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Revisiting Financial Services Sector Transparency through Whistleblowing: The Case of South Africa and Switzerland

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Abstract

The recent global financial crisis has demonstrated the ineffectiveness of traditional regulation in averting financial crime. Consequently the supervision of financial institutions has been increasingly re-evaluated and such endeavours have resulted in the reregulation of the sector in many jurisdictions. This article argues that, much as these strategies can be said to be laudable, until they emphasize engagement with the people who work in those institutions through making it possible for them to report corporate misconduct, these legislative paradigms will not avail much. As such, this article argues for the increased use of insiders through whistleblowing as a mechanism to support the exposure of illegal activities. By comparing the whistleblowing approaches adopted in South Africa and Switzerland, this article attempts to contribute to the standardization of approaches that can be used to enhance global financial sector transparency and minimize financial crime.

Keywords

Whistleblowing, financial services, transparency, financial crime

INTRODUCTION

In view of the intimate connections between the 2007–09 financial crisis, ineffective regulation and the scandals that preceded the crisis,[1] there have been

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1 See generally for a detailed analysis of the role of ineffective enforcement of financial markets regulation in the financial crisis, Majority and Minority Staff *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse* (13 April 2011, report before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs of the US Senate), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg57323/html/CHRG-112shrg57323.htm> (last accessed 29 November 2016); KT Jackson "The scandal beneath the financial crisis: Getting a view from a moral-cultural mental model" 33/2 *Harvard Journal of Law & Public Policy* (2010)

increasing demands for the re-evaluation and smarter coordination of the financial sector's governance, supervision and enforcement mechanisms, with a view to preventing recurrences.[2] Recognition that the financial fiascos cast doubt on the ability of codes of conduct, and traditional supervisory and enforcement strategies to insulate the global financial sector from failure, has led to calls for changes in current systems.[3] In essence, demands for a new architecture in the governance of the pilloried sector are founded on the critical need to re-instil the trust and credibility that has been eroded by, inter alia, lack of transparency[4] in the sector. Intertwined with human frailties, in particular untrammelled greed, excessive "group think" and "herd

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735; S Deakin "Corporate governance and financial crisis in the long run" (Centre for Business Research, University of Cambridge, working paper no 417), available at: <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp417.pdf> (last accessed 30 December 2016); J Winter "The financial crisis: Does good corporate governance matter and how to achieve it?" (DSF policy paper no 14, August 2011), available at: <http://www.dsf.nl/wp-content/uploads/2014/10/DSF-Policy-Paper-No-14-The-Financial-Crisis-Does-Good-Corporate-Governance-Matter-and-How-to-Achieve-it-Aug-2011.pdf> (last accessed 30 December 2016).

2 E Avgouleas *Governance of Global Financial Markets: The Law, the Economics, the Politics* (2012, Cambridge University Press); TCW Lin "The new financial industry" (2014) 65/3 *Alabama Law Review* 567; RB Ahdieh "The visible hand: Coordination functions of the regulatory state" (2010) 95 *Minnesota Law Review* 578; C Schwartz "G20 financial regulatory reforms and Australia" (2013) *RBA Bulletin* 77; M Kawai and ES Prasad *Financial Market Regulation and Reforms in Emerging Markets* (2011, Brookings Institution Press and Asian Development Bank Institute); E Botha and D Makina "Financial regulation and supervision: Theory and practice in South Africa" (2011) 10/11 *International Business & Economics Research Journal* 27; D Alford "Supervisory colleges: The global financial crisis and improving international supervisory coordination" (2010) 24 *Emory International Law Review* 57.

3 See S Perks and EE Smith "Employee perceptions regarding whistle blowing in the workplace: A South African perspective" (2008) 6/2 *SA Journal of Human Resource Management* 15; D Rossouw *Organization Ethics in Africa* (2nd ed, 2002, Oxford University Press); AE Hofmeister "Whistleblowing: A suitable instrument to improve public corporate governance?", available at: <http://www.sgvw.ch/wp-content/uploads/11_hofmeister.pdf> (last accessed 30 December 2016).

4 See for example M Bouvard, P Chaigneau and A de Motta "Transparency in the financial system: Rollover risk and crises" (Financial Markets Group discussion paper 700, February 2012), available at: <http://www.lse.ac.uk/fmg/workingpapers/discussionpapers/fmgdps/dp700.pdf> (last accessed 29 November 2016); E Engelen, I Ertürk, J Froud, S Johal, A Leaver, M Moran, A Nilsson and K Williams *After the Great Complacence: Financial Crisis and the Politics of Reform* (2011, Oxford University Press); A Hudson *The Law of Finance* (1st ed, 2009, Sweet and Maxwell) at 846; S Maijoor "Market transparency: Does it prevent crisis?" (European Securities and Markets Authority FMA Supervision Conference, Vienna, 29 September 2011), available at: <https://www.esma.europa.eu/sites/default/files/library/2015/11/2011_322.pdf> (last accessed 30 December 2016); Transparency International "The role of transparency in financial services reform" (presentation to Group of Experts on Banking Issues, Brussels, 1 June 2011), available at: <http://www.transparencyinternational.eu/wp-content/uploads/2012/08/2011-07-08-GEBI_position_paper_final_080711.pdf> (last accessed 29 November 2016).

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behaviour",[5] widespread lack of transparency has engendered a fertile ground upon which scandals have flourished.[6] Essentially therefore, post-crisis diagnostics have arguably cascaded into a governance discussion, in which the need for transparency and the importance of ethical and moral aspects of economic activities within the financial services have come to the fore.[7] The understanding is that:

> "Financial markets, when left to their own devices, have proven fertile grounds for disastrously bad behavior and poor decision making. Banks take on extreme leverage to fuel speculative and often foolhardy bets involving poorly understood investments; conflicts of interests can skew incentives such that analysts insufficiently assess and report risk; con men can develop fraudulent schemes to cheat investors out of their savings; and executives are empowered to act in their own short-term interest instead of the interests of the firms for which they work and shareholders."[8]

On that basis, regulators have widely embarked on extensive reformulation of national regulatory approaches and structures in the hope of enhancing financial stability and averting fraudulent activities.[9]

While such legislative interventions cannot be questioned, this article contends that, for so long as there is "jurisdictional dissonance"[10] between the regulators and the financial sector, that is to say, for so long as the regulatory

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5 RM Lastra and G Wood "The crisis of 2007–09: Nature, causes, and reactions" (2010) 13/3 *Journal of International Economic Law* 531 at 543.

6 TM Dworkin "US whistleblowing: A decade of progress?" in DB Lewis (ed) *A Global Approach to Public Interest Disclosure: What Can we Learn from Existing Whistleblowing Legislation and Research?* (2010, Edward Elgar Publishing) 36.

7 See for instance L Rohde "Lessons from the last financial crisis and the future role of institutional investors" (2011) 1 *OECD Journal: Financial Market Trends* 1; AL Nazareth and ME Tahyar "Transparency and confidentiality in the post financial crisis world: Where to strike the balance?" (2011) 1 *Harvard Business Law Review* 146; AG Haldane "Rethinking the financial network" (speech at the Financial Student Association, Amsterdam, 28 April 2009), available at: <http://www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2009/speech386.pdf> (last accessed 29 November 2016); G Feuerberg "Greed, lack of transparency caused financial crisis, says Greenberger" (6 November 2012) *Epoch Times*; Transparency International "Greed, reckless behaviour and the financial crisis: A timeline" (18 October 2012), available at: <http://www.transparency.org/news/feature/greed_reckless_behaviour_and_the_financial_crisis_a_timeline> (last accessed 29 November 2016).

8 C Brummer *Soft Law and Global Financial System: Rule Making in the 21st Century* (2012, Cambridge University Press) at 1. Also R Kuttner *Financial Regulation after the Fall* (Demos, The Future of Regulation Report Series, 2009), available at: <https://www.yumpu.com/en/document/view/25236323/kuttner-robert-quotfinancial-regulation-after-the-fallquot-damos> (last accessed 30 December 2016).

9 See for instance Hofmeister "Whistleblowing", above at note 3.

10 Lin "The new financial industry", above at note 2 at 591.

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agencies are too remote from the firms they supervise,[11] these legislative paradigms will not avail much. That cynical observation is premised on the notion that, unless the substance of the reforms is reinforced by an aggressive culture that engages with, inter alia, the insiders who have better and greater access to the operations of the financial sector, such measures will not attain the expected objectives.[12] "The jurisdictional dissonance between the regulators and the regulated has encouraged financial players to engage in games of regulatory arbitrage within and across nations, by skirting and leaping ahead of existing law, and by moving between shadow finance and regulated finance. The jurisdictional gaps and gulfs among regulators often serve as fertile ground for financial innovation and malfeasance."[13]

Without the active participation of insiders in these intricately formulated corporations, where engrained greed is considered to be "the engine that propels a market economy",[14] outsiders seeking to understand what goes on

11 Before the financial crisis, reliance on risk-based regulation entailed the use of meta-regulation, where firms were given wider discretion to act according to their own interests. The rationale for this approach was an assumption that a "command and control" environment would be counterproductive, seeing as firms were better placed and able to recognize those systems and controls that were required to be put in place, established or adapted. Ultimately, this had the unintended consequence of putting regulators out of touch with financial market issues. A major criticism of involving the regulated in developing policies aimed at meeting the regulators' objectives is that it amounted to a renunciation of the regulatory agencies' enforcement duties. See for instance: F Akinbami "Is meta-regulation all it's cracked up to be? The case of UK financial regulation" (2012) *Journal of Banking Regulation* 1; C McCarthy "Risk-based regulation: The FSA's experience" (speech delivered at ASIC Summer School, Sydney, 13 February 2006), available at: <http://www.fsa.gov.uk/library/communication/speeches/2006/0213_cm.shtml> (last accessed 29 November 2016); Avgouleas *Governance*, above at note 2 at xxii and following and 476; European Commission "Corporate governance in financial institutions: Lessons to be drawn from the current financial crisis, best practices" (Commission staff working document, 2 June 2010), available at: <http://ec.europa.eu/internal_market/company/docs/modern/sec2010_669_en.pdf> (last accessed 29 November 2016). See also: A Johnson "Banking & finance: Challenges of compliance in Nigeria" (August 2008), available at: <http://www.financialnigeria.com/development/developmentreport_category_item_detailp.aspx?item=254&categoryid=3> (last accessed 2 July 2014); P Tucker "Regulatory reform, stability, and central banking" (Hutchins Center on Fiscal and Monetary Policy working paper, 16 January 2014), available at: <http://www.brookings.edu/~/media/research/files/papers/2014/01/16%20regulatory%20reform%20stability%20central%20banking%20tucker/16%20regulatory%20reform%20stability%20central%20banking%20tucker.pdf> (last accessed 29 November 2016).

12 See generally Hofmeister "Whistleblowing", above at note 3.

13 Lin "The new financial industry" above at note 2 at 591. See also: V Fleischer "Regulatory arbitrage" (2010) 89 *Texas Law Review* 227; EF Greene and EL Broomfield "Promoting risk mitigation, not migration: A comparative analysis of shadow banking reforms by the FSB, USA and EU" (2013) 8/6 *Capital Markets Law Journal* 14.

14 Judge Easterbrook in *Wilkow v Forbes, Inc* 241 F.3d 552 at 557 (7th cir 2001). See also J Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2005, Free Press).

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in such organizations would be faced with a substantial challenge.[15] Compounding that challenge is the fact that exposing financial crime through traditional surveillance and investigative techniques is generally a resource intensive[16] pursuit and often leads to cases being discontinued or dropped for lack of evidence.[17]

Given the complexities that characterize and impede the capacity of most regulatory and supervisory agencies to execute their mandate effectively,[18] it is fair to say that reliance on other strategies, including supervisory mechanisms that engender compliance, would be expedient in deterring or mitigating the magnitude of the hidden activities and debacles.[19] On account of the fact that the financial scandals were largely a consequence of greed and lack of ethics, the assumption is that transparency would assist in promoting the interests of an informed financial services market.[20] Fostering

15 DV Jernberg "Whistle-blower programmes: The counsel-assisted option" (2004) 25/148 *Corporate Board* 7; TD Miethe *Whistleblowing at Work: Tough Choices in Exposing Fraud, Waste, and Abuse on the Job* (1998, Westview Press); JP Near and MP Miceli "Wrongdoing, whistle-blowing, and retaliation in the US government: What have researchers learned from the Merit Systems Protection Board (MSPB) survey results" (2008) 28 *Review of Public Personnel Administration* 263.

16 See A Carvajal and J Elliott "The challenge of enforcement in securities markets: Mission impossible?" (International Monetary Fund working paper WP/09/168, August 2009), available at: <http://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf> (last accessed 30 November 2016); Lin "The new financial industry", above at note 2 at 567; M Maremont and D Solomon "Behind SEC's failings: Caution, tight budget, '90s exuberance", available at: <http://www.wsj.com/articles/SB10722351387078190O> (last accessed 29 December 2016); D Leonard "Outmanned, outgunned, and on a roll" (23 April 2012) *Business Week* at 60.

17 See for instance I Carr and D Lewis "Combating corruption through employment law and whistleblower protection" (2010) 39/1 *Industrial Law Journal* 52.

18 See generally JG Lambsdorff *The Institutional Economics of Corruption and Reform. Theory, Evidence and Policy* (2007, Cambridge University Press).

19 This assertion is premised on the understanding that financial crime is often accompanied by warning signs that are known to potential whistleblowers who could alert the relevant authorities to the wrongdoing. See generally Securities Enforcement Committee "SEC adopts rules to establish whistleblower program" (25 May 2011), available at: <https://www.sec.gov/news/press/2011/2011-116.htm> (last accessed 30 December 2016); S Lyon "Understanding the new SEC whistle blower program: Breaking down the largest whistleblowing rewards in US history" (27 September 2012), available at: <https://www.nerdwallet.com/blog/investing/understanding-sec-whistleblower-program-breaking-largest-whistleblowing-rewards-history/> (last accessed 30 December 2016).

20 Hofmeister "Whistleblowing?" above at note 3; P Latimer "Whistleblowing in the financial services sector" (2002) 21 *University of Tasmania Law Review* 39. The Organisation for Economic Co-operation and Development (OECD) defines transparency as "an environment in which the objectives of policy, its legal, institutional, and economic framework, policy decisions and their rationale, data and information related to monetary and financial policies, and the terms of agencies' accountability, are provided to the public in a comprehensible, accessible, and timely manner." See OECD "Glossary of statistical terms", available at: <http://stats.oecd.org/glossary/detail.asp?ID=4474> (last accessed 30 November 2016).

transparency in the financial sector would not only disclose an unfavourable financial assessment, thereby assisting the investor in making informed decisions,[21] but also provide an invaluable surveillance tool, a means of protecting investors as well as promoting efficient and fair markets.[22]

This article contributes to that subject. By building on the widely recognized fact that whistleblowing is an essential element of the transparency agenda[23] and that it is a core element of a well-functioning risk management system,[24] it seeks to contribute to the literature on global economic governance and financial transparency. It attempts to accomplish that objective by way of a comparative examination of the degree to which Switzerland and South Africa have enhanced the transformative role of transparency through whistleblowing. This is a crucial quest, especially in view of the fact that the recent financial crisis highlighted how internationalized the financial sector has become and demonstrated how, in the absence of harmonized policies and standards, the perils of systemic risk and cross border contagion can easily spread through the global village's fault lines and vulnerabilities.[25] It has been shown that "market participants take advantage of gaps in the financial system; they also take advantage of uncoordinated regulations by engaging in highly profitable and dangerous games of arbitrage and evasion".[26]

It is therefore hoped that a comparison of this nature, albeit limited to two jurisdictions, can be a crucial tool in minimizing counterpart risk by bringing about some policy coherence through an alignment of standards and norms

21 See generally MA Young *Banking Secrecy and Offshore Financial Centres: Money Laundering and Offshore Banking* (2013, Routledge) at 139; YY Chong *Investment Risk Management* (2004, John Wiley & Sons) at 54.

22 See International Organization of Securities Commissions "Objectives and principles of securities regulation", para 4, available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf> (last accessed 30 November 2016).

23 MP Miceli, JP Near and TM Dworkin *Whistle-blowing in Organizations* (2008, Routledge), Introduction; M Kaptein "From inaction to external whistleblowing: The influence of the ethical culture of organizations on employee responses to observed wrongdoing" (2011) 98/3 *Journal of Business Ethics* 513.

24 See generally D Stewart *Organization Ethics* (1996, McGraw-Hill Companies, Inc); S Perks and EE Smith "Employee perceptions regarding whistle-blowing in the workplace: A South African perspective" (2008) 6/2 *South African Journal of Human Rights Management* 15.

25 See International Monetary Fund (IMF) "Understanding financial interconnectedness" (4 October 2010), available at: <http://www.imf.org/external/np/pp/eng/2010/100410.pdf> (last accessed 30 November 2016); DZK Árvai and İ Ötker-Robe "Financial interlinkages and financial contagion within Europe" (IMF working paper WP/09/6, 2009); J Chan-Lau, M Espinosa, K Giesecke and J Solé "Assessing the systemic implications of financial linkages" in IMF *Global Financial Stability Report* (April 2009). See generally RG Rajan *Fault Lines: How Hidden Fractures Still Threaten The World Economy* (2010, Princeton University Press); CM Reinhart and KS Rogoff *This Time is Different: Eight Centuries of Financial Folly* (2009, Princeton University Press); LA Bebchuk and H Spamann "Regulating bankers' pay" (2010) 98 *Georgetown Law Journal* 247.

26 Lin "The new financial industry", above at note 2 at 606. See also CK Whitehead "Reframing financial regulation" (2010) *Boston University Law Review* 1.

in the governance of the financial sector.[27] A comparison of this nature is also crucial having regard to the accepted fact that regulatory and standard convergence across jurisdictions is regarded as a precondition for financial integration.[28] Likewise, the linkages between South Africa and Switzerland[29] suggest that they have a stake in the soundness and stability of each other's financial systems. As such, the predictability of finance-related standards and frameworks between these countries could be enhanced by a comprehensive understanding and convergence of their governing laws.

Further, the choice of South Africa as a subject of this discussion is based on pragmatic considerations. Of late there have been increased calls there for transparency, accountability and good governance in both public and private institutions through, in particular, the exposure of illicit conduct by individuals.[30] Switzerland, on the other hand, presents an interesting contrast[31] owing, inter alia, to the controversy surrounding its approach, steeped in a long history of financial services secrecy.[32] To start with, not only does

27 See for instance: SA Beaulier et al "Knowledge, economics, and coordination: Understanding Hayek's legal theory" (2005) 1 *New York University Journal of Law & Liberty* 209 at 211; J Freeman and J Rossi "Agency coordination in shared regulatory space" (2010) 1 *Harvard Law Review* 1131; CK Whitehead "Destructive coordination" (2011) 96 *Cornell Law Review* 323.

28 C Jordan and G Majnoni "Financial regulatory harmonization and the globalization of finance" (October 2002, World Bank), available at: <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2002/11/22/000094946_02110804063983/Rendered/PDF/multi0page.pdf> (last accessed 30 November 2016).

29 For instance, over 36.5 billion South African Rand is held in the Swiss banking system; see Swiss National Bank "Banks in Switzerland: 2013 edition", available at: <http://www.snb.ch/en/mmr/reference/pre_20140619_2/source/pre_20140619_2.en.pdf> (last accessed 30 December 2016). Further, according to the Federal Department of Foreign Affairs, South Africa is Switzerland's most important trading partner on the African continent; see "Bilateral relations Switzerland - South Africa", available at: <http://www.eda.admin.ch/eda/en/home/reps/afri/vzaf/bilsaf.html> (last accessed 30 November 2016). See also "Swiss investment in SA multiplies" (5 September 2013) *SouthAfrica.info*, available at: <http://www.southafrica.info/news/international/switzerland-050913.htm#.U6m0mLA6mUl> (last accessed 30 November 2016). See also G Kreis *Switzerland and South Africa 1948–1994: Final Report of the NFP 42+ Commissioned by the Swiss Federal Council* (2007, Peter Lang).

30 See for instance L Steyn "SA banks worried about costs of economic crime" (31 January 2012) *Mail & Guardian*; G Hosken "World fraud champs" (19 February 2014) *Times Live*; PricewaterhouseCoopers "Confronting the changing face of economic crime" (PwC global economic crime survey, February 2014), available at: <http://www.pwc.co.za/en_ZA/za/assets/pdf/global-economic-crime-survey-2014.pdf> (last accessed 30 November 2016); "SA companies top fraud survey" (19 February 2014) *IOL*, available at: <http://www.iol.co.za/business/news/sa-companies-top-fraud-survey-1.1649572#.U6cEjDeKDmI> (last accessed 30 November 2016).

31 See generally M Giovanoli "Switzerland" in R Cranston (ed) *European Banking Law: The Banker-Customer Relationship* (1993, Lloyds of London Press) 183 at 185.

32 See for example, HB Meier, JE Marthinsen and PA Gantenbein *Swiss Finance: Capital Markets, Banking, and the Swiss Value Chain* (2012, John Wiley & Sons); R Palan, R Murphy and C Chavagneux *Tax Havens: How Globalization Really Works* (2010, Cornell

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Switzerland manage approximately one quarter of total global offshore assets, it has also been depicted as the "old grand-daddy of tax havens".[33] For a long time and until recently, it has managed to fend off international criticism and pressure to dismantle the existing system[34] and has, instead, taken refuge in institutionalized management systems as a means of deterring financial crime.[35] The tide has now shifted, globalization of the financial sector has brought about macroeconomic costs, including the loss of national policy making independence,[36] hence the urgent need for cohesion between global whistleblowing standards and Swiss mechanisms, with a view to creating an integrated system of standards and codes of financial sector good practice.

This article does not purport to be a comprehensive analysis of the various laws that govern disclosure of illegitimate behaviour; rather it seeks to provide an overview of the legislative approaches that govern disclosure of illicit conduct and the extent to which the two countries have sought to attain transparency in the financial sector.

RECOUNTING WHISTLEBLOWING

While it lacks an exact and universal definition,[37] whistleblowing has been broadly recognized to entail a current or former employee or contractor of an organization disclosing a perceived illicit or immoral practice of that

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University Press); D Fasnacht *Open Innovation in the Financial Services: Growing Through Openness, Flexibility and Customer Integration* (2009, Springer); G Stessens *Money Laundering: A New International Law Enforcement Model* (2000, Cambridge University Press); BN Hanshaw *The World Through Our Eyes: A Collaboration of Essays by International Students* (2003, iUniverse).

33 KH Finkelstein *The Tax Haven Guide Book* (1996, Big Island Media Corp) at 6.

34 See CH Church and RC Head *A Concise History of Switzerland* (2013, Cambridge University Press); BFJ Collardi *Private Banking: Building a Culture of Excellence* (2012, John Wiley & Sons); H Barber *Secrets of Swiss Banking: An Owners Manual to Quietly Building a Fortune* (2008, John Wiley & Sons). For instance, at the G20 summit in London on 20 April 2009, countries such as the United Kingdom, France, the USA and Germany outlined their support for laws aimed at the modification of banking secrecy laws; they have since implemented structures that support whistleblowing. In this regard, see generally CP Rettig and K Keneally "The last, best chance to disclose foreign financial accounts and assets: The 2011 offshore voluntary disclosure program and beyond!" (2011) *Journal of Tax Practice & Procedure* 33. See also BG Cantley "The UBS case: The US attack on Swiss banking sovereignty" (2007) *Brigham Young University International Law & Management Review* 1.

35 See Hofmeister "Whistleblowing", above at note 3.

36 See generally JA Hanson, P Honohan and G Majnoni *Globalization and National Financial Systems* (2003, World Bank Publications) at 2.

37 See for instance: D Lewis and T Uys "Protecting whistleblowers at work: A comparison of the impact of British and South African legislation" (2007) 49/3 *Managerial Law* 76; M Kaptein "From inaction to external whistleblowing: The influence of the ethical culture of organizations on employee responses to observed wrongdoing" (2011) 98/3 *Journal of Business Ethics* 513.

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organization to authorities who are tasked with taking appropriate action.[38] It may also emanate through an external source, a channel outside the organization such as a law enforcement agency or the government.[39] The motive is generally to avert financial, physical or psychological harm.[40]

Although it is not the purpose of this article to discuss the merits of the concept, it is worth pointing out that whistleblowing has been accepted as a tool for maintaining and enhancing the quality of governance and constitutes an essential element of a well-functioning risk management system.[41] More specifically, "whistle-blowers play a crucial role in organisational regulatory unit relationships - providing otherwise unobtainable information, enhancing the regulatory units' claims to defence of public interest and detracting from any organisation's claims of extreme or biased regulatory activity".[42]

What makes whistleblowing critical are the concerns associated with silence in the face of wrongdoing. This environment is clearly prejudicial as it results in, among other adverse consequences, numbing the consciences of and discouraging decent individuals from questioning what they clearly consider to be inappropriate conduct. Furthermore, selfishness and self-interestedness become the norm as employees shift their focus to their own short term interests and not the mutual interests of the workforce and the organization.[43]

Likewise, it has been established that the amount of money that organizations have saved and the scale of potential prejudice from which they have

38 JP Near and MP Miceli "Organizational dissidence: The case of whistle-blowing" (1985) 4/1 *Journal of Business Ethics* 1; PA French *Ethics in Government* (1993, Prentice Hall); Lewis and Uys, ibid; P Gottschalk *White-Collar Crime: Detection, Prevention and Strategy in Business Enterprises* (2010, Universal-Publishers) at 104.

39 S Dasgupta and A Kesharwan "Whistleblowing: A survey of literature" (2010) 9/4 *Journal of Corporate Governance* 57; MP Miceli, JP Near and TM Dworkin *Whistle-Blowing in Organizations* (2013, Psychology Press), chap 1; TM Dworkin and MS Baucus "Internal vs external whistleblowers: A comparison of whistleblowing processes" (1998) 17/12 *Journal of Business Ethics* 1281.

40 M Davis "Some paradoxes of whistleblowing" (1996) 15/1 *Business and Professional Ethics Journal* 3.

41 See for instance: Gottschalk *White-Collar Crime*, above at note 38; Lewis and Uys "Protecting whistleblowers", above at note 37; JS Bowman and DC Menzel *Teaching Ethics and Values in Public Administration Programs: Innovations, Strategies, and Issues* (1998, SUNY Press) 198.

42 DG Bromley "Linking social structure and the exit process in religious organisations: Defectors, whistle-blowers and apostates" (1998) 37/1 *Journal for the Scientific Study of Religion* 145 at 150. See also for instance: Lewis and Uys, ibid; Kaptein "From inaction", above at note 37; Near and Miceli "Organizational dissidence", above at note 38; French *Ethics in Government*, above at note 38; Gottschalk *White-Collar Crime*, id at 104; Dasgupta and Kesharwan "Whistleblowing", above at note 39; Miceli, Near and Dworkin *Whistle-Blowing in Organizations*, above at note 39; Dworkin and Baucus "Internal vs external", above at note 39; M Davis "Some paradoxes of whistleblowing" (1996) 15/1 *Business and Professional Ethics Journal* 3.

43 JP Near and MP Miceli "Whistle-blowing: Myth and reality" (1996) 22/3 *Journal of Management* 507.

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been safeguarded through whistleblowing can never be underestimated.[44] For instance, a study undertaken in over 500 European companies demonstrated that those companies suffered losses of more than EUR 3.6 billion through fraud[45] and scholars argue that corporations suffer more fraud occasioned by insiders than by external persons.[46] The utility of whistleblowing is reinforced further by the fact that acquiring and disclosing corporate insider information improves the functionality of the markets, in that, when the markets have adequate information, they are better equipped to allocate resources to the sectors where those resources are required.[47] On the contrary, the absence of financial transparency may reverberate into the macroeconomic systems of a country. For instance, it could be an effective tool in boosting illicit capital flight from developing countries.[48] Note should nevertheless be taken of the fact that, though commendable and popular, tipping about illicit conduct is in some quarters regarded as unethical and condemnable, and is symptomatic of lack of loyalty to an organization.[49]

THE LEGISLATIVE MECHANISMS FOR WHISTLEBLOWING IN SOUTH AFRICA AND SWITZERLAND

The perception that whistleblowers are unprincipled individuals acts as a powerful vehicle that disincentivizes those who would otherwise want to report corporate wrongdoing. Ordinarily, whistleblowers will only come forward when they have assurance that their allegations will be investigated and actioned, and that they will suffer no retaliation from the individuals whose conduct has been reported. Against this backdrop, legislation has been formulated not only to embolden employees to speak out against wrongdoing, but also to safeguard the whistleblowers from retribution.[50] This article now attempts to examine the relevant Swiss and South African legislative frameworks that seek to encourage tipping, as well as providing protection for those who do so.

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44 National Whistleblower Center "Whistleblowers still the best at detecting fraud", available at: <http://www.whistleblowers.org/index.php?option=com_content&task=view&id=102> (last accessed 30 November 2016). See also PwC "Confronting the changing face", above at note 30.

45 J Zhuang, S Thomas and DL Miller "Examining culture's effect on whistle-blowing and peer reporting" (2005) 44/4 *Business & Society* 462.

46 C Shaw "Fighting fraud: A new European study suggests fraud is wide-spread" (June 2002) *CMA Magazine* 53.

47 See generally GC Rapp "Beyond protection: Invigorating incentives for Sarbanes-Oxley corporate and securities fraud whistleblowers" (2007) 87 *Boston University Law Review* 91.

48 Q Reed and A Fontana "Corruption and illicit financial flows: The limits and possibilities of current approaches" (2011) *U4 Brief* 1.

49 S Rachagan and K Kuppusamy "Encouraging whistle blowing to improve corporate governance? A Malaysian initiative" (2013) 115/2 *Journal of Business Ethics* 367.

50 AJ Brown (ed) *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (2008, ANU E Press).

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The protection of whistleblowing in the South African context hinges on the Protected Disclosures Act 26 of 2000 (PDA).[51] Not only does this piece of legislation provide procedures that a private or public sector employee can follow when making a disclosure regarding improprieties by his or her employer, sections 2 and 3 also shield such an employee "from being subjected to an occupational detriment on account of having made a protected disclosure". Equally noteworthy is the fact that this act works retrospectively: protected disclosure extends to issues that occurred before its enactment. The protection accorded by this statute is reinforced by remedies that are made available to the employee in the event of any prejudice or occupational detriment triggered by their disclosure.[52] For clarity, section 1 of the PDA defines disclosure to encompass:

> "[D]isclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

51 It should be noted that this article is confined to the regulation of whistleblowing in the private sector; as such it does not consider other conventions and acts that regulate whistleblowing in the public sector, such as sec 159 of the Companies Act 2008, the Reporting of Public Entities Act 93 of 1992, the Corruption Act 94 of 1992, the Public Services Act 103 of 1994 and the Audit Act 122 of 1992. In addition, South Africa is a signatory to and has ratified a number of international agreements in which it has agreed to adopt whistleblowing in a bid to fight corruption and foster accountability and transparency in the management of public affairs and socio-economic development on the continent. These include the African Union Convention on Preventing and Combating Corruption, 2003, the OECD Convention on combating Bribery of Foreign Public Officials in International Business Transactions, as well as the Southern African Development Community Protocol against Corruption.

52 Sec 4(1) provides: "Any employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may - (a) approach any court having jurisdiction, including the Labour Court … for appropriate relief; or (b) pursue any other process allowed or prescribed by any law." Further, sec 4(2) provides: "For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court - (a) any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act … (b) any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice." Sec 4(3) further states: "Any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made that disclosure, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of state, to another organ of state." And, according to sec 4(4): "The terms and conditions of employment of a person transferred in terms of subsection (2) may not, without his or her written consent, be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer."

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(a) That a criminal offence has been committed, is being committed or is likely to be committed;
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) that the health or safety of an individual has been, is being or is likely to be endangered;
(e) that the environment has been, is being or is likely to be damaged;
(f) …
(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed."

Furthermore, supplementary protection in the private sector is provided under other legislation governing economic activities, such as the Investigation into Serious Economic Offences Act 117 of 1991, under which the public can report suspected economic offences to the Investigating Directorate: Serious Economic Offences. Intrinsically connected to the whistleblowing framework are values embedded in the South African Constitution, particularly section 16, which provides for freedom of expression, and the right to receive and impart information and ideas. These are said to be related to the constitutional objective of creating a transparent and accountable South African society.[53] In addition to that framework, there are private organizations, such as Whistle Blowers - Independent Whistleblowing Service Whistle Blowers (Pty) Ltd, an independent company that provides an alternative channel through which employees may anonymously report fraud and other allegations of impropriety in the workplace.[54]

By contrast, Switzerland boasts no such elaborate structures governing whistleblowing or protecting whistleblowers. Instead, any semblance of whistleblowing is couched in very broad and vague corporate governance rules, the overall import of which is a requirement that the board of directors takes appropriate measures to ensure the organization's compliance with the law,[55] without specifically calling for a whistleblowing or whistleblower protection scheme.[56]

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53 See generally P Martin "The status of whistleblowing in South Africa: Taking stock" (June 2010), available at: <http://www.advocacyaid.com/images/stories/rrdownloads/ODAC_Whistleblowing_Report.pdf> (last accessed 30 November 2016); G Dehn and R Calland *Whistleblowing Around the World: Law, Culture & Practice* (2004, Public Concern at Work).

54 For more information, visit Whistle Blowers at: <http://www.whistleblowing.co.za/> (last accessed 30 November 2016).

55 See for instance the Swiss Code of Obligations, arts 716(2) and 717(1). For a discussion of duties see: D Campbell and C Campbell *International Liability of Corporate Directors* (2nd ed, 2013, Juris Publications); AM Garbarski *La Responsabilité Civile et Pénale des Organes Dirigeants de Sociétés Anonymes* [Civil and criminal liability of the governing bodies of public limited companies] (2006, Schulthess Juristische Media Juridiques SA) 135.

56 See generally Homburger "Whistleblowing systems under data protection law" (9 January 2008), available at: <http://www.homburger.ch/fileadmin/publications/WSDAPROL_01.pdf> (last accessed 30 November 2016).

Under article 321a of the Swiss Code of Obligations, employees are obliged to protect their employer's legitimate interests. This common obligation automatically requires an employee to observe business secrets and the termination of employment does not extinguish the prohibition. As such, employees are bound by specific confidentiality covenants that hinder them from disclosing confidential organizational information.[57] Neither the labour laws nor the Code of Obligations define what is classified as confidential information and it is up to the courts to determine whether or not the information in issue could be regarded as protected. However, such information has been regarded as that, which "(i) is known only to a limited group of persons, (ii) is not publicly available and cannot be retrieved by general research, (iii) with regard to which the employer has a legitimate interest in keeping it confidential and (iv) with regard to which a third party can easily recognize that the employer wants to keep it confidential".[58]

This implied duty of silence differs strikingly from South Africa's PDA, in that under the PDA any contract that specifies that an employee will not disclose illegal or incorrect acts or information is void.

Specifically within the Swiss financial sector, article 47 of the Banking Act and article 273 of the Penal Code form the foundation upon which customer confidentiality is premised.[59] Such protection of secrecy is supplemented by additional protections under the Swiss Constitution, the Swiss Civil Code and the Swiss Code of Obligations.[60] More particularly, article 47 of the Swiss Banking Act demonstrates how any possibility of whistleblowing is likely to be suppressed. It creates a criminal penal regime that forbids bank officers such as employees and agents from violating the professional relationship of confidence between bankers and clients.[61] More specifically, article 47 states:

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57 See WL Keller and TJ Darby *International Labor and Employment Laws*, vol IIA J (3rd ed, 2008, Darby).

58 Ueli Sommer, Walder Wyss & Partners Ltd "Switzerland" at 42–48, available at: <http://www.walderwyss.com/publications/973.pdf> (last accessed 30 November 2016).

59 PC Honegger "Swiss banking secrecy" (1990) *Butterworths Journal of International Banking and Financial Law* 334; M Bauen and N Rouillller *Swiss Banking: An Introduction for Bank Customers and their Advisors* (2013, Schulthess Juristische Medien AG); B Guldimann *Inside Swiss Banking* (2010, Beat Guldimann).

60 See M Moser "Switzerland: New exceptions to bank secrecy laws aimed at money laundering and organized crime" (1995) 27 *Case Western Reserve Journal of International Law* 324.

61 An apt illustration of the ambit of art 47 is made by the conviction of Rudolf Elmer, a Swiss ex-banker, for giving data to WikiLeaks. See "Convicted whistleblower banker arrested on new charges" (20 January 2011) *France 24*, available at: <http://www.france24.com/en/20110119-whistleblower-swiss-banker-arrested-new-charges-after-sentencing-elmer-wikileaks/#./?&_suid=140775600394401884355464697095> (last accessed 30 November 2016). Further, see "Swiss bank secrecy: A whistleblower's woes" (19 July 2014) *The Economist*, available at: <http://www.economist.com/blogs/schumpeter/2014/07/$swiss-bank-secrecy> (last accessed 30 December 2016). See also V Oberti and K Laske "A major scandal brews after Spain arrests HSBC whistleblower Falciani" (24 July 2012) *Mediapart*, available at: <http://www.mediapart.fr/journal/international/240712/major-

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> "Whoever discloses a secret which has been confided to him or of which he has become aware in his capacity as a member of a governing body, employee, agent, liquidator or commissioners of a bank, as a banking Commission supervisor, as a member of a governing body or employee of recognized auditors, or whoever attempts to induce such a breach of professional secrecy, shall be liable to a term of imprisonment or a fine…"

Related to the proscription against disclosure of bank secrecy is article 43 of the Swiss Stock Exchange Act of 1995 (SESTA), which criminalizes breach of stock market secrecy and provides:

> "Whoever
> (a) discloses a secret which has been confided to him in his capacity as a member of a governing body, employee, agent, liquidator of a stock exchange or a securities dealer, or as a member of a governing body or employee of recognized auditors, or of which he has become aware in his official capacity, or
> (b) attempts to induce such a breach of professional secrecy
> shall be liable to imprisonment or a fine."

Not only does this proscription capture both intentional and negligent disclosures of a customer's financial information,[62] it also empowers the Swiss government to prosecute such violations without the injured party having filed a complaint.[63] The import of article 47 is therefore to "punish disclosures that occur due to a lack of appreciation of the notion of secrecy"[64] and serves to protect such secrecy from all forms of intrusion.[65]

Likewise, any disclosure of confidential information could trigger liability under article 273 of the Swiss Criminal Code. By virtue of the fact that banking information fits into the category of business secrets,[66] its disclosure to a

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scandal-brews-after-spain-arrests-hsbc-whistleblower-falciani> (last accessed 30 November 2016).

62 Loi sur les Banques [Banking Act] 8 November 1934, RS 952.0, art 47; P Nobel *Swiss Financial Law in the International Context* (2002, Stämpfli); P Nobel *Swiss Financial Law and International Standards* (2002, Kluwer Law International).

63 See L Krauskopf "Comments on Switzerland's insider trading, money laundering, and banking secrecy laws" (1991) 9 *International Tax & Business Law* 277.

64 PS Grassi and D Calvarese "The duty of confidentiality of banks in Switzerland: Where it stands and where it goes. Recent developments and experience the Swiss assistance to, and cooperation with the Italian authorities in the investigation of corruption among civil servants in Italy (the 'clean hands' investigation): How much is too much?" (1995) 7 *Pace International Law Review* 329 at 340.

65 Krauskopf "Comments on Switzerland's insider trading", above at note 63.

66 The Swiss Federal Supreme Court has interpreted business secrets as encompassing "any data of economic life, provided there is a legitimate interest in keeping the secret … [and] the term may also include relations and transactions of private economy concerning property and income": id at 293.

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private or official foreign organization or its agents amounts to a criminal offence that attracts a fine of up to CHF 250,000 or imprisonment of up to three years.[67] Furthermore and as if there were not enough to dash all hope of whistleblowing, article 162 of the Swiss Criminal Code safeguards private information from being divulged by those who are legally or contractually obliged to maintain its confidentiality.[68] Captured in this category, as with article 273, are bankers, the difference being that article 162 is aimed at protecting the interests of private parties.[69]

Contrary to the strict Swiss proscription against disclosure, the South African common law, while recognizing traditional bank / customer confidentiality[70] the violation of which amounts to breach of an implied contractual obligation,[71] nonetheless provides for limited circumstances where whistleblowing can be an exception to the common law duty of secrecy.

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67 Swiss Criminal Code, 21 December 1937, RS 311.0, art 273.

68 UM Lauchli "Swiss bank secrecy with comparative aspects to the American approach" (1998) 42 *St Louis University Law Journal* 865.

69 See for instance *Alfadda v Fenn* 149 FRD 28 at 32 (SDNY 1993). It should be noted that the party who owns information in the bank's custody has the right to waive their right to privacy and allow disclosure. It is not the financial institution but the customer who owns the secret, so only the injured party can bring an action for the violation of art 162. See generally Krauskopf "Comments on Switzerland's insider trading", above at note 63; L Frei "Swiss secrecy laws and obtaining evidence from Switzerland" (1984) 18/4 *The International Lawyer* 789.

70 This implied duty of the banker-customer contract is also protected under certain statutes within South Africa's financial sector. See for instance, sec 33(1)(a) of the South African Reserve Bank Act No 90 of 1989, which, inter alia, prohibits disclosure of information regarding the affairs of the bank, shareholders or customers unless compelled by law. Further, sec 14 of the Constitution of the Republic of South Africa provides for the right to personal privacy. Likewise, the Protection of Personal Information Act no 4 of 2013 promotes the protection of personal information being processed by public and private institutions, such as banks, by imposing a number of restrictions, conditions and safeguards relating to the use of such information. Under sec 8 of the Inspection of Financial Institutions Act, an inspector carrying out an inspection of a bank is obliged to preserve confidentiality unless the court, the law or the nature of an inspection compels disclosure. Banker-customer liability will be based on breach of contract; see for instance: *Legogote Development Co (Pty) v Delta Trust and Finance Co* (1970) 1 SA 584; *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C); *Cambanis Buildings (Pty) Ltd v Gal* 1983 (2) SA 128 (N) 137 F; *Kearney NO v Standard Bank of South Africa Ltd* 1961 (2) SA 647 (T) 650.

71 This was reiterated in *Abrahams v Burns* 1914 CPD 452; *GS George Consultants & Investments (Pty) Ltd and Others v Datasys (Pty) Ltd* 1988 (3) SA 726 (W); *Firstrand Bank*, ibid. See also *Stevens and Others v Investec Bank Ltd and Others* (2012 / 32900) [2012] ZAGPJHC 226 (25 October 2012); *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461. See AB Fourie *The Banker and the Law* (1993, Institute of Bankers in South Africa); A Hudson *The Law of Finance* (1st ed, 2009, Sweet and Maxwell); J Neethling *Neethling's Law of Personality* (2nd ed, 2005, Butterworths); EP Ellinger, E Lomnicka and RJA Hooley *Ellinger's Modern Banking Law* (5th ed, 2011, Oxford University Press); NT Masete "The challenges in safeguarding financial privacy in South Africa" (2012) 7/3 *Journal of International Commercial Law and Technology* 248; R Cranston *Principles of Banking Law*

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South African law permits confidentiality to be disregarded if the interests of the state are considered of greater importance than that of a customer's confidentiality.[72] It may also be varied where such disclosure is in the interest of the bank. Client confidentiality may also be superseded where there is a duty to the public to disclose[73] or if the client consents to the disclosure.

WHISTLEBLOWING CULTURE IN SWITZERLAND AND SOUTH AFRICA

What emerges from this is that, under Swiss law, there is no specific statutory protection for whistleblowers in the financial sector. In an unfavourable environment that boasts of far reaching confidentiality obligations and barriers, employees who report cases of malpractice within a company to the public are treated with cynicism and arguably do so at their own risk. Worse still "[p]oliticians continue to be very reluctant to discuss the topic, and it is certainly not at the top of any agenda. Recent developments in other OECD countries and the recommendations of international organizations seem to have had no effect on decision makers in Switzerland".[74] Besides the dominance of labour laws that demand loyalty, equally disconcerting is the fact that cultural hurdles engender fear of reprisals, which militates against any likelihood of whistleblowing.[75] Society's general attitude is that Swiss law serves to protect an individual's right to privacy and that this embraces both economic as well as purely personal affairs.[76] The rationale is that banking secrecy is the client's secrecy, not the bank's.[77]

Comparatively, this deeply entrenched culture distinguishes the Swiss financial sector from other jurisdictions. In fact, "[n]o other country has shown such strong attachment to a principle that has enjoyed little public sympathy but strong private support".[78] The common rationalization for this refusal to

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(2nd ed, 2003, Oxford University Press); HM Schooner and M Taylor *Global Bank Regulation: Principles and Policies* (2010, Academic Press).

72 See *Firstrand Bank*, above at note 70.

73 Ibid.

74 Hofmeister "Whistleblowing", above at note 3 at 118.

75 See generally WH Diamond *Switzerland: Tax Exemptions and Reductions in Tax Havens of the World* (2010, Matthew Bender Books); HJ Bar *The Banking System of Switzerland* (5th ed, 1975, Schulthess Polygraphischer Verlag).

76 See Krauskopf "Comments on Switzerland's insider trading", above at note 63; EM Victorson "*United States v UBS AG*: Has the United States successfully cracked the vault to Swiss Banking Secrecy?" (2011) 19 *Cardozo Journal of International & Comparative Law* 815.

77 Nobel *Swiss Financial Law in the International Context*, above at note 62; Krauskopf, ibid. Note however that, in case of a suit between the bank and customer, the bank would be absolved from such a requirement for secrecy; see for instance Nobel *Swiss Financial Law and International Standards*, above at note 62 at 891.

78 Grassi and Calvarese "The duty of confidentiality", above at note 64 at 331.

make concessions to international pressure is that, because in Swiss law financial services officers and employees, like lawyers, priests and doctors, owe fiduciary duties to their customers, they must never disclose clients' information that they come across in the performance of their duties.[79] It is therefore clear that Swiss attempts at whistleblowing are moderated by and play second fiddle to well developed individual liberties, especially those pertaining to the right of confidentiality. It is this attitude that has sustained Switzerland's image as an impenetrable fortress against the disclosure of information, which, disturbingly, has worked against the development of a whistleblowing culture.

Be that as it may, there have been notable developments that seem to suggest that there could be some cracks in the Swiss financial secrecy vault.[80] This is mainly demonstrated by recent cases in which Switzerland has succumbed to international pressure[81] and, against its long standing tradition of banking secrecy, co-operated with the USA by handing over details of Americans whose assets are held in Swiss banks.[82] However, that exceptional case of piercing the banks' secrecy should not be enough to cause celebration, as it has profound implications for the sovereignty of domestic Swiss law as well as the nation's strongly guarded culture of financial sector privacy.[83] The far reaching effects of this, continued umbrage at the enforced

79 HJ Bar *The Banking System of Switzerland* (5th ed, 1975, Schulthess Polygraphischer Verlag); TA Sage "Between a rock and a hard place: The legal and moral juxtaposition of Switzerland's bank secrecy laws as illustrated by the revelation of Nazi-Era accounts" (1997) 21/1 *Houston Journal of International Law* 117; the Swiss Criminal Code, art 321 (violation of professional secrecy) states: "Clergymen, lawyers, defence counsels, notaries, auditors bound to professional secrecy by the [Swiss] Code of Obligations, physicians, dentists, pharmacists, midwives, and their auxiliaries who divulge a secret entrusted to them or of which they have become aware during the exercise of their profession, shall upon petition, be punished by imprisonment or by a fine …"

80 It should also be noted that the operation of these stringent banking and stock market secrecy laws is overridden by the obligation to testify and make disclosure in terms of cantonal or federal laws. See SESTA, arts 47(4) and 43(3) for instance. See also: Nobel *Swiss Financial Law and International Standards*, above at note 62; Krauskopf "Comments on Switzerland's insider trading", above at note 63.

81 See for instance M Crutsinger "US, Switzerland agree to crack down on tax evaders" (20 June 2009) *USA Today*, available at: <http://abcnews.go.com/Business/story?id=7884864> (last accessed 29 December 2016). Furthermore, after decades of repelling international pressure, Switzerland has been forced to soften its banking secrecy laws significantly. Bilateral concessions arose mainly from collective pressure exerted by fellow OECD members (risk of blacklisting), as well as in response to US threats to indict UBS, Switzerland's biggest bank. They mainly concerned tax-related issues, but these concessions nonetheless point to the development of a new global standard built around transparency. See generally I Grinberg "The battle over taxing offshore accounts" (2012) 304 *UCLA Law Review* 305.

82 See *US v UBS AG* no 09-20423-CIV-GOLD/MCALILEY (SD Fla, 9 July 2009); Crutsinger, ibid. See also SA Stark *Hidden Treuhand: How Corporations and Individuals Hide Assets and Money* (2009, Universal-Publishers).

83 See BG Cantley "The UBS case: The US attack on Swiss banking sovereignty" (2011) 7 *International Law & Management Review* 1; "Brief for government of Switzerland as

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whistleblowing and the sovereignty-based reluctance to disclose information is best summarized by then Swiss Foreign Minister Micheline Calmy-Rey, who reiterated the fact that Swiss unwillingness to disclose financial information, even in cases where foreign account holders had violated their country's laws "is about Switzerland's sovereignty. We want our laws to be respected. It is also about our financial centers and about jobs".[84] It follows therefore that, so far as the Swiss are concerned, any changes to banking secrecy policies, especially if introduced in response to international pressure, should be seen to be aimed at preventing abuse of banking secrecy, not eliminating the "professional" secrecy obligation on the part of financial sector operatives.[85]

With a statute that specifically targets whistleblowing and as a country that boasts an array of institutional features that are necessary to minimize corruption, particularly its constitution, an independent judiciary and a robust and proactive media, all which arguably compare favourably with those of its more economically advanced counterparts in the G20,[86] South Africa is expected to fare better. The irony, however, is that, despite such resources, South Africa does not seem to have succeeded in curbing the existence of fraud or encouraging whistleblowing.[87] The regime is still beset with problems: its regulation is said to be incomplete and in a state of flux, there are inconsistencies relating to its application and it is riddled with gaps and concerns regarding its policy and implementation.[88] It has been established that "[t]he result, at a glance, is a splintered, but interrelated body of laws cutting across different departments and disciplines that are applied erratically by public and private organizations in a manner that has left whistleblowers, at risk of victimisation, losing their job or damaging their career".[89]

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amici curiae supporting respondents" at 1, *United States v UBS AG*, no 109CV20423, 2009 WL 1612394 (SD Fla, 30 April 2009).

84 See J Manley "Swiss minister to meet Clinton ahead of UBS deadline" (20 July 2009) *Reuters*, available at: <http://blogs.reuters.com/financial-regulatory-forum/2009/07/20/swiss-minister-to-meet-clinton-ahead-of-ubs-deadline/> (last accessed 30 November 2016); K McCoy "US, UBS say they have a deal in tax-evasion dispute" (31 July 2009) *USA Today*, available at: <http://abcnews.go.com/Business/story?id=8311349> (last accessed 30 December 2016).

85 See generally M Aubert "The limits of Swiss banking secrecy under domestic and international law" (1984) 2 *International Tax & Business Law* 273.

86 Transparency International "South Africa: A mandate to tackle corruption" (6 May 2014), available at: <http://www.transparency.org/news/feature/south_africa_a_mandate_to_tackle_corruption> (last accessed 30 November 2016).

87 Steyn "SA banks worried", above at note 30; Hosken "World fraud champs", above at note 30; PwC "Confronting the changing face", above at note 30; "SA companies top fraud survey", above at note 30.

88 Martin "The status of whistleblowing", above at note 53.

89 Id at 19. See also G Dehn and R Calland *Whistleblowing Around the World: Law, Culture & Practice* (2004, Public Concern at Work).

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An interplay of cultural, political and historical factors can be said to constitute a barrier that shapes people's attitude towards the disclosure of wrongdoing in organizations. Scholars have shown that, within South Africa, whistleblowing is inhibited by the need for loyalty and fear of reprisals. Historically, before independence, informants who disclosed any information to the apartheid government against the liberation cause were reviled and labelled *impimpi* [snitches]. That mindset is arguably part of the culture that whistleblowing on organizational impropriety amounts to selling out and is treachery, to be frowned on by society.[90]

Additional impediments include lack of awareness of the protection accorded by the law. On the other hand, where there is knowledge of the law, there is a perception that it does not have the capacity to protect whistleblowers, rendering disclosing information a futile exercise as no action is likely to be taken to remedy the misconduct reported, which tends to militate against any willingness to make a disclosure.[91] Probably the greatest impediment is the lack of incentives to foster a culture of disclosure. So important is incentivizing whistleblowing that it has been argued that part of the corporate governance related flaws linked to the recent financial crisis was the regulators' underestimation of the utility of financial incentives in corporate whistleblowing.[92] Coming forward with information is associated with adverse consequences[93] and, unless the rewards of making a disclosure outweigh the risks, individuals are bound to remain quiet.

A further concern has been said to be the PDA's failure to incorporate provisions that require organizations to implement robust whistleblowing structures as part of their risk management culture. The protection afforded to disclosers of information by the regulatory framework has also been criticized for being inadequate and poor. Flaws are said to include the fact that it does not amount to an effective deterrent against employers who are intent on

90 See for example: W Vandekerckhove *Whistleblowing and Organizational Social Responsibility: A Global Assessment* (2012, Gower Publishing, Ltd); M Arszulowicz and WW Gasparski *Whistleblowing: In Defense of Proper Action* (2011, Transaction Publishers); Parliamentary Monitoring Group "National anti-corruption summit, and public service restructuring: Briefings" (25 May 2005), available at: <http://www.pmg.org.za/minutes/20050524-national-anti-corruption-summit-and-public-service-restructuring-briefings> (last accessed 30 November 2016).

91 Martin "The status of whistleblowing", above at note 53.

92 See generally: MA Vega "Beyond incentives: Making corporate whistleblowing moral in the new era of Dodd-Frank Act 'Bounty hunting'" (2012) 45/2 *Connecticut Law Review* 481; MH Baer "Governing corporate compliance" (2009) 50 *Boston College Law Review* 949; TM Arnold "It's déjà vu all over again: Using bounty hunters to leverage gatekeeper duties" (2010) 45 *Tulsa Law Review* 419; PH Bucy "'Carrots and sticks': Post-Enron regulatory initiatives" (2004) 8 *Buffalo Criminal Law Review* 277; LA Cunningham "Beyond liability: Rewarding effective gatekeepers" (2007) 92 *Minnesota Law Review* 323.

93 GC Rapp "Beyond protection: Invigorating incentives for Sarbanes-Oxley corporate and securities fraud whistleblowers" (2007) 87 *Boston University Law Review* 91.

victimizing the disclosing employee.[94] In the same manner, the scope of the framework is said to be too narrow, as protected disclosure is restricted to public and private sector employees, to the exclusion of consultants, part time and agency workers[95] and citizens who are in no way connected to the organization.[96] Not only does the PDA fail to provide incentives to whistleblowers, it also does not offer immunity against civil and criminal liability for making a protected disclosure. Such gaps in South Africa's regulatory provisions have undoubtedly worked against the legitimate intentions and objectives of the legislature, hence the need to evaluate the regime with a view to making it robust.[97]

What stands out from this discussion is the fact that South Africa and Switzerland have adopted widely divergent approaches in regulating the disclosure of illegalities in the financial sector. What is reassuring in the case of South Africa, in contrast to Switzerland, is the fact that, despite flaws in the framework, South Africa has managed to build not only a relatively coherent system of disclosure but also a corpus of whistleblowing cases that can be used as a reference.[98] It is therefore clear that, while it is a more mature economy with a long history of regulating its financial sector, when all factors are

94 See Lewis and Uys "Protecting whistleblowers at work", above at note 37; D Culp "Whistleblowers: Corporate anarchists or heroes? Towards a judicial perspective" (1995) 13 *Hofstra Labour & Employment Law Journal* 109.

95 Note however that, at the time of writing this article, there are growing calls for the review of these parameters, in particular the exclusion of contract and agency employees, as well as extending to whistleblowers protection against civil suits. Additional amendments being proposed include stiffer penalties, ranging from a fine to imprisonment for a period not exceeding two years, or both a fine and imprisonment for the malicious disclosure of false information. See Protected Disclosures Amendment Bill, sec 9B, available at: <http://www.justice.gov.za/legislation/bills/2015-PDAAmmBill-b40-2015.pdf> (last accessed 30 December 2016). See also Public Protector South Africa "Public Protector welcomes whistle blower protection law amendments" (1 April 2014), available at: <http://www.pprotect.org/media_gallery/2014/01042014.asp> (last accessed 30 November 2016).

96 See for instance Second National Anti-Corruption Summit "Roundtable discussion: The Protected Disclosures Act, 2000 (Act 26 of 2000)", available at: <http://www.nacf.org.za/anti-corruption-summits/second_summit/Section6_PSC_report_Summit2_2005.pdf> (last accessed 30 December 2016).

97 For a more comprehensive discussion of the weaknesses associated with the PDA, see stakeholder comments made by the Second National Anti-Corruption Summit "Roundtable discussion", ibid.

98 There has been a comparatively large corpus of decided cases on whistleblowing. See for instance *Ngobeni v Minister of Communications and Another* J08/14 [2014] ZALCJHB 96; *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 ILJ 1670 (LC); *Tshishonga v Minister of Justice and Constitutional Development and Another* (JS898/04) [2006] ZALC 104 (26 December 2006); *Young v Coega Development Corporation (Pty) Ltd* [2009] 6 BLLR 597 (ECP) High Court; *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and Another* (532/08) [2009] ZASCA 151 (27 November 2009). See also CJ Auriacombe "Whistle blowing and the law in South Africa" (2005) 24/2 *Politeia* 197.

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aggregated, the Swiss approach of regulating whistleblowing lags behind South Africa in line with current global standards. This disparity, however, is an apt demonstration of the common perspectives that influence the adoption of a disclosure regime; more specifically these two regimes evince the fact that, subject to the preferred perception, "whistleblowing is either being considered an ethical and commendable or an unethical and condemnable behaviour. Thereby, the difference in perception is not driven by the stage of development of a given country, but rather by the political and social system".[99] Switzerland could build on the experience and examples of its fellow G20 members' financial services and broaden the existing restricted operation of its whistleblower legislation. Unless Switzerland complies and brings its whistleblowing approach into line with its regional counterparts, when it comes to minimizing financial services misconduct, unfortunately "Europe could continue to be a place of diverse policy making, yet with a common ground".[100]

CONCLUSION

It is not in doubt that there is need for consistency and coordination in the governance and risk management of the financial sector with a view to minimizing financial crime. Much as that is trite, this article has attempted to show how divergent the regulation of whistleblowing is within selected countries, also demonstrating that the attainment of unified global standards remains work in progress. Whereas an analysis of the whistleblowing approach adopted in South Africa evinces many weaknesses, the Swiss attitude to the disclosure of corporate malfeasance suggests that more could be done to build a supportive environment. Serious consideration must be given to these issues, especially in light of the lessons learned from the recent financial crisis.

Objectionable financial industry behaviour, characterized by exponential self-preservation and predatory governance, could be curtailed if there were a real possibility of such conduct being made public through whistleblowing. As such, the Swiss and South African financial sectors should be encouraged to build trust by introducing suitable whistleblowing policies and procedures. Considering how globalized the financial sector has become, it is important that nations develop harmonized frameworks that not only increase the accountability of financial institutions and their supervisors, but also restore trust in the financial sector and address transnational governance problems. The first step to accomplishing that objective is to compare the approaches in various regimes; this article has attempted to do that by comparing the Swiss and South African mechanisms and concludes that there is need for a shift in the current mechanisms.

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99 Hofmeister "Whistleblowing", above at note 3 at 117.

100 W Vandekerckhove "European whistleblower protection: Tiers or tears?" in D Lewis (ed) *A Global Approach to Public Interest Disclosure* (2010, Edward Elgar) 15 at 20.