Can conceptualising whistleblowers as 'human rights defenders' improve their protection under the ECHR?

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Abstract: Whistleblowing, particularly on issues that relate to human rights, is an important means of keeping governments accountable. Some whistleblowers could also be viewed as carrying out the function of a human rights defender. This designation can help improve their protection under the ECHR.

Whistleblowers have played an important role during the COVID-19 pandemic, by bringing the public's attention to new outbreaks of the virus, gaps in state health systems during the pandemic response and instances of corruption. However, the protection whistleblowers receive under human rights law remains weak. It is worth exploring the extent to which viewing whistleblowers as human rights defenders (HRDs) has any positive implications for the protection they can expect under human rights law focusing on the European Convention on Human Rights (the ECHR or 'the Convention') and the case law of the European Court of Human rights (the ECtHR or 'the Court'). Firstly, this post explains why (at least some) whistleblowers could be classified as HRDs, including those who disclose information relating to the healthcare sector. Secondly, the post highlights some of the weaknesses in the ECtHR's framework for the protection for

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whistleblowers. Finally, it examines whether conceptualising whistleblowers as HDRs has the potential of addressing some of these weaknesses. In this respect, it is argued that bringing whistleblowers explicitly within the HRDs paradigm not only has symbolic value but can also have legal consequences.

Can whistleblowers be classed as HRDs?

The ECHR has not endorsed an '[abstract and general definition]' of the term whistleblower. The term is usually used to denote individuals who in the course of their work come across information relating to illegality, abuses of power, corruption or other types of misconduct that occurs in the workplace and alert either internal mechanisms within their institution, regulatory bodies, or the public about this wrongdoing.

Much like HRDs, whistleblowers can face retaliation for their actions. An unauthorised public disclosure of information will usually breach the whistleblower's legally binding duty of confidence to their employer, thus exposing them to employment-related sanctions or civil lawsuits. In some cases, such disclosures can also [constitute a criminal offence]. These types of penalties might also apply to whistleblowers in the healthcare sector. Whistleblowers can also be exposed to more serious forms of persecution that threaten their life and well-being. In response to this, and to protect whistleblowers from all forms of retaliation, the ECtHR has developed a framework for protecting whistleblowers under Article 10 [ECHR] that protects freedom of expression. This framework will be discussed in more detail below.

In her excellent [analysis] of the relationship between whistleblowers and HRDs, Veronika Bílková identifies key similarities between the two concepts. As she explains, whistleblowers and HRDs both speak out and/or act in the general interest, both are oftentimes exposed to retaliation that renders them vulnerable, and both enjoy some degree of legal protection in international human rights law. However, Bílková also highlights the distinctions between the two concepts that ultimately lead her to conclude that they should be viewed as discrete categories. As she notes

> whistleblowers report on unlawful or unethical activities identified within their institution; human rights defenders promote and protect universally recognised human rights and fundamental freedoms. The two groups thus engage in different activities (reporting vs promoting and protecting human rights) and they operate within different normative frameworks (legal or ethical standards vs human rights)

While these points are astute, particularly when referring to the concept of whistleblowing in the abstract, at least some whistleblowers do fulfil the criteria

Bílková mentions and could be incorporated into the HRD concept. Some of the most prominent whistleblowing cases globally have related to whistleblowers exposing human rights abuses perpetrated by state actors. For instance, Edward Snowden revealed the mechanisms for mass surveillance and bulk interception of communications of citizens carried. From the pandemic angle, Dr Li Wenliang was the first to blow the whistle with concerns surrounding the COVID-19 virus that raised issues relating to the right to life and right to health across the globe. The intention behind these disclosures was to bring attention to the wrongdoing committed, but such disclosures were explicitly or implicitly also aimed at protecting the right that was harmed by the wrongdoing the whistleblower disclosed. For instance, by disclosing information about various mechanisms of unlawful surveillance, Snowden aimed to report to the public that these illegal practices were taking place. At the same time, Snowden's actions put public pressure on governments to cease these practices in order to protect the right to privacy which was under threat. In these contexts, Bílková's distinction between *reporting* wrongdoing that amounts to a human rights violation and *promoting or protecting* human rights is blurred. Therefore, while not all whistleblowers could be classed as HRDs, in some cases they could be, particularly if they provide information that is otherwise inaccessible to the public in relation to human rights violations or threats to human rights. The analysis above raises an important question. Why is this classification important? In this respect, the post is not arguing that all whistleblowers should be subsumed into the HRD concept or that the two concepts should be treated as the same under human rights law. Instead, focusing on the ECHR, the next section suggests that recognising the HRD role as *part* of the function of *some* whistleblowers, might have symbolic value but also practical effects on how the ECHR framework protects whistleblowers.

Persecuting whistleblowers – A role for Article 18 ECHR?

The ECtHR has recognised that any retaliation a whistleblower faces for imparting information to the public will amount to an interference with Article 10 ECHR. In order to determine whether such an interference with the whistleblower's freedom of expression satisfies the 'necessary in a democratic society' test in Article 10 ECHR, the Court relies on certain criteria. For instance, the Court assesses the veracity of the information the whistleblower shared, the public interest in their disclosure, and the harm caused to the employer by the disclosure among other factors.

One of the criteria for which the court has been criticised is the emphasis it places on the whistleblower's motives. The Court held that disclosures made due to a 'personal grievance or a personal antagonism or the expectation of personal advantage, […] would not justify a particularly strong level of protection' under Article 10. This criterion raises many concerns, primarily because it creates an incentive on the state to attack the whistleblower's good faith. In fact, character

assassinations have been a key means to discredit whistleblowers bringing to light abuses of state power. The whistleblowers mentioned in the previous sections faced attacks challenging their motivations or their mental state. This type of attack is used to construct a narrative for the whistleblower which can be used in legal proceedings to present them as a disgruntled, 'difficult' employee. This disincentivises potential whistleblowers from speaking up, reinforces harmful stereotypes of whistleblowers as unreliable, and conditions their protection under human rights law on a standard (their motives for disclosing information) that is difficult to prove.
It is notable that other whistleblower protection frameworks, for instance more recent international and supranational frameworks, provide explicitly that the whistleblower's motives should be irrelevant when it comes to their protection from retaliation. In this respect, the ECtHR's framework for whistleblower protection is now an outlier.
A relevant question arises as to whether the conceptualisation of some whistleblowers as HRDs can help alleviate some of these issues in the ECtHR's case law.

What does the HRDs framework add to whistleblower protection in the ECHR?
Recognising some whistleblowers as HRDs can have both symbolic and practical value. From a symbolic perspective, associating human rights-related whistleblowing with HRDs can help shift the narrative, moving away from the perception of the whistleblower as a disgruntled worker, towards the understanding of whistleblowers as agents who are standing up for human rights, by bringing to the public's attention instances where these rights are harmed or under threat. But there could be additional, more practical, benefits to this characterisation. Firstly, while the ECtHR has not fully developed legal standards pertaining to HRDs, the term has featured in some cases, for instance, the judgement in *Kavala v. Turkey* (2019). The applicant is a prominent HRD who has been imprisoned for many years due to his human rights activism. The Court partly relied on Mr Kavala's status as a HRD to reach the conclusion that his imprisonment breached Article 18 ECHR which provides that restrictions to 'rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed' in the ECHR.
Article 18 ECHR prohibits bad-faith limitations to ECHR rights, and can be invoked where the state uses its powers to restrict rights for an ulterior motive, namely for a reason other than those provided in the ECHR (for an in-depth analysis of this provision and the 'ulterior motive' requirement, see here). More specifically, in the *Kavala* judgement, the Court concluded that the applicant's rights were restricted with the ulterior motive 'to reduce him to silence as an NGO activist and human-rights defender [and] to dissuade other persons from engaging in such activities'. The suppression or persecution of whistleblowers exposing human rights violations by state actors should be viewed through a similar

lens. A state retaliating against a human rights whistleblower should, at least, raise the Court's suspicion that authorities are abusing the qualified nature of certain rights for improper reasons. Therefore, bringing whistleblowers into the HRDs paradigm could assist the Court in treating retaliation against a human rights whistleblower not just like any other interference with Article 10 ECHR, but as a potential bad-faith action taken to suppress a HRD and silence others who might attempt taking similar action.

Of course, HRDs status is not necessary for a finding of an Article 18 violation. Indeed, the Court has found violations of this article for other applicants who would not claim such status. However, emphasising the HRDs status of human rights whistleblowers can bring the Court's attention to the concrete restrictions of the whistleblower's rights and invite it to carry out a stricter assessment of whether these restrictions are for the 'genuine' purposes outlined in the ECHR, or the result of the state wishing to suppress critical speech or the dissemination of information that proves it was responsible for potential human rights violations. Secondly, the shift in narrative discussed previously in this section can help the Court move its focus away from the perceived motivations of the whistleblower. Rather than emphasising the whistleblower's duties to their employer which were breached by the unauthorised disclosure of information, the emphasis should be placed on the function of the whistleblower as a HRDWhile the HRDs concept is not a panacea for the weaknesses of whistleblower protection under the ECHR, it can certainly help shift the narrative in relation to certain whistleblowers and assist the Court in treating restrictions to their rights with increased suspicion.