International Cooperation for Better Whistleblower Protection in South Africa

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The act of whistleblowing is when an organisational insider exposes wrongdoing to an authority that can address that wrongdoing (Near & Miceli, 1985). Wrongdoing can encompass any illegal, immoral or unethical activity that emerges from an organisation's confines (Jubb, 1999). The actions of South African whistleblowers have, generally, brought about positive change in the country. Most prominently, that change has come in the form of whistleblowers shedding light on state capture, which involved a complex network of private actors and public officials influencing state affairs to exert control over the state for purposes of their own benefit (Radulovic, 2023c). Former President Jacob Zuma stepped down from his post due to the allegations of whistleblowers fingering him as the primary force driving the capture of the state (Radulovic, 2023c). However, even before revelations of state capture entered the public domain, whistleblowers played an integral role in exposing various forms of malfeasance, such as fraud and corruption, in South Africa (Uys, 2022). It must, nonetheless, be noted that the tendency for individuals to expose wrongdoing was uncommon in apartheid South Africa, with acts of disclosure becoming more prevalent after the country transitioned to democratic rule.

The behaviour change is essentially the by-product of a new post-apartheid Constitution (1996), which brought with it new laws. One law of particular importance to whistleblowers is that of the Protected Disclosures Act No. 26 of 2000 (PDA). However, the PDA has been severely criticised due to the incomprehensive protection it provides to whistleblowers (Lewis & Uys, 2007; Martin, 2010). The PDA was amended by way of the Protected Disclosures Amendment Act No. 5 of 2017 (PDAA). The amendment emanated from a report on the PDA released by the South African Law Reform Commission (SALRC) in 2007. This report proposed an initial set of amendments to the PDA. A strong driver behind this report was that the National Development Plan had identified that whistleblowers are key to a resilient and strong anti-corruption system and recommended, among other things, that the PDA should be reviewed and regulations should be developed to strengthen support for whistleblowers. The SALRC was consulted widely during the course of this investigation. Unfortunately, the amendment has been subject to public and academic criticism (Davis, 2020; Radulovic, 2023a).

Even though the PDAA expanded the legal framework for protections afforded to South African whistleblowers, these expanded protections fail to meet several requirements set forth by Transparency International (an international non-governmental orgnisation) guidelines (Thakur, 2018). The guidelines outlined in *A Best Practice Guide for Whistleblowing Legislation* offer a comprehensive set of recommendations for policymakers and advocates of whistleblower protection, focusing on the implementation of the *International Principles for Whistleblower Legislation* into national statutes (Transparency International, 2018). These International Principles serve as a framework for policymakers in formulating and enhancing both new and existing whistleblower legislation, ensuring adequate protection for whistleblowers (Transparency International, 2013). Judging by these standards, whistleblower protection in South Africa leaves much to be desired, complying with only 5 of the 20 best standard practices (Feinstein & Devine, 2021).

Why the Emphasis on Legislation?

Any piece of legislation governs the behaviour of the state's citizens in the legal realm it focuses on. It establishes

legal rights and obligations, and as such, legislation has the capacity to protect both individual and collective rights by providing a framework that denizens need to abide by. A failure to establish comprehensive (and adequate) legislation results in several loopholes pertaining to the domain of focus of that law. The outcome of such loopholes has been particularly prevalent when examining whistleblower retaliation in South Africa, encompassing an extensive set of activities broadly involving work-related retaliation, social retaliation, lawfare retaliation and, in the worst cases, physical retaliation (Radulovic, 2023b). The wrongdoers fingered by whistleblowers carry out these retaliations, as do those associated with the wrongdoers and the act of wrongdoing and those enlisted by the wrongdoers to exact revenge against the whistleblowers.

Thus, if adequate whistleblower legislation existed, one could expect better disclosure experiences for those who engage in whistleblowing. Wrongdoers would be held to account, as robust legislation would not only prohibit retaliatory behaviour but it would also impose penalties on those that enact such behaviour, as well as impose penalties against those organisations that do not have mechanisms in place to adequately protect whistleblowers. Consequently, the solution should, ideally, be a macro one where relevant state organs take action and speedily implement adequate whistleblower protection provisions into appropriate laws. Noting this, it must be added that there are provisions within a number of South African laws, such as criminal law and the Protection from Harassment Act (2011), that could account for whistleblower protection, but they are not explicitly intended for the protection of whistleblowers and are not as broadly encompassing as the lacklustre PDAA is. In order to improve inadequate whistleblower protection, South African policymakers should consult a number of global instruments (discussed below).

Relevant Global Instruments for the Protection of Whistleblowers

As a point of departure, South African policymakers should consult Transparency International's *A Best Practice Guide for Whistleblowing Legislation* (2018) as well as the earlier *International Principles for Whistleblower Legislation* (2013). These documents provide a basis for not only the formulation and improvement of new legislation but also the adequate implementation of such legislation.

Moving forward, South African policymakers would do well to consult legislation that has been widely accepted as being either effective or broadly encompassing. The European Union's (EU) Whistleblower Directive (WD) is one such instrument. The WD's core contribution is that it provides for the equal treatment of whistleblowers in the legal domain (Martić, 2021). Another effective instrument is the Serbian Law on Protection of Whistleblowers (LPW) (2014). The LPW has an outstanding track record (Radulovic, 2023a). Moreover, it ranks as one of the most comprehensive instruments for whistleblower protection, complying with 15 of the 20 best practices outlined in *A Best Practice Guide for Whistleblowing Legislation* (Feinstein & Devine, 2021).

The LPW's protection is comprehensive, as it extends the same level of protection to those mistakenly identified as whistleblowers or associated with whistleblowers as it does to actual whistleblowers (Law on Protection of Whistleblowers, 2014). Nevertheless, the LPW affords protection to whistleblowers in the event of public disclosure, even if whistleblowers have not previously utilised internal or external reporting channels (Radulovic, 2023a). The LPW also mandates that all companies have an internal whistleblowing procedure, failing which they will be penalised (Law on Protection of Whistleblowers, 2014). Crucially, the LPW mandates that all organisations will be fined in the event of retaliation against a whistleblower, which is prohibited by the law (Radulovic, 2023a). The LPW also makes some provisions for compensation and judicial relief, which is coincidentally a significant loophole in the PDAA since whistleblower compensation is only possible in the event of a favourable Labour Court outcome (Radulovic, 2023a).

Considering compensation, several additional successful instruments could be drawn upon when addressing this major loophole of the PDAA. For example, the Australian Federal Court can order whistleblower compensation (Armstrong & Francis, 2015). This compensation can cover a variety of detriments arising out of disclosure and account for loss, damage or injury, restraint of retaliation, apology, and reinstatement of the whistleblower (Armstrong & Francis, 2015). There are also instruments within the United States (US) that offer adequate provisions for whistleblower compensation, with five US states providing for whistleblower compensation (Cordis & Lambert,

2017).

Thus, in light of these numerous global instruments that hold relevance when considering the improvement of South Africa's whistleblowing protection mechanism, South African legislators should consult such instruments. In doing so, tried-and-tested provisions could be adapted for the South African context. This adaptation would entail assembling an amalgam of the best global laws, critically working through relevant instruments and analysing which provisions within those instruments would best fit the South African context. To effectively accomplish this, collaborative efforts would be needed with not only the lawmakers that were involved in passing such legislation but also with civil society involved in supporting whistleblowers within those contexts, as well as an examination of the experiences of whistleblowers from countries with adequate whistleblower protection.

Leaning on Global Collaborative Efforts

Collaboration on a global scale is not missing in the realm of whistleblowing. One prominent collaborative example is the Whistleblowing International Network (WIN), which serves not only as a "global whistleblowing membership network" but also as an "information hub for the whistleblower protection community" (Whistleblowing International Network, 2019a). WIN also works "to strengthen the legal, technical and strategic skills of civil society around the world to support whistleblowers in the public interest" (Whistleblowing International Network, 2019a). There is, similarly, international collaboration on the research front, with the International Whistleblowing Research Network providing a platform for academics and researchers to exchange their work and ideas. Several other collaborative initiatives seek to advance the global understanding of whistleblowing and how whistleblowers can be better protected.

However, a particular approach is required for South Africa – which could prove very costly and time-consuming but highly beneficial for the country's whistleblowers. The South African context requires a specific approach due to the severity and frequency of retaliation against whistleblowers, with assassination attempts against whistleblowers being plenty. Hence, it would require not only online meetings but, more importantly, site visits and in-person interaction with key individuals in countries with adequate whistleblower protection legislation. Such an initiative would have to include both legislators and members of civil society organisations that support whistleblowers.

The reasoning behind this is based on evidence emerging from a country with an effective whistleblower protection law – Serbia. In Serbia, Pištaljka (which translates to 'The Whistle') has presented itself as the go-to civil society organisation for anything whistleblowing-related. Pištaljka functions not only as a non-governmental organisation but also as an independent media outlet advocating for whistleblowers' rights. Founded by two journalists, who were whistleblowers themselves, Pištaljka has, at its disposal, three reporters and four lawyers (above-and-beyond the editor-in-chief, editor and director). This means that the organisation has ten full-time staff members.

During my visit to Pištaljka in August 2024, I was surprised at the scope of their operation. Located in well-equipped offices on a central pedestrian-only street in Zemun, Belgrade, they have several of their own publications (a full wall shelf, to be precise). These publications primarily include whistleblowing guides and toolkits. It is important to note that Pištaljka receives grants from the United States Agency for International Development, Open Society, the United Nations Development Programme, the European Union, the Dutch Embassy in Serbia, the Norwegian Embassy in Serbia, and the Serbian Ministry of Culture and Information (Pištaljka, n.d.). Thus, having access to funding from several sources increases their capacity to engage in effective operations. Recently, Pištaljka released a whistleblowing music video on YouTube in collaboration with a band with a distinct Balkan sound (in a genre of music which is particularly popular in the region). It documents their regional tour advocating for whistleblowers' rights. That, in itself, presents a unique methodology for reaching the masses on issues concerning whistleblowers' rights.

It is precisely because of its success rate – having "defended more than 40 whistleblowers from retaliation and provided advice to more than 2,000 clients", large scope of operations, and unique methodology that Pištaljka "was part of the working group to draft the Serbian" LPW (Whistleblowing International Network, 2019b). Pištaljka has also engaged in the training of more than 1000 judges and more than 200 public prosecutors on whistleblowing, and

it has run a whistleblowing clinic at the Belgrade Law School since 2022 (Whistleblowing International Network, 2019b). Imagine a South Africa where whistleblowing-orientated non-governmental organisations work with the state to revise whistleblower protection legislation and train its judges on a better understanding of the legislation – this would, undoubtedly, produce favourable results, mainly because of the experience these non-governmental organisations have accrued through working with numerous whistleblowers.

Therefore, learning from organisations like Pištaljka would be invaluable to those seeking to improve South African whistleblower protection law. This is, however, not unprecedented. In June 2024, a South African delegation comprising representatives from The Whistleblower House, Corruption Watch, The Ethics Institute, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), the Public Service Commission, the Ministry of Justice of South Africa, the National Anti-Corruption Advisory Council, and the Office of the Public Protector, went to Serbia to learn about the practical application of the LPW. The delegation met with a judge at the High Court in Belgrade and Pištaljka at their offices. Interestingly, the South Africa delegation was made up of representatives of both non-governmental organisations and government institutions.

These forms of international cooperation and relations can have bountiful effects for those countries wishing to improve their whistleblowing legislation (and the implementation thereof, as the South African delegation set out to do). However, it must be emphasised that such endeavours are both expensive and logistically complex to execute. However, site visits can be of significant benefit to both civil society and government officials and institutions. For such international collaboration to be fully effective, these endeavours must occur regularly and would likely need to be state-subsidised.

Conclusion

International cooperation on issues regarding whistleblowing can produce positive outcomes for South Africa. As whistleblowing is a mechanism that can police unethical behaviour, international consultation can be used to address issues of corruption. It is undeniable that effective cooperation can be time-consuming, expensive, and logistically complex to execute, but dedicating resources to do so effectively will yield positive results for whistleblowers. The rewards would outweigh the costs if the South African government selects the correct individuals (those in actively involved civil society organisations and relevant government institutions). The correct personnel would learn from states with adequate whistleblower protection legislation and implementation thereof and be able to assist in the revision of South African whistleblower protection legislation (in an appropriate manner). Collaboration, however, would have to be focused explicitly on countries whose laws largely comply to international standards, as set out by *A Best Practice Guide for Whistleblowing Legislation*. When legislation and implementation are improved, the focus could shift to aiding other countries in Southern Africa, currently in the same predicament. Regular consultation with relevant global bodies (such as Transparency International and WIN) would also need to be conducted if South Africa wishes to transcend this predicament effectively.

However, we must accept that legislation forms but one piece of the puzzle. Of course, an adequately revised PDAA would be a step in the right direction for South Africa, and so would its adequate implementation. National collaborative efforts are also necessary, where various civil society organisations collaborate amongst each other and relevant state institutions collaborate with a collective of those civil society organisations. Much effort would be required to bring this to fruition, and so would much political will. After all, it becomes challenging to revise legislation that can hold wrongdoers accountable if the wrongdoers are in the top echelons of the state. Pessimism aside, South Africa needs to comply with the global standards for whistleblower protection and, evidently, international cooperation on the matter could yield a positive outcome.

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