AUTOMATIC EXCHANGE OF TAX INFORMATION AND THE RIGHT TO PRIVACY

— A SOUTH AFRICAN CONSTITUTIONAL ANALYSIS

ABSTRACT

Broad-based automatic exchanges of information are increasingly viewed as the norm in global tax practice. The mass transmission of large amounts of personal and financial data creates informational risks and implicates the privacy rights of impacted data subjects. This investigation considers the interaction between broad-based automatic exchanges of information –specifically the Common Reporting Standard (CRS) and FATCA– and the right to privacy contained in section 14 of the South African Constitution. To date there has not been any authoritative legal precedent on this area and the available academic literature is also limited. Applying a doctrinal research method and drawing on the approach employed by the Constitutional Court when adjudicating Bill of Rights matters; a synthesis and analysis of various written sources was undertaken. The sources consulted include: legislation, South African case law, international law, treaty instruments, foreign case law, policy papers and academic literature. This study finds that the CRS exchange of taxpayer information is aimed at reducing global tax evasion and is reciprocal in nature. Additionally, the exchanges take place within a robust privacy framework. Accordingly, the CRS is constitutionally valid, with only limited opportunity to further enhance constitutional consonance. Contrastingly, the FATCA data exchanges are *de facto* unilateral. They cannot therefore be linked to any legitimate objective to improve tax compliance and revenues in South Africa. In this regard the investigation concludes that FATCA fails to pass constitutional muster.

KEYWORDS

Automatic exchange of taxpayer information – Common Reporting Standard (CRS) – FATCA – Constitutional right to privacy – Limitation of constitutional rights in South Africa–

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CHAPTER ONE

INTRODUCTION

I. INTRODUCTION

The modern economy is characterised by globalisation and digitalisation.[1] Historically, value was generated by physically transporting tangible commodities across defined borders to be sold in 'brick and mortar stores'.[2] This model is dwindling in relevance. In the contemporary economy, technological advancement has resulted in more and more virtual transactions taking place seamlessly and remotely.[3]

Fundamental changes in the economic and commercial landscape necessitate corresponding changes in the tax environment.

The evolution of the tax landscape is multi-faceted. Global multinationals have changed the way in which they structure operations to reduce overall taxes suffered.[4] Finance ministries are increasingly focused on policy-design which allows them to be fiscally competitive while simultaneously securing a fair share of global tax revenues.[5] Whilst revenue authorities look to use technology and enhanced "information flows" to improve tax transparency and curb evasionary opportunities.[6]

Up until this point, the inherent complexities of tax structuring, policy and administration for various actors in the modern globalised and digitalised economy have been outlined. These intricacies are even further compounded when one considers the practical challenges encountered by tax authorities in implementing tax policy and reforms locally. All changes to

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[1] World Economic Forum *World Economic Forum Annual Report 2018-2019* (2019) at 38 available at http://www3.weforum.org/docs/WEF_Annual_Report_18-19.pdf, accessed on 22 February 2020.

[2] United Nations Committee of Experts on International Cooperation in Tax Matters Fifteenth session (Agenda item 5(c)(ix)) *Tax Consequences of the digitalized economy* (2017) at 4-5.

[3] Ibid at 3-4.

[4] European Parliamentary Research Service *Multinational enterprises, value creation and taxation, Key issues and policy developments* (2019) at 2 available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637971/EPRS_BRI(2019)637971_EN.pdf, accessed on 22 February 2020.

[5] OECD *OECD Secretary-General Tax Report to G20 Finance Ministries and Central Bank Governors* (2019) at 18 available at https://www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-october-2019.pdf, accessed on 22 February 2020.

[6] Sanjeev Gupta, Michael Keen, Alpa Shah & Geneviève Verdier *Digital Revolutions in Public Finance* (2017) at 26.

tax systems take place within the parameters and confines of a broader ecosystem of domestic laws, regulations and legal administration. A fit for purpose 21st century tax system must therefore address the global tax imperatives; whilst also being conducive to the domestic legislative and administrative frameworks.

In this study these themes converge.

II. RESEARCH QUESTION

The Constitutionality of Automatic Exchanges of Information ("AEoI") in South African law is evaluated.

More specifically, whether the AEoI in terms of the Foreign Account Tax Compliance Act ("FATCA") and the Organisation for Economic Co-operation and Development's ("OECD's") Common Reporting Standard ("CRS") are consonant with the South African Constitution.[7] In particular, this research hones in on the right to privacy. In discharging this research mandate, two sub-questions are posed:

a. *Do the AEoI - pursuant to FATCA and the OECD's CRS- interfere with the constitutional right to privacy?*

b. *If so, is this interference constitutionally condoned?*

To answer these questions, a seven-part approach is employed.

III. PROPOSED APPROACH

The report begins by prefacing its inquiry with an examination and summation of the existing body of literature in this area.

In the second part, key concepts relating to tax information exchange are set out. This includes: its progression and evolution over time; the advent of automatic exchanges of information; and the culmination of tax information exchange in broad-based automatic exchanges of information based on FATCA and the CRS.

[7] Constitution of the Republic of South Africa, 1996.

In part three, the interaction between the FATCA as well as CRS AEoI instruments and South African law is evaluated. An examination of the information exchange obligations created by such international instruments within the context of the South African domestic legal framework is considered. As part of the discussion on the domestic legal framework, the notion of constitutional sovereignty is introduced –put briefly, it is the requirement that all law and conduct must conform to the rights and values espoused in the Bill of Rights–thereafter its practical implications are explained. The chapter then progresses to describe the structured methodology applied by the Constitutional Court in adjudicating Bill of Rights matters. Informed by the approach of the Court, this chapter culminates in framing the inquiry on the constitutionality of AEoI.

In the fourth part of the report, the substantive constitutional inquiry begins. The right to privacy is interpreted with reference to the textual provisions of the Constitution, the jurisprudence of the Constitutional Court, and international law. The attendant question of whether the automatic exchange of tax payer information violates the right to privacy is also considered.

Ostensibly concluding that the right to privacy is impinged by the FATCA and CRS AEoI in chapter four; the fifth chapter considers whether such limitation is reasonable and justifiable. This analysis is again informed by the Constitution; and supplemented by the approach and jurisprudential precedent of the Constitutional Court.

In part six, the body of comparative foreign law is considered. The results of constitutional challenges against FATCA in comparable jurisdictions are explicated; and the relevance of these decisions in the South African constitutional schema is assessed.

Finally, in the seventh chapter, the various aspects and themes covered in the prior chapters are drawn upon and synthesised to reach a conclusion.

IV. REVIEW OF EXISTING ACADEMIC LITERATURE

To date, there have been no reported constitutional challenges against the automatic exchanges of taxpayer information in South Africa. Accordingly, there is no binding judicial precedent in this area. Similarly, the academic discourse on the constitutionality of tax information exchange is scant.

Although the constitutionality of AEoI in South Africa is not extensively dealt with in literature; the imperative to evaluate tax law against the Constitutional standard is not new.

As early as 1994, The Katz Commission was mandated by National Treasury to consider whether prevailing tax legislation and administrative practices passed constitutional muster.[8] In *Silke* –a comprehensive guide on South African income taxation– the authors dedicate an entire chapter to the 'Constitutional aspects of income tax.'[9]

More pertinently, Croome's book *Taxpayers' Rights in South Africa*,[10] evaluates whether the exchange of taxpayer information pursuant to a tax treaty is constitutionally permissible. Notwithstanding the robustness of Croome's analysis, his work was published in 2010. This was prior to the substantial enactment of FATCA and the conception of the OECD's CRS. His work therefore does not engage constitutional considerations relating to broad-based AEoI.

After reviewing the academic literature on the subject matter, only one analogous paper is identifiable –a minor dissertation written by Möller in early 2016.[11]

Möller's work evaluates the constitutionality of the tax information exchange framework with reference to the rights to privacy and fair administrative action.[12]

Her dissertation is substantively set out in four chapters, each of which is briefly discussed below.

First, she explains the provisions in the domestic law which enable and facilitate the exchange of taxpayer information; as well as the South African legal confidentiality safeguards.[13]

Thereafter, she briefly discusses and applies the section 36 limitation analysis, highlighting that the rights entrenched in the Bill of Rights are subject to limitation where it is just and reasonable

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[8]Beric Croome *Taxpayers' Rights in South Africa* (2010) at 5-8.
[9]Alwyn De Koker, & RC Williams *Silke on South African Income Tax* vol 4 Service issue (2016) at ch22.
[10]Beric Croome op cit note 8 at 165-168.
[11]Louise Möller *An analysis of the current framework for the exchange of taxpayer information, with special reference to the taxpayer in South Africa's constitutional rights to privacy and just administrative action* (MCom minor dissertation, University of Cape Town, 2016).
[12]Ibid.
[13]Ibid at 7-10.

to do so. She goes on to attempt a partial limitation analysis in the context of tax information exchange.[14]

In the third substantive section, Möller zooms in on the constitutional right to privacy and the provisions of the Protection of Personal Information ("PoPI") legislation. She considers whether the right to privacy is impinged by the exchange of information and continues her limitations analysis.[15]

In the final substantive chapter she assesses the right to just administrative action and further develops her limitations analysis.[16]

Möller's work provides a useful reference point to any study seeking to interrogate the constitutionality of tax exchange provisions. In conducting this investigation, one is fortunate to be able to refer to her work, where appropriate; and to compare and contrast the ultimate research findings.

The two studies are however distinguished on the bases of both scope and time. Möller's analysis is looser in its scope. It includes both automatic and upon request exchanges of information; and engages the right to just administrative action in addition to the right to privacy. By contradistinction, this analysis is narrower and more focused. The scope of this research is limited to AEoI (through the FATCA and CRS instruments) and evaluates only one constitutional right – the right to privacy.

Additionally, Möller's work was submitted in early 2016. Since then there have been a number of significant developments in the AEoI space. One such development has been the adoption and practical implementation of the OECD's CRS. Furthermore, data privacy is increasingly recognised as a core component of the right to privacy; and a fundamental human right.[17] This cognition has culminated in a number of legal challenges against AEoI in foreign jurisdictions. Foreign challenges highlight the tension between the objectives of tax transparency and the need for data privacy; but also provide a useful legal reference point which enriches this analysis.

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[14] Ibid at 11-14.
[15] Ibid at 15-35.
[16] Ibid at 38-53.
[17] United Nations Conference on Trade and Development *Data protection regulations and international data flows: Implications for trade and development* (2018) at 3.

V. RESEARCH METHOD AND STRUCTURED DELIBERATIVE APPROACH

To answer the research questions posed in this study, a doctrinal research method is employed.

This method relies extensively on document analysis; and syntheses of various authoritative sources to derive conclusions on the law.[18] The document landscape reviewed and analysed includes: the Constitution of the Republic of South Africa,[19] other relevant pieces of domestic legislation, South African case law, international human rights instruments, international treaties, policy documents and commentaries, guides on interpretation and application of FATCA and the CRS as well as academic commentary.

In the substantial constitutional inquiry set out in chapters four and five, this report mirrors the deliberative approach taken by the Constitutional Court in deciding a Bill of Rights matter. This is referred to as the 'two-stage enquiry.'[20] In the first part of the two-stage inquiry the court analyses and interprets the right; whilst the second-part embarks on a limitation analysis, to assess if the infraction of the right is justifiable.[21]

VI. LIMITATIONS AND CONSTRAINTS

There are several limitations which impact this study. These include constraints arising from: the absence of binding authoritative precedent on the issues considered; the sparsity of directly relevant published academic research on this area; the inherent limitations of employing a doctrinal research approach; as well as the delimitation of this study to the constitutional right of privacy. Each of these aspects is briefly discussed further.

It is salient to highlight that there have not been any legal challenges to the automatic exchange of taxpayer information in South Africa to date. Accordingly, there is no existing precedent on this specific issue. This study therefore can only offer a reasoned analysis –premised on existing law and supplemented by other literature– postulating how a court could decide a similar matter.

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[18]S N Jain 'Legal research and methodology' (1972) Vol.14 No.4 *Journal of the Indian Law Institute* 487 at 491-494.
[19]Constitution supra note 7.
[20]*S v Williams* 1995 (7) BCLR 861 (CC), 879D-G.
[21]Ibid.

This study is further constrained by a lack of secondary sources –in the form of published academic research– on this topic. A review of the literature has indicated only one directly corresponding published study. The sparseness of academic discourse on this specific area results in a study with increased emphasis on synthesising primary documentation. By implication there is less scope for juxtaposing and evaluating alternate scholarly interpretations. It is expected that as the academic discourse in this area develops and matures further, juxtaposing commentaries and critiquing secondary interpretations will feature more prominently.

Given that a doctrinal research method is employed by this study; the inherent limitations of the research methodology apply. The chief limitation being that the conclusions advanced in this paper remain a subjective interpretation of objective law.[22]

The constitutional challenge addressed in this paper is delimited to a review of AEoI in terms of the section 14 constitutional right to privacy. The research does not delve into other constitutional aspects, such as the section 9 right to equality, the right to just administrative action and the right to human dignity or other related rights. Additionally, the subject matter of the constitutional challenge is also limited to AEoI and does not extend to exchanges upon request, or tax payer privacy in a domestic context.

It is important to be mindful of these constraints when contextualising this report.

[22]Khusal Vibhute & Filipos Aynalem *Legal Research Methods* (2009) at 80-83.

CHAPTER TWO

THE EVOLUTION OF TAX INFORMATION EXCHANGE

I. INTRODUCTION

(a) Underscoring the significance of tax information exchange

The International Consortium of Investigative Journalists' ("ICIJ") publication of the Panama Papers, Paradise Papers, Mauritius Leaks and Africa Leaks has ensured that tax transparency continues to dominate the global tax agenda.[23]

Enhanced tax transparency encourages taxpayer compliance, curbs evasionary practices and stimulates trust and confidence in the fiscus. One of the main initiatives directed at enhancing international tax transparency is tax information exchange. The OECD explains that –

> '[i]ntergovernmental cooperation aim[ed] at addressing cross-border tax evasion ...has rapidly grown over the past few years and tax transparency and exchange of information is one of its key components.'[24]

The notion of cross-border tax authority collaboration and information exchange between revenue authorities is not a new practice. Notwithstanding the long-standing origins of cross-border tax information exchange, its objectives are increasingly relevant in a digitalised globalised economy.

In the contemporary economy, there is greater pressure on the state to finance socio-economic goods and services for citizens.[25] Similarly in the modern economy, there is increased opportunity for high net-worth individuals and multinational entities to employ novel schemes to

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[23]International Consortium of Investigative Journalists *All our investigations* available at *https://www.icij.org/investigations/*, accessed on 22 February 2020 and OECD *OECD Global Forum on Transparency and Exchange of Information for Tax Purposes Tax Transparency in Africa, Africa Initaitive Progress Report 2018* (2018) at 6-7 available *at http://www.oecd.org/tax/transparency/Tax-transparency-in-Africa-2018-progress-report.pdf,* accessed on 22 February 2020.
[24]Ibid.
[25]Calvin Woodard 'Reality and social reform: The transition from laissez-faire to the welfare state' (1962) Vol. 72 No.2 *Yale L.J.* 286 at 323.

reduce taxes suffered.[26] These factors make tax transparency and the mechanism of cross-border tax information exchange critically important.

In this chapter, a brief history of the evolution of tax information exchange is set out. The discussion begins by explaining the development of tax information exchanges from "exchanges upon request" to the advent of broad-based AEoI. The discussion also encases the specific instruments which enable the exchange of tax information; including a critical assessment of their respective scopes, contents and implications.

II. TAX INFORMATION EXCHANGE – THE BEGINNING

The first recorded tax treaty was concluded between France and Belgium in 1843.[27] Interestingly, the treaty focused exclusively on tax information exchanges and cross-border collaboration between tax authorities.

Jogaratan summarises the provisions of the 1843 treaty as follows –

> 'Under the agreement, officials in charge of land register offices were required to share documents and information which would "assist the effective and regular collection of taxes imposed by the laws of the two countries, or which refer to estates in which these countries are reciprocally interested". Article 2 of the agreement specified the types of documents and information that were be communicated between the authorities. These were documents, which involved the transfer of ownership of property such as deeds of sale or contracts, which affected the same, gifts, auctions, liquidations and marriage settlements.'[28]

The Belgium-France treaty introduced the fundamental notions of reciprocity and information exchange between tax administrators. It laid the conceptual foundations for international collaboration between revenue authorities.

[26] ECONFIP *Economists for Inclusive Prosperity Research Brief: Taxing multinational corporations in the 21st century* (2018) at 1 available at https://econfip.org/policy-brief/taxing-multinational-corporations-in-the-21st-century/, accessed on 22 February 2020.
[27] J Murray van Schalkwyk *An analysis of treaties for the exchange of information for tax purposes impacting the South African retail sector in the Southern African Development Community region* (MCom minor dissertation, University of Cape Town, 2014) at 2-3.
[28] Sunita Jogarajan 'Prelude to the international tax treaty network: 1815-1914 early tax treaties and the conditions for action' (2011) Vol.31 No.4 *Oxf*. 679 at 687.

It was only much later in 1899, that the mitigation of double tax became a prominent feature of the tax treaty.[29] By the early 1900s there were a number of bilateral tax treaties in place globally. These treaties covered both the mitigation of double taxes and collaborative tax administration. Given that each tax treaty was negotiated individually between the respective states; the contents and treatment prescribed in each of the conventions was disparate and incongruous. The result was a complex network of patchy cross-border tax administration, collaboration and regulation.[30]

Accordingly, in 1921 the League of Nations –predecessor to the United Nations ("UN")– initiated a project with a view to drafting a number of uniform model tax treaties.[31] After various iterations, several model bilateral tax conventions were agreed upon. These model conventions provided the framework for a harmonious international tax regime. Further development resulted in the composition of tax treaty commentaries over time.[32] Commentaries serve as supplementary aids to assist in the interpretation and application of the particular treaty.

Today the most commonly used treaty frameworks are the United Nations, the OECD and the United States Model Tax Conventions. Each of these model conventions includes a tax information exchange article.[33]

III. MODEL TAX CONVENTIONS AND BILATERAL TAX INFORMATION SHARING

The United Nations, United States and OECD Model Tax conventions all contain tax information exchange provisions.[34] Tax information exchanges are facilitated in terms of article 26, in each of the respective conventions.

[29]Ibid at 690
[30]Klaus Vogel 'Double tax treaties and their interpretation' (1986) Vol.4 *Int'l Tax & Bus. Law* 1 at 10-11.
[31]Ibid at 11.
[32]Ibid.
[33]United Nations *United Nations Model Double Taxation Convention between Developed and Developing Countries* (2008) art 26 available at *https://www.un.org/esa/ffd/wp-content/uploads/2014/10/ta-unmodel-Article26-ExchangeInformation_revised_.pdf,* accessed on 22 February 2020; OECD *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions –Article 26 of the OECD Model Tax Convention on Income and Capital and its Commentary* available *at https://read.oecd-ilibrary.org/taxation/implementing-the-tax-transparency-standards/article-26-of-the-oecd-model-tax-convention-on-income-and-on-capital-and-its-commentary_9789264088016-6-en#page3*, accessed on 22 February 2020; and United States Department of the Treasury *United States Model Income Tax Convention* art 26 available at *https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf*, accessed on 22 February 2020.
[34] Ibid.

In this chapter, the information exchange provisions of all three models are considered in a single analysis. This method is both appropriate and expedient in light of the fact that the textual provisions in each of the conventions are substantially similar.

Article 26 is premised on the principle of reciprocity and consists of six common core paragraphs.[35]

The first paragraph establishes the reciprocal tax information exchange obligation of "foreseeably relevant" information between revenue authorities. In the second paragraph, confidentiality and secrecy provisions in relation to the exchanged information are set out. Paragraphs 3, 4 and 5 expound on the scope of the exchange provisions: firstly delimiting the obligation of the requested state to exclude certain types of highly sensitive data or data which would be impractical or illegal for the requested state to obtain; but also clarifying that the mere fact that data is unavailable to the revenue authority of the requested state does not vitiate a state's exchange obligations pursuant to the convention. The sixth paragraph provides three mechanisms for tax information exchange, namely: spontaneous, automatic and upon request tax information exchanges.[36]

At this point, it is salient to discuss the provisions of paragraphs 1 and 2 of the Article further.

(a) Paragraph 1 – obligating and enabling provision on tax information exchange

Paragraph 1 sets out the primary information exchange requirement.

> 'The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this convention or the administration or enforcement of the domestic laws concerning taxes of every kind...'[37]

The textual provisions of the paragraph clearly indicate its expansive scope.

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[35] United Nations op cit note 33 at 1.3.
[36] Ibid at 5.4.
[37]OECD *Update to Article 26 of the OECD Model Tax Convention and its Commentary* (2012) at 1 available at *https://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20(2).pdf*, accessed on 22 February 2020.

On this point, the UN commentary explains that tax information exchanges are neither limited to residents or citizens of contracting states; nor are they limited to only those taxes covered in the underlying convention.[38]

In addition to the broad scope of persons and taxes covered; the informational content which can be exchanged is similarly expansive.

The descriptor of "foreseeably relevant" information, replaces its linguistic predecessor "necessary." The OECD explained that this amendment was made to clarify and emphasise that the scope of information exchanged between tax authorities should not be too narrowly construed.[39]

Accordingly, the framework provided by article 26 authorises tax information exchanges on a wide range of data, regarding a number of persons and relating to all tax types.

A generous interpretation does not however licence revenue authorities to embark on "fishing expeditions." Fishing expeditions are explained in the OECD's model commentary as 'speculative requests that have no apparent nexus to an open inquiry or investigation.'[40] The commentary goes further to provide an illustrative example of a request for information which would constitute a fishing expedition; and is accordingly disallowed under article 26 of the convention –

> 'a group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers does not meet the standard of foreseeable relevance.'[41]

This comment raises an obvious reservation, that is –do automatic exchanges of group information, such as FATCA and the OECD's CRS, in substance constitute mass "fishing expeditions"? This question is deferred until the next chapter.

(b) Paragraph 2 – data security

[38]United Nations op cit note 33 at 2.
[39]OECD op cit note 37 at 5-5.5.
[40]Ibid at 5.
[41]Ibid.

Paragraph 2 details the confidentiality and privacy requirements relating to information exchanges between the Contracting States.

In terms of this provision, the receiving state must apply its local data protection and privacy laws to information received to ensure that the tax subject's data remains private and confidential.[42] Generally, the information obtained can only be used for the narrow purpose of tax administration.[43] Any confidentiality breach which compromises the privacy of exchanged data is subject to sanction under the receiving state's domestic law.[44]

At first blush, this confidentiality standard in the article appears to be insufficient. Personal and financial information relating to a resident or citizen of a requested state is effectively localised into the requesting state. It is conceivable that the requesting state may have inferior data protection or privacy laws relative to the requested state. In addressing these concerns, the Model Conventions allow contracting states to supplement the provisions of the Model Tax Convention with *ad hoc* privacy requirements, to satisfy their respective privacy and confidentiality concerns.[45]

(c) A fault line in article 26

Although article 26 of the respective Model Tax Conventions was meticulously drafted, there remained a fundamental weakness in the information exchange framework.

Article 26 was encased within a broader bilateral tax convention. Where there was no tax treaty between two states; there was no basis for information sharing. This limitation was particularly problematic when considering the reality of the tax treaty network. The states that do not conclude tax treaties are typically "tax havens".[46] These fiscally-friendly jurisdictions are also hotbeds for tax evasion. Without a mechanism to exchange information with these countries, there was a significant deficiency in the tax information exchange framework.

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[42]Ibid at 2.
[43]Ibid at 12.
[44]Ibid at 11.
[45] Ibid at 10.
[46]Marta Pankiv 'Tax Information Exchange Agreements (TIEAs)'in Günther & Tüchler (eds) *Exchange of Information for Tax Purposes* (2013) at 4.

IV. THE DEVELOPMENT OF THE TAX INFORMATION EXCHANGE AGREEMENT

In 2002 the OECD responded to this dilemma by developing a model Tax Information Exchange Agreement ("TIEA").[47] The TIEA is a bilateral agreement to facilitate the exchange of tax information in the absence of a full-scale tax treaty between the two states.[48]

A TIEA is effectively a compact tax treaty. TIEAs deal exclusively with cross-border information sharing and collaboration between fiscal authorities. Ordinarily these instruments do not contain any substantive provisions on determining residency, the allocation of taxing rights or the provision of tax relief. The singular function of a TIEA is therefore to enhance tax transparency.[49]

The provisions of the Model TIEA are broadly analogous to those contained in article 26 of the Model Tax Conventions. The treaties contain corresponding confidentiality provisions;[50] and the "foreseeably relevant" criterion is also shared.[51]

Although the foreseeable relevancy criterion is common to both instruments, the Model TIEA explicitly sets out factors that a requesting state must demonstrate when submitting a data request. Article 5 of the Model TIEA refers.

> 'The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:
>
> (a) the identity of the person under examination or investigation;
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> (b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;
>
> (c) the tax purpose for which the information is sought;
>
> (d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

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[47]Ibid 3-5.
[48]OECD *Agreement on Exchange of Information on Tax Matters* available *at https://www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf*, accessed on 22 February 2020.
[49]Ibid art. 1.
[50]Ibid art. 8 and OECD op cit note 37 at 11.
[51]OECD op cit note 48 art. 1 and OECD op cit note 37 at 1.

(e) to the extent known, the name and address of any person believed to be in possession of the requested information;

(f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

(g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties'[52]

The implication of this provision is that it is more onerous for a requesting state to obtain information. The scope of the information exchange is *de facto* narrowed, when compared to data exchanges in terms of article 26 of the Model Tax Conventions. Additionally, the scope of information exchanges is even further constrained by two other provisions in the TIEA. First, the TIEA is limited to a closed list of tax types.[53] Secondly, the default TIEA template only applies to requests for the exchange of tax information. The standard template does not provide for the automatic or spontaneous exchange of information.[54]

V. MODES OF TAX INFORMATION EXCHANGE

Tax information exchanges are initiated in one of three ways, namely: "upon request," "automatically," or "spontaneously."

Data is shared upon request, when the receiving-state initiates a specific request for the relevant information.[55] Contrastingly, automatic and spontaneous exchanges of information are exchanges which take place without the receiving state having to make a request for the data.

An automatic exchange of information is a routine and periodic information sharing arrangement between revenue authorities. No specific request is initiated by the recipient state; and the exchange takes place automatically.[56]

[52] OECD op cit note 48 art.5.
[53] Ibid art. 3 and Marta Pankiv op cit note 46 at 8.
[54] OECD op cit note 48 art.5.
[55] Arthur J Cockfield 'Protecting taxpayer privacy rights under enhanced cross-border tax information exchange: towards a multilateral bill of rights' (2010) Vol.42 No.2 *U.B.C Law Review* 421 at 424.
[56] Ibid.

A spontaneous exchange of information takes place when the tax authority of one state, of its own volition and in the absence of a request by another state, chooses to transmit data to a counterpart foreign tax authority, with a view to promoting a more effective collection and administration of taxes in the foreign state.[57]

VI. CRITIQUE OF THE ERSTWHILE TAX INFORMATION SHARING MODEL — MAKING A CASE FOR A DIFFERENT DATA SHARING FRAMEWORK

Although tax information sharing articles in model tax conventions provided a framework for exchanging information between fiscal authorities, these mechanisms had been criticised as inadequate and 'insufficient.'[58] The critique is predicated on two main tenets — first, the bilateral nature of the tax information exchanges; and secondly, the "reasonable foreseeability" standard as a basis for information exchange.[59]

(a) Bilateral nature of the model

Both Model Tax Conventions and TIEAs are bilateral in nature.

Double Tax Agreements (DTAs) are definitionally bilateral. On the other hand, the model TIEA appears to cater for multilateral exchanges of information; but it is not multilateral in substance.

> 'The multilateral instrument is not a "multilateral" agreement in the traditional sense. Instead, it provides the basis for an integrated bundle of bilateral treaties. A Party to the multilateral Agreement would only be bound by the Agreement *vis- à-vis* the specific parties with which it agrees to be bound.'[60]

The bilateral nature of tax treaties require countries to negotiate and enter into individual tax agreements with a number of states. The Tax Justice Network captures the bilateral problem well

[57]Ibid.
[58]Thomas Rixen *The Political Economy of International Tax Governance* (2008) 139 and Itai Grinberg 'The battle over taxing offshore accounts' (2012) 60 *UCLA L.Rev.*304 at 313-317.
[59]Thomas Rixen op cit note 58 at 139-140 and Lee Sheppard 'Don't ask, don't tell, part 4: Ineffectual information sharing' 22 *Tax Notes* 1411-1418.
[60]OECD op cit note 48 art 5.

when they describe the treaty network as a system where there are only 'a few links between many players.'[61]

The process of negotiating and entering into a large number of treaties with a growing list of jurisdictions is both costly and labour intensive.[62]

In the absence of an expansive network of treaties, a state's ability to exchange information is structurally constrained; and the objective of effective and efficient information exchange is subverted.

(b) Reasonable foreseeability prerequisite for the exchange of information

A related criticism against bilateral exchanges of information is the foreseeable relevancy criterion. In terms of this requirement the requesting state bears the onus to show that the data sought is "foreseeably relevant."

This criterion has resulted in a *de facto* limitation of information exchanges to those made upon request after a reasonable and mature case has already been built against the taxpayer.[63] Mere suspicion of a harmful tax practice is unlikely to be specific enough to yield a successful information exchange. This impedes the requesting state's ability to obtain and use information to curb harmful tax practices.

VII. THE DEVELOPMENT OF A BROAD-BASED AUTOMATIC EXCHANGE OF TAX INFORMATION

To summarise, a prohibitive prerequisite for the exchange of taxpayer information is the existence of a DTA or TIEA containing an information sharing article. Even then, the mere

[61]Tax Justice Network *Tax Justice Briefing: Tax Information Exchange Arrangements* (2009) at *2* available at *https://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf*, accessed on 22 February 2020.
[62]Michael Lang, Pasquale Pistone, Claus Staringer, Alfred Storck & Martin Zagler *Tax Treaties: Building Bridges Between Law and Economics* (2010) at 546.
[63]Chang-Ryung Han & Rachael McGauran 'Tracing trails: implications of tax information exchange programs for customs administrations' (2014) Vol.8 No.2 *World Cust. J.* 3 at 4-6 and David M Kemme, Bhavik Parikh & Tanja Steigner 'Information Exchange Agreements in the OECD' (2017) Vol.23 No.3 *Eur. Financial Manag.* 519 at 523.

existence of an information sharing article in a treaty does not in and of itself guarantee a successful data exchange.[64]

Although Article 26 of the Model Tax Conventions do provide for bilateral automatic exchanges of information, these provision was largely unutilized.[65] Information exchanges were largely predominated by upon request procedures. Revenue authorities were required to demonstrate the necessity of information requested. Citing these reasons in an empirical study, Kemme, Parikh and Steigner conclude that tax information exchange treaties were ineffectual; and a new mechanism for tax collaboration was needed.[66]

The European Union Savings Directive ("EUSD") was arguably the first meaningful step towards an automatic exchange of tax information.[67] The EUSD has now been superseded by the CRS;[68] nevertheless its significance in the history of tax information exchange remains relevant.

In terms of the EUSD regime, member-states were required to automatically report on interest income earned by residents of other EUSD-states to that respective resident state.[69] Although limited to European states, the EUSD represented the first broad-based automatic, multilateral exchange of taxpayer information.

The need for improved automatic exchanges of information was again highlighted in 2008, when German and American authorities learnt of massive tax evasion perpetrated by their taxpayers' use of offshore accounts in Lichtenstein and Switzerland.[70]

In the economic context of the 2008 global financial crisis, the LGT and UBS Swiss Banking scandals starkly highlighted the need for cross-border collaboration between tax authorities.[71]

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[64]Michael Lang et al op cit note 62.
[65]J Murray van Schalkwyk op cit note 27at 3 and Itai Grinberg 'Beyond FATCA: An evolutionary moment for the international tax system' (2012) *Georgetown University Law Centre* 1 at 6-7.
[66]David M Kemme et al op cit note 63 at 525.
[67]Itai Grinberg op cit note 58 at 321.
[68]Eva Andrés-Aucejo 'Towards in international code for administrative cooperation in tax matter and international tax governance' (2018) 40 *Revista Derecho del Estado* 45 at 51-2 and European Union Council of the European Union *Press release: Savings taxation directive repealed* (10 November 2015) available at *https://www.consilium.europa.eu/en/press/press-releases/2015/11/10/savings-taxation-directive-repealed/*, accessed on 22 February 2020.
[69]J C Brouwer & G J Kinnegim 'What the EU savings directive means' (2003) 14 *Int'l Tax Rev.* 10 at 10.
[70]J Richard (Dick) Harvey Jr 'Offshore accounts: Insider summary of FATCA and its potential future' (2012) *Vill. L. Rev.* 471 at 476.

These scandals eventually gave rise to the Foreign Account Tax Compliance Act —FATCA. FATCA was passed by Congress in 2010 and came into effect in 2014.[72] It is discussed in more depth in the next section.

VIII. FATCA — SUBSTANTIVE PROVISIONS AND THE ENABLING LEGAL MECHANICS

(a) The objective of FATCA

The objective of FATCA is to increase American fiscal revenue by enhancing fiscal transparency. Through providing the Internal Revenue Service ("IRS"), with increased data on offshore accounts held by US persons, opportunities for tax evasion are constrained and tax revenues improve.[73] Put differently, by increasing the data available to the American tax authority, the IRS is able to curb evasion committed by Americans using offshore banking accounts.[74]

(b) FATCA content

In order to achieve this objective in relation to American individuals, FATCA adopted a two-part approach, consisting of both: a "self-reporting" and a "third party reporting" element.[75]

The "self-reporting" element is administrative and requires Americans who hold qualifying foreign assets to declare this interest to the IRS annually. Broadly, Americans with interests in financial assets outside of the United States to the value of $50,000 at the end of the year; or the value of which exceeded $75,000 at any time in the fiscal year- must file this administrative return.[76] The self-reporting aspect of the FATCA regulation is extraneous to this research.

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[71]Ibid and Itai Grinberg op cit note 65 at 6-7.
[72]United States Department of the Treasury *Foreign Account Tax Compliance Act (FATCA)* available at *https://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca.aspx,* accessed on 22 February 2020.
[73]Joanna Heiberg 'FATCA: Towards a multilateral automatic information reporting regime' (2012) 69 *Wash. & Lee L. Rev*. 1685 at 1698-1701.
[74]Ibid.
[75]Ibid.
[76]IRS *Do I need to file Form 8938 "Statement of Specified Foreign Financial Assets"?* at *https://www.irs.gov/businesses/corporations/do-i-need-to-file-form-8938-statement-of-specified-foreign-financial-assets*, accessed on 22 February 2020.

The third-party reporting element is more pertinent to this study. Foreign financial institutions must identify and report data relating to US Accounts held by them in terms of FATCA. Foreign financial institutions are required to register with the IRS; and to collect and transmit data relating to identified American account holders annually and automatically each year.[77]

FATCA prescribes generous criteria to be applied in identifying American accounts. The Internal Revenue Code provides that a US Person is –

> '(A) a citizen or resident of the United States, (B) a domestic partnership, (C) a domestic corporation, (D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and (E) any trust if— (i) a court within the United States is able to exercise primary supervision over the administration of the trust, and (ii) one or more United States persons have the authority to control all substantial decisions of the trust.'[78]

After having identified an account as a US account, the Foreign Financial Institution must report to the IRS on specific metrics in relation to such account. The automatic reporting fields include: The name, address, and TIN of each account holder for US individuals; and in the case of US Owned entities: the name, address, and TIN of each of the US owner of such entity; the foreign account number; the asset value and periodic income earned.[79]

(c) Withholding in respect of recalcitrant US accounts

Theoretically FATCA reporting can be avoided.

A "recalcitrant" US account, is an account that fails to comply with the FATCA reporting requirements. An uncooperative accountholder can escape FATCA reporting -*de jure*. In such instances a withholding tax will apply. The withholding tax is levied on all US source payments made by foreign financial institutions holding accounts which fail to comply with the FATCA reporting requirements.[80]

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[77]IRS *FATCA Information for Foreign Financial Institutions and Entities* at *https://www.irs.gov/businesses/corporations/information-for-foreign-financial-institutions,* accessed on 22 February 2020.

[78]I.R.C § 1473 available at *https://www.law.cornell.edu/uscode/text/26/1473*, accessed on 22 February 2020 and I.R.C § 7701 available at *https://www.law.cornell.edu/uscode/text/26/7701#a_30*, accessed on 22 February 2020.

[79]I.R.C § 1471available at *https://www.law.cornell.edu/uscode/text/26/1471*, accessed on 22 February 2020.

[80]IRS *Instructions for Form 8966 FATCA Report* availableat*https://www.irs.gov/pub/irs-prior/i8966--2018.pdf*, accessed on 22 February 2020.

It is salient to note that the scope of this draconian withholding tax is not limited to US source-payments in relation to non-compliant or recalcitrant US account; but rather it applies to all US source payments flowing through the financial institution where the account is held.

Grinberg explains —

> 'if foreign financial institutions will not agree to report to the United States on income earned by U.S. individuals through accounts at those institutions, FATCA requires withholding on a wide range of payments from the United States to those same financial institutions, regardless of whether the payments are beneficially owned by U.S. persons on which the IRS wants reporting, non-U.S. customers of the institution, or the institution itself.'[81]

This punitive tax leverages America's status as a global financial powerhouse making it practically untenable for foreign financial institutions to hold accounts of non-compliant Americans or to avoid FATCA reporting.

Anecdotally, several banks in Europe and the United Kingdom have been forced to close the accounts of non-FATCA-compliant American citizens. These "accidental American" clients were not in possession of a US Tax or Social Security Number; and could therefore not be FATCA compliant. Appling the draconian 30% Withholding Tax to all US source payments flowing through the bank was practically imprudent and economically irrational. Banks terminated their relationship with these customers, effectively resulting in a *de facto* exclusion of "accidental Americans" from the banking system.[82]

Up to this point the objectives and the substantive content of FATCA have been broadly outlined. FATCA required foreign financial institutions to share information with the IRS on US accountholders. This model posed potential regulatory and financial challenges. First, the domestic laws in some states precluded the direct sharing of sensitive financial data extraterritorially.[83] Secondly, there were considerable costs involved for financial institutions to

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[81]Itai Grinberg op cit note 65 at 24.

[82]Darla Mercado 'Why 'accidental Americans' have an uphill battle with the IRS' *CNBC* 3 October 2019, available at *https://www.cnbc.com/2019/10/03/why-accidental-americans-have-an-uphill-battle-with-the-irs.html*, accessed on 22 February 2020.

[83]Stjepan Gadžo & Irena Klemenčić 'Effective international information exchange as a key element of modern tax systems: promises and pitfalls of the OECD's common reporting standard' (2017) Vol.41 No.2 *Public Sector Economics* 207 at 214, Frederic Behrens 'Using a sledgehammer to crack a nut: Why FATCA will not stand' (2013) *Wis. L. Rev.* 205 at 205-208 and IRS *FATCA Information for Governments* available at *https://www.irs.gov/businesses/corporations/fatca-governments*accessed on 22 February 2020.

individually transmit data to the IRS.[84] These challenges were addressed by the IRS in drafting the Model Inter-Governmental Agreements ("IGA").

(d) Model 1 Inter-Governmental Agreements

The Model 1 IGA is an agreement entered into between the American government and the government of another state. The IGA empowers financial institutions to collect data on US accounts and report this data to the local revenue authority.[85] The local revenue authority then transmits this data to the IRS annually. This method effectively results in FATCA compliance; whilst mitigating domestic regulatory and financial impediments.

Of the 113 IGAs currently in-force, 102 agreements are Model 1 Agreements, the remaining 11 IGAs are based on Model 2 IGAs.[86] Model 2 IGAs are entered into directly between the financial institutions and the IRS.[87] The local tax authority does not act as an informational intermediary in these exchanges. Given that South Africa has entered into a Model 1 IGA and that this is the more prevalent agreement type,[88] the Model 2 IGA is not discussed further in this report.

The Model 1 IGA provides the treaty framework for an automatic exchange of information via a bilateral instrument. Model 1 IGAs are further sub-divided into two types, namely Model 1A and Model 1B IGAs. The difference between the two sub-types is that the former is a reciprocal exchange instrument; whilst the latter is unilateral.

The IGA between South Africa and the United States was signed on 9 June 2014; and entered into force in October 2014.[89]

The IGA leverages article 26 of the Existing DTA between South Africa and the United States; which permits the automatic exchange of information between the respective tax

[84]Frederic Behrens op cit note 83at 205-208 and IRS op cit note 83.
[85]Stjepan Gadžo & Irena Klemenčić op cit note 83 at 214.
[86]United States Department of the Treasury op cit note 72.
[87]Leopoldo Parada 'Intergovernmental agreements and the implementation of FATCA in Europe' (2015) Vol.7 No.2 *World Tax Journal* 1 at 4-5.
[88]United States Department of the Treasury op cit note 72.
[89]Agreement between the Government of the Republic of South African and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA, The Annexes Thereto and the Memorandum of Understanding in GN 93 *GG* 38466 available at *https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-2014-04%20-%20FATCA%20IGA.pdf*, accessed on 22 February 2020.

authorities.[90]The IGA is based on the Model 1A IGA and provides for a bilateral, automatic and reciprocal exchange of information between South Africa Revenue Service ("SARS") and the IRS.[91]

(e) Reciprocity and the content of information exchanged

The South Africa-United States Intergovernmental Agreement is "reciprocal" in nature. The reciprocity of information exchange is however only *de jure*. Both the structural design and implementation reality of the reciprocity provisions are in fact one-sided.

A critique of the unilateral nature of FATCA is set out herein. This criticism is picked up in the limitation analysis in chapter five, where one evaluates whether the violation to the right to privacy is legally justifiable —constitutionally considered.

In article 6 of the IGA,

> '[t]he Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with South Africa. The Government of the United States is committed to further improve transparency and enhance the exchange relationship with South Africa by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange.[92]

The pledge towards reciprocity in information exchange rings hollow. First, there is glaring asymmetry in the information that the US receives relative to the information that they share.

The information to be shared by South African financial institutions with the IRS is set out in the IGA. The content of information to be reported by foreign financial institutions to the IRS pursuant to FATCA has already been discussed in an earlier segment of this chapter. It would be repetitive to rehearse it here. It is therefore sufficient to say that the information set out in that part corroborates with the actual provisions of Article 2, paragraph 2(a) of the South Africa-United States IGA.[93]

[90]Ibid.
[91]Ibid art.6.
[92]Ibid.
[93]Ibid art.2(a).

Paragraph 2(b) of Article 2 contains the “reciprocal” information to be shared by American financial institutions with the South African Revenue Service (“SARS”).[94]

Contrasting the two paragraphs clearly reveals asymmetry. The IGA allows the US to receive more information than they are required to share.

The US receives but is not obliged to deliver data relating: to depositary accounts held by foreign resident individuals; foreign passive entities controlled by residents of the other state; the account value and certain types of receipts earned during the year.[95]

Cotorceanu summarises the disparity in information sharing in the following table:[96]

Table 1

Type of account	IGA partner must give	Does USA reciprocate?
Depository (ie cash) accounts	Account balance or value	No
	If held by an **individual**: • Gross interest paid	Yes, if the account earns $10 or more of interest
	If held by an **entity**: • Gross interest paid	No
Custodial	Account balance or value	No
	Gross interest and dividends	*US source* income only, but only if • already subject to reporting, and • only with respect to individuals or entities resident in the partner jurisdiction
	Other income generated with respect to assets held in the account	No
	Gross proceeds from the sale or redemption of property	No
	Account balance or value	No
Accounts *other than* Custodial and Depository Accounts	Gross amount paid or credited, including redemption payments	No
Accounts held by passive NFEs	Information on controlling persons	No

1- Table illustrating FATCA information sharing asymmetry by Peter A Cotorceanu

94 Ibid art.2(b).

95 Peter A Cotorceanu ‘Hiding in plain sight: how non-US persons can legally avoid reporting under FATCA and GATCA’ (2015) *Trust & Trustees* 1 at 3.

96 Ibid.

Notwithstanding the structural asymmetry in the information sharing provisions, the US claims they are prohibited from actually transmitting any FATCA data in terms of American Federal and State laws. The IGA instrument itself acknowledges this and makes a 'political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange.[97] Grinberg is sceptical on America's commitment to sharing data and dismisses it as simple 'rhetoric.[98]

In addition to the lack of reciprocity in tax information sharing; a further criticism directed against FATCA is the use of the "right to US citizenship" criterion to determine whether a person is American for tax purposes. This critique is briefly set out below.

(f) FATCA critique — reporting based on a right to American citizenship

Traditionally the determination of a country's right to impose taxes has been based on a subject's tax residency; and not on the basis of citizenship. American tax legislation is almost unique, in that it grants the IRS taxing rights on the basis of a subject's right to American citizenship.[99]

This inconsistency has resulted in effective tax reporting on the accounts of many American citizens who are resident outside of America, where the IRS has no globally legitimate interest in obtaining data. Heiberg explains that the predicament as follows:

> 'US citizens living abroad generally fall into a category of "benign actors"' whose primary reasons for establishing and maintaining overseas accounts are unrelated to tax… "accidental citizens" who were merely born in America and left the country at a young age. The average nonresident citizen holds foreign assets, including bank accounts, retirement funds, insurance plans, and investments, that are necessary for living and working in his country of residence. Similarly, due to international income exclusions and credits, citizens living abroad have, at most, a *de minimis* tax liability… FATCA poses serious problems for U.S. citizens living abroad.'[100]

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[97] Agreement between the Government of the Republic of South African and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA op cit note 89 art. 6.
[98] Itai Grinberg op cit note 64 at 25.
[99] IRS *Introduction to Residency under U.S. Tax Law* available at *https://www.irs.gov/individuals/international-taxpayers/introduction-to-residency-under-us-tax-law,* accessed on 22 February 2020.
[100] Joanna Heiberg op cit note 73 at 1712.

The practical reality for American citizens living abroad hints perhaps at an overbreadth FATCA's reach and intimates notions of constitutional invalidity. The overbreadth doctrine is explained further in the limitations analysis set out in chapter five.

(g) Confidentiality of FATCA data

Finally, the confidentiality of the data transmitted pursuant to FATCA is considered. The IGA between South Africa and the US relies on the underlying DTA.[101] The confidentiality provisions of the DTA are therefore also imported to the IGA.[102] Briefly, this ensures that the data transmitted is subject to the privacy laws of the recipient state; and that the recipient state is limited in its use of the data to tax matters only.

The standard DTA confidentiality requirements are also supplemented in the IGA. The transmitting state (effectively South Africa) may review the mechanics and processes for the transmission and storage of data to the IRS to ensure that they are satisfied with the specifications and safeguards in that system. Data transmission can be suspended until such a review has satisfactorily been concluded.[103]

FATCA was the conceptual forerunner to the OECD's Automatic Exchange of Information based on the CRS.[104] In the next part, the objectives of the CRS, its contents and confidentiality clauses and the legal mechanics of its implementation in South Africa are considered.

IX. THE OECD'S COMMON REPORTING STANDARD

(a) CRS and FATCA common objectives

The need for financial information relating to offshore accounts was not limited to America. Improving tax compliance and constraining evasion is a common objective shared by revenue authorities globally.

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[101]Agreement between the Government of the Republic of South African and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA op cit note 89 art.2.1.
[102]Ibid art.3.7.
[103]Ibid art.3.7-3.8.
[104] Pasquale Pistone 'Coordinating the action of regional and global players during the shift from bilateralism to multilateralism in international tax law' (2014) *World Tax Journal* 3 at 4.

In 2013, the OECD responded to a call by G20 members to '[develop] a new multilateral standard on automatic exchange of information.'[105] This culminated in the drafting of the Common Reporting Standard for the Automatic Exchange of Information. The CRS for the AEoI was finalised in 2014; and approved as the Standard for Automatic Exchange of Financial Account Information in Tax Matters by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes.[106]

AEoI in terms of the CRS represents the first broad-based, multilateral automatic exchange of information. In October 2014, South Africa expressed its intention to be an early-adopter of the CRS.[107] To date there have been three multilateral exchanges of information. The 2018 CRS AEoI consisted of information exchanged between 94 jurisdictions relating to 47 million accounts, with an aggregate value of EUR 4, 9 trillion.[108]

In this part, the scope and contents of the CRS is explained. This includes what constitutes a reportable account; the informational content shared; confidentiality and privacy safeguards embedded in the standard; and the legal mechanism that enables the collection and exchange of CRS data.

(b) Contents of the CRS

The CRS vests responsibility in the financial institutions of participating jurisdictions to perform due diligence procedures on financial accounts held with a view to identifying "reportable accounts." After an account has been identified as reportable, specific information on these accounts is shared with the account-holder's resident jurisdiction automatically each year.[109]

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[105]OECD *OECD Report for the G8 Summit A Step Change in Tax Transparency* (2013) 5 available at *https://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf,* accessed on 22 February 2020.
[106]OECD *Global Forum on Tax Transparency and Exchange of Information for Tax Purposes The 2019 AEOI Implementation Report* (2019) 1-2 available at*https://www.oecd.org/tax/transparency/AEOI-implementation-report-2019.pdf,* accessed on 22 February 2020.
[107]OECD *Joint Statement by the Early Adopters Group* (2014) 1 available at *https://www.oecd.org/tax/exchange-of-tax-information/AEOI-early-adopters-statement.pdf,* accessed on 22 February 2020.
[108]OECD *OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors* (2020) 15 available at*www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-riyadhsaudi-arabia-february-2020.pdf,* accessed on 22 February 2020.
[109]OECD *Standard for Automatic Exchange of Financial Information in Tax Matters* 2ed (2018) 56 available at *http://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-offinancial- account-information-in-tax-matters.htm,* accessed on 22 February 2020.

The OECD provides detailed guidance on which accounts represent reportable accounts and what information is to be shared regarding these accounts. The nubs of these aspects are set out in this paper.

(i) Reportable Accounts

A reportable account is an account which is held in one CRS reporting jurisdiction but controlled by a resident of another CRS reporting jurisdiction. In establishing whether an account is reportable, the financial institution relies on one or more due diligence tests set out by the OECD. These tests include inquiring into one or more of the following: the documentary evidence on residency held by the bank in their records, self-certifications made by the client regarding their residency; account manager assessments; and a search of the bank's electronic databases for specific indicia.[110]

The electronic indicators evaluated include the physical and postal addresses of all persons authorised to use the account, recurrent instructions to make transfers to another jurisdiction and any telephone numbers originating in another jurisdiction. The Handbook issued by the OECD sets out the electronic indicia comprehensively –

> '1. identification of the Account Holder as a resident of a Reportable Jurisdiction(s);
>
> 2. current mailing or residence address in a Reportable Jurisdiction(s);
>
> 3. one or more current or most recent telephone numbers in a Reportable Jurisdiction(s) and no telephone number in the jurisdiction of the Reporting Financial Institution;
>
> 4. current standing instructions (other than with respect to a Depository Account) to repeatedly transfer funds to an account maintained in a Reportable Jurisdiction(s);
>
> 5. currently effective power of attorney or signatory authority granted to a person with an address in a Reportable Jurisdiction(s); or
>
> 6. a current "hold mail" instruction or "in-care-of" address in a Reportable Jurisdiction(s) if the Reporting Financial Institution does not have any other address on file for the Account Holder.'[111]

[110] Ibid 78-81.
[111] Ibid 77-78.

Due to the large number of indicia specified, it is possible that a single account may indicate multiple reporting jurisdictions. In such cases, the account information must be reported to each of the jurisdictions indicated; except where the account is "cured" to a single jurisdiction.[112]

After identifying an account as a reportable account, a financial institution must report on standardised data fields in respect of that account. This data includes both non-financial and financial fields.

Non-financial data reported focuses on personal details of the account holder or controlling person –including their name, address, date of birth, place of birth, tax identification numbers - and the financial institution where the account is held.[113]

The financial data relates to the transactions which took place during the reporting period and the value of the account at the end of the period. This is briefly expounded upon in the next section.[114]

(ii) Financial information reported

At each reporting date a financial institution must, in respect of reportable accounts, report on: the closing value of accounts at the reporting date and the currency in which it is denominated. Additionally, the financial institution must also collect and share data relating to income streams traditionally associated with instruments which constitute financial assets such as: dividend income, interest income and the gain or loss arising on the disposal or maturing of such assets.[115]

Conjunctively, the financial and non-financial data reported is intended to be sufficient for a cursory evaluation by the receiving jurisdiction to evaluate whether or not the controller of the account satisfies their tax obligations in that jurisdiction.[116]

Having briefly sketched the substantive content of the CRS; it is appropriate to now consider the legal instrument which facilitates this AEoI and the salient provisions thereof.

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[112]Ibid.
[113]Ibid 99.
[114]Ibid 77-78.
[115]Ibid 104 and OECD *Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information§2* available *at http://www.oecd.org/ctp/exchange-of-tax-information/multilateral-competent-authority-agreement.pdf*, accessed on 22 February 2020.
[116]OECD op cit note 109 at 99.

(c)The need for a new legal instrument for AEoI in terms of the CRS

Relying on existing exchange articles in bilateral tax agreements to was untenable for a number of reasons. First, the multilateral nature of information exchange advocated by the CRS was ill-suited to a fundamentally bilateral instrument. In terms of the bilateral model, each country seeking to exchange information would be required to have an agreement in place authorising the two-way information exchange. Simply relying on this bilateral mechanism in a traditional DTT would require over 5000 bilateral treaties to be in place between various states before any scalable and meaningful exchanges could take place.[117]

Additionally, article 26 of the Model Double Tax Treaties precludes tax authorities from engaging in "fishing expeditions." As previously discussed, fishing expeditions are broad, general requests which often fall short of the "foreseeable relevance" standard. More specifically, the OECD states that 'a group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers...' is a fishing expedition.[118] Applying the OECD's illustrative guidance, information exchanges in terms of the CRS would constitute fishing expeditions and therefore be precluded from information sharing under article 26 of the DTA.

In addition to the aforementioned shortcomings, the default TIEA template also posed a further limitation. As previously mentioned, the standard TIEA template does not provide for the automatic exchange of information. TIEAs between states would therefore need to be amended to allow for automatic exchanges of information in terms of the TIEA instrument.[119]

In light of the inherent limitations of the erstwhile information exchange framework; there was a clear case for a more pragmatic legal instrument to be developed to facilitate the exchange of information between states.

By 2014, the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("Multilateral Convention") and the corresponding Multilateral Competent Authority Agreement

[117]Ibid 42.
[118]OECD op cit note 37 at 5.
[119]OECD op cit note 109 at 41-43.

("MCAA") were tabled and signed. These represent the most commonly used instruments to facilitate CRS information exchanges.[120]

(d) The mechanics of the Multilateral Convention and the MCAA

The Multilateral Convention and MCAA are instruments which work in concert to provide a legal framework for the implementation of the automatic, multilateral and reciprocal exchanges of information.

The Multilateral Convention is the international legal agreement between states. It is the legal foundation which authorizes the exchange of information, amongst other administrative collaboration activities, between fiscal authorities.[121]

The MCAA is an agreement which leverages the Convention's framework and specifically enables the automatic exchange of CRS data. Once activated, the MCAA establishes a bilateral relationship for reciprocal automatic exchange of information within a multilateral context.[122]

The MCAA performs three functions. First, it ratifies the Multilateral Convention; secondly it allows signatories to "activate" the exchange relationship; and finally it provides further information on the exchange of data in terms of the CRS.[123]

Included in the Convention and MCAA are provisions on the information to be exchanged and the confidentiality safeguards required. The financial and non-financial information to be reported is captured in section 2 of the MCAA; and has already been discussed in a prior part of this chapter.[124]

The confidentiality requirements are discussed in the next part.

(e) Confidentiality provisions in the Multilateral Tax Convention and MCAAs

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[120]OECD *Multilateral competent authority agreement 61 jurisdictions sign multilateral agreement implementing the Standard on automatic exchange* (2015) available at*http://www.oecd.org/tax/exchange-of-tax-information/multilateral-competent-authority-agreement.htm*, accessed on 22 February 2020.
[121]OECD *Global Forum on Tax Transparency and Exchange of Information for Tax Purposes The 2019 AEOI Implementation Report* (2019) 1-2 available at*https://www.oecd.org/tax/transparency/AEOI-implementation-report-2019.pdf*, accessed on 22 February 2020.
[122]OECD op cit note 109 at 43.
[123]OECD op cit note 121 at 14.
[124]OECD op cit note 115.

The primary confidentiality and privacy provisions regarding the CRS AEoI are contained in article 22 and section 5 of the Multilateral Convention and MCAA respectively.

These provisions place a narrow-scope limitation on the use of information obtained by limiting the use of data to the administration and enforcement of taxes.[125]

The data exchanged between states is subject to the privacy and confidentiality laws and regulations of the receiving state; and can be augmented by the supplying state requesting that further data protection mechanisms be put in place in the receiving state.[126] All data breaches must also be immediately reported to the OECD.[127]

Notwithstanding the textual provisions of the Convention and Agreement, the OECD adopts a broader approach to striving to ensure the privacy and confidentiality of information exchanged.[128] In this vein, the CRS framework makes provision for pre-implementation "confidentiality and data exchange assessments";[129] on-going peer reviews focusing on confidentiality;[130] and procedures to suspend information exchange where confidentiality has been breached.[131]

X. JUXTAPOSING FATCA AND CRS INFORMATION EXCHANGES

Although conceptually consistent, there are significant differences between the design and implementation of the FATCA and CRS regimes.[132] The *de facto* reality is that FATCA operates unilaterally and is predicated on the basis of American citizenship or a right to American

[125] Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the Provisions of the Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters, which Entered into Force on 1st June 2011 GN 113 *GG* 37332 art. 22 available at *https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/Multilateral%20Convention%20of%20MAA%20in%20Tax%20Matters.pdf,* accessed on 22 February 2020 and OECD *Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information§2* available *at http://www.oecd.org/ctp/exchange-of-tax-information/multilateral-competent-authority-agreement.pdf,* accessed on 22 February 2020.
[126] OECD op cit note 115.
[127] Ibid.
[128] OECD op cit note 109 at 52.
[129] Ibid at 52-54.
[130] OECD op cit note 106 at 16.
[131] Ibid.
[132] Stjepan Gadžo & Irena Klemenčić op cit note 83 at 217-218and Eschrat Rahimi-Laridjani & Erika Hauser 'The new global FATCA: An overview of the OECD's common reporting standard in relation to FATCA' (2016) Vol.3 No. 13 *Journal of Taxation and Financial Products* 9 at 13.

citizenship.[133] Contrastingly, the OECD's CRS is premised on multilateral, reciprocal exchanges of tax-resident information between member states.[134]

The manner of ensuring implementation also differs. The CRS does not make provision for financial institutions to escape their reporting obligations via a punitive withholding tax on recalcitrant accounts; instead international pressure is used to force states to commit to the CRS and responsibility for enforcing in-country implementation is left to domestic authorities in each jurisdiction.[135] The draconian 30% withholding tax imposed on US source payments where FATCA disclosures are not made makes non-disclosure untenable. The withholding tax is a punitive measure devised by US Treasury to ensure extraterritorial application of FATCA rules by foreign financial institutions.[136] Notwithstanding these differences, FATCA and CRS developments have radically enhanced tax transparency and cross-border collaboration between revenue authorities globally.

XI. CONCLUSION

This chapter is prefaced with an explanation of the need for cross-border fiscal collaboration. Stemming from that explanation, the evolution of tax information exchange was explored. The discussion began by explaining the first tax agreement in 1843, the development and progression of tax information exchanges since, and the culmination of tax information exchanges in the automatic broad-based sharing of data.

In the course of this discussion the contents and manner, as well as confidentiality and privacy safeguards of various tax information exchange regimes were summarised. The relevant provisions of the underlying legal instruments, which authorize and empower states to share data, were also discussed. The instruments canvassed include the DTAs, TIEAs, IGAs which facilitate FATCA, and the Conventions and Agreements that enable the AEoI based on the CRS.

In the next chapter relevant aspects of the South African legal framework which give effect to the exchange of information in domestic law are explored. This includes the interplay between

[133]Wouter Lips ' Great powers in global tax governance: a comparison of the US role in the CRS and BEPS' (2019) Vol.16 No.1 *Globalizations* 104 at 109.
[134] Ibid.
[135] Eschrat Rahimi-Laridjani & Erika Hauser op cit note 132.
[136] Ibid.

domestic laws and constitutional sovereignty; as well as framing the constitutional inquiry which lies at the core of this research.

CHAPTER THREE

THE INTERPLAY BETWEEN THE DOMESTIC LEGAL FRAMEWORK IN SOUTH AFRICA & THE AUTOMATIC EXCHANGE OF TAX INFORMATION

I. INTRODUCTION

A prerequisite for a cross-border automatic exchange of information is that an appropriate legal framework be in place for the collection and exchange of data. 'The legal framework includes both domestic law and the international exchange instrument.'[137]

In the previous chapter, the provisions of various international exchange instruments were discussed. International exchange instruments give effect to the cross-border exchange of information between revenue authorities globally. The IGAs and Conventions, read together with the respective subsidiary agreements, establish and regulate the relationship between nation states. The international instruments indicate a pledge to share data and illustrate administrative and operative specifications on the data to be shared.

In this chapter, the other element of the legal framework is examined. More specifically, the domestic legal provisions in South African municipal law which facilitates the AEoI are set out. This chapter is divided into two main parts.

In the first key part, the ratification of the international instruments (discussed in chapter two) and their reception into South African law is discussed. This includes the subsidiary regulatory provisions which empower financial institutions to collect the required data; and share it with the South African Revenue Service ("SARS").

In the second key part, the notion of constitutional sovereignty is introduced — the doctrine that all laws and conduct must be consistent with the Constitution.[138] The three phases of the constitutional inquiry are described; and the two-stage approach applied by courts when

[137] OECD op cit note 108 at 53.
[138] Constitution supra note 7.

evaluating Bill of Rights challenges is explained. The discussion progresses to consider how these aspects interface with the AEoI.

The chapter culminates in the framing of the constitutional inquiry which forms the nub of this inquiry.

II. PART ONE — RATIFICATION OF INTERNATIONAL INSTRUMENTS AND RECEPTION INTO SOUTH AFRICAN LAW

The Multilateral Convention of Mutual Administrative Assistance in Tax Matters, the corresponding MCAA, and IGAs represent international treaties between nation states and are subject to the Vienna Convention on the Law of Treaties.[139] The manner in which these international treaties are received into domestic municipal law varies between countries.[140] There are two broad approaches for reception of international instruments into municipal law, namely – the monist approach and the dualist approach.[141]

Monists argue that international law and domestic laws are interrelated components of the same system.[142] Accordingly, once a treaty has been entered into it automatically forms part of the domestic or municipal law in the signatory state without any further intervention. Contrastingly, the dualist approach is predicated on the notion that a sharp distinction exists between international and domestic law.[143] In a dualist system, additional legislative intervention is required before an international instrument becomes binding.[144] The Constitution of a country usually determines whether a monist or dualist approach is applied in the reception of international treaties.

In apartheid South Africa, a purely dualist approach informed the relationship between international treaties and South African law. Dugard explains-

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[139]Brian J Arnold *International Tax Primer* 3 ed (2016) at 136.
[140]Ibid at 137 and Richard Firmpong Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2007) 30 *Fordham Int'l L.J.* 296 at 297.
[141]Richard Firmpong Oppong op cit note 140.
[142]G Ferreira and A Ferreira-Snyman 'The incorporation of public international law into municipal and regional law against the backdrop of the dichotomy between dualism and monism' (2014) Vol. 17 No.4 *P.E.L.J* 1471 at 1471 and Richard Firmpong Oppong op cit note 140.
[143]G Ferreira and A Ferreira-Snyman op cit note 142.
[144]John Dugard 'International law and the South African Constitution' (1997) 8 *Eur. J. Int'l L.* 77 at 81.

> 'Before 1994 South Africa followed the English dualist approach to the incorporation of treaties. Treaties were negotiated, signed, ratified and acceded to by the executive. Only those treaties incorporated by Act of Parliament became part of South African law.' [145]

Presently, the interplay between international treaties and municipal law in South Africa is provided for in Chapter 14 of the Constitution.[146] More specifically, the mandate to enter into international treaties is vested in the executive.[147] Generally treaties are only binding after ratification by both houses of the legislature; and corresponding domestic legislation is passed to give effect thereto.[148]

The exception to this generic provision is two-fold: first, certain types of agreements do not require parliamentary approval. This exception covers treaties of a 'technical, administrative or executive nature.'[149] Secondly, where an agreement is ratified but domestic legislation has not yet been enacted to give effect thereto; those provisions hold full legal status.[150]

The textual provisions of section 233 clearly indicate that South Africa adopts a hybrid approach regarding the reception of international treaties into municipal law.[151] Whether a dualist or monist approach is taken is primarily a function of the nature of the treaty –in other words, whether the treaty is of a 'technical, administrative or executive nature.'[152] Additionally, whether a provision in a ratified treaty is self-executing in the absence of domestic legislation is also ambiguous.[153] These are matters which are deferred for judicial interpretation.[154]

Whether or not tax treaties constitute agreements of a 'technical, administrative, or executive nature' is moot. All international tax instruments are negotiated and entered into by National

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[145] Ibid.
[146] Constitution supra note 7.
[147] Ibid s 231(1).
[148] Ibid ss 231(2) and 231(4).
[149] Ibid s 231(3).
[150] Ibid s 231(4).
[151] G Ferreira and A Ferreira-Snyman op cit note 142 at 1478-1485.
[152] Constitution supra note 7 s 231(3).
[153] Ibid s 231(4).
[154] John Dugard op cit note 144 at 83 and Werner Scholtz & Gerrit Ferreira 'The interpretation of section 231 of the South African constitution: a lost ball in the high weeds!' (2008) Vol.41 No.2 *The Comparative and International Law Journal of South Africa* 324 at 333.

Treasury, forwarded to the relevant parliamentary sub-committees for consideration; recommended to Parliament for ratification; and published in the Government Gazette once the requisite approvals have been obtained.[155]

Section 108 of the Income Tax Act is the underlying provision in the national legislation which gives effect to the respective tax treaties; and imbues the status of law on its provisions.[156] The section provides —

> 'The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to .... the rendering of reciprocal assistance in the administration of and the collection of taxes... As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in this Act.'[157]

In *Krok v C:SARS,*[158] the Supreme Court of Appeal ("SCA") explained the manner in which tax treaties are incorporated into South African law. Referring to s108 of the Income Tax Act the SCA stated - 'they became part of South African law as they were approved by the legislature under these provisions and duly gazetted.'[159]

(a) FATCA Inter-Governmental Agreement received into South African law

The IGA which establishes FATCA reporting between South Africa and the United States was signed on the 9 June 2014.[160] The National Assembly and the National Council of Provinces

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[155] Parliamentary Monitoring Group National Council of Provinces *International Tax Agreements: overview by National Treasury and SARS* (27 August 2014) available at *https://pmg.org.za/committee-meeting/17440/,* accessed on 22 February 2020 and Parliamentary Monitoring Group National Assembly Finance Standing Committee *Adjustments Appropriation Bill; International Tax Treaties with China & Nigeria* (28 September 2000) available at *https://pmg.org.za/committee-meeting/49/,* accessed on 22 February 2020.
[156]Income Tax Act 58 of 1962.
[157]Ibid ss 108(1) and 108(2).
[158]*Krok v C:SARS* 2015 (4) All SA 131 (SCA).
[159]Ibid para 24.
[160]Agreement between the Government of the Republic of South African and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA op cit note 89 art.10 and SARS 'United States and South Africa sign an Intergovernmental Agreement to share tax information' 9 June 2014 available at *https://www.sars.gov.za/Media/MediaReleases/Pages/9-June-2014---United-States-and-South-Africa-Sign-an-Intergovernmental-Agreement-to-Share-Tax-Information.aspx,* accessed on 22 February 2020.

approved the instrument on 28 October 2014.[161] The requisite notices were published in the Government Gazette on 13 February 2015.[162] Accordingly, pursuant to section 231 of the Constitution of the Republic, read together with section 108 of the Income Tax Act and the definition of an international tax agreement in the Tax Administration Act,[163] the provisions of the IGA between South Africa and the United States have the status of law in South Africa.

(b) CRS's AEoI Multilateral Convention and MCAA received into South African law

The Multilateral Convention was signed by South Africa on 1 June 2011[164]. On 9 May 2012, the Standing Committee on Finance recommended the Convention be ratified by the National Assembly.[165] The Convention eventually received parliamentary approval and was published in the Government Gazette on 21 February 2014.[166]

The MCAA (a subsidiary agreement facilitated by the Multilateral Convention) which gives effect to AEoI based on the CRS, was signed on 27 January 2016.[167] When considered altogether, the requirements set out in s231 of the Constitution have been satisfied and automatic exchange of information based on the OECD's Common Reporting Standard have been received into South African municipal law.

Transposing the requirements of international treaties into local law was only one aspect of amending the domestic legal framework to accommodate an AEoI. Further regulatory

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[161]SARS 'Update on implementation of FATCA in South Africa' 26 March 2015 available at *https://www.sars.gov.za/Media/MediaReleases/Pages/26-March-2015---Update-on-implementation-of-FATCA-in-South-Africa.aspx*,accessed on 22 February 2020.

[162] *GG* 38466 (13 February 2015).

[163]Tax Administration Act 28 of 2011 s 1.

[164] Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the Provisions of the Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters, which Entered into Force on 1st June 2011 GN 113 *GG* 37332 available at *https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/Multilateral%20Convention%20of%20MAA%20in%20Tax%20Matters.pdf*, accessed on 22 February 2020.

[165] Parliamentary Monitoring Group National Assembly Finance Standing Committee *Report: on the Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2011 Protocol, dated 09 May 2012* (9 May 2012) available at *https://pmg.org.za/tabled-committee-report/1576*, accessed on 22 February 2020.

[166]*GG* 37332 (21 February 2014).

[167] SARS *External Business Requirements Specification: Country-by-Country and Financial Data* v2.2 (2017) 3 available at *https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-CBC-2017-03%20-%20Final%20BRS%20on%20the%20OECD%20CbC%20Reporting.pdf*, accessed on 22 February 2020.

amendments were required to obligate financial institutions to obtain, share and retain this data. These regulations were facilitated by the Tax Administration Act.[168]

(c) Changes to domestic law to enable AEoI reporting for financial institutions

Section 3(3)(a)(i) of the Tax Administration Act empowers SARS to obtain any information it requires for the purposes of sharing this information with a foreign revenue authority when acting in accordance with an international tax agreement.[169] As discussed in the previous section, both the FATCA IGA and the Multilateral Convention constitute international tax agreements, the CRS falls within the scope of an international tax standard.

In this vein, SARS issued a number of Public Notices. The Notices empower and obligate financial institutions to collect, retain and share the data needed to meet the obligations pursuant to these agreements. With further reference to FATCA, SARS issued Public Notices 508,[170] 509[171] and 597.[172]

Public Notice 509 obliges reporting financial institutions to perform due diligence procedures to identify reportable accounts, to obtain the requisite FATCA reporting information in respect of those accounts and to submit a return to SARS in respect of such accounts.[173] Notice 508, provides for the retention of data by reporting financial institutions. A financial institution must retain records which 'demonstrate that it has observed the requirements under the intergovernmental agreement.'[174] Finally, Notice 597 provides for the imposition of administrative non-compliance penalties on financial institutions who fail to satisfy their FATCA obligations.[175]

Regulatory amendments were also warranted to lawfully mandate financial institutions to collect and share CRS data with SARS. To this end, the Minister of Finance passed regulations in March

[168]Tax Administration Act supra note 163 s (3)*(a)(i)*.
[169]Ibid.
[170]Public Notice 508 *GG* 37778 (27 June 2014).
[171]Public Notice 509 *GG* 37778 (27 June 2014).
[172]Public Notice 597 GG 38983(10 July 2015).
[173]Public Notice 509 supra note 171 and Tax Administration Act supra note 163 s 26.
[174]Public Notice 508 supra note 170 and Tax Administration Act supra note 163 ss 29 and 30.
[175]Public Notice 597 supra note 172 and Tax Administration Act supra note 163 s 210.

2016.[176] The regulations set out the due diligence procedures to be performed by financial institutions to identify reportable accounts; and create a reporting obligation between the financial institution and SARS in respect of such accounts.[177] Public Notice No. 192 issued by the Commissioner, requires financial institutions to submit the CRS data to SARS.[178] There are also provisions on data retention and sanctions for non-compliance with reporting obligations.[179]

When aggregated, the international instruments entered into by the executive and approved by the legislature; the relevant legislative provisions in the Income Tax Act and Tax Administration Act; and various pieces of secondary legislation constitute the legislative framework which facilitates the AEoI in South African municipal or domestic law.

Having situated the AEoI regimes in South African law, the next part of this chapter introduces the notion of "constitutional sovereignty."

III. PART TWO — CONSTITUTIONAL CONSIDERATIONS

The doctrine of constitutional sovereignty is perhaps best encapsulated in section 2 of the Constitution itself – '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'[180]

In this part of the chapter, the concept of constitutional supremacy is explained in more detail. It begins by describing how the Constitution interacts with other laws; and its impact on the validity of those laws. Thereafter, the methodology employed by courts when inquiring into whether a law meets the constitutional standard is described. Finally, this chapter concludes by framing the inquiry into the constitutionality of AEoI.

(a) Constitutional sovereignty — the interaction between the Constitution and other laws & its impact on validity

[176]Reg 210 *GG* 39767 (2 March 2016) and Tax Administration Act supra note 163 s 257.
[177]Reg 210 *GG* 39767 supra note 176 and Tax Administration supra note 163 s 257.
[178]Public Notice 192 *GG* 40660 (3 March 2017) and Tax Administration supra note 163 s 26.
[179]Public Notice 193 *GG* 40660 supra note 178 and Tax Administration supra note 163 s 210.
[180]Constitution supra note 7 s 2.

During apartheid, the South African constitution was predicated on the Westminster model; accordingly the doctrine of Parliamentary Sovereignty applied.[181] Parliamentary sovereignty effectively meant that the legislature was the focal arm of state authority. The legislature had the authority to make any law they deemed appropriate. Laws passed by the legislature were not evaluated against any substantive normative standard. Elliot explains that where parliament holds "supreme" law making authority they are 'legally competent to enact legislation which is utterly repugnant to the most fundamental of values.'[182]

Another feature of the system of parliamentary sovereignty was the constrained role of the judiciary. Since parliament held unfettered law making competence, the role of the judiciary was limited to reviewing the procedural aspects of laws passed and a formalistic application of the law. Dugard explains an inherent feature of the Westminster model is 'judicial subordination to the will of Parliament.'[183]

Although not the only contributing factor to the atrocities of apartheid, the model of parliamentary sovereignty represented a structural enabler for the racist practices of the apartheid government.[184]

Unsurprisingly, in the transition to a democratic South Africa, the model of constitutional supremacy was largely preferred over its parliamentary counterpart.[185] In terms of this model, all laws and conduct must be consonant with the constitutional standard. The substantive content of the constitutional standard is contained in the Bill of Rights.[186] To the extent that a court finds a

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[181]John Dugard *Human Rights and the South African Legal Order* (2015) 25 and Heinz Klug *The Constitution of South Africa: A Contextual Analysis* (2010) 6.

[182]Mark Elliott 'Parliamentary sovereignty and the new constitutional order: Legislative freedom, political reality and convention' (2002) Vol. 23 No.3 *Legal Studies* 340 at 341.

[183]John Dugard 'A bill of rights for South Africa' (1990) Vol.23 No.3 *Cornell Int'l L.J.* 441 at 442.

[184]*S v Zuma* 1995 (2) SA 642 (CC) para 17.

[185]Frank I Michelman 'The rule of law, legality and the supremacy of the Constitution' in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 5) 11-26–11-27.

[186]Constitution supra note 7 ch 2.

law or conduct to be 'inconsistent with the Constitution...[it is] invalid to the extent of its inconsistency.'[187]

The new constitution model has significantly expanded the judiciary's mandate. Due to this expansion, courts are often called upon to evaluate a law or executive conduct for constitutional consonance.[188] The jurisprudential approach taken by the courts in adjudicating these matters is generally consistent. In the next part, the methodology followed by the courts in Constitutional adjudication is explained.

(b) The methodology followed by the courts in Bill of Rights adjudication

When evaluating a law or practice for constitutional consonance, the courts customarily follow a three-stage approach. Currie and De Waal describe these stages as: "procedural questions"; "substantive issues" and "remedies."[189]

(i) "Procedural questions"

In the "procedural questions" phase, courts are concerned with issues of jurisdiction, standing and application. This phase constitutes a preliminary inquiry to evaluate if the applicant is competent to bring this challenge before the court; whether the court is competent to hear the matter; and if the Bill of Rights is applicable and appropriate to apply in the context of the specific case.[190] Once the court is satisfied that the matter before it warrants constitutional adjudication, they then turn to evaluate the "substantive issues."

(ii) "Substantive issues"

The substantive inquiry goes to the heart of the matter. In this phase, the court evaluates the applicant's contention that a law or practice falls short of the constitutional standard. The

[187] Constitution supra note 7 s 172 and *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 40.
[188] Constitution supra note 7 ss 165 and 172.
[189] Ian Currie and Johan De Waal *The Bill of Rights Handbook* 6 ed (2013) at 23-24.
[190] Ibid 23-26.

substantive evaluation consists of two related inquiries. Kentridge AJ explains - 'First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?'[191]

1. *Giving dimension to a right in the Bill of Rights*

The first inquiry therefore focuses on defining the parameters of the right contained in the Bill of Rights; and assessing whether the law or conduct challenged interferes with that right.[192]

The early decisions of the Constitutional Court, such as *Zuma*[193] and *Makwanyane*[194]offer useful guidance into interpretation of rights contained in the Bill of Rights. In this vein, when defining the parameters of a right, courts must be cognisant of the historical context which gave rise to the right;[195] and interpret the textual provisions of the Constitution in a generous and purposive manner.[196] Judicial interpretation of the right must promote the broader constitutional project;[197] whilst also being consistent with international legal instruments and norms.[198]

Where it is found that the contested practice infracts upon the right, only then will the limitation analysis follow. The limitation analysis is the second stage of the substantive two-stage enquiry. It is performed to determine whether the infraction of the right is constitutionally permissible.

2. *Limitations analysis*

[191]*S v Zuma* supra note 184 para 21.
[192]Ian Currie and Johan De Waal op cit note 189 at 26 and DW Freedman, ES Pugsley & GE Devenish 'Constitutional Law Bill of Rights' in WA Joubert & TJ Scott *The Law of South Africa* Vol 5(4) 2 ed (2000) para 14.
[193]*S v Zuma* supra note 184.
[194]*S v Makwanyane* 1995 (3) SA 391 (CC).
[195]Ibid para 10.
[196]Ibid para 9 and *S v Zuma* supra note 184 para 14-15.
[197]Constitution supra note 7 s 35(1) and *S v Makwanyane* supra note 194 para 34.
[198]Constitution supra note 7 s 35(1) and *S v Makwanyane* supra note 194 para 35.

The limitations analysis is predicated on the notion that the rights espoused in the Bill of Rights are not absolute entitlements.[199] Rather, the rights contained therein are subject to limitation, where such limitation of the right can be substantiated 'in an open and democratic society...'[200]

The Interim Constitution[201] introduced the concept of the limitation clause in section 33. The provision was arranged in two parts.[202]

First, the preamble to the limitation provision contained an important precondition. A right in the Bill of Rights may only be constitutionally limited pursuant to a law of general application.[203] Currie and De Waal explain the concept of "law of general application" as 'the law must apply impersonally, it must apply equally to all and it must not be arbitrary in its application.'[204] Although rarely litigated contentiously, the law of general application inquiry remains salient.

The second, and more substantive, part of the limitation analysis examines whether the rights infraction is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'[205] This is an exercise in judicial interpretation, informed by the facts and circumstances of a particular case. Here, the court systematically evaluates the proportionality of the rights infringement to determine whether it is constitutionally consonant.

In *Makwanyane*, the court gave further dimension to the substantive inquiry in the limitation analysis.[206] Their jurisprudence, and more specifically the judgment by Mokgoro,[207] strongly influenced the development of the limitations clause, as it appears in the final text of the prevailing Constitution:

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[199]Ian Currie and Johan De Waal op cit note 189 at 150 and *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 23.
[200]Constitution supra note 7 s 36 and *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* supra note 199 para 23.
[201]Constitution supra note 7.
[202]Ibid.
[203]Ibid s 36 and *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 104.
[204]Constitution supra note 7 s 36 and Ian Currie and Johan De Waal op cit note 189 at 156.
[205]Constitution supra note 7 s 36.
[206]*S v Makwanyane* supra note 194.
[207]Ibid para 300-318.

> 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.'[208]

The factors listed in the limitations clause do not represent a closed list. Conjunctively, they seek to '[weigh] up the harm done by a law that is the infringement of a fundamental right; against the benefits the law seeks to achieve or the reason for and purpose of the law.'[209]

The limitations analysis holistically considers: the significance of the right constrained in the constitutional order;[210] the manner and degree to which the right is limited;[211] and the state's reason for limiting that right.[212] Additionally, the court assesses whether there is congruence between the state's motive or reason for limiting the right and whether the limitation actually serves this purpose. The court also considers if there may be an alternate mechanism the state could employ to achieve its objective in a way which would be less intrusive to fundamental rights.[213]

(iii) "Remedies"

Where a fundamental right in the constitution has been found to have been violated in an unjustifiable manner, courts are enjoined to order an appropriate remedy. The appropriate

[208]Constitution supra note 7.
[209]Ian Currie and Johan De Waal op cit note 189 at 178.
[210]Ian Currie and Johan De Waal op cit note 189 at 178-179 and Stu Woolman & Henk Botha 'Limitations' in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 5) 34-70.
[211] Stu Woolman & Henk Botha op cit note 210 at 34-79 and Ian Currie and Johan De Waal op cit note 189 at 178-179.
[212]Stu Woolman & Henk Botha op cit note 210 at 34-79.
[213]Ibid 34-85 – 34-86 and Ian Currie and Johan De Waal op cit note 189 at 182.

remedy at a minimum will include a declaration of the law's invalidity; and may also include appropriate supplementary relief, as the circumstances indicate.[214]

(c) Framing the constitutional inquiry

This research is chiefly concerned with the constitutionality of automatic exchanges of tax information. More specifically, it is a inquiry into whether or not the AEoI –in terms of the FATCA and the CRS regimes– impinge on a person's constitutional right to privacy?

The substantive interpretation of the right to privacy and the corresponding limitations analysis are discussed in chapters four and five respectively. It is however apt to very briefly dispose of the "procedural questions" which preface those inquiries in the scope of this chapter.

The objective of the procedural inquiry is to preliminarily evaluate the competence of the constitutional challenge. It considers which court has jurisdiction to hear the matter; whether the Bill of Rights is the relevant body of law that applies; and the standing of the specific parties in relation to the dispute.

(i) Jurisdiction of the courts

Each of the superior courts of South Africa holds concurrent competence in respect of constitutional matters.[215] Theoretically the Constitutional Court could hear a challenge to the constitutionality of the AEoI as a court of first instance. This would be based on an application for direct access to the court.[216] Such application is however unlikely to succeed. In *Bruce*,[217] the court explained that applications for direct access are rarely granted. They explained that the court does is not equipped to deal with evidentiary matters and prefers to draw on the

[214]Constitution supra note 7 s 172,
[215]Ian Currie and Johan De Waal op cit note 189 at 108.
[216]Constitution supra note 7 s 167.
[217]*Bruce v Fleecytex Johannesburg CC* 1998 (2) SA 1143 (CC) para 7.

jurisprudence of lower courts in its deliberations.[218] It is therefore more likely that an AEoI challenge will first be heard in a High Court; and that any potential declaration of invalidity will be referred to the Constitutional Court for confirmation.[219]

Having established the jurisdiction of the courts to hear a challenge on the constitutionality of the AEoI; the applicability of the Bill of Rights must now be considered.

(ii) Application of the Bill of Rights

The right to privacy is contained in the Bill of Rights. The state is therefore constitutionally enjoined to 'respect, protect, promote and fulfil' the right to privacy.[220] This obligation binds all arms of state including 'the legislature, the executive, the judiciary and all organs of state.'[221]

Additionally, the rights contained in the Bill of Rights, also enjoy horizontal application.[222] In *Khumalo*, O'Regan explains 'The applicant relies directly on...the Constitution, despite the fact that none of the parties to the....action is the state, or any organ of state.'[223] The constitutional right to privacy is therefore not limited to a public law relationship; but is also enforceable between private subjects.

The plurality of application finds contextual relevance in this paper. It enjoins private banks in addition to the state to take steps to give effect to a person's right to privacy.

(iii) *Locus standi*

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[218]Ibid.
[219]Constitution supra note 7 s 167(5).
[220]Ibid s 7.
[221]Ibid s 8(1).
[222]Ibid s 8(2).
[223]*Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 29.

The textual provisions of section 38 offer a generous stance on the issue of standing. This section practically allows almost any impacted person to launch a constitutional challenge. This 'broad approach'[224] has also been confirmed by the Constitutional Court in their jurisprudence.

Additionally, the right to privacy as contained in the Bill of Rights is also not limited to South African citizens or residents; but instead applies to 'everyone.'[225] Furthermore, Woolman posits that the Bill of Rights should apply to state conduct both inside as well as outside of South Africa.[226] In this vein he explains '[t]here seems to be no good reason why abuses of state power within South Africa's borders should be subject to Chapter 2, but abuses of state power outside the borders should not be similarly subject.'[227]

The practical implication is that a constitutional challenge could be launched by any person whose bank account may be subject to AEoI reporting; any impacted reporting institution on the basis of the horizontal application of rights; or any other person –including a juristic person– acting in the public interest.

With further reference to the first of these categories, that is a person whose account is subject to AEoI reporting, there are two identifiable sub-classes of potential applicants. The first sub-class relates to South African residents holding offshore accounts in CRS-network jurisdictions. This applicant could argue that by entering into a treaty and receiving sensitive data pursuant to that treaty, the State has offended the fundamental right to privacy. The applicant would allege that the act of committing to the treaty and receiving private information was not in line with the section 7 injunction for the state to 'respect, protect, promote and fulfill the rights in the Bill of Rights.'[228]

Correspondingly, an American citizen or resident of a CRS-network country with a reportable account in South Africa may also bring a challenge. They would argue that the signing of the

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[224] *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 165.
[225] Constitution supra note 7 s 14.
[226] Stu Woolman 'Application' in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 5) 31-114.
[227] Ibid.
[228] Constitution supra note 7.

treaty and the transmission of sensitive data by SARS to the other state's revenue authority falls short of the constitutional standard enjoined in section 7.[229]

When these points are taken together, it is clear that all persons in or out of South Africa are entitled to the right to privacy. A number of applicants could therefore launch a constitutional challenge against the state or even the reporting financial institution. *Locus standi* would be a simple procedural hurdle to clear.

IV. CONCLUSION

In this chapter, the interface between FATCA, the CRS international instruments and the domestic legal framework in South Africa was examined. The examination was divided into two parts. In the first part, the reception of the FATCA and CRS international instruments into South African law was discussed. The discussion included a brief summation of the enabling regulatory amendments which obligated South African financial institutions to collect and report on the requisite AEoI data fields.

In the latter part of the chapter, constitutional considerations were introduced - more specifically, the notion of constitutional supremacy and its imperative implication. As part of the constitutional considerations discussed, the structured methodology courts apply when adjudicating a Bill of Rights matter was also set out.

This chapter disposed of the preliminary constitutional inquiry and ultimately culminated in framing the constitutional challenge which lies at the heart of the research – that is, whether the FATCA and CRS AEoI regimes constitute a violation of the fundamental right to privacy; and the posterior question of whether such a violation is constitutionally permitted in terms of the limitations clause?

The contention that the AEoI potentially violates the right to privacy is sufficient to render the case justiciable. Currie and De Waal explain that for the Bill of Rights to find application in litigation: 'the applicant need only make an allegation. It is not necessary at this stage to prove to the court that a fundamental right has been infringed or is threatened. The basis, on which the allegation is made, must, however, be clearly set out.'[230]

In the next chapter, the contents of the fundamental right to privacy and the manner in which the AEoI infringes on or threatens this right is set out.

[230]Ian Currie and Johan De Waal op cit 189 at 85.

CHAPTER FOUR

THE RIGHT TO PRIVACY — A FUNDAMENTAL HUMAN RIGHT

I. INTRODUCTION

In chapter three, the structured approach courts follow when deliberating a Bill of Rights matter was explained- "procedural issues"; "substantive issues"; and "remedies".

The nucleus of a judgment is usually found in the substantive evaluation.

The substantive evaluation is a two-part appraisal. First, the right is defined, scoped and interpreted. As part of this process, the challenged law or conduct is assessed to establish whether a *prima facie* violation of the right has taken place. Secondly, the limitation analysis holistically evaluates whether the infraction is constitutionally permitted.

In this chapter, the first part of the substantive evaluation brought to the fore. The right to privacy is defined and scoped. The inquiry which follows is whether the disclosure of information in terms of the FATCA and CRS AEoI breaches this fundamental right.

In scoping the right to privacy, the textual provisions of section 14 of the Constitution and the corresponding body of interpretative judicial precedent are discussed. Further texture is given to the right by drawing on international law. Thereafter, the subsidiary legislation which may give effect to the right to privacy in the context of the AEoI is considered. Together these aspects provide the legal scaffolding to evaluate whether the FATCA and CRS AEoI constitute an impingement on the right to privacy.

II. SCOPE OF THE RIGHT TO PRIVACY

(a) History and evolution of the right to privacy

The right to privacy is not a new or post-constitutional right in South African law. The right was historically recognised and fell within the domain of personality rights in the common law of delict.[231]

Notwithstanding the long-standing recognition of the right to privacy in South African law, its essence was often violated during apartheid. Oppressive laws and practices - such as the Immorality Act and interception of communication pursuant to Post Office Act- constituted *de facto* violations of a person's privacy and eroded the related values of freedom and dignity.[232]

It is therefore unsurprising that section 13 of the Interim Constitution[233] – the forerunner to section 14 of the Final Constitution[234] – recognised and entrenched privacy as a fundamental human right.

(b) Textual provisions of the Constitution.

In its early jurisprudence, the Constitutional Court explained that the point of departure when interpreting any right contained in the Bill of Rights is the text of the right itself.[235] The text of section 14 of the Constitution accordingly refers —

> '14. Privacy. —Everyone has the right to privacy, which includes the right not to have-
>
> (a) their person or home searched;
>
> (6) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed.'[236]

The broad and overarching entitlement to privacy in section 14 is augmented by a specific list of inclusions. These pronounced constructions are highlighted as forming part of the right to privacy. The list however is not closed and the right to privacy is necessarily more extensive.

[231] Ian Currie and Johan De Waal op cit note 189 at 316 and David McQuoid-Mason 'Privacy' in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 5) 38-2 - 38-18.
[232] David McQuoid-Mason op cit note 230 at 38-22, 38-25 - 38-26.
[233] Constitution of the Republic of South Africa Act 200 of 1993.
[234] Constitution supra note 7.
[235] *S v Zuma* supra note 184 and *Sv Makwanyane* supra note 194 para 266.
[236] Constitution supra note 7 s 14.

Whilst privacy is not comprehensively defined in the Constitution, the Constitutional Court has provided interpretative guidance on its meaning in *Bernstein.*[237]

(c) Judicial and academic interpretation of the right to privacy

Bernstein v Bester[238] was the first Constitutional Court judgment on the right to privacy.

In *Bernstein,*[239] the Court borrows from American jurisprudence in propagating a generic two-part test to determine if privacy rights are implicated. The test involves a subjective and an objective inquiry. 'The party... must establish both that he or she has a subjective expectation of privacy and that society has recognised that expectation as objectively reasonable.'[240]

The test articulated in *Bernstein* has been confirmed and applied by the Constitutional Court in a number of subsequent cases.[241]

Whether or not a person's expectation of the right to privacy is reasonable, is a function of the facts and circumstances of the matter. Courts have considered a wide range of factors including: the manner in which the information was obtained; the inherently intimate or mercantile nature of the information; the existence of consent to the exchange; as well as any subsequent publication or propagation of the data.[242]

At this point, it is salient to distinguish between two facets of the right to privacy. McQuiod-Mason differentiates between privacy rights that '[protect] personal autonomy' and those which seek to '[protect] information.'[243] In this research, the latter is pertinent. The constitutional precedent relating to informational privacy focuses on the interception of communication and

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[237] *Bernstein v Bester NO* 1996 (2) SA 751 (CC).
[238] Ibid.
[239] Ibid
[240] Ibid para 75.
[241] *Khumalo v Holomisa* supra note 223 para 27, *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) para 91 and *Minister of Justice and Constitutional Development v Prince* 2018 (6) SA 393 (CC) paras 44-48.
[242] David McQuoid-Mason op cit note 230 at 38-26 - 38-34.
[243] Ibid at 38-22 and 38-25.

seizure.[244] Although the principles articulated in these judgments offer valuable insights, they do not directly address the relationship between the right to privacy and mass data sharing- which lies at the conceptual core of this investigation.

In 2018 the United Nations High Commissioner for Human Rights issued a report on the 'right to privacy in the digital age.'[245] This report more precisely articulates the interface between the reality of big data and the right to privacy in the context of international law. This report is discussed further in the next part.

(d) International law and the right to privacy

South Africa subscribes to a number of international and regional human rights declarations and covenants.[246] A fundamental right included in many of these instruments is the right to privacy.[247] When considered concurrently with the constitutional mandate for courts to apply international law when interpreting the Bill of Rights,[248] the relevance of the UN report to this study is plainly apparent.

International law acknowledges that 'technological developments carry very significant risks for human dignity, autonomy and privacy and the exercise of human rights in general.'[249] Accordingly a cautious and rights-centric approach is advocated.

The scope of informational privacy is generously defined. It extends to: collecting, sharing, reviewing, analysing or aggregating data; and is not simply limited to the review or application

[244]Ibid at 38-25 - 38-34.
[245]United Nations General Assembly Human Rights Council Thirty-ninth session (Agenda items 2 and 3) *The right to privacy in the digital age* (2018).
[246]South AfricanHuman Rights Commission Report *Annual International and Regional Human Rights Report 2016* (2017) at 25-42.
[247]United Nations *Universal Declaration of Human Rights (UDHR)* art. 12 available at *https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf*, accessed on 22 February 2020 and United Nations Human Rights Office of the High Commissioner *International Covenant on Civil and Political Rights* art.17 available at *https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx*, accessed on 22 February 2020.
[248]Constitution supra note 7 s 39(2).
[249]United Nations General Assembly Human Rights Council op cit note 244 at 2.

of data.[250] Whilst a potential legitimate state interest in obtaining data on persons is lawfully recognised; interference in the right to privacy must be fully justified.[251]

The South African state's legal obligation is not simply limited to refraining from interference with privacy; but also extends to actively promoting the realisation of the right.[252] This is achieved where the state establishes an integrated framework to promote the right to privacy.

Such a framework is predicated on the core principles of transparency and accountability; and requires the state to refrain from automatically and arbitrarily collecting data; limiting data obtained to occasions where there is a legitimate purpose therefor; obtaining "real consent" of subjects; restricting the use of the data to its original purpose; defining data retention periods; constraining extraterritorial transmission of data; implementing data privacy controls; and informing data subjects that data is being held. [253] Central to this model is the enactment of national privacy legislation.

In the next part the privacy legislation enacted in South Africa, in particular the Protection of Personal Information Act ("PoPI"),[254] is considered.

III. SOUTH AFRICAN DOMESTIC PRIVACY LEGISLATION — THE PROTECTION OF PERSONAL INFORMATION ACT

Although not yet fully implemented, PoPI is the national legislation which gives partial legislative effect to the constitutional right to privacy.[255]

This part includes a discussion on the information which enjoys protection in terms of PoPI; the practical implication of PoPI regarding this information; as well as a consideration of whether the automatic tax information exchanges fall within the scope of PoPI legislation.

[250]Ibid at 3.
[251]Ibid at 11.
[252]Constitution supra note 7 s 7 and United Nations General Assembly Human Rights Council op cit note 244 at 7-8.
[253]United Nations General Assembly Human Rights Council op cit note 244 at 8-11.
[254]Protection of Personal Information Act 4 of 2013.
[255]Ibid – preamble and Louise Möller op cit note 11at 25.

(a) Basic provisions of PoPI

PoPI regulates the processing of personal information by a responsible party in or through South Africa.[256] Both "processing" and "personal information" are broadly defined.

Essentially, personal information is information which identifies a natural or juristic person. It includes the 'name, identification numbers, addresses, and financial information of that person.'[257] PoPI will apply when this information is "processed" in or via South Africa. Information is processed if data is accumulated, obtained, analysed, stored, transferred or destroyed.[258]

The expansiveness of these definitions accord with guidance in international law; and the generous approach applied in interpreting constitutional rights. Practically it means that most data events will fall within the scope of PoPI, unless expressly excluded.

The implication of PoPI legislation is that it establishes a minimum standard for the protection of personal information. In terms of this legislation, data can only be processed for a legitimate legal purpose;[259] and must be applied for its intended purpose.[260] The processing of data must be curtailed to a minimum.[261] The responsible party must take adequate steps to ensure that data is accurate and that it is kept confidential.[262] Additionally, in most cases, the data subject must be informed that data is being processed; and should be afforded access to this information.[263] Where data is transmitted outside of South Africa, this must also be disclosed to the data subject; alongside the data privacy levels in the receiving jurisdiction.[264]

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[256]Protection of Personal Information Act supra note 253 s 3.
[257]Ibid s 1.
[258]Ibid.
[259]Ibid ss 9 and 10.
[260]Ibid s 13.
[261]Ibid s 10.
[262]Ibid s 19.
[263]Ibid ss 22 and 23.
[264]Ibid s 18.

Given the extensive scope and implication provisions of PoPI legislation, a number of exceptions have been provided for. There are two potentially relevant exceptions which are discussed in the context of the AEoI.

(b) PoPI exceptions

The first of these is contained in section 6 of the Act, it provides that PoPI does not apply to —

> 'the processing of personal information by or on behalf of a public body – the purpose of which is the prevention, detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders, or the execution of sentences or security measures, to the extent that adequate safeguards have been established for the protection of such personal information.'[265]

Möller in evaluating this exception concludes that tax exchanges of information will not be able to employ this exception.[266] She reasons 'a foreign tax offence does not constitute an "offence" for the purposes of the POPI Act.'[267] Möller therefore argues that SARS will be bound by the provisions of PoPI when exchanging tax information.

Whilst Möller may potentially be correct in concluding foreign tax offences are not offences for the purposes of PoPI; she fails to take into account another potential exception provided for in the Act. Section 36 of the PoPI vests the discretion to grant an exemption in the Information Regulator.[268] The regulator may exempt a public body from PoPI provisions in cases where she concludes that the processing of personal information is in the public interest; and the promotion of the public interest prevails over the data subject's privacy.[269]

[265]Ibid s 6*(1)(c)(ii)*.
[266]Louise Möller op cit note 11at 28.
[267]Ibid at 28.
[268]Protection of Personal Information Act supra note 253 s 36.
[269]Ibid s 37.

In exercising this discretion, the regulator must take into account South Africa's obligations in international law and recognise the 'legitimate interests of public and private bodies in achieving their objectives in an efficient way.'[270]

Although the PoPI regulator has been appointed, the act is not fully in-force and effect.[271] Accordingly no such exemptions have been granted to date. There is however a compelling argument to be made that SARS could seek to obtain an exemption regarding AEoI. Their application would ostensibly be predicated on the basis of South Africa's international treaty obligations to exchange tax information; and would likely be successful in exempting tax information exchanges from PoPI requirements. The remainder of this paper operates on the assumption that SARS would be exempted from the provisions of PoPI.

Even in cases where PoPI does not apply, a person's constitutional right to privacy is not extinguished; instead the section 14 right to privacy is engaged directly or through other legal provisions.

Having defined and given texture to the constitutional right to privacy, one must turn to consider whether the disclosure of information in terms of the FATCA and CRS AEoI constitutes an infringement of this right.

IV. DOES THE DISCLOSURE OF INFORMATION IN TERMS OF FATCA AND THE CRS INFRINGE ON THE SECTION 14 RIGHT TO PRIVACY?

As explained in chapter 2, once a financial institution has identified an account as reportable, in terms of the FATCA or the CRS regimes, they must collect and report on specified data fields in respect of those accounts.

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[270] Ibid ss 44*(1)(b)* and 44*(1)(c)*.

[271] John Giles 'When is the POPIA deadline in South Africa' *Michalsons* 28 January 2020 available at *https://www.michalsons.com/blog/when-is-the-popia-deadline-in-south-africa/39672*, accessed on 22 February 2020.

The data fields reported cover both the personal identification of the account beneficiary; and financial data pertaining to the account. It includes: the name of the account holder, their address, the tax identification number (TIN), account number, residence jurisdiction, the asset value of their account and the income earned.

Although the disclosure of this type of information is not listed as a specific incidence implicating the right to privacy;[272] the inclusions listed in section 14 are not exhaustive. The test set-out by the Constitutional Court in *Bernstein* must therefore be considered.[273]

The *Bernstein* test essentially enquires into whether the FATCA or CRS data-subject had an expectation that their account data would be kept private; and if this expectation was reasonable.[274]

One factor which forms part of this enquiry is the nature of the data. FATCA and CRS data is largely mercantile and commercial in nature. It does not relate to 'delicate...issues pertaining to bodily and psychological integrity.'[275] Accordingly this data is not part of what the court refers to as an uninfringeable 'inner sanctum.'[276]

Notwithstanding the lack of inherent intimacy of the data, the financial and personal data disclosed is still sensitive and also enjoys protection under section 14 of the Constitution, albeit more easily limited.[277] The notion that AEoI data is legitimately viewed as private data finds support in other areas of the law, both nationally and internationally.

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[272] Constitution supra note 7 s 14.
[273] *Bernstein v Bester NO* supra note 236.
[274] Ibid para 75.
[275] *NM v Smith* 2007 (5) SA 250 (CC) para 40.
[276] *Bernstein v Bester NO* 1996 supra note 236 para 67.
[277] *Bernstein v Bester NO* 1996 supra note 236 para 77.

In South Africa, there are legislative provisions and corresponding case law which establish a bank's duty to preserve the secrecy of client data.[278] These notions of secrecy and confidentiality corroborate the right to privacy.

In an international context, the United Nations has confirmed that the processing of personal data implicates the right to privacy. More specifically, the OECD –the custodian of the CRS– has highlighted the importance of preserving privacy when exchanging tax information.[279]

Some may argue that FATCA and CRS data is obtained with client consent; and is therefore not private. The argument goes as follows - where an account holder is aware of the FATCA or CRS regime; they tacitly consent to the disclosure of their private data. The person's "consent" snuffs out the right to privacy. McQuiod-Mason correctly dismisses this argument. He explains it is 'wrong... [to] assume that the subscribers and clients have forfeited their rights to privacy simply by agreeing to comply with the statutory or other requirements of their service providers.'

To conclude, the data required from financial institutions in terms of FATCA and the CRS is of a personal and financial nature. Applying the *Bernstein* test, account holders have a reasonable and legitimate expectation of privacy in relation to such data. The *prima facie* deduction is that the automatic exchange of information pursuant to the CRS and FATCA AEoI violates the constitutional right to privacy. This *prima facie* finding is confirmed when one considers the generous interpretive approach applied in constitutional litigation and prevailing international law.

V. CONCLUSION

In this chapter, the constitutional right to privacy has been scoped with reference to the textual provisions of the Constitution and judicial precedent. The interface between big data and the

[278] Jamil Ddamulira Mujuzi 'Bank secrecy: Implementing the relevant provisions of the United Nations Covenant against corruption in South Africa' in Bernard Martin & Raymond Koen (eds) *Law and Justice at the Dawn of the 21stCentrury* 126.

[279] OECD op cit 109 at 52-55.

right to privacy, with reference to international law lend further texture to the interpretation of the right.

The Protection of Personal Information Act was also discussed.[280] The discussion included a general overview of PoPI; and the supposition that tax information exchange practices will likely be exempted from the provisions of the Act.

Finally, the research inquired into whether CRS and FATCA tax information exchange violates a person's right to privacy; and concluded that the right to privacy is indeed intruded upon.

The infringement of a constitutional right does not however automatically render a law or practice unconstitutional. Whether or not this infringement is constitutionally permitted is determined by assessing whether the infraction is 'reasonable and justifiable in an open and democratic society...'[281] This assessment is generally referred to as the limitations analysis. In chapter five, the limitations analysis is applied to the FATCA and CRS tax information exchange practices.

[280] Protection of Personal Information Act supra note 253.
[281] Constitution supra note 7 s 36.

CHAPTER FIVE
THE LIMITATIONS ANALYSIS

I. INTRODUCTION

In prior chapters, the courts' structured approach when deliberating a Bill of Rights matter was discussed. The "substantive evaluation" was described as the nucleus of these cases. To recapitulate, the substantive evaluation comprises two parts — first, the construal of the right; and secondly the limitations analysis. In the previous chapter, the first part of the inquiry was determined. The research held that tax information sharing in terms of the CRS and FATCA breaches the section 14 right to privacy.[282] In this chapter the inquiry proceeds to activate the limitations analysis.[283]

The limitations analysis is predicated on the central idea that although human rights may be of fundamental importance; they are rarely absolute.[284] Other rights or societal considerations may legitimately be in tension with fundamental human rights. Section 36 is the constitutionally mandated framework which evaluates and balances these competing considerations. After reasoning through the limitations analysis, one is able to determine the constitutionality of the impugned law or practice.

The history, development and mechanics of the limitation clause were set out in chapter two of this report. In this chapter, it is therefore appropriate to delve directly into the application of the limitations clause to FATCA and CRS tax information exchanges.

In light of the conceptual congruence between FATCA and the CRS regimes, it is more expedient to discuss them together in a single analysis. Where the differences between the two schemes are relevant, this will be highlighted and distinctly addressed.

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[282]Constitution supra note 7.
[283]Ibid s 36.
[284] Ian Currie and Johan De Waal op cit note 189 at 150 and *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* supra note 199 para 23.

II. THE LAW OF GENERAL APPLICATION INQUIRY

The limitations analysis in section 36 sets out the requirements for the limitation of a fundamental human right. It includes the requirement that a fundamental right can only be limited by a law of general application.[285] In *Dladla* the Constitutional Court explains that the 'complexities in construing 'law of general application' are considerable.'[286]

The 'law of general application requirement' can be distilled it into its two discrete parts, namely - that the rights contravention takes place pursuant to a law; and secondly that such a law is one of general application.

(a) Do the provisions of FATCA and the CRS have the status of law?

In chapter two, the international instruments which facilitate FATCA and CRS reporting were discussed. The third chapter, went on to explain the reception and procedural incorporation of these instruments into South African law. In the absence of a creative counter-argument, it ostensibly follows that the FATCA and CRS AEoI regimes operate under the status of law in South Africa.

In so far as FATCA is concerned, there is however a creative (albeit ultimately self-rebutted) counter-argument to be made. This argument challenges the assertion that FATCA operates under valid law in South Africa.

The IGA entered into between SARS and the IRS leverages Article 26 of the DTA between South Africa and the United States.[287] DTAs are treaties which fall within the ambit of the Vienna Convention.[288] Although neither South Africa nor the United States has expressly adopted the Vienna Convention; both states recognise it as a binding source of customary

[285]Constitution supra note 7 s 36(1).
[286]*Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) at 133.
[287]Agreement between the Government of the Republic of South African and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA op cit note 89 art.2.1.
[288]Brian J Arnold op cit note 139 at 136.

international law.[289] Article 2 of the Vienna Convention provides that 'A treaty is an international agreement (in one or more instruments, whatever called) concluded between States and governed by international law.'[290] Accordingly, the precepts of international law apply to FATCA.

Central to international law, and in particular treaties, is the notion of reciprocity.[291] In chapter two, the lack of reciprocity in tax information exchange between South Africa and the United States was highlighted. The lack of reciprocity is twofold. First, it arises in the conceptual or structural design of FATCA. Not all IGAs are reciprocal; and where an IGA is reciprocal the data exchanges are asymmetrical. The United States is entitled to receive more information than they are obliged to share. Challenging the legitimacy of the FATCA instrument on the basis of this non-reciprocal feature is unlikely to succeed. Simma explains 'the validity of a treaty devoid of substantive reciprocity cannot be challenged because of this deficiency itself…'[292]

Secondly, the non-reciprocity of data exchange also arises *de facto*. The argument here is more compelling. Pursuant to the United States–South Africa IGA, the United States has an obligation to act "reciprocally." In other words America is reciprocally enjoined to share data with South Africa. In actuality they fail to do so. Effectively, this means that the United States is in breach of its international treaty obligations. The Vienna convention allows for suspension of a treaty in instances where a country fails to honour its treaty commitments.[293] A suspension of the FATCA IGA would render any collection and exchange of information unlawful, until such time as the United States fulfils its treaty obligations. There are however practical challenges in employing this course of action. The suspension of the IGA would need to be initiated by the South African government; and could not be done by any other person. Whether a person can employ an

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[289]Department of International Relations and Cooperation Office of the Chief State Law Advisor (IL) *General Information* available at *http://www.dirco.gov.za/chiefstatelawadvicer/general.html*, accessed on 22 February 2020 and U.S. Department of State *Vienna Convention on the Law of* Treaties available at *https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm*, accessed on 22 February 2020.
[290]Brian J Arnold op cit 139 at 136-7.
[291]Bruno Simma 'Reciprocity' in Rüdiger Wolfrum (ed) *Encyclopedia of Public International Law* (2008) at 2.
[292]Ibid.
[293]Iain Cameron 'Treaties, Suspension' in Rüdiger Wolfrum (ed) *Encyclopedia of Public International Law* (2007) at 2.

administrative law remedy to compel the State to suspend FATCA is outside of the scope of this study.

The remainder of the research therefore operates on the premise that the regulatory framework –within which the FATCA and CRS data exchanges operate– constitutes valid law.

(b) Are the FATCA and CRS regimes general in application?

To limit a right in the Bill of Rights in a constitutionally consonant manner, the limiting law must be made general in its application.[294] Woolman and Botha posit that there are four defining characteristics that a law must possess to qualify as a law of general application, namely - '(1)parity of treatment, (2) non-arbitrariness, (3) accessibility or public availability; and (4) precision or clarity.'[295]This study adopts these criteria in assessing whether the FATCA and CRS AEoI instruments are laws of general application.

(i) "Parity of treatment"

Put simply, the parity of treatment requirement implicates the value of equality. It dictates that similarly situated persons be treated equally by the law.[296]

In so far as FATCA is concerned, the parity requirement seems to be met. The IRS has issued extensive guidance on whether an account is reportable and what information should be disclosed where a reportable account is identified. Uniform due-diligence requirements and reporting templates are used to identify and report on US accounts.[297] These standardised elements constructively facilitate parity.

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[294]Constitution supra note 7 s 36.
[295]Stu Woolman & Henk Botha op cit note 210 at 34-61.
[296]Ibid.
[297] IRS *FATCA XML Schema and Business Rules for Form* 8966 (2019) available at *https://www.irs.gov/businesses/corporations/fatca-xml-schemas-and-business-rules-for-form-8966*, accessed on 22 February 2020.

In so far as the CRS is concerned, the parity of treatment becomes arguable. Like the IRS, the OECD has also provided extensive guidelines on due diligence processes to identify reportable accounts; and defined the data to be exchanged in respect of such accounts.[298] However, the reciprocal and multilateral features of the CRS mechanism render the "parity of treatment" more contentious.

This potential contention manifests in two ways: first, in respect of information exchanged by South Africa in respect of non-resident accountholders; and secondly, in respect of information received by South Africa in respect of South African residents' offshore accounts.

If one were to apply the parity concept fastidiously, information should be collected and exchanged on all non-resident accountholders with accounts in South Africa. By only exchanging information with states that are part of the CRS treaty network, South Africa treats non-residents dissimilarly. The privacy right of a non-resident domiciled in a CRS signatory state is impinged; whilst the same right to privacy of a non-resident from a non-CRS jurisdiction is preserved.

Correspondingly, SARS only receives information on South African residents holding accounts in CRS network jurisdictions. It follows that a South African resident's right to privacy may or may not be violated depending on the jurisdiction in which their banking account is maintained.

This point is perhaps best illustrated by way of an example. A South African resident with a bank account in a CRS jurisdiction, such as Switzerland, is subject to CRS reporting and will suffer an intrusion of his privacy when SARS receives information regarding his offshore bank account. However SARS will not receive information regarding another South African resident, who operates an offshore account in a non-CRS signatory jurisdiction, such as the United States. The latter resident's privacy remains intact; whilst the former's is prejudiced. The distinction operates based solely on where the resident banks.

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[298] OECD Global Forum on Transparency and Exchange of Information for Tax Purposes Automatic Exchange Portal *Online support for the implementation of automatic exchange of information in tax matters* (2018) available at *https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/schema-and-user-guide/*, accessed on 22 February 2020.

In replication, the State may argue that the "parity" requirement be read down to render CRS information sharing constitutionally valid. In *Democratic Alliance v Speaker of the National Assembly*, the constitutional court explains the notion of reading down:

> 'There is... a principle of constitutional interpretation that where it is reasonably possible to construe a statute in such a way that it does not give rise to constitutional invalidity, such a construction should be preferred to another construction which, although reasonable, would give rise to such inconsistency."[299]

This interpretation would require us to define "similarly situated groups" more narrowly than the simple "resident/non-resident" distinction articulated above. Residents of CRS and non-CRS network countries would need to be construed as separate groupings. Correspondingly, South African residents holding offshore accounts in CRS and non-CRS jurisdictions would also need to be seen to be dissimilarly situated. Each of these groupings would then have a different *prima facie* entitlement to the right to privacy.

The reading down of a provision however is not always appropriate.[300] In *Joubert v Van Rensburg* the court remarked that a law which permitted a deprivation of agricultural land could not be found to be general in application.[301] The court explained that the challenged law seems to have fallen short of the parity requirement, since it only applied to one land-type and not to land generally. Determining whether reading down would be constitutionally acceptable in this case is arguable.

It is certainly open to interpretation to determine whether or not the parity requirement is met. Whilst the differential treatment of various resident and non-resident groups may offend the notion of parity, strictly construed, this distinction is hardly arbitrary. On that note, one turns to consider whether the FATCA and CRS regulatory regimes meet the "non-arbitrariness" requirement, a further criterion required for a law of general application.[302]

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[299] *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC) para 126.
[300] *Bertie Van Zyl (Pty) Ltd v Minister of Safety and Security* 2010 (2) SA 181 (CC) paras 22 and 89.
[301] Stu Woolman & Henk Botha op cit note 210 at 34-61.
[302] Ibid.

(ii) "Non-arbitrariness"

In *Makwanyane*, the Court explains arbitrariness as follows –

> 'State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system where operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order...Arbitrariness must also, by its very nature, lead to unequal treatment of persons. Arbitrary action, or decision-making, is incapable of providing rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.'[303]

The court explains that where persons are treated differently, the differentiation must be predication on a rational basis. Rationality is not an onerous standard to discharge. It was described by Chaskalson J in *Pharmaceutical Manufacturers* as 'a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.'[304]

Cross-border collaboration between tax authorities is aimed at combating tax evasion and enhancing tax transparency. Automatic exchanges of tax-payer information through the FATCA and CRS initiatives are recognised as international best practice to achieve these aims.[305] The absence of some countries from the global tax information exchange network prejudices the aims of global tax information exchange. As illustrated in the previous part, it results in different treatment of persons based on jurisdiction. Notwithstanding these limitations to the current model, South Africa's assent to the FATCA and CRS reporting regimes remains intelligible. The information exchange implications arising from these initiatives are therefore rationally connected to a legitimate government purpose; and the non-arbitrariness criterion is satisfied.

(iii) "Precision or clarity"

[303] *S v Makwanyane* supra note 194 para 156 and Ian Currie and Johan De Waal op cit note 189 at 170.
[304] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* supra note 187 para 90.
[305] OECD *Standard for Automatic Exchange of Financial Account Information in Tax Matters* at 9-12 *available at https://read.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition_9789264267992-en#page9,* accessed on 22 February 2020.

A further requirement to determine whether a law is one of general application is that of clarity. The law should be articulated in a sufficiently precise manner. This circumscribes the potential for unfettered executive discretion; whilst reinforcing legal certainty and corroborating the rule of law.[306]

As discussed in a previous part of this chapter, both the IRS and the OECD have published prescriptive guidance on the exchange of information. This incorporates the criteria which determine the identification of reportable accounts; as well as the data fields to be collected and the manner of exchange. SARS has further buttressed these guidances with additional templates and explanatory materials.[307] It is therefore uncontroversial that the law is precise and clearly articulates its scope and implication.

The precision and clarity with which the FATCA and CRS regulations have been articulated also implicates the fourth and final requirement to determine if a law is one of general application – namely that of "accessibility or public availability."[308]

(iv) "Accessibility or public availability"

In terms of this requirement the contents of a law and its span of application should be publically available. Currie and De Waal reason, '[p]eople should be able to know of the law, and to conform their conduct to the law.'[309]

In a prior chapter, the gazetting and incorporation of the CRS and FATCA standards into South African law was detailed. Publication in the government gazette is the traditional method used to ensure that a law is known; and in this instance it ought to be sufficient to satisfy the public availability criterion.

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306 Stu Woolman & Henk Botha op cit note 210 at 34-63 – 34-64.
307 SARS *Automatic Exchage of Information (FATCA and CRS)* (1 June 2019) available at *https://www.sars.gov.za/ClientSegments/Businesses/Mod3rdParty/AEOI/Pages/default.aspx*, accessed on 22 February 2020.
308 Stu Woolman & Henk Botha op cit note 210 at 34-65.
309 Ian Currie and Johan De Waal op cit note 189 at 172.

(c) Conclusion on the law of general application

For FATCA and the CRS to limit a person's right to privacy in a constitutionally compliant manner the underlying legislative instruments must be "laws of general application". Some dimensions of the law of general application enquiry are uncontroversial – these include the accessibility, and precision aspects. Contrastingly, other dimensions of the law of general application assessment lie within the penumbra –these are: whether the FATCA regime is valid law; as well as the parity and arbitrariness requirements.

Notwithstanding these opacities, it is concluded that the FATCA and CRS regimes operate under laws of general application. This conclusion rests on three legs. First, there are legitimate and persuasive arguments –which are set out above– supporting the notion that the regimes exist in terms of "laws of general application". Secondly, to conclude that information sharing takes place under a law of general application accords with the interpretive approaches of "reading down" and "reading in".[310] These approaches are favoured by the Court where practicable;[311] since they afford rational legislative positions deference. Finally, the conclusion draws on an approach of interpretative charity; and safeguards against the 'risk [of] missing issues that might merit our consideration.'[312] Put practically, it does not prematurely end the discussion on constitutionality; but enables the research and analysis to proceed to its next phase– the substantive limitation analysis.

III. THE SUBSTANTIVE LIMITATIONS INQUIRY

The "law of general application" part of limitation analysis assessed the legality of the FATCA and CRS. It did not meaningfully engage the substance of the law and limitation. Substantial engagement was deferred to this part of the constitutional inquiry. Section 36 permits limitations to fundamental human rights – 'to the extent that the limitation is reasonable and justifiable in an

[310] *Ex Parte Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 para 21 and fn 30.
[311] *Democratic Alliance v Speaker of the National Assembly* supra note 298 para 126.
[312] Frank I Michelman 'On the uses of interpretive 'charity': some notes on application, avoidance, equality and objective unconstitutionality from the 2007 term of the constitutional court of South Africa' (2008) Vol 1. No. 1 *Constitutional Court Review* 1 at 4.

open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.'[313]

This benchmark is necessarily vague. In *Makwanyane*, the court explains 'there is no absolute standard that can be laid down...principles can be established but the application of those principles to particular circumstances can only be done on a case-by-case basis.'[314]

The evaluation of whether the interference with the right to privacy by the CRS and FATCA AEoI is 'reasonable and justifiable'[315] requires one to balance competing constitutional considerations. We are chiefly guided in this evaluation by the principles of proportionality, necessity and reasonableness.[316] These principles accord with international law[317] and underpin the factors crystallised in section 36 of the Constitution –

> '(a) the nature of the right;
> (b)the importance and purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.'[318]

In *Manamela*, the Constitutional Court emphasised that the factors listed in section 36 are not a '[mechanical]....sequential check-list';[319] but rather that they represent factors which inform a broader and holistic justification inquiry.

Applying this jurisprudential directive of the Constitutional Court; the section 36 listed factors are not applied formalistically or even "sequentially" in this report. Instead, the discussion begins by explaining the importance and purpose of tax information sharing. Thereafter, the nature of the right to privacy; and the nature and extent of its limitation by FATCA and the CRS are discussed. Here, the content set out in chapter four is cross-referenced and buttressed. Finally,

[313]Constitution supra note 7 s 36(1).
[314]*S v Makwanyane* supra note 194 para 149.
[315]Constitution supra note 7 s 36(1).
[316]*S v Makwanyane* supra note 194para 149.
[317] United Nations General Assembly Human Rights Council op cit note 244 at 4.
[318]Constitution supra note 7 s 36(1).
[319]Stu Woolman & Henk Botha op cit note 210 at 34-69 to 34-70 and *S v Manamela* 2000 (3) SA 1 (CC) para 32.

the link between the purpose of these information sharing regimes and the infringement of the right to privacy is evaluated. This includes whether similar ends could be better achieved by alternate or less restrictive means.

(a) Importance and purpose of tax information sharing

In the contemporary world, the role of the state is expanding. Laissez-faire and free market doctrines have yielded to more interventionist socio-economic models.[320] The modern state is characterised by welfarism. Woodard describes the welfare state as the state in which 'the chief responsibility for abolishing poverty rests on the state and the state must, in turn, exert its faculties towards that end.'[321]

This reality of the modern welfare state is even more poignant in the South African context. In *Soobramoney,* the Constitutional Court remarked '[w]e live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions in great poverty ... a commitment to address them, and transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.'[322]

The Constitution itself, partially addresses the challenge of "great poverty" through the inclusion of justiciable socio-economic rights. The rudimentary implication of this is socio-economic entitlements are constitutionally recognised, judicially protected and legally enforceable.[323] The inclusion of justiciable socio-economic rights also gives rise to corresponding fiscal implications. This was acknowledged by the Constitutional Court in its certification judgment, 'socio-economic rights will almost inevitably give rise to ...[budgetary] implications.'[324]

[320]Calvin Woodard op cit note 25 at 286-287.
[321]Ibid at 288.
[322]*Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) para 8 and Eric C Christiansen 'Adjudicating non-jusiticable rights: Socio-economic rights and the South African constitutional court' (2006) 38 *Colum. Hum. Rts. L. Rev*. 321 at 321.
[323]Christof Heyns & Danie Brand 'Introduction to socio-economic rights in the South African constitution' (1998) Vol.2 No. 2 *Law, Democracy and Development* 153 at 156.
[324]*Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) para 78.

The Constitution also recognises and provides for the establishment of a National Revenue Fund.[325] Accordingly, there is a broad framework for the state to levy taxes in order to finance its spending.

The primary mandate of the South African Revenue Service is to collect taxes.[326] Inferentially, SARS has an implicit duty to curb tax evasion.

The use of off-shore accounts is posited to be central to many forms of tax evasion. Zucman, in his 2015 book, *The Hidden Wealth of Nations The Scourge of Tax Havens*, states that approximately 8% of global wealth is held by a small number of offshore tax havens; significant portions of which are undisclosed.[327] Zucman avers further, that the annual revenue lost by tax authorities, as a result of schemes involving offshore jurisdictions, was around $200 billion at the time of publication; and was forecast to continue rising.[328]

More contextually, the OECD explains,

> 'As the world has become increasingly globalised it is easier for all taxpayers to make, hold and manage investments through financial institutions outside of their country of residence. Vast amounts of money are kept offshore and go untaxed to the extent that taxpayers fail to comply with tax obligations in their home jurisdiction...Co-operation between tax administrators is critical in the fight against tax evasion and in protecting the integrity of tax systems . A key aspect of that co-operation is exchange of information.'[329]

It is clear that any State has a legitimate interest in subscribing to international instruments which enable it to effectively and efficiently administer taxes. This is even more imperative in the South African context, where the State is constitutionally enjoined to provide social goods and services.

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[325] Constitution supra note 7 s 213.
[326] National Government of South Africa *South African Revenue Service (SARS) Overview* available at *https://nationalgovernment.co.za/units/view/40/south-african-revenue-service-sars*, accessed on 22 February 2020.
[327] Gabriel Zucman *The Hidden Wealth of Nations: The Scourge of Tax Havens* (2015) at 3-6.
[328] Ibid.
[329] OECD op cit note 304.

In *Metcash*[330] –a constitutionally predicated challenge to various provisions of the Value Added Tax ("VAT") Act– Kriegler J held that the challenged provisions of the VAT Act were indeed justifiable limitations of the taxpayer's rights.[331] In the heads of argument advanced by Advocate Marcus SC on SARS's behalf, he contends that '[t]he importance of the purpose of the limitation is inextricably bound up with the capacity of the State to impose and collect taxes in order to fulfil its constitutional and other obligations.'[332]

Borrowing from Marcus's compelling argument, it is obvious that South Africa's participation in tax information sharing serves an important purpose in the broader constitutional context.

While this argument holds true for the reciprocal exchanges of information in terms of the CRS; it is not plainly apparent how the unilateral transfer of data to the IRS pursuant to FATCA serves an important purpose in the South African constitutional order. Similar sentiments have been echoed in a letter by the General Secretariat of the Council of the European Union to the United States Secretary of the Treasury on 3 December 2019.[333]

In the letter, the EU highlights the lack of reciprocity in data exchanges with America; and how this reality threatens the global goals of tax information exchange.[334] Moreover, the United States has increasingly been cited as a tax haven.[335] Asymmetry in only supplying the United States with tax data, but not receiving any in exchange, not only negates the purpose of tax sharing but potentially counteracts its objectives entirely. Taxpayers may be incentivised to open

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[330] *Metcash Trading Limited v Commissioner for the South African Revenue Service* 2001 (1) SA 1109 (CC).
[331] Ibid para 72.
[332] *Metcash Trading Limited v Commissioner for the South African Revenue Service* RESPONDENTS' HEAD OF ARGUMENT at 5.57 available at *https://collections.concourt.org.za/bitstream/handle/20.500.12144/2103/Respondent%27s%20Heads%20of%20Argument-1861.pdf?sequence=4&isAllowed=y*, accessed on 22 February 2020.
[333] Council of the European Union *Note FATCA – Exchange of information under Intergovernmental Agreements – Letter to the US Secretary of the Treasury* (11 December 2019) available at *https://data.consilium.europa.eu/doc/document/ST-15021-2019-INIT/en/pdf,* accessed on 22 February 2020.
[334] Ibid.
[335] Todd Ganos 'World's best tax haven: The United States' *Forbes* 19 September 2019 available at *https://www.forbes.com/sites/toddganos/2019/09/19/worlds-best-tax-haven-the-united-states/#4e33edf14049,* accessed on 22 February 2020, Bloomberg Editorial Board 'The U.S. is becoming the world's new tax haven' 28 December 2017 available at*https://www.bloomberg.com/opinion/articles/2017-12-28/the-u-s-is-becoming-the-world-s-new-tax-haven,* accessed on 22 February 2020 and Tax Justice Network 'Will the EU really blacklist the United States?' (11 June 2018) available at *https://www.taxjustice.net/2018/06/11/will-the-eu-really-blacklist-the-united-states/,* accessed 22 February 2020.

offshore accounts in the United States, arbitraging information sharing asymmetries to evade taxes. Aside from the soft goal of international co-operation or the very real threat of American sanctions; it is unclear how the violation of privacy arising from FATCA data exchanges serves an important purpose in the South African scheme.

(b) The nature of the right to privacy; and the nature and extent of its limitation

The right to privacy was discussed extensively in chapter four. It represented the first part of the two-part inquiry applied in Bill of Rights adjudication. Botha and Woolman consider the whether the nature of the right to privacy should then be considered again as part of the second stage limitation analysis.[336] They conclude that the inclusion of "the nature of the right" consideration in section 36 renders the limitation analysis suppler.[337] It allows the court to take into the bargain the contextual importance of the implicated right in a constitutional society, based on the equality, human dignity and freedom.[338] Put differently, the nature of the right and its importance in the democratic order; informs the level of justification required to limit that right.

Given the similarities between this factor and the content of the right to privacy canvassed in chapter four, it is not necessary to rehearse those aspects again in this chapter. Instead, that discussion is only supplemented with information that underscores the importance of the right.

In chapter four it was concluded that personal and financial information shared in terms of the CRS and FATCA regimes does not form part of the 'closest intimate sphere.'[339] It is not an element of a person's "inner sanctum" and is therefore not protected by an inviolable core right to privacy.[340] Notwithstanding this characterisation, the research did not posit that the data shared is not sensitive or vulnerable to significant risks. Marcovici elaborates on the risks of tax

[336] Stu Woolman & Henk Botha op cit note 210 at 34-70 – 34-73.
[337] Ibid.
[338] Ibid.
[339] *Bernstein v Bester NO* supra note 236 para 7.
[340] Ibid para 67.

information sharing as 'fears that information will fall into the hands of corrupt officials and hackers leading to kidnap, ransom and identity theft.'[341]

These considerations underscore the importance of the right to privacy in a society premised on the values of human dignity, equality and freedom. Informational injuries of this sort have the capacity to implicate the related constitutional rights of freedom of movement, freedom and security of the person, property and life.[342] As more rights and values are implicated, the importance of the right becomes more compelling.

The OECD has acknowledged the risks inherent in the collection, transmission and sharing of taxpayer data in a report entitled "Keeping it Safe."[343] Similarly, the IRS has also issued the "International Data Safeguards & Infrastructure Workbook."[344] In these guidances, the need to maintain confidentiality in tax exchange systems is emphasised and practical specifications regarding safeguards are articulated.

The frameworks and measures adopted to safeguard the confidentiality of data are relevant as they have the capacity to temper the extent to which the right to privacy is infringed. A further consideration listed in section 36.[345]

As discussed in chapter two, the FATCA IGA is hosted by article 26 of the DTA between South Africa and the United States.[346] The confidentiality provisions of article 26 therefore apply. The article requires a receiving state to apply the privacy and confidentiality requirements that apply

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[341]Vanessa Houlder 'Noose tightens on tax havens in global crackdown' *Financial Times* 7 December 2016 available at *https://www.ft.com/content/ab8ee980-b6f3-11e6-ba85-95d1533d9a62,* accessed on 22 February 2020.
[342]Constitution supra note 7 ss 21, 12, 11 and 25.
[343]OECD *Keeping it safe: The OECD guide on the protection of confidentiality of information exchanged for tax purposes* (2012)available at *https://www.oecd.org/ctp/exchange-of-tax-information/keeping-it-safe-report.pdf,* accessed on 22 February 2020.
[344] IRS *International Data Safeguards & Infrastructure Workbook* (20 March 2014) available at *https://www.irs.gov/pub/fatca/IntlSafeguardsWorkbook.pdf,* accessed on 22 February 2020.
[345]Constitution supra note 7 1996.
[346] Convention between the Republic of South Africa and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Captial Gains available at *https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2012-82%20-%20DTA%20United%20States%20of%20America%20GG%2018553.pdf,* accessed on 22 February 2020.

in its domestic law to the data received.[347] Effectively, this means that the United States will apply its standard data protocols to ensure the confidentiality of FATCA information shared by South Africa. The applicable confidentiality clauses are contained in a number of fragmented American standards, including the: Internal Revenue Code, Privacy Act, Management Guidelines for Agency Records, Internal Revenue Manual and the US Criminal Code.[348] An analysis of these provisions is beyond the scope of my paper. It is however, sufficient to briefly discuss the adequacy of the American data standard.

The data protection framework in South African law is stronger than its American counterpart. McQuiod-Mason explains that although American privacy standards provide a useful benchmark for data protection; the entitlement to informational privacy is stronger in South African law.[349] Transmitting FATCA data to the United States, essentially subordinates the data to a less robust privacy standard than it would enjoy in South Africa. One must therefore consider whether the lower American privacy standard is fatal to the legality of FATCA. It is not.

The privacy protection standards in the American model are not fully congruent with South African law. Notwithstanding this, a court may find that total correspondence of data confidentiality is not a requirement for the validity of FATCA. It is arguable that the American standard represents an alternate conception of the right to privacy in an 'open and democratic society based on human dignity, equality and freedom.'[350] This assertion is evidenced by the consistent reference by the Constitutional Court to American jurisprudence as a benchmark of comparative foreign law.[351]

More weightily, as discussed in chapter two, the South Africa–United States IGA permits the SARS to specify additional data safeguards before transmitting FATCA data to the IRS.[352] The State therefore has the capacity to bring the data standards relating to FATCA transmissions to par with South African privacy law. SARS's failure to do so cannot invalidate the IGA

[347]Ibid art.26.
[348]OECD op cit note 342 *at* 42.
[349]David McQuoid-Mason op cit note 230 at 38-27 – 38-28.
[350]Constitution supra note 7.
[351]Mark S Kende *Constitutional Rights in Two Worlds* (2009) at ix.
[352]Agreement between the Government of the Republic of South African and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA op cit note 89 art.3.

instrument; nor can it taint the legality of historic data transmissions. An affected person may however have recourse by way of an administrative action to compel SARS to specify additional confidentiality criteria.

Contrastingly, the CRS instruments provide a more robust framework for ensuring that data exchanged remains private and confidential. This framework strives to limit unauthorised access to the information; as well as unauthorised use of the data by permitted users.[353] The robust model includes ensuring that the recipient country has adequate privacy laws in place. Where the domestic legal framework is deemed inadequate an information supplying state may specify further requirements to ensure the confidentiality of data.[354] Additionally, practical processes, policies and procedures are also included to ensure informational privacy, this includes: background checks before hiring prospective employees and privacy training for employees once hired.

CRS Signatory States are subject to 'pre-exchange assessments conducted by a panel of experts from Global Forum member jurisdictions to determine whether their confidentiality and data safeguard frameworks, both legally and operationally, meet the required standards.'[355] The model also envisages a system of on-going peer review where data protection standards are continuously monitored and improved.[356] Additionally, the CRS framework also provides for the suspension of tax information exchange in the event of a partner country data breach.[357]

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[352]OECD op cit note 342 at 7.

[354]Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the Provisions of the Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters, which Entered into Force on 1st June 2011 GN 113 *GG* 37332 art. 22 available at *https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/Multilateral%20Convention%20of%20MAA%20in%20Tax%20Matters.pdf*, accessed on 22 February 2020

[355]OECD *Global Forum on Tax Transparency and Exchange of Information for Tax Purposes The 2019 AEOI Implementation Report* (2019) 14 available at*https://www.oecd.org/tax/transparency/AEOI-implementation-report-2019.pdf*, accessed on 22 February 2020.

[356]Ibid.

[357]Ibid at 16.

Despite the dynamic and robust nature of the CRS confidentiality and privacy framework, the Bulgarian tax authority suffered a data breach in 2019.[358] This event triggered an immediate suspension of tax information sharing with Bulgaria.[359] Although some may argue that the breach highlights the real risks of tax information sharing and the fallible nature of the CRS privacy safeguards – It does not. A simple reality of the modern global economy is that it is impossible to secure data absolutely.[360]

The FATCA and CRS confidentiality safeguards, although not always effective, temper the extent to which tax information exchanges violate the right to privacy. They serve to moderate the intensity of the intrusion and enhance reasonability of the limitation. But even slight intrusions on rights for significant purposes can only be reasonable where there is a relationship between the limitation and its purpose.

(c) The relationship between the limitation and its purpose; and a consideration of whether less restrictive means to achieve the same purpose exist

The writers Currie and De Waal explain this requirement as follows –

> 'The law must tend to serve the purpose it is designed to serve. If the law does not serve the purpose it was designed to serve at all it cannot be a reasonable limitation of the right. If the law only marginally contributes to achieving its purpose it cannot be an adequate justification for an infringement of fundamental rights.'[361]

In the context of AEoI, it must therefore be considered whether and to what extent the State's conduct in infringing on a person's right to privacy through the FATCA and CRS actually reduces tax evasion in South Africa?

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[358]OECD Global Forum on Transparency and Exchanges of Information for Tax Purposes *Statement on the data breach in the National Revenue Agency of* Bulgaria (30 August 2019) available at *https://www.oecd.org/tax/transparency/statement-on-the-data-breach-in-the-national-revenue-agency-of-bulgaria.htm,* accessed on 22 February 2020.

[359]Ibid.

[360]Robin Kruzer 'The story of data, Part 4: Will it ever be truly secure?' Martech: Analytics & Data (29 May 2018) available at *https://martechtoday.com/the-story-of-data-part-4-will-it-ever-be-truly-secure-216239*, accessed on 22 February 2020.

[361]Ian Currie and Johan De Waal op cit note 189 at 183.

The *de facto* unilateral nature of the FATCA regime calls into question whether there is any rational relationship between the state's goal of improving tax compliance in South Africa; and breaching the privacy of persons holding reportable accounts. The reciprocal nature of the OECD's CRS standard makes that inquiry more complex.

There are several challenges that can be directed at interrogating whether tax information exchange actually curbs tax evasion. In this paper, three key aspects are assessed. First, whether information exchanges are actually an effective means of reducing tax evasion. Secondly, some of the inherent loopholes in the tax information exchange framework are canvassed; and more specifically, whether these loopholes weaken the relationship between the limitation of the right to privacy and the purpose of counteracting evasion. If the practices are only marginally effective, the exchanges are less justifiable. Thirdly, the practical capacity constraints faced by the current tax administration in South Africa. Capacity constraints limit the ability to apply AEoI data to reduce tax evasion; and annul the purpose of the privacy infringement. Together, these aspects inform the ultimate conclusion on whether there is a sufficiently close relationship between the AEoI violations of the right to privacy and the reduction of tax evasion.

The AEoI pursuant to the CRS is a relatively new practice. Research and data on its efficacy in reducing tax evasion is therefore limited. In this paper, the limited research in this domain is supplemented with studies on the efficacy of analogous regimes - such as FATCA and the country-by-country reporting. The findings in these studies are used as proxies to evaluate the efficacy of automatic exchanges of tax information in curbing tax avoidance.

It is common-cause that FATCA and country-by-country reporting have impacted taxpayer behaviour and evasionary practices.[362] The overall efficacy of these initiatives in enhancing tax compliance is however more intricate.

[362]Felix Hugger 'The impact of country-by-country reporting on corporate tax avoidance (Ifo working paper) (2019) No. 304 *Liebniz Institute for Economic Research* 1 at 17-18, Lisa De Simone, Rebecca Lester & Kevin Markle 'Transparency and tax evasion: Evidence from the foreign account tax compliance act (FATCA).' (2018) *J. Account. Res.* 1 at 38-39 and Leo Ahrens & Fabio Bothner 'The big bang: Tax evasion after automatic exchange of information under FATCA and CRS' (2019) *New Political Economy* 1 at 13.

In the context of FATCA, De Simone, Lester and Markle note a reduction in the harmful tax practice of round-tripping.[363] It does not however follow that there has been a reduction in tax evasion. There is a plurality of conclusions that can be explained as follows –'we are unable to conclude whether the reduction in round-tripping following implementation of FATCA suggests an increase in tax compliance or the use of alternative evasion mechanisms.'[364]

It is therefore apt to briefly mention some 'alternative evasion mechanisms'[365] and their prevalence in assessing whether AEoI contributes sufficiently to enhanced compliance.

De Simone *et al*, extensively discuss the holding of undisclosed asset classes –such as real estate and art– that allow one to escape AEoI.[366] Neither real estate nor art is not subject to AEoI disclosures. The writers adduce evidence to show a statistically significant increase in real-estate prices and the quantity of art held in the Geneva Freeport post-FATCA.[367]

Acknowledging De Simone *et al's* hypothesis, Noked argues further that such a scheme could be extended to other non-reportable assets classes, including: cryptocurrencies, precious stones, valuable metals and antiques.[368] In a separate paper, Noked also discusses the possibility of tax-payers structuring entities in a way that allows them to participate in the banking space whilst simultaneously escaping CRS reporting entirely.[369]

Knobel also discusses the possibility of increased onshore tax evasion and the use of simulated residency to dodge CRS reporting.[370]The CRS has responded to the latter loophole by proposing enhanced due diligence processes.[371]The new processes include verifying a client's physical

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363Lisa De Simone *et al* op cit note 361 at 37.
364Ibid.
365Ibid.
366Ibid at 33-36.
367Ibid.
368Noam Noked 'Tax evasion and incomplete tax transparency' (2018) Vol.7 No.31 *Laws* 1 at 4-5.
369 Noam Noked 'FATCA, CRS, and the wrong choice of who to regulate' (2018) Vol.22 No. 1 *Fla Tax Rev.* 77 at 77.
370 Andre Knobel 'OECD's handbook for implementation of the CRS: TJN's preliminary observations' *Tax Justice Network* 15 September 2015 at 7 available at*https://www.taxjustice.net/wp-content/uploads/2013/04/OECD-CRS-Implementation-Handbook-FINAL.pdf*, accessed on 22 February 2020.
371OECD *Consultation document: Preventing abuse of residence by investment schemes to circumvent the CRS* (19 February 2018 – 19 March 2018) at 6 available at*https://www.oecd.org/tax/exchange-of-tax-*

address and corroborating this against other information known to the bank.[372] Also, further self-certifications are required to be completed by the client.[373]Although these additional due diligence procedures improve the integrity of the CRS residence testing; they are not impermeable or absolutely immune to manipulation. They fail to be dispositive in their determination of a person's actual tax residency.

Returning to the constitutional question at hand, that is –whether there is a relationship between the restriction of informational privacy and reducing tax evasion in terms of the CRS? It is clear that the CRS regime is effective in targeting a segment of evasionary practices. The CRS may however only be diverting evasion to another quadrant. In this way, the CRS only marginally counters tax-evasion.

Within a South African context, a further practical point arises. Assuming that AEoI reduce tax evasion significantly; the current state of affairs at SARS (as set out by the Nugent commission[374]) clearly indicates a lack of capacity to utilize the data obtained. Accordingly, under the present circumstances, the limitation of the right to privacy may fail to give effect to a reduction in evasion at all.

Although the CRS and FATCA data exchanges fail to capture all evasionary practices; the reporting parameters remain very broadly defined. This results in vast amounts of unfiltered and unvalidated data being collected and shared, often where there is no legitimate basis to do so.
In cases where a foreign tax authority obtains irrelevant or inappropriate on a taxpayer, the consequences are potentially significant. Croome explains that where tax information is obtained by the incorrect tax authority, the taxpayer may need to go through a costly and arduous process to resolve the matter.[375]

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information/consultation-document-preventing-abuse-of-residence-by-investment-schemes.pdf, accessed on 22 February 2020.

[372]Ibid.

[373]Ibid.

[374]The Presidency *Commission of inquiry into tax administration and governance by SARS* (14 December 2018) available at *http://www.thepresidency.gov.za/report-type/commission-inquiry-tax-administration-and-governance-sars*, accessed on 22 February 2020.

[375]Beric Croome op cit note 8 at 166-167.

In Constitutional jurisprudence this falls within the parameters of the overbreadth doctrine. The Court has explained that '[o]verbreadth analysis is properly conducted in the course of application of the limitations clause. To determine whether a law is overbroad, a court must consider the means used…in relation to its…objectives.'[376] In doing so, courts assess whether there is a less intrusive method that could be employed by the legislature to pursue its objective.'[377]

In evaluating whether there are any less restrictive means the state could use to curb offshore tax evasion, three distinct alternates are considered. The tenability of each alternate is briefly discussed in-turn.

As discussed in chapter two, tax information exchange historically took place pursuant to bilateral treaties. These treaties required a requesting state to demonstrate the necessity or foreseeable relevance of information prior to any exchange taking place. As set out in that chapter, the bilateral and relevancy aspects frustrated the exchange process. Reverting to the historical model and relying on traditional tax information sharing articles is likely to be ineffective; and will not adequately address tax evasion.[378]

Another alternate, is to scope the due diligence parameters more narrowly. This proposition is also unlikely to be tenable. Fewer or less comprehensive indicia make the scope of reporting more permeable. It allows people to manipulate the criteria and escape reporting. This suggestion is likely to enable circumvention and inhibit compliance.

A more pragmatic suggestion was advanced by Croome prior to the implementation of AEoI, it is however especially pertinent in the current context. Croome suggested that affected persons be notified of the content of tax information exchanges before data is transmitted; and that they be given an opportunity to cure any errors.[379] His recommendation accords with the transparency

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[376] *Case v Minister of Safety and Security* supra note 240 para 49.
[377] Stu Woolman & Henk Botha op cit note 210 at 34-85.
[378] Lukas Menkhoff & Jakob Miethe 'International treaties insufficiently curb global tax evasion' (2018) 42 *DIW* at 408-9.
[379] Beric Croome op cit note 8 at166-167.

dimension of the right to privacy;[380] and resonates with the *audi alteram partem* principle of natural justice.

IV. CONCLUSION

It is incontrovertible that the need to collect and obtain taxes in South Africa is of critical importance. Inimical to this are evasionary practices. Banking in an offshore jurisdiction is often a critical enabler to harmful tax practices. The state therefore has a legitimate interest in collecting and obtaining information relating to such practices.

An inherent feature of collecting and exchanging taxpayer information is the impingement of a person's right to privacy. Although not intimately private, data exchanged remains sensitive and enjoys constitutional protection. The inclusion of robust privacy and confidentiality safeguards in the information exchange frameworks lessens the extent of the intrusion on the right. Notwithstanding the fact that alternative evasionary mechanisms remain available to taxpayers and the current lack of capacity at SARS to process information; a court is likely to hold that there is a sufficient nexus between the purpose of the tax sharing and curbing tax evasion.

Perhaps the only area for Constitutional enhancement of the CRS regime would be to consider notifying tax payers prior to information exchanges. A court will therefore likely conclude that the limitation of the right or privacy arising from CRS data exchanges will constitute a reasonable and justifiable limitation of the right to privacy.

In so far as the FATCA regime is concerned, the conclusion is less apparent. The main reason for the discrepancy is based on the *de facto* unilateral nature of FATCA reporting; whilst CRS reporting is truly reciprocal. The South African state does not obtain any information on South African residents holding accounts in the United States; accordingly the aim of curbing tax evasion and enhancing compliance in South Africa is nullified. There is can thus be no plainly apparent relationship between reporting on reportable US accounts and the increase in South

[380] United Nations General Assembly Human Rights Council op cit note 244 at 7 and 12.

African fiscal revenue. These concerns are not uniquely South African and are being echoed by the European Union. An affected person may therefore be able to argue that the limitation of their right to privacy is not ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’[381]

Woolman and Botha explain that the inclusion of the phrase ‘open and democratic society based on human dignity, equality and freedom’ in section 36 suggests that courts look to comparative law of foreign jurisdictions for interpretative guidance.[382] In the next chapter, the constitutional challenges advanced against AEoI regimes in foreign jurisdictions are briefly considered.

[381]Constitution supra note 7 s 36.
[382]Stu Woolman & Henk Botha op cit note 210 at 34-68.

CHAPTER SIX
COMPARATIVE FOREIGN CASE LAW

I. INTRODUCTION

The Constitution permits the judiciary to consider foreign law as an interpretative aid when deciding Bill of Rights matters.[383] Over the years the Constitutional Court has made extensive use of comparative foreign law in its deliberations.[384]

To my knowledge, there have been no reported constitutional challenges directed against the OECD's CRS standard in foreign law. There have however been several challenges to FATCA. In this chapter, a brief overview of the constitutional cases advanced against FATCA in the United States of America, France and Canada is provided. These jurisdictions have been selected on the basis that they have comparable legal systems; and operate as societies which can be viewed as 'open and democratic… based on [the values of] human dignity, equality and freedom.'[385]

It is important to preface the discussion on foreign law with an important rider. Although foreign law is a valuable tool which provides a useful reference point in deciding constitutional challenges, it is does not constitute determinative precedent in South African law.

The constitutional court has cautioned against simply transposing foreign precedent in deciding South African matters. In *Makwanyane* the court clearly sets out the status of foreign law in judicial decision making –

> 'In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and

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[383]Constitution supra note 7 s 39*(1)(b)*.
[384] Andrea Lollini ' Legal argumentation based on foreign law – an example from case law of the South African constitutional court' (2007) Vol.3 *Utrecht L.* Rev 60 at 65-71 and C Rautenbach 'The South African constitutional courts' sue of foreign precedent in matters of religion: without fear of favour?' (2015) Vol. 18 No. 5 *P.E.R* 1546 at 1549 -1550.
[385]Constitution supra note 7.

> circumstances, and the structure and language of our own Constitution. We can derive assistance from… foreign case law, but we are in no way bound to follow it.'[386]

When considering comparative foreign case law in this chapter, this directive of the court is taken into account. In addition to discussing the findings of the foreign court, the appropriateness of importing their precedent into South African jurisprudence is also evaluated.

II. UNITED STATES OF AMERICA

In 2015, several applicants brought a multifaceted attack against FACTA in the Southern District Court of Ohio. The applicants in this action included several American citizens living abroad; an American citizen who owned a financial service provider in Albania; and US Senator Rand Paul acting in the name of Congress. They argued that the FATCA instrument was procedurally defective; and substantively unlawful.[387]

The substantive challenge rested on three main prongs. First, that it violated the right to privacy;[388] secondly, that it failed in extending equal protection under the law to groups of Americans;[389] and finally that it imposed a grossly disproportionate penalty in the case of non-compliance with the law.[390]

The court refused to adjudicate several arguments raised on the basis that six out of the seven applicants in the action lacked standing.[391] Only a single claim advanced by one applicant was therefore entertained. This claim rested on the equal protection clause; and was dismissed. The court reasoned that all American nationals were treated equally in terms of FATCA; and that the

[386] S *v Makwanyane* supra note 194 para 39.
[387] *Crawford v. United States Dep't of the Treasury*, No 3:15-cv-250, 2015 WL 5697552 (S.D Ohio Sept. 29 2015) at *13.
[388] Ibid at *22.
[389] Ibid at *24.
[390] Ibid at *31.
[391] Ibid at *11-23.

‘disparate impact’ of the law on various classes of nationals did not constitute an ‘equal protection violation.’[392]

Despite not entertaining arguments advanced on the right to privacy, the court in an *orbiter dictum* mentioned that a person can have ‘no reasonable expectation of privacy’ in respect of banking records.[393]

The applicants subsequently petitioned the Sixth Circuit Court and the Supreme Court of the United States to hear the matter. Their applications were dismissed due to a lack of standing.[394]

The American courts’ findings on both standing and privacy are unlikely to find application in a South African constitutional context.

Loots explains that the South African Constitution confers a liberal approach on the issue of standing. With reference to precedent, she argues that the Constitution ‘confers practically unlimited *locus standi* in *judicio* and that no limit is placed on the manner in which persons may approach the court.’[395]

Similarly, the American court’s assertion that financial information cannot be private is threadbare and of little consequence in South African law. McQuoid Mason explains the disparity between the South African right to privacy and its American counterpart –‘The United States’ experience concerning access to information is useful, but should not be followed blindly.... it has been held ...that a bank client has no expectation of privacy in respect of information contained in cheques and deposit slips handed to the bank. [This decision is] wrong.’[396]

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[392]Ibid at *27.
[393]Ibid at *23.
[394]*Crawford v. U.S. Dep’t of the Treasury,* 868 F.3d 438 (6th Cir. 2017).
[395]Cheryl Loots‘ Standing, ripeness and mootness’ in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 5) 7-3 – 7-4.
[396]David McQuoid-Mason op cit note 230 at 38-27 - 38-28.

III. FRANCE

In 2019, the Accidental American Association challenged the lawfulness of FATCA in the *Conseil d'Etat*, the French Administrative Court. The association argued that FATCA was unlawful on three grounds. First, its structural and de facto unilateral features; secondly, its discord with the right to privacy in the French Constitution; and thirdly its dissonance with the EU rights instruments and directives.

The court did not entertain the second challenge. They held that it was outside the court's jurisdiction to hear a matter relating to substantial violation of a constitutional right.[397]

The applicant's administrative challenges on points of structural and de facto non-reciprocity were dismissed. The court held that the *pacta sunt servanda* duty to act in accordance with the terms of treaty instruments was sufficient to render structural informational exchange asymmetries lawful.[398] On the de facto unilateral nature of information exchanges -applying threadbare reasoning- the court found that the engagement between US and French authorities to enable information exchanges constituted adequate performance.[399]

The *Conseil* also held that FATCA reporting did not fall short of the European Union standards. They reasoned that America had data privacy standards in place which broadly accorded with European international law. In substantiation of this finding they cited the following factors: a shared underlying premise of transparency; the existence of confidentiality safeguards; and legal sanctions for data breaches.[400]

The findings of the *Conseil* are problematic for a multiplicity of reasons.

At the time of the court's decision it had been nine years since FATCA was initiated by the United States and six years since the IGA with France has signed. The notion that America

[397]CE, ass., 19 juill. 2019, nº 424216, ECLI:FR:CEASS:2019:424216.20190719, *Assoc. des Américains accidentels*, Publiée au Recueil Lebon, P. Ramain, rapp.; A. Lallet, rapp. publ 16.
[398]Ibid rapp. publ 12.
[399]Ibid rapp. publ 13.
[400]Ibid rapp. publ 20.

remained in the process of effecting changes to its legal framework to permit a reciprocal exchange of data over this extensive period is simply incredulous.

Moreover, in July 2018, the European Parliament passed a resolution titled 'The adverse effects of the US Foreign Account Tax Compliance Act on EU citizens.' In the resolution, Parliament resolved to re-open discussions with the United States regarding FATCA. In particular, Parliament directed the Council to focus on 'ensuring the full reciprocal exchange of information, [and] upholding the fundamental principles of EU law.'[401]

The fundamental principles refer primarily to privacy requirements. Clause 6 of the resolution

> '[s]tresses the importance of providing an adequate level of protection for personal data transferred to the US under FATCA, in full compliance with national and EU data protection law; calls on the Member States to review their IGAs and to amend them, if necessary, in order to align them with the rights and principles of the GDPR; urges the Commission and the European Data Protection Board to investigate without delay any infringement of EU data protection rules by Member States whose legislation authorises the transfer of personal data to the US IRS for the purposes of FATCA, and to initiate infringement procedures against Member States that fail to adequately enforce EU data protection rules.'[402]

The French *Conseil's* decision fails to take into account this resolution. The applicants have recourse to appeal to the Court Justice of the European Union (CJEU).

Subsequent to the French court's decision, the European Union has conducted public hearings on the impact of FATCA;[403] and has engaged with the United States on their action plan to meet the reciprocal exchange obligation.[404] In the future it is likely that a court will take judicial notice of these legislative acts in assessing the legality of FATCA.

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[401]European Parliament Texts Adopted *The adverse effects of the US Foreign Account Tax Compliance Act on EU citizens* (2018) at pt.10 available at *http://www.europarl.europa.eu/doceo/document/TA-8-2018-0316_EN.pdf*, accessed on 22 February 2020.
[402]Ibid at pt.6.
[403]European Parliament Committees Hearings *Public hearing on FATCA and its extraterritorial impact on EU citizens* (12 November 2019) available at *https://www.europarl.europa.eu/committees/en/peti/events-hearings.html?id=20191104CHE06441*, accessed on 22 February 2020.
[404] Council of the European Union op cit note 332.

IV. CANADA

The first Canadian legal challenge against FATCA was an application for an injunction to halt FATCA brought in 2015.[405] The application failed.[406] One of the applicants in the initial case, Gwendolyn Deegan, again challenged the constitutionality of FATCA in a separate case in 2019. The Federal Court of Ontario held that FATCA was lawful.[407] Deegan *et al* argued that FATCA violated the Canadian Charter of Rights and Freedoms. More specifically, they claimed that FATCA prejudiced the rights to privacy and substantive equality; and was therefore unconstitutional. [408]

In dealing with the question of privacy, Justice Mactavish found that personal and financial data exchanged in terms of FATCA enjoyed constitutional protection.[409] Her finding was however restrained. She explained that the right to financial privacy was not unqualified. To this end she said 'those affected by the Impugned Provision have only a limited expectation of privacy in their banking information.'[410]

The Justice then turned to assess the reasonability of the information sharing provisions.

In the privacy challenge, the arguments advanced by the Attorney General in support of the FATCA IGA did not focus on proving that the underlying FACTCA data was not private. Instead, he argued that the data exchange of private information was reasonable. He posited that if the Canadian government had refrained from entering into the US-Canada IGA; Canadian financial institutions would need to enter into exchange agreements with the IRS individually in order to maintain financial relations with America. This process would be administratively and financially burdensome for Canadian banks. It would have a 'potentially catastrophic effect' on

[405]Virginia *Hillis and Gwendolyn Deegan* v *Attorney General of Canada and Minister of National Revenue*, 2015 FC 1082.
[406] Ibid para 77.
[407]Ibid para 442.
[408]Ibid para 6.
[409]Ibid para 303.
[410]Ibid para 313.

the Canadian financial sector and the broader economy.[411] The court endorsed this justification and held that the IGA was legal.

The Canadian court's finding that financial data enjoys a limited right to privacy is consonant with the right to privacy in South Africa. Similarly, the requirement for the state to justify any interference in a fundamental right –such as the right to privacy– also corresponds with the South African Constitutional framework. Where the cases diverge is on the contents of that justification.

The Canadian Attorney General contended that the State's violation of the right to privacy was justifiable. He explained that Canadian banks would have been compelled to enter into individual FATCA exchange agreements with the IRS, had the state refrained from doing so.[412] In both eventualities data would be exchanged and the right to privacy would be infringed. Essentially, the State's committal to the IGA was simply a more efficient and effective way to achieve the very same outcome.

This justification although convincing is not absolutely compelling in the South African context. The main reason for this is based on a fundamental difference in the scope of application of the respective rights' instruments. The Canadian Charter does not apply directly to horizontal private law disputes; at best the values of the Charter could indirectly inform the interpretation of the common law.[413] By contrast, the South African Constitution provides for the direct horizontal application of rights in private law. It states that '**[a]** provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'[414]

In the context of FATCA AEoI, both the South African state and South African financial institutions are constitutionally enjoined to ensure that a person's fundamental right to privacy is preserved. By contrast, the Canadian charter only imposes a direct obligation in this regard on

[411] Ibid para 316.
[412] Ibid para 312.
[413] Mark Tushnet 'The issue of state action/horizontal effect in comparative constitutional law' (2003) Vol.1 No.1 *International Journal of Constitutional Law* 79 at 82.
[414] Constitution supra note 7 s 8(2).

the State. The obligation on a private financial institution is derived by an indirect infusion of constitutional values into private law; and is therefore more tenuous. Constitutionally considered, this disparity would feature significantly when considering the effect of foreign law.

V. THE IMPACT OF FOREIGN LAW ON THE CRS

As alluded to at the beginning of this chapter, there do not appear to be any challenges to the OECD's CRS standard. In chapter five, this research concluded that the CRS was largely constitutionally consonant. The lack of foreign legal challenges to the CRS somewhat corroborates this finding. The only area of improvement which may be proposed to enhance constitutional muster, was the inclusion of a mechanism to notify a person regarding the content of the information shared.

Such a mechanism would afford affected persons with an opportunity to review information exchanged; and rectify any potential errors. In doing so, the data subject is able to avoid adverse effects arising from erroneous reporting.

Notwithstanding the lack of direct foreign precedent on the validity of the CRS, there are several dicta in foreign sources of law which lend credence to my position. In the aforementioned decision of the *Conseil d'Etat*, the French court in describing a feature of an appropriate data standard says – 'administrations must...guarantee the right of everyone to access the data collected concerning him and to request its rectification.'[415]

In October 2019, a European national residing in the United Kingdom began crowd-funding to raise money to finance a lawsuit seeking to overturn FATCA. Although the challenge has not yet been heard, preliminary engagement between the applicant and the United Kingdom tax authority was facilitated through the Office of the Information Commissioner. As part of this discourse, the tax authority conceded that in terms of the law 'customers must be notified of such

[415] CE, ass., 19 juill. 2019, nº 424216 op cit note 396 rapp. publ 25.

disclosure, if account holders wished to consult or correct information about themselves it would be appropriate for those customers to contact their Financial Institution in this respect.'[416]

VI. CONCLUSION

In this chapter, three foreign cases on the legality of FATCA were discussed. Each of these challenges was unsuccessful, albeit for different reasons. The American challenge was dismissed primarily on the basis of a lack of standing. The French case indicated a predilection for outcome-based decision making and failed to adequately engage EU precedent on privacy law. Finally, the Canadian court held that the violation of privacy pursuant to FATCA was reasonable. Where appropriate, the foreign law findings were cross-checked for validity against South African constitutional standards; and an explanation of why a South African court may reach a different conclusion was advanced.

This chapter also discussed the lack of precedent on the legality of the CRS; and used this insight to show that the CRS is arguably constitutionally valid. It also borrowed from related foreign law to substantiate the position that the constitutional consonance of the OECD's CRS can be further enhanced by notifying data subjects on the contents of information exchanged.

[416]Information Commissioner's Office *Freedom of Information Act 2000 (FOIA) Decision notice* (1 March 2019) at pt.16 available at *https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614446/fs50751683.pdf,* accessed on 22 February 2020.

CHAPTER SEVEN

CONCLUSION

This research posed the question –Do broad-based automatic exchanges of tax information pass constitutional muster? More specifically, it was an inquiry into the FATCA and CRS information exchange regimes and their interface with the right to privacy in the South African Constitution.[417]

In this chapter, the research is synthesised and the conclusions are articulated. Furthermore the research findings are evaluated against those expressed by Möller, in her analogous study of 2016.[418] Finally, avenues for further research are proposed.

I. A SYNTHESIS OF THE RESEARCH AND ARTICULATION OF THE CONCLUSIONS

Privacy –particularly informational privacy– is a limited right in South African law. Nevertheless, it still enjoys constitutional protection. Any limitation of the right to privacy must be linked to a legitimate purpose and must be commensurate with that purpose. Where the limitation fails to meet these requirements; the result is a law which is unconstitutional and unlawful –in effect, this is not valid law at all.

This research posits that the FATCA regime fails to pass constitutional muster. The transmission of South African data to the IRS constitutes an unreasonable and unjustifiable limitation of the accountholder's right to privacy. The *de facto* reality of a one-sided flow of information to the IRS, without a reciprocal receipt of information by SARS, means that South African authorities receive no reports on the financial affairs of South African tax residents in the United States. In the absence of such information, the South African tax authority cannot claim that participation in FATCA is linked to the legitimate purpose of improving tax compliance and reducing evasion in South Africa. Until such time as reciprocal reporting is in effect, it is argued that the exchange of data is unconstitutional. An applicant may bring an administrative action to compel National Treasury to suspend information exchanges with the US until the IRS's obligation of reciprocity

[417]Constitution supra note 7.
[418]Louise Möller op cit note 11.

is met. This strategy effectively employs an administrative action to give effect to the constitutional right to privacy. This research finding is corroborated by the increasing global pressure on American authorities to honour reciprocal FATCA obligations or assent to the CRS.

The analysis in respect of the CRS is more involved. Although the exchange of sensitive personal and financial information in terms of the CRS certainly intrudes on a person's right to privacy; such an intrusion is 'reasonable and justifiable in an open and democratic society...[419]' The reasonability and justifiability of the rights violation rests on two key tenets. First, the OECD has developed a robust and integrated data privacy framework. These safeguards lessen the extent of the imposition on the right to privacy. Secondly, the reciprocal nature of CRS reporting means that South Africa receives data on South African tax residents. In theory at least, SARS can use this information to enhance tax compliance and curb tax evasion in South Africa. The only potential reservation on the constitutionality of the CRS is based on the overbreadth of reporting, this may result in sensitive financial data being reported inappropriately to a foreign tax authority. In this regard –drawing on the recommendations of Croome and the UK Information regulator– it is suggested that persons holding reportable accounts should be notified in advance regarding: the exchange of information, the countries with which the information will be shared, the contents of information to be exchanges; and a process be designed which provides for the rectification of any errors prior to the cross-border transmission of data. This recommendation corroborates with principles of natural justice and recognised international law. It cures overbreadth of CRS reporting and enhances overall constitutional consonance.

II. EVALUATION AGAINST CORRESPONDING STUDIES

In crosschecking these research findings against those of Möller's, it is important to preface this discussion by highlighting a difference in scope between the respective studies. Möller's study is broader in its scope; she has therefore dealt with both the FATCA and CRS AEoI regimes in a single general analysis. Contrastingly this study provides a narrower and more focused analysis. It evaluates the idiosyncrasies of the FATCA and CRS exchanges in relatively more detail; and accordingly reaches a different conclusion on the constitutionality of each AEoI regime.

[419]Constitution supra note 7 s 36.

Since Möller has made no independent finding on the constitutionality of the FATCA regime, her work offers no direct basis for comparison on the research finding on the unconstitutionality of FATCA. This research does however fully concur in Möller's general conclusion that persons should be notified regarding tax information exchanges prior to data transmission.[420] Her findings in this regard are further buttressed by this study.

III. OPPORTUNITIES FOR FURTHER RESEARCH

Cross-border AEoI is a pervasive reality of the globalised and digitized modern economy. AEoI practices carry concurrent informational risks and legal considerations. The interplay between these elements is relevant at both a global and in-country level. The avenues for further research in this area similarly exist at both an international level and within a domestic context. Internationally, there is increased awareness around taxpayer rights, with academics calling for a global multi-lateral taxpayer bill of rights.[421] There is scope to contribute to this global discussion. Within a South African context, there is a significant gap in the literature on the efficacy of tax information exchanges -whether and to what extent SARS uses information received to curb evasion and improve compliance. There also remains scope to contribute further to the constitutional analysis on the AEoI.

[420] Louise Möller op cit note 11 at 35-37.
[421] Arthur J Cockfield op cit note 55 at 421.

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UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

Faculty of Commerce, Law and Management

Candidate's Declaration

Name of Candidate:	Aisha Mia
Person Number:	466119
Degree:	MCom (Accounting- Taxation)
Supervisor / Co-Supervisor:	Professor De Koker
School:	Accountancy
Title of Thesis/Dissertation/ Research Report:	Automatic Exchange of Tax Information and the Right to Privacy — A South African Constitutional Analysis

Candidate's Declaration:

i. I hereby submit my ~~PhD Thesis/~~Masters dissertation for examination (circle applicable).

ii. I confirm that my signed declaration in terms of Rule G9.7 is included in each copy of the thesis/ dissertation.

iii. I have checked all copies of my thesis/ dissertation and declare that no pages are missing or poorly reproduced.

iv. I hereby submit a ~~CD/USB containing~~ a PDF version of my submission for examination and 0 bound copies.

Candidate's Signature: Aisha Mia **Date:** 19 April 2020