn, often borrowed from the language of terrorism law (Anonymized) often used against political opponents in Russia (van der Vet 2014). Despite the substantive and established ECtHR jurisprudence of migration cases from Russia, there was a serious problem with the enforcement of these judgments. The Russian government often respected these decisions in monetary individual terms – paying the damages to the applicants – but delayed and obstructed the broader adaptation of its legal system in response to the general measures issued by the Court (Guasti, Siroky and Stockemer 2017). This combination of factors makes these cases fit well within the broader profile of human rights litigation from Russia (van der Vet 2014, 2018; van der Vet and Lyytikäinen 2015).

In the sociological literature dissent 'foregrounds linguistic or normative disagreement' and is seen as a subset of protesting or heterodox behavior (Collinson and Stephen 2006: 305). It is defined as 'speech that criticizes existing customs, habits, traditions, institutions, or authorities' (Shiffrin 2000: ix). This places dissent at the level of opinions, values and attitudes of

disagreement with the officially sanctioned version of events, with their interpretation and analysis. This paper identifies a two-fold source of dissenting consciousness among migrant-litigants and their lawyers from Russia. First, the ECtHR's judgments, when confronted with narratives of applicants and their legal representatives not only come short of presenting the full picture of the case but privilege the voice of the state in terms of reliance on documentary evidence. Second, even if the ECtHR decides in the applicant's favor, the lack of actual change of one's situation in Russia, due to protracted and incomplete enforcement, gave rise to dissenting consciousness, as defining migrant-applicants' relationship with law. Analytically, dissenting consciousness is rooted in a strong sense of legal alienation and a profound conviction about the illegitimacy of law, yet – as I demonstrate later – it is short of active resistance.

This paper proceeds in three parts. First, upon explaining the methodology of the study, I review the different framings of dissent drawing on the legal (judicial) and social conflict theory literatures. This provides the foundation for conceptualizing dissent within the recent orientation of 'under the law' legal consciousness. My paper innovates upon this concept by highlighting an alternative response to law's perceived illegitimacy – dissent as self-limiting resistance. Second, I present ethnographic illustrations of dissenting consciousness to demonstrate how lay narratives of the legal process provide an opportunity for 'airing of voices with challenge to mainstream' (Lynch 2004:311). Third, the discussion conceptualizes legal consciousness of human rights claimants in authoritarian regimes like Russia drawing on productive junctions between dissent (heterodoxy), legal fatalism and legal alienation.

Methodology

This paper is based on fieldwork conducted in Russia in several different settings. The initial ethnographic data collection took place over five months in 2014 in a number of legal aid NGOs helping migrants and refugees with their immigration situation in Russia (Anonymized). In the last six years, I interviewed – either in person in Russia or via phone, from the UK – forty (40) human rights lawyers and their clients about their experiences of pursuing immigration and refugee cases before the Russian domestic courts and the ECtHR. These interviews were sometimes in more formal setting, e.g., in the offices of the legal aid NGOs, sometimes less structured and informal. They lasted between 30 minutes and 2 hours. These interviewees traced the applicants' legal battles through the different stages of the Russian legal hierarchy all the way to the ECtHR. Substantively, these cases ranged from matters relating to extradition procedures, a refusal of a refugee status, unsuccessful attempts at legalization of one's status in Russia, through to deportation. The interviews reached beyond the straightforward evidence and

legal argumentation and inquired into the sociological background of the problem at hand, the various assumptions and expectations of the parties involved, and the personal hopes and fears of each respondent. They constituted multi-vocal narratives about everyday experiences of one's legal claim, commentaries on the legal developments before the domestic courts, experiences of detention and the evolving relationship with the immigration authorities.

I then compared and contrasted these voices with the accounts of the Russian authorities found in official letters and the ECtHR's judgments part of the Garabayev group of over 80 cases concerning extraditions and deportations of migrants from Central Asia (Anonymized).² The lawyers petitioned the Strasbourg Court as the 'last hope for justice' (HR lawyer, Helsinki 2018) yet justice does not always materialize. It is beyond the scope of this paper to discuss the limitations of international human rights tribunals (for a good overview see Madsen et al 2018), yet some explanation lies in the very nature of the Council of Europe, founded on a consensus of all the contracting states. Except that these very states are also the main violators of human rights. In lay terms the enforcement of ECtHR judgments resembles the practice of 'marking one's own homework'. This critical endeavor of comparing the narratives of my respondents to the formal ECtHR judgments and documents highlighted divergences from the officially accepted sequences of events and interpretation of facts and provided a unique opening for the dissenting consciousness to manifest itself.

Ethical considerations

From a research ethics perspective, a sizable group of my respondents (the applicants before ECtHR) could be deemed as vulnerable, with interviews heightening the risks of participants potentially experiencing emotional upset triggered by reliving the events that gave rise to their human rights claims. Prior to the fieldwork I developed safeguarding procedures to ensure these risks were minimized. First, I only interviewed claimants upon their explicit consent – this was communicated to the participants using project information sheet and oral consent procedure. I chose participants, who would have told their stories many times (e.g. to courts at domestic level) and knew how to navigate and manage their emotions. I gave them the option of a legal counsel, or someone else they trusted to be present during the interview to offer emotional support. I also refrained from recording these interviews, hence alleviating some of the pressures connected with capturing the participants talking about sensitive issues 'word for word'. When typing down the notes I ensured that the stories of my claimants were heavily anonymized. I used pseudonyms for any identifying details (geographical, time-sensitive or personal in nature), changed,

² For the most recent list of cases in the Garabayev Group see the Council of Europe Committee of Ministers 1340th meeting (March 2019) <https://rm.coe.int/090000168091ed13> [Accessed 21 March 2022].

or abandoned these details altogether. Further risk to identifying participants was reduced by my approach – I was not interested in high-profile cases that were publicized in the media (increasing the risk of identification), but the everyday and low-profile cases. Finally, all the references to the text of the ECtHR’s judgments have been paraphrased, again to protect the anonymity of my respondents.

Locating the theoretical origins of dissenting consciousness

Dissent inside and outside of the courtroom

The concept of dissent was developed most prominently within the study of judicial practice, as one of the defining features of courtroom dynamics (Schwartz 1997; Lynch 2004; Alder 2000 for the US, Australian and UK’s Supreme Courts, respectively). The dissenting judges were the ‘prophets with honor’ or ‘heroes who bravely confronted power and changed history’ (Sarat 2010: 2). Lynch compared dissenters on the bench to whistle-blowers (Lynch 2004), while Paterson’s study of the UK’s Supreme Court dubbed them as splendid isolators (Paterson 2013), who ‘offset the democratic deficit in the common law’ (Alder 2000).

Despite the various rhetorical figures invoked to frame dissent in the courtroom, there is a widespread consensus among the scholars that judicial dissent injects ‘a readily recognizable democratic tone into an arm of government which is often perceived as remote and unaccountable’ (Lynch 2004: 726). It also provides a safety valve for the decision-making by enabling dialogue and allowing members’ individual freedom ‘in expressing their views’. These observations hold true with regard to the dissenting consciousness of migrant-applicants before the ECtHR. Their dissent did complicate and nuance the narrative about Russian overall relationship with the ECtHR that tended to be framed through either the discourse of non-compliance (Burkov 2017) or ‘traditionalist (Orthodox) ideology and culture’ incompatible with ‘liberal (Western) values’ (Fura and Maruste 2017: 223). The views of ordinary people who have gone through the human rights claims making before the ECtHR from Russia injected diversity and plurality into the legal process and prevented from seeing Russia as legal and ideological monolith.

More recent engagements with dissent outside of the courtroom situate it in an era of global war on terrorism, where security is used to ‘justify new policies that impose substantial costs on civil liberties’ (Sarat 2010: 6). Under the conditions of ‘the visceral performance of moral clarity’ dissent is no longer ‘a cultural practice of engaging the question of injustice’ (Sarat 2010: 3) but seems to be fully inscribed within the binary nationalist narrative of political belonging; it is ‘deprived of its in-betweenness, precluded before it could be articulated’ (Sarat 2010: 7). How much applicability do these arguments have

regarding the lay dissenters pursuing their human rights claims from Russia? In a country known for systemic human rights violations, that was eventually thrown out from ECtHR as a result of military aggression on sovereign Ukraine, everyday dissenters are likely to be marginalized, domesticated, and generally considered as if they ‘do not belong’. Their capacity to act and thereby to resist is severely limited by the structural conditions of not being taken seriously, not because of the gravity of their dissent, but the sheer volume of it – Russia has over the last years ranked consistently first in terms of the number of applications to the ECtHR (ECtHR 2021). The notoriety of Russia’s relationship with the ECtHR (Burkov 2017) intensified throughout its closure of prominent human rights NGOs, the introduction and expansion of the infamous Foreign Agents law (Malkova 2020), and – ultimately – its unprovoked attack on Ukraine, led to a situation whereby any whistle-blower eventually became labelled as ‘the boy who cried wolf.’

Lay dissent in social theory

Dissent gained its, now uncontested, place in social theory through the works of Karl Marx and Ralph Dahrendorf and their social conflict theories. For Marx, dissent, rooted in working class consciousness, was anti-systemic in its expression; it was the driving force behind the often violent and revolutionary conflict toward a new socio-economic formation (Dawson 2016). Studies of popular dissent were conducted primarily by Marxist social historians, who turned away from the sole focus on the powerful and examined the everyday life and ‘common people’ (Tilly, Tilly and Tilly 1975; Hobsbawm 1959).

Dahrendorf, in turn, viewed non-violent and non-revolutionary dissent (in opposition to conflict theorized by Marx), as a normal part of society and, at times, as a productive driver of social change (Dahrendorf 1958). In his modern social conflict theory, dissent was the organizing principle behind the social forces advocating progress, leading to democratic changes in terms of the greater political access afforded to different socio-political groups, participation and choice within an existing polity (Dahrendorf 2017). For Dahrendorf, conflicts became more intense and complex when dissenters organized themselves and turned from latent (quasi-)interest groups (he borrowed this idea from Talcott Parsons) to distinct and structured groups, that made demands, developed programs, and formulated goals. In other words, conflicts gained political salience when dissenters organized and became dissidents. Much of the Western social movements scholarship grew out of Dahrendorf’s idea that the accommodation of the concretized demands of the (self-organized) dissenters was one of the central tasks in politics. This literature was often suffused with dissent as an organizing societal principle (Boykoff 2013), and yet, despite the widely celebrated claim that dissent permeated the democratic culture, the concept was quite often inadequately defined, used as a shorthand or a metaphor (Della Porta and Diani 2020).

More important limitations of this specific understanding of dissent come from its Western epistemological assumptions (Mignolo 2018), short of explaining the course of dissent in autocratic political regimes, like contemporary Russia, which do not accommodate social demands of the dissenters, and prevent them from being transformed into a political action (Petrov, Lipman and Hale 2014). This is where my paper steps in and develops an idea around dissenting consciousness of human rights claimants, at the level of normative ideas and values, but short of organizing and expressing dissent behaviorally through resistance, social movement, or political action. Lay persons' narratives of bringing cases against the Russian government to the ECtHR can be seen as widening the democratic conversation whereby 'a mix of opinions may provide conversational satisfactions to a spectrum of those affected, less broadly appealing, but nonetheless akin to the variegated talk in the political realm' (Bennett 2000: 853). Therefore, in the wider community the subversive stories told by the past applicants before ECtHR revealed various degrees of dissenting consciousness and had a pluralizing effect in injecting the political regime with alternative interpretations of facts and events.

Dissent within the legal consciousness paradigm

Given this brief genealogy of dissent, the detailed ideas about law and legality have been elaborated within the legal consciousness paradigm, which expanded exponentially in recent years (Chua and Engel 2019; Halliday 2019). It could be characterized by several different schools that have grown from the original ambition to address issues of legal hegemony (Ewick and Silbey 1998).³ Legal consciousness, whether seen as a worldview, perception or decision (Chua and Engel 2019) ultimately refers to a social practice:

in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings become part of the material and discursive systems that limit and constrain future meaning making ... it is through the invocation or application of these schemas in particular settings and interactions that we actively make, 'as we make sense' of, the world (Ewick and Silbey 1998: 39-40).

My conceptualization of dissent within the framework of legal consciousness responds to a rising concern that the field had lost its 'critical edge and theoretical utility' (Silbey 2005: 324). People may recognize law as a tool that

³ Lynette Chua and David Engel (2019) distinguish four schools of legal consciousness: 1) the original school of legal hegemony (Patricia Ewick and Susan Silbey); 2) the identity school (e.g. Leisy Abrego work with 1.5 generation of Latinos in the USA); 3) the legal mobilization school (e.g. KE Hull studies of same-sex couples' struggle for legal recognition); and 4) a burgeoning fourth school of 'relational legal consciousness' to highlight its immanent group character (see the work of Marina Kurkchian). Simon Halliday (2019) provides an alternative overview of legal consciousness research around critical, interpretative, comparative cultural and law-in-action approaches.

is wielded over them and may sometimes fashion resistance to that subordinating force, though their experiences of law and interpretations of those experiences as a 'life outside the law' are merely an expression of the very ideological apparatus that creates rule-governed subjectivity (Douglas, Sarat and Umphrey 2006: 11). According to Patricia Ewick and Susan Silbey's classic triad of legal consciousness, the same person may think of law as objective in one instance ('before the law'), boast of manipulating it in the next ('with the law'), and then complain of its oppression ('against the law'), without questioning or posing a real threat to law's legitimacy (1998). By invoking particular and different relationships among ideas and practices, the multiple and heterogeneous narratives reveal their mutual interdependence (Ewick and Silbey 2002: 165).

However, 'people's habitual patterns of talk and action, and their common sense understanding of the world' and of law are highly complex (Merry 1990: 5), and it is difficult to conceive of them as limited to these three schemas of legal consciousness. The understanding and interpretation of one's predicament as 'being failed' by the law – drawing on the discursive undertones of some judicial dissenters – is constitutive of the concept of dissent and brings it in dialogue with the fourth, much less explored (or 'missing') schema of legal consciousness. 'Under the law' legal consciousness (Fritsvold 2009) fills an important gap by focusing on the relative neglect of dissent and agency in the previous accounts of everyday legality.

Under the law legal consciousness

Erik D. Fritsvold who introduced the term 'under the law' legal consciousness, developed it in relation to radical environmental activists in the USA labelled by the Federal Bureau of Investigation (FBI) as 'eco-terrorists' (Fritsvold 2009: 800). Fritsvold interviewed the members of the radical environmental movement around their perceptions of 'law enforcement, the judicial system, and the relationship between the legal system and other social institutions' to inquire into their participation in the construction of legality (Fritsvold 2009: 800). He argues that 'radical environmentalists have nurtured an Under the Law legal consciousness' given their open challenge to the legitimacy of law and the social order (2009: 806, 807, emphasis original).

The activists did not merely acknowledge that law, as a tool, may often fail to achieve its social justice objectives; their understanding of legality went beyond seeing the law as untrustworthy ('against the law' orientation). They perceived 'the law as fundamentally illegitimate because it was created by and embedded in a social order that is fundamentally illegitimate' (2009: 810). The state law was viewed as 'an agent of injustice'; its only role was to reproduce the unequal distribution of power and resources, and actively repress dissent. 'Under the law' legal consciousness represents a high degree of legal alienation – 'it views the law as a veil for a social order that is perceived to be intrinsically

corrupt' (Fritsvold 2009: 810). These understandings and values around law are followed by specific behavioral choices: 'flamboyant acts of instrumental lawbreaking for the purpose of symbolic or actual subversion' (2009: 806).⁴ US radical environmental activists, by their outright rejection of the legal and political system constitute an open challenge to the democratic way of managing dissent from Dahrendorf's theory and align themselves closer to Marx's ideas of dissent as driving a revolutionary conflict.

I find 'under the law' legal consciousness a useful analytical heuristic to frame the cognitive orientation toward the law shared by many human rights applicants from Russia – the law is unjust and at service of the political system, rather than merely failing to achieve social justice objectives. Yet, while I acknowledge that my respondents might have ascribed themselves to the cognitive level of 'under the law' legal consciousness, they were never in the structurally advantaged position to share the same behavioral choices, tactics and strategies as Fritsvold's radical environmental activists. On the contrary, their views of the law as ultimately illegitimate were married with a sense of fatalism about the law at the behavioral level, making their protest self-limiting, as essential to their orientation of dissent. Migrant applicants follow the legal route of dissent – taking their case before the European Court of Human Rights. If they view the law as ultimately illegitimate – why follow that route, then? Is it just one of the examples of the complexities and contradictions of legal consciousness?

Dissent and legal fatalism

I found answers to these questions in Simon Halliday and Bronwen Morgan's study 'I Fought the Law and the Law Won?' (2013) of radical environmental movement in the UK. They observed how activists' narratives about the state law oscillated on a trajectory from protest to withdrawal with a corresponding 'lack of power and a rejection of or by the mainstream' (Halliday and Morgan 2013: 21). The authors constructed an orientation toward legality distinguished by the 'corresponding affinity between a legal consciousness of collective dissent and one of fatalism' (Halliday and Morgan 2013: 1). Their analysis demonstrates:

the existence of a legal consciousness of dissenting collectivism where state law is critiqued as being oppressive to groups and, more significantly, is struggled against ... But the key point here is that it is a *struggle*. And the struggle, ..., can be frustrating, short-lived and

⁴ These direct actions include, but are not limited to arson, large-scale property destruction, identity theft, and monkeywrenching.

ultimately unsuccessful (Halliday and Morgan 2013:30, emphasis original).

This conceptualization of legal consciousness shares with Fritsvold's the different critiques of state law as illegitimate and ultimately at service of those in power. However, the behavioral responses following from this understanding are different: while the US environmental activists continue to see the value of engagement in tactical lawbreaking, their British counterparts seem more resigned about their struggle, which brings them closer to legal fatalism about the potential to achieve change through/in law.⁵ Their sense of legal alienation and resignation, combined with a deep conviction of a higher sense of justice and ethics outside the state legal system, come helpful when translated to the specific empirical context of the vulnerable migrant-claimants from Russia before the ECtHR.

Empirical illustrations of dissenting consciousness

The stories of my respondents are complex. They usually start when, upon their migration to Russia, they have learned that they were sought in their countries of origin – in Central Asia – in relation to charges of political or religious extremism, attempts to overthrow a constitutional order, conspiring to commit a crime against a state or participation in an allegedly extremist Muslim organization (e.g. Hizb-ut-Tahrir).⁶ The lawyers who represented them stressed:

Most people were intimidated by local police or security service officers at home for being 'too religious', i.e., practicing the religion openly, celebrating Muslim marriages... or practicing religion outside official framework (Trenina, 2014:7, see also Lemon, 2021 on state practice of conflating Islamization with radicalization in Central Asia).

My respondents' ordeal before the Russian domestic legal system and the ECtHR highlights several of important aspects of dissenting consciousness. Drawing on the theoretical literature above, I operationalise dissenting consciousness as: legal alienation and disenfranchisement from the law, inability of law to achieve justice accompanied by open legal cynicism, and the strong believe that the law – ultimately – is subservient to political goals. One lawyer expressed the latter claim in clear terms:

⁵ The concept of dissenting collectivism has been applied in two distinct empirical contexts, see: (Anonymised) and Gill and Creutzfeldt (2018).

⁶ Hizb ut-Tahrir, founded in 1953 in Jerusalem, is a political and ideological movement with a fundamentalist Islamic inclination that translates into English as a 'Party of Liberation'. It rejects democracy, secularism and all Western models of state. Hizb ut-Tahrir calls for the establishment of an 'Islamic state' based on the early Islamic model of caliphate. However, unlike jihadi groups such as al-Qaeda and Islamic State (ISIS), it rejects the adoption of violence. The movement has followers in the Middle East, Central and Southeast Asia, and some Western countries.

I am not sure it lies in the legal sphere. It is politics. I have no exception [from it] in my practice (HR lawyer, Moscow 2014).

Legal alienation

My respondents' – applicants' and lawyers' alike – narratives highlight interpretations that diverge from the officially sanctioned sequences of events found in the court judgments, as example of their legal alienation. Myriam Nizamova⁷ is a migrant from Tajikistan and a mother of three. I met her in the headquarters of the NGO where I was conducting my fieldwork. An immigration lawyer introduced us, knowing I was interested in the stories of people whose cases reached the Strasbourg Court. At the time of these events Myriam's husband was in Russian prison awaiting extradition based on charges of religious extremism. Soon she became of interest to the Russian authorities. In the following months, the security services summoned Myriam for questioning on many occasions:

I was going, but always with my three children. They were my insurance. They were small, so I knew that finally the authorities would let me go, as the kids were making noise, and I needed to give them food and attend to them. Immediately prior to my arrest, the leading officer asked me to come to questioning alone. This is when I got truly scared. I tried to argue that it would be difficult given that my husband was in prison, and I had no one to leave my children with.

One day a car arrived in front of the Mrs Nizamova's block of flats. When Myriam went out, two security service officers emerged from the car and requested Myriam to accompany them for questioning. Myriam did not want to go without her lawyer. However, the men forced her into the car and drove her away.

Now we come to a point in the story when my argument about dissenting consciousness in the narratives of migrants-applicants becomes particularly relevant. In our conversation, Myriam described her subsequent arrest leading to detention by the Russian authorities using the language of forcible abduction – 'the men forced me into the car and drove away'. According to Myriam, the security service officers pushed her into the car against her will. In her case before the ECtHR we read, however, based on the reports by officers X. and Y. who arrived to summon Myriam for questioning, that she 'asked for a lift to the questioning session'. The security officers simply 'agreed to do so'. The documents officially sanctioned by the Russian state and

⁷ Name changed.

contained in the ECtHR judgment elaborated on the event as follows (this and all subsequent ECtHR excerpts have been paraphrased):

Officer X. was driving, officer Y. was in the front passenger seat while the back seat was for the applicant alone. Her freedom was not restricted and during the journey, she was talking on a mobile phone and sending messages. She did not show any anxiety or stress regarding the questioning, nor asked to see her lawyer or family.

According to Myriam, however, the incident she experienced looked markedly different to the official reports and protocols:

When they got me into the car, I dialled the number of the lawyer, but it went to voice mail. I kept the phone on and was loudly asking the men where they were taking me. I discretely recorded the address on the phone, so Nadya [the lawyer] could find me once she became available. When Nadya came to the security services headquarters and called the officers on the intercom – they were not picking up; when they finally picked up, they said ‘no, Mrs Nizamova is not here’. I could hear this as I was sitting just nearby, so I shouted: ‘Nadya, I am here!’

The ECtHR deciding Myriam’s case found no evidence that would enable it to depart from the findings of the domestic courts which established that Myriam had asked the security service officers to ‘give her a lift in their car’ to the questioning. Central to alienation from the law is its perceived social illegitimacy: law’s estrangement from its social and human origins (Teubner, 2001). Here, the ECtHR relied on a legalistic technicality around inaccurate indication of the time of Myriam’s arrest to decide that the Russian security services were not guilty of her arbitrary deprivation of liberty:

While it is regrettable that the authorities did not accurately record the time of the applicant’s arrest, this did not result in a breach of procedural guarantees against arbitrary detention.

Myriam’s vocal disagreement with this interpretation of the events by the ECtHR was put even stronger – in a conversation with me she called it a lie. This could be seen as the main cause of her legal alienation – the human rights’ law that was promised to protect Myriam has ultimately led to her double victimisation: first when the abduction took place, and second when the Court did not recognize it as such in its ruling and instead legitimised Russian authorities’ version of events.

Disenfranchisement from the law

Another example of viewing the law as ultimately illegitimate comes from Khumoyun Umidov,⁸ whose application for asylum in Russia was rejected by the Federal Migration Service (FMS). This rejection triggered extradition procedure to Uzbekistan in relation to charges of political activism and religious extremism. Khumoyun was arrested in Russia. However, when the term of his detention pending extradition ended, he had to be released. The official court records and proceedings submitted by Russia before the ECtHR talk dispassionately about Khumoyun's release and immediate re-arrest on account of violating the Russian immigration law:

The Prosecutor ordered the applicant's release because the maximum period of detention pending extradition had expired. On the same day, Mr Umidov was arrested for his alleged failure to comply with the administrative rules governing labor migration in Russia.

Khumoyun recalls the situation in a very different manner:

The NGO lawyer could not be present at my release. Outside, two FMS officers asked me for my papers. Obviously, I did not have any as I've been locked up for six months. Turns out my freedom was strictly temporary; I was transferred to a different detention center for not having the right papers to be in Russia.

Khumoyun's dissent was directed toward the substance of the law as enforced through Russian authorities' actions, which constituted 'nothing more than 'a legal trick' which may be in accordance with the law, but which went against [his] own sense of justice' (Hertogh, 2018:14). The substantive disenfranchisement from the protection of the law was accompanied by procedural alienation from the different legal institutions. Khumoyun's experiences before Russian authorities and courts involved several different legal procedures – criminal (in the case of extradition) and administrative (relating to the expulsion and refugee status application). Each of these proceedings was equally alienating; for the authorities it was a matter of formality, yet for Khumoyun the substitution of extradition with the expulsion proceedings resulted in a Kafkaesque experience of release from detention and subsequent arrest within the span of half an hour.

⁸ Name changed.

Cynicism due to law's inability to achieve justice

Many applicants' sense of disenfranchisement from the legal process was further strengthened by their experiences before the ECtHR. The claimants were barely known to the Court from under the piles of documentary evidence. Most cases were heard in private following written pleadings in response to ECtHR's specific questions pertaining to the substance of potential human rights violations. It is therefore likely that these structural arrangements around deciding the cases 'on paper' in Strasbourg further amplified the sense of disempowerment on the side of the applicants (Dembour 2015). The impassionate and succinct record-keeping by the Court could often be seen as favoring the states and sometimes concealing their broader practices of noncompliance like secret renditions of migrant-applicants in the extradition cases (Anonymised). The ECtHR now recognizes the abduction as a particular infringement of human rights – Russian tacit knowledge of, and at times, complicity in, certain cases of abduction is part of an established ECtHR case law (*Savridin Dzburayev v Russia* 2013). On numerous occasions, we could however read in the judgments that:

The applicant was born in 1987. He is presently serving a prison sentence in Uzbekistan.

This short statement of facts hides as much as it reveals. The man in question could not have launched his application before the ECtHR directly from Uzbekistan, as that country is not a party to the European Convention. In the meantime, he must have spent some time in Russia. How did he find himself back in Uzbekistan, and in prison? The practice of abductions and renditions comes clearly in the dissenting narratives of the human rights lawyers and amplifies their legal cynicism (Kurkchiyan 2009). This one speaks for many immigration lawyers whom I interviewed:

Your clients are safest when they are in a detention center in Russia, when the center's management is accountable for them. Having your client's released should be a cause for concern – they are at risk. No one knows what might happen (HR lawyer, Helsinki 2018).

Another lawyer recalled her attempts to investigate a sudden disappearance of her client on the day of his release from detention. The Russian authorities submitted to ECtHR records of investigating the alleged disappearance. These included excerpts from questioning (under the criminal liability for perjury) of their own security agent:

Officer Z. stated that the applicant was of no interest to his agency, he was not aware of the applicant's possible whereabouts, and there was no

contact or exchange of information between his agency and the Tajik law enforcement [a country the applicant was seeking asylum from].

When I interviewed her, the human rights lawyer, focused her side of the story on two, one-minute episodes coming from a CCTV footage covering the entrance to the detention facility around the time of the release of her client. She found it important to share the following:

The first five minutes you see [my client] taking his documents and leaving the detention facility. But the remaining 40 minutes of the CCTV footage, maybe the Russian authorities thought I was lazy and would have not watched this, but I did go through the entire tape. And there is some interesting stuff; 20 minutes into the recording one of the officers asks:

- Do you see them? There are two of them. One is in the military uniform and the other one is civilian.

Another episode, half an hour after the release, a senior officer comes in and says:

- I am asking if you have seen anything. No? Well-done [Russian: *molodtsy*], of course you have seen nothing! (HR Lawyer, Moscow, 2014)

This episode provides the lawyer with ample evidence that the detention facility officers did see the security service officers in plain clothing, they exchanged remarks about the men. The conversation between the officers and their superior is yet another example how any evidence about potential abduction is repressed before it becomes formulated. The lawyer's legal cynicism was further amplified by the attitude of the international community during the Committee of Ministers⁹ meetings:

From the resolutions we have learnt that the international community simply accepted Russia's explanation that my clients went into hiding upon their release (HR lawyer, Moscow, 2017).

Numerous reports of her clients' disappearance were met with no response of the main ECtHR's enforcement body. This further reinforced the lawyer's conclusion about the law's inability to achieve justice. Since my last contact with her in 2020, she has left the practice of human rights lawyering. Many of her colleagues have emigrated from Russia since.

⁹ The Committee of Ministers is made up of the Ministers for Foreign Affairs of member States of the Council of Europe. Its major role is the enforcement of the ECtHR judgments.

Discussion: legal alienation, fatalism, heterodoxy, and dissent

Different substantive and procedural aspects of legal alienation – ‘a cognitive state of psychological disconnection from official state law and the justice system’ (Hertogh 2018: 55) – and cynicism about the law among the human rights lawyers intensify the sense of the law’s illegitimacy and demonstrate how the dissenting consciousness is nested within the cognitive level of ‘under the law’ legal consciousness theorised earlier. Given, however, the respondents’ reflection on their predicament in contemporary Russia, ‘under the law’ orientation might not necessarily result in explicit support for the subversion of law through tactical acts of instrumental lawbreaking (Fritsvold 2009: 820). My respondents – applicants and lawyers alike – did not engage in tactical playing ‘with the law’ or fighting ‘against the law’; their actions brought them close to the British environmental activists examined by Halliday and Morgan, whose dissent was combined with fatalism and resignation about achieving any change through/in law. Like Khumoyun, for example, they simply want to get on with their lives:

What can I do now? I went to the Strasbourg and back. Achieved nothing. Most important to me is that they [the Russian and Uzbek authorities] leave me alone. I want to live away from the purview of the law.

The dissent of my respondents may not be observable at the level of their actions but is present in their narratives expressing their values and attitudes toward the law. By articulating their stories in such a detail and with so much emotion, they push back against the ‘moralizing narratives of legal institutions that define world views of criminality [and] sanity’ (Foucault 1977: 67). This provides viable counterpoints to state and institutional renderings of reality – shifting the dynamics and openly challenging the taken-for-granted nature of situational power relations (Ewick and Silbey 2003: 1331) – which may lead to hegemonic rupture, if only for a moment. We can read these legal stories as sites and ‘openings for resistance’, distorting the asymmetry of power between the (legally and formally privileged) narrative of the state and that of the individual. The dissent in these stories comes through a particular order (appropriation) of events and the positioning of one’s personal narrative against the language of the law of the formal ECtHR judgment. The dissent comes through telling an alternative story that disrupts and exceeds the textual confinement of the facts of the case before the Strasbourg Court. The disruption of the officially sanctioned timelines and interpretation of events comes clearly in the accounts of the lawyers whose clients were abducted (Russia never admitted this before the ECtHR), or migrants-applicants who were transferred in a deadly game of ping-pong between the different procedures of extradition and deportation in Russia.

Telling a story ‘on their own terms’, telling ‘what really happened’ constitutes a challenge to the legally affirmed sequence of events. This again is shown in the example of Myriam’s summons for questioning by the security officers in Moscow. While the ECtHR did not recognize this as ‘deprivation of liberty’ due to inadequate timekeeping by the security officers, Myriam kept telling and retelling her story, placing it firmly within the frames of abduction and arbitrary detention. Through this narrative, she asserted ‘the truth on her side’ and freed herself from the confines of the written legal form. Referred to as ‘tales of the unrecognized’ (De Certeau 1984: 68) or ‘weapons of the weak’ (Scott 1985) in the broader literature, these narratives as expressions of dissenting consciousness represent the ways in which relatively powerless persons attempt to ‘alter the structures of power in society’ (Halliday and Morgan 2013:30). This form of dissent has important repercussions for reversing the imbalance of power inherent to the legal process. As James Baldwin asserted:

[The] victim who is able to articulate the situation of the victim has ceased to be a victim: he, or she, has become a threat (Baldwin 1998: 562).

My respondents’ dissent as expressed through their stories is far removed from the forms of tactical lawbreaking employed by US environmental activists in response to law’s perceived illegitimacy. Similarly, many people who disagree with Russia’s brutal invasion on Ukraine do not engage in active street protests. This is not because their dissent is lukewarm, but rather due to their structural positioning within an environment that brutally crushes active dissent. Their dissenting consciousness comes instead close to the ‘negative diagonal’ from Halliday and Morgan’s analysis – ‘a kind of axis between the isolation/fatalism... and the dissenting collectivism’ (Halliday and Morgan 2013: 21). This combination fuelled human rights applicants’ and their lawyers’ critique of state law and sustained their counter-hegemonic struggles. It was their internal voice of dissent, a representation of an emotional logic that ruptured the fabric of the law’s reasoning (Sarat 2012: 8).

Dissenting consciousness, as a concept, explicitly engages with questions of agency and legal power not through active subversion but self-limiting resistance to state/legal power. The inequality of the parties in the legal process before the ECtHR is striking. The document-based reasoning privileges the state in procuring, sourcing, and producing all kinds of written evidence, and ‘raises important questions around the adequate representation of the interests (and even rights) of persons concerned by the proceedings before the Court’ (*AM and Others v Russia 2021*). The structural, ‘objective’ conditions of representing vulnerable clients before the ECtHR unsurprisingly give rise to

legal fatalism. Yet the applicants' and lawyers' responses are more complex than that. Dissent manifests itself in aesthetically cynical yet profound disagreement with officially sanctioned narratives, traversing the strict confines of legalistic form through affective appropriation of facts and events. Like the eloquently penned judicial dissents, this voice and agency is distinctively related to Judith Butler's idea of hearing 'beyond what we are able to hear' and attending to an alterity whose presence is overwhelmed by events (Butler 2001). At the same time, the dissenting consciousness is marked by a great deal of vulnerability and a sense of alienation from the law's protection and its promise of justice: the applicants' struggle might ultimately be unsuccessful; their human rights might remain hollow. Since Russia's departure from the European Convention system this scenario has become ever more probable.

Conclusion

Addressing the nature of dissent in contemporary Russia, this paper conceptualized dissenting consciousness based on a qualitative case study of migrants-applicants and their legal representatives before the ECtHR. Dissenting consciousness heuristically captures a degree of agency, a response, rooted in the critique of state law as illegitimate and the sense of legal alienation (attributes of 'under the law' legal consciousness). Unlike active resistance or protest 'against the law' (Ewick and Silbey 2003; Fritsvold 2009), dissenting consciousness comes useful to unpack the 'negative diagonal' between 'isolation/fatalism and the dissenting collectivism', as core to this orientation of legality (Halliday and Morgan 2013). Dissent comes with strong, often passionate, and powerful disagreement, but one that is not necessarily followed by an act of subversion or protest due to several different structural considerations in which one is enmeshed. This, perhaps, is not specific to authoritarian Russia: 'while responses to dissent in state and society are contingent and historically specific, the general tendency is toward the containment, if not outright repression, of dissent' remarked Austin Sarat in the context of United States' global war on terror (Sarat 2010: 2).

Conceptualized in this way, dissenting consciousness intelligibly relays the migrant-applicants' and their legal representatives' experiences of pursuing cases before the ECtHR from Russia. The dissenting consciousness captures their nuanced position vis-à-vis the Strasbourg Court and the corresponding state upon encountering the limits of human rights law: short of concrete acts of sustained resistance but also not entirely acquiescent either. In complex cases, the applicants vocally criticize the law for failing to substantially accommodate their claims within the established jurisprudence ('legal tricks'). They feel alienated from the legal process, which privileges papers and official documents over their own testimonies. Incapable of active resistance their dissenting consciousness is self-limiting to the articulation of their struggle and vulnerability to potential failure, but also fatalism and resignation about law

given Russia's protracted and foot dragging approach to the enforcement of any ECtHR judgment, which ultimately led to its exclusion from the Council of Europe. Future research could examine from a comparative perspective the applicability of dissenting consciousness, as framing applicants' experiences of claims making before the ECtHR, in other Convention-notorious countries of Eastern Europe.

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