SCHOOL OF ACCOUNTANCY

University of the Witwatersrand

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BALANCING THE TAXPAYER'S RIGHT TO PRIVACY AGAINST THE AUTOMATIC EXCHANGE OF INFORMATION

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A research report submitted to the Faculty of Commerce, Law and Management, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master in Commerce (specialising in Taxation)

Johannesburg, 2020

Abstract

Since 2009, a primary objective of the Organisation for Economic Co-operation and Development (OECD) has been to increase global tax transparency in order to combat tax evasion. According to the OECD, the removal of bank secrecy restrictions and the implementation of the Automatic Exchange of Information standard, which allows participating jurisdictions to access information on the foreign financial accounts of their residents, is necessary to reduce tax evasion. The Automatic Exchange of Information, however, is argued to be excessive in the information that is required to be exchanged.

This research report examines and analyses the constitutional issues that are raised with regard to the current practice of the Automatic Exchange of Information. The current policy framework of the Automatic Exchange of Information is critically assessed with particular reference to the taxpayer's constitutional right to privacy.

This research report considers whether the Automatic Exchange of Information infringes upon the taxpayer's right to privacy and if so whether the infringement is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. It is submitted that no right granted by the Constitution is absolute and therefore a limitations analysis must be performed in order to ascertain whether there is an appropriate constitutional balance between the right to privacy and the Automatic Exchange of Information.

Keywords: Right to privacy; Automatic Exchange of Information, OECD, Tax transparency; South African Revenue Services; The Constitution; Limitation of rights

Declaration

I declare that this research report is my own unaided work. It is submitted for the degree of Master of Commerce in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

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Alon David de Koker

Acknowledgements

I would like to express my deepest gratitude to my father, Alwyn de Koker. My father is a tax authority in South Africa has always been a person in my life whom I admire. I am very proud to be able to complete this research paper under his guidance.

Without the support and nurturing of my mother Nadine de Koker it would not have been possible for me to have made it this far in my life and I am extremely grateful for all that she has done for me.

I am also grateful to my sister Gabrielle de Koker for her continued support and constructive evaluation.

I would like to extend my sincere thanks to my best friend Jonathan Kadish for his encouragement, assistance and review of my work.

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1. INTRODUCTION

"By our presence here today, we solemnly honour the pledge we made to ourselves and the world, that South Africa shall redeem herself and thereby widen the frontiers of human freedom. As we close a chapter of exclusion and a chapter of heroic struggle, we reaffirm our determination to build a society of which each of us can be proud, as South Africans, as Africans, and as citizens of the world. As your first democratically elected President I feel honoured and humbled by the responsibility of signing into law a text that embodies our nation's highest aspirations." – Nelson Mandela[1]

Preceding 1994, taxpayers in South Africa had little defence against fiscal legislation or conduct or decisions taken by the South African Revenue Service ("SARS") that infringed upon their common law rights. The first democratic elections held in 1994 created substantial changes in South Africa as the interim Constitution, which came into operation on 27 April 1994, brought about the final demise of the tricameral constitutional system and the apartheid order that it had upheld.[2] The Constitution of the Republic of South Africa, 1996 ("the Constitution") replaced the interim Constitution thereafter and constitutes the supreme law of the Republic, any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[3] The Constitution is a monument to the determination of a society to rectify the crimes committed during the Apartheid – the evils of colonialism, racism and the various social problems as a result of years of inequality.[4]

The Minister of Finance in his 1994 Budget Speech decided to appoint a Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa ("the Katz Commission").[5] The Katz Commission in its Interim Report approached the rule of law and stated as follows:

> "The Commission notes that the tax system is subject to the Constitution and must conform to society's commitment to the Rule of Law. This means not only that the system should be effective

[1] Nelson Mandela, Speech at signing of 1996 Constitution (Sharpeville, 10 December 1996).
[2] Currie, I. and de Waal, J. (2001) *The New Constitutional & Administrative Law: Volume 1 Constitutional Law.* Juta & Co Ltd p. 45.
[3] The Constitution of the Republic of South Africa Act 108 of 1996, Chapter 1 Section 2.
[4] *Supr*a note 2 at page 2.
[5] Department of Finance *Budget Review* (22 June 1994) Republic of South Africa para 2.3 at 2.5.

> in the enforcement of all tax laws, equally and irrespective of status, but also that citizens' right to be taxed strictly in accordance with the terms of those laws should be scrupulously protected both in the design of those laws and in their implementation."[6]

According to a survey conducted by the Organisation for Economic Co-operation and Development ("OECD"), all taxpayers in democratic societies are afforded with the following basic rights:[7]

- The right to be informed, assisted and heard;
- The right of appeal;
- The right to pay no more than the correct amount of tax;
- The right to certainty;
- The right to privacy; and
- The right to confidentiality and secrecy

In South Africa the Constitution, together with the Income Tax Act[8] ("the ITA"), the Tax Administration Act[9] ("the TAA") and South Africa's Roman-Dutch common law heritage provide the basis of taxpayers' rights.

Since 2009, one of the main missions of the OECD has been to increase global tax transparency.[10] This purpose involves lifting the veil of secrecy for tax purposes in order for the administration and enforcement of taxes by making available all information on legal and beneficial ownership of any type of entity or legal arrangement, accounting and bank records available to tax authorities for exchange purposes.[11]

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[6] Katz Commission, 1994, *Interim Report of the Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa*, para (e) p 9, cited in Croome B.J., (2008) *Taxpayers' Rights in South Africa: an analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to the courts*, PhD thesis, Dept. of Commercial Law, University of Cape Town, p 11.
[7] OECD (1990) *Taxpayers Rights and Obligations – Practice Note.*
[8] The Income Tax Act 58 of 1962.
[9] The Tax Administration Act 28 of 2011.
[10] OECD *Global Forum on Transparency and Exchange of Information for Tax Purposes: Multilateral Co-operation Changing the World.* 10th Anniversary Report. Available at https://www.oecd.org/tax/transparency/global-forum-10-years-report.pdf.
[11] *Ibid*.

South Africa is not a member of the OECD. However, it is one of the key partners of the OECD and participates in many OECD activities.[12] South Africa is an Associate in six OECD Bodies and Projects, and a Participant in fifteen.[13] Relevant to this dissertation is that South Africa is one of the early adopters of the Common Reporting Standards ("CRS") and dedicated to the exchange of information ("EoI") initiated by the OECD. According to the OECD the EoI is about attaining a global tax co-operation through the accomplishment of international tax standards that will put an end to bank secrecy and tax evasion.[14]

1.1 PROBLEM STATEMENT

The current legislation, regulations and procedures involved in the AEoI process of South African taxpayers is yet to be challenged from a Constitutional perspective. The purpose of this dissertation is to ascertain whether taxpayers' fundamental rights in South Africa, particularly the right to privacy, are protected by the Constitution, the applicable legislation and lastly the common law against the AEoI.

1.2 RESEARCH METHOD

The research method adopted for this dissertation is one of a legal analysis and interpretation. Specifically, the principles gleaned from the Constitution, different relevant statutes and case law were critically analysed and weighed against the rules and process of the EoI and the information gathering powers conferred upon SARS.

1.3 LIMITATIONS TO THE RESEARCH REPORT

This research report will consider the Constitutional rights which are relevant with specific regard to AEoI and the information gathering powers of SARS. Not all the rights provided by the Constitution are relevant to South African taxpayers in fiscal matters. For example, the right to life contained in section 11 of the Bill of Rights is not infringed upon by the AEoI or the information gathering process of SARS. It is fascinating to consider that China imposed

[12] OECD, *Our Global Reach*. Available at https://www.oecd.org/about/members-and-partners/.
[13] OECD, *South Africa and the OECD.* Available at https://www.oecd.org/southafrica/south-africa-and-oecd.htm.
[14] OECD, *Exchange of Information*. Available at https://www.oecd.org/tax/exchange-of-tax-information/.

the death penalty as a possible punishment for tax evasion until 2011.[15] Other rights contained in the Bill of Rights such as the right to environment (section 24), children (section 28) and education (section 29) are not applicable in tax matters and are thus beyond the scope of this research report.

1.4 STRUCTURE OF THE RESEARCH REPORT

Chapter 2 of this report sets out the historical synopsis of the development of the Automatic Exchange of Information, the contrast between the Foreign Account Tax Compliance Act[16] and the Common Reporting Standard and finally the OECD's persistent need for greater tax transparency.

Chapter 3 discusses the constitutional right to privacy, its significance and because no right in our Constitution is absolute, the general limitation section contained in section 36 of the Bill of Rights which allows for a right to be limited under certain conditions.

Chapter 4 examines the applicable legislation which empowers SARS to collect taxes and also the obligations required by SARS as an organ of state in South Africa. Chapter 4 also introduces the Protection of Personal Information Act and the effect it may have on the exchange of information when it comes into force.

Chapter 5 considers whether the AEoI does actually infringe upon the right to privacy and if so whether it can be a justifiable limitation in our democracy. The analysis will include balancing the limitation of the right against the purported benefits of the legislation. Chapter 5 will also consider the legal actions against the AEoI in foreign countries.

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[15] McCaster, N (2011) *China Drops Death Penalty for Tax Evasion*, Newser Staff. Available at https://www.newser.com/story/112878/china-drops-death-penalty-for-tax-evasion.html.

[16] FATCA is the acronym for the Foreign Account Tax Compliance Act, which is an American law passed in March 2010. FATCA requires reporting of specified United States (US) persons or entities controlled by specified US persons by certain foreign financial institutions (FFIs – see definition of an FFI under question 3 of the FATCA for entities section) and possible withholding tax on US source income. Its aim is to identify US persons who may be using offshore accounts to avoid US taxation on their income and assets. The South African Government has signed an intergovernmental agreement (IGA) with the Internal Revenue Service (IRS) agreeing to exchange information provided by financial institutions in South Africa. The IGA has been agreed in substance as if it is enacted.

The final chapter shall set out the conclusions drawn from the balancing exercise of the limitation of the right against the purported benefits derived from the law as well as some questions raised about the legitimacy of the AEoI.

2. THE DEVELOPMENT OF EXCHANGE OF INFORMATION FOR TAX PURPOSES

2.1 A BRIEF OVERVIEW

In order to demonstrate how the standards for exchange of information have shifted over time to reach the current standard of AEoI, it is essential to begin with the origins of exchange of information. The strengthening of the framework for information exchange was perceived as a political priority as early as 1998 within the discussion of the Recommendation on Counteracting Harmful Tax Practices.[17] Clause 4 of the Recommendations and Guidelines for Dealing with Harmful Tax Practices states:

> "Recommendation concerning foreign information reporting rules: that countries do not have rules concerning reporting of international transactions and foreign operations of resident taxpayers consider adopting such rules and that countries exchange information obtained under these rules."[18]

In addition to this the document also makes a recommendation to removing impediments to the access of banking information by tax authorities for tax purposes.[19] These issues gained further momentum in 2008, when several tax evasion scandals broke out;[20] the largest Swiss Banks had conspired in assisting wealthy clients such as UBS in escaping taxation via offshore structures.

[17] OECD (1998) *Recommendation on Counteracting Harmful Tax Competition*, (adopted by the Council at its 923rd Session on 9 April 1998 [C/M(98)9/PROV]). Available at https://one.oecd.org/document/C(98)17/FINAL/en/pdf.
[18] *Ibid* clause 4 p. 4.
[19] *Ibid* clause 7 p. 4.
[20] Gadzo, S & Klemencic, I, (2016) *Effective International Information Exchange as a Key Element of Modern Tax Systems: Promises and Pitfalls of the OECD's Common Reporting Standard,* p. 209, available at http://www.pse-journal.hr/upload/files/pse/2017/2/gadzo_klemencic.pdf.

The OECD has declared that tax evasion and avoidance is a global concern that reduces government revenue and undermines trust in the tax system.[21] Developing countries are often affected the most by tax evasion and avoidance.[22] The low competence of some African tax administrations to enforce tax laws and tackle illicit financial flows ("IFFs") is one of the major reasons for this drawback.[23] The amount lost annually by Africa due to tax evasion was believed to be more than 50 billion United States Dollars ("USD"), however, according to former South African President Thabo Mbeki, the amount had exceeded to about 80 billion USD in 2018.[24]

The remainder of this chapter presents a historical overview of EoI and its development to the present day global AEoI.

2.2 A HISTORICAL SYNOPSIS OF EXCHANGE OF INFORMATION

It appears that the first EoI rules took place in the structure of the double taxation treaties signed between Belgium and France in 1843 and Belgium and the Netherlands in 1845.[25] The history fundamental to the development of modern tax treaties dates back to the early work subsidized by the League of Nations in the 1920s.[26] The present day system of bilateral treaties, which have a crucial role in assigning taxing rights over cross-border income, is largely influenced by the work under the League of Nations in the 1920s.[27]

In 1963 the Draft Double Taxation Convention on Income and Capital ("MTC") was approved. Article 26 of the MTC ("Article 26") specified a legal basis whereby information may be exchanged in three different forms being: (a) exchange of information upon request; (b) spontaneous exchange of information; and (c) automatic exchange of information.[28] Tax treaty

[21] OECD (2018) *Global Forum on Transparency and Exchange of Information for Tax Purposes: Tax Transparency in Africa, Africa Initiative Progress Report 2018*, p.6, available at http://www.oecd.org/tax/transparency/Tax-transparency-in-Africa-2018-progress-report.pdf.
[22] *Ibid*.
[23] *Ibid.*
[24] *Ibid.*
[25] Oberson, X., (2015) *International Exchange of Information in Tax Matters: Towards Global Transparency*, p. 4. Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing.
[26] Friedlander, L and Wilkie, S., (2006) *Policy Forum: The History of Tax Treaty Provisions – And Why it is Important to Know About it*, vol. 54, no. 4 p. 909.
[27] *Supra* note 20 p. 211.
[28] OECD 2012, *Update to Article 26 of the OECD Model Tax Convention and its Commentary*, p. 7. available at https://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20(2).pdf.

practice has indicated that exchange of information upon request is the most standard form, however, since 2009 the emphasis has shifted from the previously preferred method of exchange of information upon request to AEoI.[29]

According to Zucman[30] the law of 1901 in France introduced the first automatic exchange of information between banks and the tax authorities which was intended to prevent fraud on inheritance. Thereafter in 1908 the first international tax treaty on AEoI was concluded between France and the United Kingdom. In 1988 the OECD and the Council of Europe drafted the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("Multilateral Convention") which afforded the possibility for AEoI on a global basis.[31] According to Eccleston[32] the League of Nations supported for what is a precursor to the Multilateral Convention:

> "The International tax regime… has been designed to protect the sovereign right of nation states to make tax law. A consequence of this regime, with its network of bilateral double tax agreements, is that there is a need for high-level administrative cooperation in order to ensure that firms and individuals with international sources of income are not subject to either conventional double taxation or double non-taxation. Given this context, it is not surprising that informal administrative co-operation dates back the first double tax agreements with the League of Nations developing a draft Treaty on Mutual Assistance on Matters of Taxation in 1928.
> As early as 1927, the International Chamber of Commerce dismissed the League of Nations Draft Treaty on Mutual Assistance in Tax Matters as "an extension beyond national frontiers of an organized system of fiscal inquiry" and "an organized plan of attack on the taxpayer."

[29] *Supra* note 20 p. 211.
[30] Zucman, G., (2015) *The Hidden Wealth of Nations: The Scourge of Tax Havens*, p. 57. University of Chicago Press.
[31] OECD 2011, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matter, Amended by the 2010 Protocol*, Available at https://read.oecd-ilibrary.org/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en#page7.
[32] Eccleston, R, (2011) *Revolution or Evolution: Sovereignty, the Financial Crisis and the Governance of International Taxation*, Journal of Applied Law and Policy 13 at 16. Cited in Sawyer, A (2015) *The Implications of the Multilateral Convention and the Foreign Account Tax Compliance Act: An Australasian Perspective*, available at https://ir.canterbury.ac.nz/bitstream/handle/10092/11671/12652196_sawyer_edits%20proof%20only%20%281%29.pdf?sequence=1.

2.3 ARTICLE 26 OF THE OECD MODEL CONVENTION

Many countries concluded a vast amount of DTAs, of which Article 26 forms the legal basis. According to Rohatgi "the primary purpose of double tax treaties is to avoid and relieve double taxation through equitable (and acceptable) distribution of tax claims between countries…".[33] As mentioned above, the 1963 initial draft MTC provided for Article 26, which was a provision dealing with the exchange of information in tax matters "on request". "On request" information exchange involves one country requesting from another country information that it relevant to a resident taxpayer.[34] The information which could be exchanged about taxpayers under Article 26 of the 1963 MTC was quite limited and the justifications for requesting such information was narrow.[35] Thereafter, the OECD Committee on Fiscal Affairs adjusted and approved Article 26 and the revised version was incorporated into the 1977 MTC.

In order to prevent tax evasion, Article 26 was amended to ensure that contracting states were obligated to supply information available which was relevant from third countries.[36] This was made possible by adding the clause '*the exchange of information is not restricted by Article 1*'. Article 1 limited contracting states to exchange information regarding individuals that were resident of one of the two states.

In 2005 Article 26 underwent further amendments in order to enhance its application and extension by the addition of paragraphs 4 and 5, which reformed the circumstances for information to be exchanged. Article 26 was amended to state that information will be exchanged if it is "foreseeably relevant for the administration or enforcement of taxes of every kind" and obliges each party to "use its powers to obtain and provide such information even if it is not needed for its own tax purposes".[37] The original wording of Article 26 provided that information would only be exchanged if it was "necessary". This amendment had the effect of lowering the threshold for which information may be exchanged. Furthermore, the addition of

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[33] Rohatgi, R., (2005) *Basic International Taxation*, p. 39. London: Kluwer International Law.
[34] Kwon, N. (2016) *A Very Complicated Game of Hide and Seek: Will Automatic Exchange of Information Become a Game Changer in International Tax Evasion?* P. 25, LLB Thesis, University of Otago.
[35] *Ibid*.
[36] Gupta, R., *Shifting Sands: The Unravelling of International Exchange of Information and Disclosure Rules on Tax Matters*, eJournal of Tax Research vol. 16 no. 3, p. 664.
[37] OECD (2017) *Model Tax Convention on Income and on Capital.* Article 26. Available at https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page1322.

Article 26(5) excludes interference from bank secrecy, which posed an impediment to effective information exchange.

Article 26 has been extended beyond the usual exchange of information on request ("EoIoR") to include spontaneous and automatic exchanges of information.[38]
According to the Manual on the Implementation of Exchange of Information Provisions for Tax Purposes[39], the three different manners of information exchange are clarified as follows:

> "Exchange of information on request. Exchange of information on request refers to a situation where the competent authority of one country asks for particular information from the competent authority of another contracting party.
>
> Automatic exchange of information. Information which is exchanged automatically is typically information comprising many individual cases of the same type, usually consisting of details of income arising from sources in the source country, e.g. interest, dividends, royalties, pensions etc. This information is obtained on a routine basis (generally through reporting of the payments by the payer) by sending the country and is thus available for transmission to its treaty partners. Normally, competent authorities interested in automatic exchange will agree in advance as to what type of information they wish to exchange on this basis. To improve the efficiency and effectiveness of automatic exchanges of information the OECD has designed both a standard paper format and a standard electronic format (known as the OECD Standard Magnetic Format or "SMF"). The OECD recommends the use of the SMF and has developed a model memorandum of understanding for automatic exchange of information available for use by any country. The OECD has also designed a "new generation" transmission format for automatic exchange (known as the Standard Transmission Format or "STF") to eventually replace the SMF.
>
> Spontaneous exchange of information. Information is exchanged spontaneously when one of the contracting parties, having obtained information in the course of administering its own tax laws which it believes will be of interest to one of its treaty partners for tax purposes passes on this information without the latter having asked for it. The effectiveness of this form of exchange of information largely depends on the ability of tax inspectors to identify, in the course of an investigation, information that may be relevant for a foreign tax administration. The competent authority of the contracting party that provides information spontaneously should request feedback from the recipient tax administration as it may result in a tax adjustment for the sending contracting party. For instance, a foreign tax administration informed on a spontaneous basis that commission fees were reported to have been paid to one of its residents, may find out that no commission fees were actually paid and it may report this fact to its counterpart who

[38] *Supra* note 34.
[39] OECD (2006), *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, Module on General and Legal Aspects of Exchange of Information* [18], available at https://www.oecd.org/tax/exchange-of-tax-information/36647823.pdf.

> supplied the information. As a result the deduction of the commission fees will be denied and the taxable income adjusted accordingly. Positive feedback also provides an incentive for tax inspectors to continue providing information spontaneously."

The above amendments to Article 26 exhibit a significant extension. The effect of these amendments is that Article 26 is no longer based on the principle of reciprocity, it surpasses domestic law protecting the privacy of taxpayer's privacy and there is a major erosion of taxpayers' rights. The erosion of taxpayers' rights is a persistent matter in terms of the advancement of EoI and this will be demonstrated throughout the rest of this chapter.

Although Article 26 was drafted to provide the widest interpretation possible, the fundamental flaw that remained in the exchange of information was that if there was no tax treaty that existed between the two states then there was no legal basis for the sharing of information. States who do not conclude tax treaties are typically known as 'tax havens'.

2.4 TAX INFORMATION EXCHANGE AGREEMENTS

In order to put tax havens under an increasing amount of pressure to comply with EoI, in 2002 the OECD published a 'black list' of seven jurisdictions which refused to comply with the standards set forth by the OECD.[40] Numerous tax havens responded to the political pressure by making amendments to their banking and secrecy laws. Tax havens were required to sign a minimum of 12 Tax Information Exchange Agreements ("TIEAs") in order to escape the 'black list'.[41]

According to the OECD the following questions should be asked in determining whether a jurisdiction is a tax haven:

> "(a) whether a jurisdiction imposes no or only nominal taxes (generally or in special circumstances) and offers itself, or is perceived to offer itself, as a place to be used by non-residents to escape tax in their country of residence;

[40] Bilicka, K & Fuest, C., (2012) *With Which Countries Do Tax Havens Share Information?* p. 2, Oxford University Centre for Business Taxation.
[41] *Ibid*.

(b) laws or administrative practices which prevent the effective exchange of relevant information with other governments on taxpayers benefiting from the low or no tax jurisdiction;
(c) lack of transparency; and
(d) the absence of a requirement that the activity be substantial, since it would suggest that a jurisdiction may be attempting to attract investment or transactions that are purely tax driven."[42]

The model TIEA is based off Article 26 and the key principles of the TIEA are summarized as follows:

"(a) Existence of mechanisms for exchange upon request;
(b) Exchange of information for purposes of domestic tax law in both criminal and civil matters;
(c) No restrictions of information exchange caused by application of dual criminality principle or domestic tax interest requirement;
(d) Respect for safeguards and limitations;
(e) Strict confidentiality rules for information exchange; and
(f) Availability of reliable information (in particular, bank, ownership, identity and accounting information) and powers to obtain and provide such information in response to a specific request)."[43]

The purported objective of the OECD's model TIEA was to establish an effective exchange of information which was not binding on states.[44] However, there are many weaknesses in respect of TIEAs. Firstly, many of the tax havens signed TIEAs with countries such as Greenland and the Faroe Islands, which have very small populations, in order to bulk up the number of TIEAs signed.[45] Secondly, there is no basis for AEoI or spontaneous exchange of information and the strict conditions for information exchange under the TIEA make it improbable that information will be exchanged. And thirdly, the bar for the 'black/white/grey' listing is very low as the black list was cleared within a couple of days after the OECD published its 'black list' of jurisdictions and the grey list was also emptied rapidly after secrecy jurisdictions hurried to sign 12 TIEAs among themselves.[46]

[42] OECD (1998) *Harmful Tax Competition: An Emerging Global Issue*, p. 22.
[43] Sawyer, A., (2011) *The OECD's Tax Information Exchange Agreements: An Example of (In)effective Global Governance?* Journal of Applied Law and Policy, 2011.
[44] *Ibid*.
[45] *Ibid* at 50.
[46] *Ibid*.

2.5 FOREIGN ACCOUNT TAX COMPLIANCE ACT

Particular attention must be drawn to the Foreign Account Tax Compliance Act ("FATCA") as this act acted as the catalyst for the worldwide expansion of AEoI. FATCA is contained in Chapter 1471-1474 of the Internal Revenue Code of 1986 and was enacted into law by section 501(a) of the Hiring Incentives to Restore Employments ("HIRE") Act 2010.[47]

The US levies tax on the source of both residence and citizenship. The FATCA was enacted by the United States ("US") in order to target non-compliant US taxpayers using foreign accounts[48] by requiring financial institutions worldwide to automatically report detailed information about any US related financial accounts to the Internal Revenue Services ("IRS"). The FATCA created an unparalleled revolution in offshore banking due to the detail of information which was required to be exchanged and non-compliant banking groups were threatened with a 30% withholding tax on all US source payments.[49]

From a public international law perspective, the main criticism of FATCA is that it does not entail the principle of reciprocity and it effectively represents an exertion of US law into the jurisdictions of foreign countries without their consent.[50] Since FATCA does not require the principle of reciprocity, it allows the US to provide banking secrecy to non-US residents investing in the US and the US was criticized on taking a one-sided advantage against tax evasion.[51]

There have been numerous debates on the effectiveness of FATCA. Although the IRS has developed computer information protocols, there is no guarantee of its reliability or security.[52]

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[47] Byrnes, W & Munro, R.J., *Background and Current Status of FATCA*, at 1.01, Texas A&M University, School of Law, Research Paper No. 17-31.
[48] U.S. Department of the Treasury *Foreign Account Tax Compliance Act (FATCA)*, Available at https://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca.aspx.
[49] Meinzer, M., (2017) *Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?* p. 9, Available at https://poseidon01.ssrn.com/delivery.php?ID=356081026089002110100017121008029107002018062052016094106009119107009125101126007091126006036123018099112088082025119124020116104084063059092096095071065067102072017079094104117001113004006115009084089120064020013102114122118118124015067023070031127&EXT=pdf.
[50] *Ibid*; *Supra* note 20 at 213.
[51] *Ibid.*
[52] *Supra* note 47 at 1-102.

The National Taxpayers Advocate has reported multiple times that the IRS is overburdened, undermanned and underfunded and its costs on the taxpayers and economy are overwhelming and increasing.[53] FATCA has also been criticized of discouraging investment in US assets. Financial institutions who wish to save money on due diligence procedures and updating their computer information systems choose to avoid investments in US assets in order to escape the provisions of reporting under FATCA.[54] Many financial institutions outside of the US have also refused to extend their services to US account holders in order to avoid complications with the IRS.

The above disapprovals of FATCA initiated the intergovernmental agreement ("IGA") for implementing FATCA.[55] The IGA was reached in February 2012 after it was announced in a joint statement by the US Treasury and the finance ministers of five large European governments (France, Germany, Italy, Spain and the United Kingdom, hereafter the "G-5").[56] In Joint Statement I, it was agreed that the US and the G-5 have agreed to work together in order to achieve common reporting and due diligence standards.[57] The Framework for the IGA consisted of reporting by financial institutions to the tax authority in the country in which they are situated, who will further participate in the AEoI.[58] This routing mechanism, in contrast to the direct one-way reporting to the IRS, resolved the problem of incompatibility of domestic laws in other states. The Joint Statement effectively made FATCA and information exchange an international agreement. The Joint Statement also declared that the US would dedicate itself toward a common model for automatic exchange of information, including the development of reporting and due diligence standards.[59]

Two types of IGA models have been prepared by the US Treasury (namely the Model 1 and Model 2) and have accordingly been used in negotiations with other countries. Model 1 is the only model containing the principle of reciprocity and both versions establish a framework for

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[53] *Ibid*.
[54] *Supra* note 20 at 213.
[55] Grinberg, I., (2013) *Taxing Capital Income in Emerging Countries: Will FATCA Open The Door?* p. 10, Georgetown Law, Faculty Publications, Public Law Research Paper no. 13-031.
[56] *Ibid.*
[57] US Treasury Department, *Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA*, available at https://www.treasury.gov/press-center/press-releases/Documents/020712%20Treasury%20IRS%20FATCA%20Joint%20Statement.pdf.
[58] *Ibid*.
[59] *Ibid*.

financial institutions to report to their respective tax authorities followed by an automatic exchange of information.[60] Model 1 is only available to jurisdictions with whom the US have concluded an income tax treaty or tax information exchange agreement and the IRS is satisfied that the recipient state have the necessary protections and practices to ensure that US taxpayer information remains confidential and shall only be used for tax purposes.[61] Since Model 1 incorporates the principle of reciprocity of information exchange, it was selected as the outline for the creation of OECD's global standard of AEoI.[62]

2.6 THE NEW STANDARD OF AUTOMATIC EXCHANGE OF INFORMATION

The G20 London summit of April 2009 has been regarded as a turning point in the international EoI.[63] The London summit consisted of a sequence of statements and movements towards the implementation of the AEoI as the new international standard. Paragraph 15 reads as follows:

> "To this end we are implementing the Action Plan agreed at our last meeting, as set out in the attached progress report. We have today also issued a Declaration, Strengthening the Financial System. In particular we agree:[…]
>
> > To take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of information."[64]

Thereafter, the Leaders' Statement at the Pittsburgh Summit held on 24 -25 September 2009 stated:

> "Our commitment to fight non-cooperative jurisdictions (NCJs) has produced impressive results. We are committed to maintain the momentum in dealing with tax havens, money laundering, proceeds of corruption, terrorist financing, and prudential standards. We welcome the expansion of the Global Forum of Transparency and Exchange of Information, including the participation of developing countries, and welcome the agreement to deliver an effective

[60] *Supra* note 47 at 1-83.
[61] *Ibid*.
[62] *Supra* note 20 at 214.
[63] London Summit – Leaders' Statement, 2 April 2009. Available at https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf.
[64] *Ibid* at 15.

> program of peer review. The main focus of the Forum's work will be to improve tax transparency and exchange of information so that countries can fully enforce their tax laws to protect their tax base. We stand ready to use countermeasures against tax havens from March 2010. We welcome the progress made by the Financial Action Task Force (FATF) in the fight against money laundering and terrorist financing and call upon the FATF to issue a public list of high risk jurisdictions by February 2010. We call on the FSB to report progress to address NCJs with regards to international cooperation and information exchange in November 2009 and initiate a peer review process by February 2010."[65]

On 19 April 2013 the G20 Finance Ministers and Central Bank Governors sanctioned automatic exchange as the new international standard.[66] This decision was followed by the earlier decision adopted by the G-5 of their intention to develop and guide multilateral tax information exchange based on the Model IGA to increase international tax compliance and implement FATCA.[67] On 13 February 2014 the OECD, at the appeal of the G8 and G20, compiled a model Competent Authority Agreement ("CAA") and the Common Reporting Standard ("CRS") intended for the international standard of AEoI. The CRS for automatic exchange of information was endorsed by the G20 Finance Minister and Central Bank Governors in February 2014.[68] Thereafter the Joint Statement was released by the Early Adopters Group, to which South Africa is a participant, and reads as follows:[69]

> "Tax evasion is a global problem and requires a global solution. We therefore welcome the new standard in automatic exchange of information between tax authorities developed by the OECD (Common Reporting Standard). This will provide a step change in our ability to clamp down on tax evasion, which reduces public revenues and increases the burden on those who pay their taxes.
>
> We committed ourselves to early adoption of the Common Reporting Standard, through joining the initiative first launched by France, Germany, Italy, Spain and the UK in April 2013. In doing so we recognized that only those financial centres which adopt the highest standards in

[65] Pittsburgh Summit – Leaders' Statement September 24 – 25 2009. Available at https://g20.org/en/g20/Documents/2009-Pittsburgh_Declaration.pdf.
[66] OECD (2014), *Standard for Automatic Exchange of Financial Account Information in Tax Matters* at 3, OECD Publishing. Available at https://read.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters_9789264216525-en#page3.
[67] *Ibid*.
[68] *Ibid*.
[69] Joint Statement by the Early Adopters Group, October 2014. Available at https://www.oecd.org/tax/exchange-of-tax-information/AEOI-early-adopters-statement.pdf.

> tax transparency and work in close cooperation to tackle cross-border tax evasion will prosper in the future."

Under CRS, subject to some exceptions, reportable persons are those that are tax residents of reportable jurisdictions.[70] The CRS is based largely on the IGA approach to implementing FATCA in order to maximise efficiency and reduce costs for financial institutions.[71]

According to the OECD the CRS contains the reporting and due diligence standard that reinforces the AEoI.[72] In order for a jurisdiction to implement CRS it must have rules and regulations in place for financial institutions to report information which is consistent with the extent of the confidentiality and to follow due diligence procedures.[73] The AEoI is a major shift because it forces jurisdictions to move from a passive compliance to an active gathering and reporting of taxpayer information.

According to the OECD each financial institution must report the following information:[74]

1) The name, address, jurisdiction(s) of residence, TIN(s) and date and place of birth (in the case of an individual) of each reportable person;
2) The account number (or functional equivalent in the absence of an account number);
3) The name and identifying number (if any) of the reporting financial institution;
4) The account balance or value as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the closure of the account.

As of January 2020, 108 jurisdictions will have committed to the AEoI.[75] South Africa was one of the early adopters and committed to the AEoI already in 2017.[76]

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[70] Noked, N., (2018) *Tax Evasion and Incomplete Tax Transparency*, p. 2. Laws 2018, 7, 31; doi:10.3390/laws7030031.
[71] *Supra* note 66 at 5.
[72] *Supra* note 66 at 19.
[73] *Ibid*.
[74] OECD (2017), *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, p. 29, Second Edition, OECD Publishing, Paris.
http://dx.doi.org/10.1787/9789264267992-en.
[75] OECD (2020), *Global Forum on Transparency and Exchange of Information for Tax Purposes*. Available at https://www.oecd.org/tax/automatic-exchange/commitment-and-monitoring-process/AEOI-commitments.pdf.
[76] *Ibid*.

Although the OECD promises that there will be an equitable distribution of benefits for all jurisdictions which commit to the AEoI, it is questionable whether this is actually the case. According to de Rugy,[77] although the OECD publish papers on the theoretical benefits of economic growth and smaller-government policies, high-tax nations are entitled to all they can extract from people and companies. This means that individuals should not be allowed to legally shift economic activities to lower tax jurisdictions if such actions deprive big European governments to 'feed their domestic fiscal beast'.[78] Accordingly the OECD undermines tax competition and coerces low-tax jurisdictions to change their tax policies for the benefit of high-tax nations.[79] It must be noted that the composition of the G20 is problematic from a representational viewpoint since the African continent is severely under represented and low income countries are completely absent.[80] The legitimacy of the OECD's authority from a representational viewpoint has been questioned as well.[81] According to Fung: "Nicknamed the 'rich man's club', the OECD is neither inclusive with regard to its membership nor operates in a political vacuum; its policies serve first and foremost the interest of the member countries".[82] Although it is beyond the scope of this paper to analyse the effects of the OECD policies, it is important to note that historically the OECD has formed policies which benefit the OECD member countries to the detriment of other countries.

2.7 CONTRAST BETWEEN FATCA AND CRS

FATCA is fundamentally a bilateral regime based on IGAs concluded with foreign jurisdictions in contrast to the CRS which is a mix of bilateral and multilateral regimes and

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[77] de Rugy, V., (2017) *Should the United States Stop Cooperating With the OECD?* https://www.realclearpolitics.com/articles/2017/04/14/should_the_united_states_stop_cooperating_with_the_oecd_133606.html.

[78] *Ibid.*

[79] de Rugy, V., (2015) *The International Corporate Tax Grab*. Available at https://www.creators.com/read/veronique-de-rugy/07/15/the-international-corporate-tax-grab.

[80] Vestergaard, J (2011) *The G20 and Beyond: Towards Effective Global Economic Governance*. DIIS Report at 6. Norwegian Foreign Minister Jonas Gahr Store described the G20 as a 'self-appointed group' where its 'composition is determined by the major countries and powers. It may be more representative than the G7 or the G8, in which only the richest countries are represented, but it is still arbitrary. We no longer live in the 19th Century, a time when the major powers met and redrew the map of the world. No one needs a new Congress of Vienna.' Jonas Gahr Store in an interview conducted by M. Ertel, 'Norway Takes Aim at G20: "One of the Greatest Setbacks Since World War II", *Der Spiegel*, 22 June 2010.

[81] Fung, S. (2017) *The Questionable Legitimacy of the OECD/G20 BEPS Project*. Erasmus Law Review, Issue 2.

[82] *Ibid*.

hundreds of IGAs among the signatories to the CRS.[83] As a result, FATCA requires financial institutions to report only those clients which qualify as US persons whereas the CRS involves over 90 countries who have currently committed and therefore has a much broader scope of tax residency.[84] Secondly, the definition of a "reporting financial institution" under CRS is different to the definition of a "foreign financial institution" under FATCA. Finally, there is no de minimis limit under CRS, however, FATCA is only applicable to individual accounts with balances exceeding 50,000.00 US dollars.[85]

Although it is beyond the scope of this paper to analyse the fundamental weaknesses involved in the implementation of the CRS, it is important to note some of the weaknesses which will be discussed below.

The main weakness of the CRS is that the since the OECD is a non-governmental organization ("NGO") formed by the original League of Nations, it does not have official means to coerce compliance by member states.[86] Since the CRS is a collective agreement to increase tax transparency, it is advantageous for a jurisdiction to dissent to the CRS and attract investments. Also, since the OECD does not have an official means of enforcement and depends on its member states to pressure other countries to comply with their policies, it has not been sufficient in pressurizing all countries to comply with its policies.[87] For example the United States of America has enough power to disregard these external pressures and as result for non-US taxpayers, the US offers a level of privacy that other jurisdictions are unable to offer essentially making it a tax haven.[88] A further weakness of the CRS is that it is unable to be enforced in the same manner as FATCA, where financial institutions are threatened with a 30% percent withholding fee for non-compliance.

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[83] LeVine, R, Schumacher, A & Zhou, S (2016) *FATCA and the Common Reporting Standard: A Comparison.* Journal of International Taxation: IFA Madrid 2016 special edition. Available at https://uk.practicallaw.thomsonreuters.com/w-004-2056?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

[84] KPMG, *FATCA and CRS.* Available at https://home.kpmg/ru/en/home/services/advisory/risk-consulting/forensic/fatca-and-crs.html.

[85] *Ibid*.

[86] Scarfone, J & Kerr, M., (2018) *Paved Paradise: Analysis of the Common Reporting Standard to Combat Tax Avoidance*, p. 6. Liberated Arts: A Journal for Undergraduate Research, Vol. 4, Issue 1, Article 4.

[87] *Ibid*.

[88] Joseph, D & Kallman, J., (2020) *Is Trump's U.S.A the new Tax Haven?* Available at https://mooresrowland-asiapac.com/news/Is-the-USA-the-new-tax-haven.

2.8 CONCLUSION

This chapter has given a brief summary of the history of exchange of information, the need for cross-border transparency and the gradual development to the current day AEoI. It has explained certain international tax regimes such as FATCA, TIEAs and CRS and their impact on the exchange of information.

The following chapter investigates the right to privacy granted by the Constitution.

3. THE RIGHT TO PRIVACY AND ITS LIMITATIONS

3.1 THE RIGHT TO PRIVACY

The right to privacy has been explained by social scientists to be critical for the preservation of a person's individual dignity, including his physical, psychological and spiritual well-being.[89] According to Jerry Kang the term "privacy" expresses several ideas that can be assembled into three groupings.[90] These groupings are the following:

a. Physical space – particularly the territorial solitude to which an individual is shielded from unwanted objects or signals;
b. An individual's ability to make certain decisions without interference; and
c. The flow of personal information – specifically an individual's control over the acquisition, disclosure and use of his or her personal information.

The right to privacy is contained in Section 14 of the Bill of Rights and states:

> "Everyone has the right to privacy, which includes the right not to have
>
> a. Their person or home searched;
> b. Their property searched;
> c. Their possessions seized; or
> d. The privacy of their communications infringed"

The right to privacy is also protected by South African common law which recognizes a right to privacy as an independent personality right that is a component of the concept of 'dignitas'.[91] According to Currie and de Waal[92]:

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[89] Burns, Y (2001) *Communications Law*, Butterworths, Durban. Cited in van der Bank, C.M., (2012) *The Right to Privacy – South African and Comparative Perspectives, p. 78. European Journal of Business and Social Sciences*, Vol 1, No. 6.
[90] Kang, J., (1998) *Information Privacy in Cyberspace Transactions*, p. 1202. Stanford Law Review, Vol. 50:1193.
[91] Currie, I & de Waal, J *The Bill of Rights Handbook,* Sixth Edition p. 296.
[92] *Ibid*.

> "At common law, the breach of a person's right to privacy constitutes an *iniuria*. It occurs when there is an unlawful and intentional acquaintance with private facts by outsiders contrary to the determination and will of the person whose right is infringed, such acquaintance taking place by an intrusion or disclosure"[93]

In *Financial Mail v Sage Holdings*[94] Corbett CJ held that there are two forms in which an invasion of privacy may take place being an unlawful intrusion upon the personal privacy of another and the unlawful publication of private facts about a person. He further stated that not all intrusions or publications will be unlawful. The Court must have regard to the particular facts of the case and judge them according to the contemporary *boni mores* and the general sense of justice of the community.

Privacy is what can reasonably be believed to be private.[95] Ackermann J described the 'continuum of privacy interests' in *Bernstein v Bester* as the following:

> "The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[96]

The Constitutional Court in *Bernstein v Bester*[97] identified that the test to determine whether a person's right to privacy has been invaded is two-fold. The first part of the test is that the party claiming an infringement of his or her privacy must establish that he or she has a subjective expectation of privacy and that the expectation has been recognized as objectionably reasonable by society.

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[93] For a further discussion see *Financial Mail and Motor Industry Fund Administration v Janit* 1994 (3) SA 56 (W).
[94] *Financial Mail v Sage Holdings* 1993 (2) SA 451 (A), 462G.
[95] *Supra* note 91 p. 298.
[96] *Bernstein v Bester NO* 1996 (2) SA 751 (CC) [67].
[97] *Bernstein v Bester NO* 1996 (2) SA 751 (CC) [75].

The Constitutional Court in *Hyundai* held that the right to privacy does not relate solely to a person within his or her intimate space.[98] Therefore when people are in their offices, cars or on their mobile telephones, they still retain the right to be left alone by the state unless certain conditions are met.[99] Furthermore, wherever a person has the capability to decide what information he or she desires to disclose to the public and the expectation that such a decision will be respected, the law of privacy will be applicable.[100] In *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*[101], Didcott J stated "what erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the state".

The constitutional entrenchment of the right to privacy does not repeal the common law right to privacy but rather, builds upon it.[102] A distinction can be drawn between confidentiality and privacy in relation to tax matters. Confidentiality relates to the handling of information provided to them by taxpayers that must not be divulged to anyone else, whereas privacy relates to a taxpayer's rights not to disclose private information to tax authorities.[103] The right to privacy also includes the right not to have one's person or home searched, one's property searched or possessions seized.[104] Furthermore, searches and seizures that invade one's privacy must be administered in terms of legislation clearly outlining the power to search and seize.[105]

In terms of international law the right to privacy is recognized in various instruments such as Article 12 of the Universal Declaration of Human Rights of 1948 which states that: "no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[106] This recognition of the right to privacy is protected

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[98] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) [16].
[99] *Ibid.*
[100] *Ibid.*
[101] *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (5) BCLR 609 (CC).
[102] Arendse, JA, Williams, RC, Klue, S, 2019 *Silke on Tax Administration* (2019) chapter 3.12.
[103] Baker, P and Groenhagen, AM, *The Protection of Taxpayers' Rights – an International Codification* (2001) p 47.
[104] *Supra* note 91 p 304.
[105] *Ibid.*
[106] United Nations, Universal Declaration of Human Rights of 1948. Available at https://www.un.org/en/universal-declaration-human-rights/.

and make legally enforceable by a number of treaties. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[107] declares the following:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention or disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 11 of the American Convention of Human Rights[108] states:

"1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks."

3.2 THE SIGNIFICANCE OF THE TAXPAYER'S RIGHT TO PRIVACY

Taxpayers' rights to privacy and confidentiality is a necessary right. According to the OECD:

> "Confidentiality of taxpayer information has always been a fundamental cornerstone of tax systems. In order to have confidence in their tax system and comply with their obligations under the law, taxpayers need to have confidence that the often sensitive financial information is not disclosed inappropriately, whether intentionally or by accident. Citizens and their governments will only have confidence in international exchange if the information exchanged is used and disclosed only in accordance with the agreement on the basis of which it is exchanged. As in the domestic context, this is a matter of both the legal framework as well as having systems and procedures in place to ensure that the legal framework is respected in practice and that there is

[107] European Court of Human Rights, Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950. available at www.echr.coe.int
[108] American Convention on Human Rights: Pact of San Jose, Cost Rica 1979.

> no unauthorized disclosure of information. What applies in the domestic context regarding protecting the confidentiality of tax information equally applies in the international context."[109]

The Tax Administration Report of September 2017 prepared by the Davis Tax Committee argued the following about the right to privacy and confidentiality:

> "This is a very crucial and fundamental right. The extent of the right is debatable. Whether the right limits the use of information to a division in the tax authority, for example, that information provided in terms of a voluntary disclosure should not be shared with the audit department within the revenue authority or that the information in the possession of the revenue authority should not be shared with other government department, like the police or the central bank, or anyone else remains an open question. However, as a minimum, such information should be kept confidential by the tax authority".[110]

Lastly, the International Bureau of Fiscal Documentation (IBFD) has indicated that:

> "The right to privacy is widely acknowledged as a fundamental right. Considering the massive loads of information that tax administrations possess on their taxpayers and the sensitive nature of the information so collected, it is a general minimum standard of all tax systems that they take measures to provide such information with protection from any breach or misuse, either by tax administration officials or by third parties, such as withholding agents, that have access to taxpayers' information."[111]

3.3 LIMITATION OF THE CONSTITUTIONAL RIGHT TO PRIVACY

As with other rights encompassed in the Bill of Rights, the right to privacy is not absolute and a violation of the right may be justifiable in terms of Section 36 of the Constitution, also known as the limitation of rights. The courts in South Africa have recognized that the right to privacy

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[109] OECD (2012) *Keeping it Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes.* Available at https://www.oecd.org/ctp/exchange-of-tax-information/keeping-it-safe-report.pdf.

[110] The Davis Tax Committee *Tax Administration Report: September 2017* p. 68. Available at https://www.taxcom.org.za/docs/20180605%20Tax%20Admin%20Report%20-%20on%20website.pdf. Cited in Milo, D. (2018) *Balancing Taxpayer Confidentiality and the Public's Right to Know* p. 25 Mcom (Tax) thesis, faculty of Commerce, Law and Management, University of the Witwatersrand.

[111] International Bureau of Fiscal Documentation (2018) *Observatory on the Protection of Taxpayers' Rights: 2015-2017 General Report on the Protection of Taxpayers' Rights.* Available at https://www.ibfd.org/sites/ibfd.org/files/content/pdf/OPTR_General-Report.pdf.

must be limited in certain cases where an action for the invasion of privacy and that the public benefit, or the right to freedom of expression may override an individual's right to privacy. It is important to note that a balance must be reached between these competing rights and that there is no presumptive preference for one right above the other.[112]

Section 7(3) of the Constitution declares all rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36, or elsewhere in the Bill.

Section 36 of the Constitution reads as follows:

> "1. 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 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.
> 2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

The Constitutional Court follows a two-stage approach in deciding matters involving the limitation of Constitutional rights. The first question is whether a right in the Bill of Rights has been violated by law or conduct of the respondent. The second question (which inevitably depends on the answer to the first question) is whether the violation of the right can be justified as a tolerable limitation of the right.[113] If the court finds that a right has been infringed, then the onus is on the respondent (usually the state) to demonstrate that the infringement of the right is nevertheless acceptable in terms of the criteria set out in section 36 of the Constitution.[114] Even if the respondent makes no endeavor to discharge this 'burden of justification' the court must nevertheless consider the likelihood that the limitation of rights is

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[112] Burchell, J., (2009) *The Legal Protection of Privacy in South Africa: A Transplantable Hybrid, p. 19.* Electronic Journal of Comparative Law, vol. 13.1. available at https://www.ejcl.org/131/art131-2.pdf.
[113] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC) [41].
[114] *S v Makwanyane* 1995 (3) SA 391 (CC) [102].

justifiable.[115] In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[116] the Constitutional Court adopted this approach and considered whether the limitation placed on the right by the legislation was justifiable even though the respondent did not endeavor to justify the laws which were challenged. However, in other cases the Constitutional Court has shown that it will not go to great lengths to consider the law's justifiability should the respondent not put up an adequate case for justification.[117]

The South African Constitution allows the limitation of rights where the limitation is justifiable meaning that the limitation must serve a purpose that most people would consider as convincingly important, however, even the purpose is convincingly important, the limitation of the right will not be justifiable unless there is good reason for believing that the limitation would accomplish the purpose for which it was intended, and that there is no other less restrictive means to achieve said purpose.[118]

In terms of South African law, the courts have recognized public benefit or consent as grounds for justification against an action for the invasion of privacy, however other defences have been approved such as reasonable publication and privileged occasion.[119] In relation to public benefit as a ground of justification in *NM and Others v Smith and Others*[120] Madala J stated:

> "This protection of privacy in my view raises in every individual an expectation that he or she will not be interfered with. Indeed there must be a pressing social need for that expectation to be violated and the person's rights to privacy interfered with."

According to Boruchowitz J in *Kumalo v Cycle Lab (Pty) Ltd*[121] the defence of consent can only succeed if the defendant's actions fall within the limits of the consent given. He refers to the example where the plaintiff consented to her photograph being used to show a news item

[115] *Supra* note 91 p. 153.
[116] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).
[117] *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC) [78]; *Johncom Media Investments Ltd* v M 2009 (4) SA 7 (CC) [26].
[118] *Supra* note 91 p. 151-152.
[119] *Supra* note 112 p. 19.
[120] *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC) [45].
[121] *Kumalo v Cycle Lab (Pty) Ltd* (31871/2008) [2011] ZAGPJHC 56 (17 June 2011) [27].

but not as an advertisement for a rifle and therefore the publication fell out of the ambit of consent.[122]

The State has an obligation to provide certain services to the citizens of South Africa and can only finance its expenditure by imposing income tax and other taxes on persons and goods.[123] Legislation that requires a taxpayer to submit tax returns and provide other documents to SARS containing personal information would constitute an infringement of the taxpayer's right to privacy, however, such infringement would be reasonable and justifiable in terms of Section 36 of the Constitution. There is no less restrictive means for SARS to achieve such purpose. Nevertheless, according to Arendse, Williams and Klue "it may be arguable that particular statutory powers vested in SARS in this regard are excessively wide, and that the statutory provision is therefore *pro tanto* in breach of the Constitution and invalid, such as where a statutory provision purports to give SARS an unfettered discretion to require the taxpayer to furnish any and all 'information, documents or things'."[124]

In order for a right contained within the Bill of Rights to be legitimately limited by a law, the law must be (*a*) a law of general application and (*b*) reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. What is reasonable and justifiable in an open and democratic society is an illusive concept – one that cannot be precisely defined by the Courts as far as a limitation on a fundamental right is concerned, and will depend on the circumstances of each particular case.[125]

In *A S and Another v G S and Another*[126], Madondo DJP explained the meaning of a law of general application and stated:

> "…A limitation must be authorized by a law and the law must be of general application. The law of general application requirement is the expression of a basic principle of liberal political philosophy and of constitutional law known as the rule of law. There are two components to this principle. The first is that the power of the government is derived from law. The

[122] *Ibid*.
[123] See chapter 13 of the Constitution.
[124] *Supra* note 102 chapter 3.14.
[125] See Gubbay CJ in *In re*: *Munhumeso* 1995 2 BCLR 125 (ZS) 135C–D; 1995 1 SA 551 (ZS); 1995 1 SACR 352 (ZS).
[126] *A S and Another v G S and Another* (D12515/2018) [2020] ZAKZDHC 1 (24 January 2020) [41]-[42].

> government must have lawful authority for all its actions, otherwise it will not be a lawful government but will be a despotism or tyranny.
>
> The law must be general in its application which means the law must apply equally to all and must not be arbitrary. This means that the law must be sufficiently clear, accessible and precise that those who affected by it can ascertain the extent of their rights and obligations…"

Although the exchange of sensitive personal and financial information under the CRS framework intrudes on a person's right to privacy, it is submitted that such an intrusion is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' as encapsulated in section 36(1), and that the intrusion may be said to be outweighed by significant social considerations. In this context, the reasonability and justifiability of the rights violation is also rational and proportional and may be justified with reference to two key principles: Firstly, the OECD has developed or has at least tried to develop a robust and integrated data privacy framework, which lessens the extent of the imposition on the right to privacy. Secondly, the reciprocal nature or *quid pro quo* of the exchange of information means that South Africa receives data on South African citizens and tax residents. There is a credible argument that it serves a compellingly important purpose in that SARS can use the information to enhance tax compliance and curb tax evasion in South Africa.

The limitation of rights shall be evaluated in greater depth in chapter 5 of this paper. The relevant factors which the court must take into account when weighing up the competing values between the right and the legislation shall be explored and each of these requirements shall be dealt with in detail below.

4. THE APPLICABLE LEGISLATION AND LIMITATION OF THE RIGHT TO PRIVACY IN A DOMESTIC CONTEXT

4.1 THE TAX ADMINISTRATION ACT

The Minister of Finance announced in his 2005 Budget Review the drafting of tax administration legislation as a project "to incorporate in one piece of legislation certain generic administrative provisions, which are currently duplicated in the different tax acts".[127] This consequently resulted in the enactment of the Tax Administration Act, 2011. The TAA was promulgated on 4 July 2012 and implemented on by proclamation on with effect from 1 October 2012. The TAA is an example of legislation which of general application which empowers SARS to infringe upon a taxpayer's right such as the right to privacy as mentioned above.

The purpose of the TAA is to guarantee the effective and efficient collection of tax by some of the following measures:

a. Providing for the alignment of the administration provisions of the various tax acts as far as practically possible;
b. Consolidating such provisions into a single piece of legislation;
c. Determining the powers of SARS and officials;
d. Providing for delegation of powers by the Commissioner;
e. Prescribing the rights and obligations of taxpayers and other persons to whom the TAA applies;
f. Prescribing the powers and duties of persons involved in the administration of a tax act; and
g. Generally to give effect to the objects and purposes of tax administration;[128]

The TAA as well as any other fiscal legislation in South Africa is subject to the Constitution. This principle was confirmed in *First National Bank of South Africa Limited t/a Wesbank v*

[127] SARS *Tax Administration.* Available at https://www.sars.gov.za/Legal/TaxAdmin/Pages/default.aspx.
[128] *Supra* note 9 s 2. See also in this regard Arendse *et al*, 2019 chapter 1.3.

The Commissioner for the South African Revenue Service and Another[129] where Ackermann J stated the principle as follows:

> "…it is first necessary to emphasise that even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards"

In terms of the South African Revenue Service Act[130] ("SARS Act") SARS is recognized as an organ of state. According to Section 4(2) of the SARS Act SARS must exercise its public power or function subject to the Constitution as stipulated in Section 195 of the Constitution.

Section 195 of the Constitution states:

> "1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> a. A high standard of professional ethics must be promoted and maintained.
> b. Efficient, economic and effective use of resources must be promoted.
> c. Public administration must be development-oriented.
> d. Services must be provided impartially, fairly, equitably and without bias.
> e. Peoples' needs must be responded to, and the public must be encouraged to participate in policy-making.
> f. Public administration must be accountable.
> g. Transparency must be fostered by providing the public with timely, accessible and accurate information.
> h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
> i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
>
> 2. The above principles apply to

[129] *First National Bank of South Africa Limited t/a Wesbank v The Commissioner for the South African Revenue Service and Another* 2002 (7) BCLR 702 (CC); [2002] 64 SATC 471 para 31.
[130] South African Revenue Service Act 34 of 1997.

a. Administration in every sphere of government;
b. Organs of state; and
c. Public enterprises."

In addition to Section 195, SARS is subject to conduct itself in terms of Section 7 of the Constitution. Section 7 of the Constitution reads as follows:

"1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

3. The rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36, or elsewhere in the Bill."

4.2 SARS' INFORMATION GATHERING POWERS

The TAA has considerably enhanced the information gathering powers available to SARS as well as the taxpayers' rights in order to balance SARS' new information gathering powers. Sections 74A, B, C and D of the ITA were repealed and replaced by sections 40 to 66 of the TAA. Chapter 5 of the TAA sets out the information gathering procedures that are available to SARS.

Section 46(1) reads as follows:

"SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires"

The TAA defines "relevant material" as any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed.[131]

The administration of a tax Act is referred to in section 3 of the TAA and is widely defined. Section 3(2) of the TAA states that the administration of a tax Act means to obtain full information in relation to anything that may affect the liability of a person for tax in respect of a previous, current or future tax period.[132] Section 3(2) also empowers SARS to obtain information relating to a taxable event or the obligation of a person to comply with a tax Act.

Section 3(3) of the TAA specifically provides for the exchange of information pursuant to an international tax agreement concluded by South Africa.

> *"(3) If SARS has, in accordance with an international tax agreement, received a request for –*
>
> *(a) Information, SARS may obtain the information requested for transmission to the competent authority of the other country as if it were relevant material required for purposes of a tax Act and must treat the information obtained as if it were taxpayer information;*
> *(b) The conservancy or the collection of an amount alleged to be due by a person under the tax laws of the requesting country, SARS may deal with the request under the provisions of section 185; or*
> *(c) The service of a document which emanates from the requesting country, SARS may effect service of the document as if it were a notice, document or other communication required under a tax Act to be issued, given, sent or served by SARS."*

4.3 RATIFICATION OF CRS AND FATCA IN SOUTH AFRICA

There are two main provisions relating to the ratification of international tax treaties in South Africa, namely section 231 of the Constitution and section 108 of the ITA.

Section 231 provides:

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[131] *Supra* note 9 s 1.
[132] See the remainder of s 3 of the Tax Administration Act, 2011 for further powers bestowed upon SARS.

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and National Council of Provinces, unless it is an agreement referred to in subsection (3).
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

Section 108 of the ITA states:

> "(1) 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 prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.
> (2) 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."

Tax treaties concluded by South Africa are generally not regarded as agreements "of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession". The provisions of section 108(2) of the ITA seem to predict parliamentary approval and indicate that international tax treaties are not of the kind referred

to in section 231(3) of the Constitution.[133] South Africa is therefore only bound after both houses of Parliament have ratified the international tax agreement. The effect of section 108 is to ensure that domestic statutory obligations are created once the international tax agreement has been approved in both National Assembly and the National Council of Provinces.[134]

In terms of the reception of FATCA into South African law the IGA between South Africa and the US was signed on 9 June 2014.[135] The IGA was approved by the National Assembly and National Council of Provinces on 28 October 2014 and thereafter published in the government gazette on 13 February 2015.[136] In terms of section 231 of the Constitution read together with 108 of the ITA the procedures were followed correctly and FATCA has domestic statutory obligations in South Africa.

In respect of the reception of the CRS and AEoI into South African law the Convention on Mutual Administrative Assistance in Tax Matters was entered into by South Africa on 1 June 2011 and thereafter gazetted on 21 February 2014.[137] Thereafter the Multilateral Competent Authority Agreement ("MCAA"), which is a multilateral framework agreement that provides a standardized and efficient mechanism to facilitate the AEoI in accordance with the OECD standard was signed on 27 January 2016.[138] The MCAA enables the AEoI and its legal basis is found in Article 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.[139] In order for the CRS to be consistent with South African domestic law the TAA had to be amended as it did not make provision for the AEoI in terms of the standard required by the OECD. The TAA was amended by the Tax Administration Laws Amendment Act, 2015

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[133] du Plessis, I., (2015) *The Incorporation of Double Taxation Agreements into South African Domestic Law*, p. 1189. PER/PELJ 2015(18)4.
[134] *Commissioner for the South African Revenue Service v Van Kets* 2012 (3) SA 399 (WCC) [16].
[135] SARS Legal Counsel (2017) *Guide on the U.S. Foreign Account Tax Compliance Act (FATCA)* (Issue 2).
[136] Government Notice 93.
[137] SARS *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. Available at https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/Multilateral%20Convention%20of%20MAA%20in%20Tax%20Matters.pdf.
[138] OECD (2018) *What is the Multilateral Competent Authority Agreement*. Available at https://www.oecd.org/tax/transparency/technical-assistance/aeoi/whatisthemultilateralcompetentauthorityagreement.htm.; OECD (2019) *Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) and Signing Dates*, available at https://www.oecd.org/tax/beps/CbC-MCAA-Signatories.pdf.
[139] *Ibid*.

which made provisions for the AEoI in terms of the CRS and was followed by the publication of the CRS regulations.[140]

It is submitted that the correct procedures were followed for the purposes of ratifying the international agreements of FATCA and the CRS and therefore they have been incorporated into South African domestic law.

4.4 THE PROTECTION OF PERSONAL INFORMATION ACT (POPI)

The purpose of POPI[141] is to give effect to the constitutional right to privacy, protect personal information and strike a balance between the processing and flow of personal information across the borders of the Republic; and to provide for matters connected therewith. POPI was signed into law by the President on 19 November and published in the Government Gazette Notice 37067 on 26 November 2013. Certain sections of POPI have already come into force, however it is only limited to a few sections.[142] The majority of POPI is not yet effective and the sections which are currently in force are not of great significance. It is uncertain when the President will proclaim the effective date of POPI, but it is likely to be on April 1, 2020.[143]

While it is beyond the scope of this paper to critically analyse the contents of POPI and the impact it shall have on SARS and the AEoI, there are some sections contained in POPI which are of particular importance.

In terms of section 6(c)(ii) of POPI the Act does not apply to the processing of personal information by or on behalf of a public body –

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[140] SARS (2019) Exchange of Information Conventions / Agreements. Available at https://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Exchange-of-Information-Agreements-(Bilateral).aspx.; Public Notice 20 *GG* 39586 of 8 January 2016 and Act No. 23 of 2015:Tax Administration Laws Amendment Act, 2015; Public Notice 10573 *GG* 39767 of 2 March 2016 and Regulations for purposes of Paragraph (a) of the definition of "International Tax Standard" in section (1) of the Tax Administration Act, 2011 (Act no. 28 of 2011), promulgated under section 257 of the Act, specifying the changes to the OECD standard for Automatic Exchange of Financial Account Information in Tax Matters.

[141] Protection of Personal Information Act No 4 of 2013.

[142] Michalsons (2020) *POPI Commencement Date or POPI Effective Date Starts the Clock*. Available at https://www.michalsons.com/blog/popi-commencement-date-popi-effective-date/13109.

[143] *Ibid*.

> "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 executions of sentences or security measures, to the extent that adequate safeguards have been established in legislation for the protection of such personal information."

In her research report, Moller states that the information gathered under the exchange of information process cannot be considered to be an offence.[144] In her reasoning she asserts that AEoI is triggered by predetermined and presumptive criteria and is not a specific investigation into a taxpayer's businesses.[145] It is submitted that she is correct in her findings as if the AEoI was performed on the basis that SARS were investigating an offence, then the effect of this would be that anyone who has affairs outside of South Africa which are subject to the AEoI would not be afforded the principle of the presumption of innocence and as a result would be contrary to the Constitution. She further argues that an 'offence' in terms of the POPI Act would not constitute an offence in terms of TAA as the TAA does not extend the definition of the term 'offence' to other pieces of legislation.[146] She goes on further to state that the term 'offence' is not defined in the POPI Act and therefore a foreign tax offence could not be considered to be an 'offence' in terms of the POPI Act.[147] As POPI currently reads, SARS would not be exempt from the Act and would have to comply with the procedures contained within POPI.

Should POPI come into force however, it will not interfere with nor prevent SARS from carrying out its constitutional or statutory duties, however, in terms of section 18 of POPI the party collecting and exchanging a subject's information is required to give notification to the affected person when collecting personal information. Section 18(4)(1)(c)((ii) states that "it is not necessary for the responsible party to comply with subsection (1) if non-compliance is necessary to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997…" and SARS may therefore argue that the right to be notified is restricted.

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[144] Moller, L (2016) *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*, p. 29, Department of Finance and Tax, Faculty of Commerce, University of Cape Town.
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*

In terms of section 72 of POPI personal information may only be transferred by SARS to a foreign country if the country to which the information is sent has adequate and similar levels of protection to the personal information as that afforded by POPI, as well as other countries to which the information may be consequently transferred; or the taxpayer has consented to the transfer. In terms of the CRS there are core requirements that a country must meet before it will be permitted to cooperate with other countries who have committed to the AEoI. These core requirements are summarized as follows[148]:

- Jurisdictions should ensure that all Reporting Financial Institutions apply due diligence procedures which are in accordance with the CRS and collect and report information required by CRS;
- Jurisdictions should exchange information in accordance with the AEoI standard;
- Jurisdictions should keep the information exchanged confidential and properly safeguarded.

Since the countries who are parties to the CRS must comply with the uniform standards it is unlikely that SARS will be affected by section 72 of POPI. Finally, in terms of section 37 of POPI, the Regulator may grant SARS an exemption to SARS if he feels the public interest outweighs the interference with the right to privacy and it may be argued that SARS may also be exempt from certain obligations (such as the obligation to give notification in terms of section 18) contained in POPI in terms of section 38 which exempts a public body in processing personal information for the purpose of a public function.

In view of the observations made in this chapter, it is suggested that when POPI comes into force that it will not effect the obligation of SARS to automatically collect and exchange information under the CRS or FATCA, however it remains to be seen if POPI will have any substantial impact on the AEoI.

[148] OECD (2018) *Global Forum on Transparency and Exchange of Information for Tax Purposes, The framework for the full AEOI Reviews: the Terms of Reference* p. 4-5. Available at https://www.oecd.org/tax/transparency/AEOI-terms-of-reference.pdf.

4.5 CONCLUSION

This chapter discussed the constitutional and legislative rights and obligations imposed on SARS particularly in the context of the collection and exchange of information. It also summarized the adoption of international tax treaties into our domestic law and the affect that it has in a domestic context. Finally, the contents of POPI, which is yet to be effective, were analysed and its potential effects on the current practice of the AEoI were investigated.

It is accepted that SARS have extremely wide powers in the collection and exchange of information provided the correct safeguards are in place.

5. THE RIGHT TO PRIVACY VS THE AUTOMATIC EXCHANGE OF INFORMATION

5.1 INTRODUCTION

This chapter analyses whether the taxpayer's Constitutional right to privacy in South Africa is violated by the AEoI in terms of the OECD's CRS. If it is found that the right to privacy is indeed violated by the AEoI, then this chapter will investigate whether the right to privacy can be justifiably limited in terms of the criteria set forth by the limitation of rights in section 36 of the Constitution. Although the AEoI is yet to be challenged in South Africa, this chapter shall endeavour to answer the question above based on existing case law and any evidence which may be relevant to the criteria contained in section 36.

In order to determine whether the AEoI infringes upon the right to privacy, the two-stage approach which is followed by the South African courts, as mentioned above, must be applied. As previously stated, the two-stage approach involves asking whether a right in the Bill of Rights has been infringed by law or conduct of the respondent. If this can be answered in the affirmative, then the second enquiry is whether the infringement can be justified as a permissible limitation of the right.[149]

In determining whether there is a justification in the limitation of a right,[150] the law (*a*) must be a law of general application, and (*b*) must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[151]

5.2 DOES THE AUTOMATIC EXCHANGE OF INFORMATION VIOLATE THE RIGHT TO PRIVACY?

In order to determine whether a right in the Bill of Rights has been infringed, a factual inquiry must be applied. As stated in chapter 2, AEoI forces jurisdictions to move from a passive compliance to an active gathering and reporting of taxpayer information. This means that once

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[149] See, for example, *S v Motloutsi* [1996] 1 All SA 27 (C); 1996 2 BCLR 220 (C); 1996 1 SA 584 (C); 1996 1 SACR 78 (C).

[150] The limitation provision states that "[t]he rights entrenched in this section *may* be limited." The permissive word "may" and not the imperative word "shall" is used. See also Cachalia *et al Fundamental Rights in the New Constitution* 37 ("Internationally, this right is absolute and unqualified . . . No justification is possible").

[151] *Supra* note 91 p. 155.

an account or person has been identified as a reportable account or person it must be reported and disclosed to the tax authorities. This includes all persons who are tax resident in a reportable jurisdiction, subject to a few limitations.

The reportable information includes the personal identification of the account holder as well as financial information relating to the account. The personal identification information comprises of the name(s), jurisdiction(s) of residence, the date and place of birth and income earned. The information relating to the account includes the account number, the account balance or value and the name and identifying number of the reportable institution among others.

The information which is reported is not specifically included in section 14 of the Bill of Rights, however the term 'privacy' is defined extremely broadly and is not exhaustive.

According to the test set out in *Bernstein*[152] there must be a legitimate expectation of privacy. This means that the information exchanged under the CRS must have a subjective expectation of privacy and also that society has recognized it as objectively reasonable.[153]

It is submitted that the nature of the financial information disclosed and exchanged by the tax authorities is of a personal and private matter. For this reason, the OECD have placed safeguards in the protection and confidentiality of the information exchanged. Article 22 of the multilateral Convention on Mutual Administrative Assistance in Tax Matters reads as follows[154]:

> "1. Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law.

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[152] *Supra* note 96.

[153] In *Investigating Directorate*: *Serious Economic Offences v Hyundai Motor Distributors* (*Pty*) *Ltd*: *In re*: *Hyundai Motor Distributors* (*Pty*) *Ltd v Smit* 2000 10 BCLR 1079 (CC) para 16; 2001 1 SA 545 (CC); 2000 2 SACR 349 (CC) it was held that "[w]herever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play."

[154] OECD (2012) *Keeping it Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*, p. 10. Available at https://www.oecd.org/ctp/exchange-of-tax-information/keeping-it-safe-report.pdf.

2. Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes. They may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes."

The right to banking confidentiality and secrecy is also evident in South Africa and can be defined as the claim to confidentiality and secrecy by a customer against his bank in respect of his personal, financial and any other information.[155] In *Financial Mail* (*Pty*) *Ltd v Sage Holdings Ltd* [156] Corbett CJ held that a breach of the right of privacy could occur either by way of an unlawful intrusion upon the privacy of another, or by way of unlawful disclosure of the private facts about a person.[157]

According to the test in *Bernstein*, it can be shown that there is a legitimate expectation of privacy for the taxpayer's information which is disclosed and exchanged in terms of the AEoI.

In addition to the legitimate expectation of privacy there is the concept known as 'informational privacy' as set out by the Constitutional Court in *Hyundai.*[158] Informational privacy is defined as an 'interest in the collection, use of and disclosure of personal information'.[159] Under the current practice of the AEoI, once a person or account is identified as a reportable entity, there is no choice or consent about what information is exchanged or with which countries the information is exchanged.

It is submitted therefore that the AEoI in terms of the CRS constitutes an infringement of the constitutional right to privacy. In the following sections of this chapter it will be considered

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155 de Kock, S.Y., (2015) *The Bank's Duty of Confidentiality and Secrecy with Reference to Money Laundering and Terror Financing Legislation in South Africa*. PhD. Faculty of Law. [Unpublished] Retrieved from: https://ujdigispace.uj.ac.za.

156 1993 2 SA 451 (A) 426F. The unlawfulness of a factual infringement of privacy is adjudged "in the light of contemporary *bonuses mores* and the general sense of justice of the community as perceived by the Court".

157 See also McQuoid-Mason, *The Law of Privacy in South Africa* at 37-9, 86-8, 135 *et seq*, 169 *et seq.*

158 *Supra* note 91 p. 303.

159 Ibid.

whether this infringement of the right to privacy is justifiable and reasonable in a South African context.

5.3 LIMITATIONS ANALYSIS – PART 1

In order for a law to limit a right to be legitimately in South Africa it must be a law of general application. There are two requirements applicable to the law of general application in this case, namely, (*a*) it must be authorized by law and (*b*) it must be general in its application.

(a) Authorised by law

The government must act with lawful authority, otherwise it is not a lawful government but a tyranny or despotism.[160] If an action is not authorized by law then it cannot be justified in terms of section 36 of the Constitution.[161]

Both the international agreements of CRS and FATCA have been ratified and have become a part of South African domestic law as explained in chapter 4. FATCA derives its legal basis from the intergovernmental agreement concluded between South Africa and the US and the CRS derives its legal basis from the Multilateral Convention on Mutual Administration Assistance in Tax Matters and subsequently the Multilateral Competent Authority Agreement which facilitates the AEoI.

It is submitted that both FATCA and CRS are authorized by law in South Africa and the second requirement in terms of a law of general application will now be considered.

(b) General application

[160] *Supra* note 91 p. 155.

[161] *Dladla and Another v City of Johannesburg and Others* (CCT124/16) [2017] ZACC 42; 2018 (2) BCLR 119 (CC); 2018 (2) SA 327 (CC) (1 December 2017) [52]: Now that it has been established that the applicant's rights have been limited, the next question is whether the limitations of these rights can be justified under section 36(1) of the Constitution. For the limitations to be justified under section 36, they must first and foremost be authorized by a "law of general application". This is a threshold test which must be met before a justification analysis may begin. It cannot be gainsaid there here the impugned rules were not authorized by a "law of general application". The rules were imposed by a contract concluded between the City and MES. Because the contract is a private agreement and does not bind third parties, it is the very opposite of a "law of general application". Absent that law, the City may not invoke section 36 in an attempt to justify the limitations created by the rules in question; *August v Electoral Commission* 1999 (3) SA 1 (CC).

In order for a law to be general in its application it must be stated in a clear and accessible manner.[162] The law must also specify with reasonable certainty to those who are bound by it what is obliged of them so they may regulate their actions accordingly.[163] On a substantive level this means that the law must apply impersonally and it cannot be arbitrary in its application or target particular people or groups.[164] In the seminal case of *S v Makwanyane*[165], Ackermann J stated:

> "We have moved from a past characterized by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose 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."

The Constitutional Court affirmed this principle in *Prinsloo v van der Linde and Another*[166] and held that when legislation which differentiates between groups or individuals is enacted, the state is required to act in a rational manner:

> "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state."

It is important to note that equal application of the law does not mean that a law must apply to everyone, but merely that it applies to everyone that it regulates in the same way. In other words, the law must treat similarly situated persons in the same manner.[167] In *Islamic Unity v*

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[162] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) [47].
[163] *Affordable Medicines Trust and Others v Minister of Health of the Republic of South Africa and Another* (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005).
[164] *Supra* note 91 p. 156.
[165] *S v Makwanyane* 1995 (3) SA 391 (CC) [156]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) [84].
[166] *Prinsloo v van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) [25].
[167] Woolman, S. and Botha, H. (2007) *Limitations on the Bill of Rights under the South African Constitution From Constitutional Law of South Africa*, chapter 34.7. available at

Independent Broadcasting Authority, the Code of Conduct for Broadcasting Services which was under scrutiny only applied to broadcasters and not the general public at large, however because it applied to all broadcasters equally it therefore qualified as a law of general application.[168]

Gleaning the principles mentioned above a law of general application must contain the following features: (*a*) equal treatment; (*b*) non-arbitrariness; (*c*) accessibility or public availability; and (*d*) precision or clarity.[169]

It is submitted that the AEoI under the CRS does contain equal treatment and non-arbitrariness as all South African taxpayers who are subject to the AEoI in terms of the CRS face the same conditions and will face the same penalties for non-compliance with the CRS. Although the AEoI only applies to taxpayers who qualify for AEoI and not to taxpayers who do not have any tax obligations outside of South Africa, according to the principle in *Islamic Unity v Independent Broadcasting Authority* the law still qualifies as a law of general application because it treats all taxpayers who are subject to the AEoI in the same way. There is a credible argument for the proposition that not all resident taxpayers who have accounts in other countries are treated equally because if a resident taxpayer holds an account in a country that is not a signatory to the CRS, that taxpayer's information will not be exchanged with SARS nor will SARS disclose any information to the tax authorities of that country. This, however, is a result of a loophole under the current CRS regulations and not the intention of the legislation. It is still unclear how many countries will not commit to the AEoI and this loophole may still be closed in the future.

In terms of accessibility or public availability the OECD has published the second edition of the CRS Implementation Handbook on their website, which, although not part of the CRS, provides a practical guide to implementing the CRS to both government officials and financial institutions and provides a contrast between FATCA and the CRS.[170] The OECD has also published the Model Mandatory Disclosure Rules for CRS Avoidance Arrangements. In South

https://www.researchgate.net/publication/313423411_Limitations_on_the_Bill_of_Rights_under_the_South_African_Constitution_From_Constitutional_Law_of_South_Africa.

[168] *Supra* note 91 p. 157.

[169] *Supra* note 167.

[170] OECD (2018) *Automatic Exchange Portal: Online Support for the Implementation of Automatic Exchange of Information in Tax Matters*. Available at https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/.

Africa, SARS have provided a number of publications on their website including an overview of how the CRS works, the CRS regulations, a FAQ guide on the CRS and the CRS Commentary.[171] It can therefore be concluded that there is sufficient accessibility or public availability.

The CRS regulations are not a model of clarity, and the precise words need to be closely studied, since they bristle with arbitrary distinctions. Although the OECD has published various handbooks and SARS have provided a FAQ guide on the CRS, there are many instances where it is unclear what needs to be reported. For example, there is nothing in the CRS agreements that prohibit a country from refusing to exchange information with another country, even if such other country complies with the data protection regulations. At other times the regulations may be conducive more to confusion than to clarity. Neither FATCA nor the CRS provide any guidance on the classification and reporting of cryptocurrencies and many countries have yet to decide whether cryptocurrencies can be classified as financial assets.

5.4 LIMITATIONS ANALYSIS – PART 2

(a) Proportionality

In a limitations analysis, proportionality generally concerns the limitation of the right, on the one hand, and the purpose of the limitation, on the other.[172] Proportionality can also be described in terms of harm imposed and the benefit achieved which leads to the sense that the conflicting rights and interests must be weighed and balanced against each other to arrive at the fairest result.[173]

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[171] SARS (2018) *How Does CRS Reporting Work*. Available at https://www.sars.gov.za/ClientSegments/Businesses/Mod3rdParty/AEOI/Pages/How-does-CRS-reporting-work.aspx.

[172] Rautenbach, I.M. (2014) *Proportionality and the Limitation Clauses of the South African Bill of Rights*, p. 2231. PER, 2014, Volume 17, No 6.

[173] *Ibid*. The principle of proportionality, as laid down in Article 5 of the Treaty on European Union, regulates the exercise of powers by the European Union and has been pioneered by the German Federal Constitutional Court and the European Court of Human Rights. Chaskalson P in *S v Makwanyane* remarked that although the approach of these courts to proportionality is not identical, all recognise that it is essential to the process of any legitimate limitation of a fundamental right. Furthermore, the principle of proportionality is also inherent in the different levels of scrutiny applied by the courts of the United States in adjudicating on the validity of the abridgment of justiciable rights embodied in the American Constitution and its Bill of Rights.

The Constitutional Court in *S v Makwanyane*[174] implemented the following approach to the application of the general limitation clause under the interim Constitution:

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality… The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity… This is inherent in the requirement for proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

After *Makwanyane,* the following was stated in *S v Bhulwana*[175], which re-emphasized the same premises:

> "In sum, therefore, the Court places the purpose, effects, and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."

The relevant factors set out in *Makwanyane* are now contained in section 36 of the Constitution and are stated as follows:

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;
e. Less restrictive means to achieve the purpose.

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[174] *Supra* note 114 [104].
[175] *S v Bhulwana* 1996 (1) SA 388 (CC).

The following sections will explore each of the relevant factors in order to determine whether the right to privacy in terms of the AEoI can be a justifiable limitation.

(b) The nature of the right

The right to privacy and its importance was discussed extensively in chapter 3, however it is necessary to elaborate further on the nature of the right in order to perform the exercise of the balancing of the right to privacy against the intrusion of it by the AEoI.

Some rights weigh more heavily than others and thus the more important the right, the more difficult it will be to justify the infringement of such right.[176] In order to determine whether the infringement is justified a court must first ascertain the importance of the right in the general constitutional scheme.[177] The rights in the Bill of Rights fall into two broad categories, namely, first and second generation rights.[178] Civil and political rights, generally included in most constitutions in the world, tend to be considered as first generation rights.[179] These rights include the basic rights to life, freedom and dignity and they also incorporate the fundamental rights associated with democracy.[180] The second generation rights are those that include the social and economic features in a democracy.[181]

According to the Constitutional Court in *S v Makwanyane*[182]:

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby."

[176] *Supra* note 91 p. 164.
[177] *Ibid.*
[178] Constitutional Court of South Africa *The Bill of Rights: First, Second and Third Generation Rights.* Available at https://www.concourt.org.za/index.php/constitution/your-rights/the-bill-of-rights.
[179] *Ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] *Supra* note 114 [144].

In *Khumalo and Others v Holomisa*[183] the Constitutional Court also stated that the right to dignity and the right to privacy are entwined:

> "The value of human dignity in our constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a *close link* between *human dignity and privacy* in our constitutional order. The right to privacy, entrenched in Section 14 of the Constitution, recognizes that human beings have a right to have a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity." (emphasis added)

Furthermore, O'Regan J held that the more intimate the information is, the more important it is in fostering privacy, dignity and autonomy that the individual makes the decision to disclose the information and that decision should not be made by others.[184]

In applying the above stated principles to the right to privacy, it is submitted that the right to privacy is a first-generation human right and therefore one of the most important rights in the Bill of Rights. It is also entwined with the right to dignity which as stated above is the most important right along with the right to life. It is therefore evident that the invasion of the right to privacy must be heavily justified by the state in terms of the AEoI.

(c) The importance of the purpose of the limitation

This factor involves two discreet assessments, firstly the identification of the purpose of the limitation and secondly an evaluation of its significance.[185]

The purpose of the AEoI is to reduce tax evasion by providing for the exchange of non-resident financial account information with the tax authorities in the account holders' country of

[183] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) 418 at para [27].
[184] *NM and Others v Charlene Smith and Others* (2007) 7 BCLR 751 (CC) [132].
[185] *Supra* note 167 at chapter 34.8 p. 74.

residence.[186] According to the OECD the AEoI will enable the detection of formerly unnoticed tax evasion and therefore enable governments to recover tax revenue lost to non-compliant taxpayers.[187] The secondary benefit is that it will increase voluntary disclosures of hidden assets and encourage taxpayers to report all relevant information.[188] The purpose of the limitation of the AEoI is therefore consistent with the values of an open and democratic society based on human dignity, equality and freedom.

As stated in chapter 4, SARS have a constitutional obligation to collect all revenues due and ensure optimal compliance with tax legislation in order to enable the government to contribute towards the economic and social development of South Africa. This is an extremely important obligation. The compliance with constitutional and international obligations is compellingly important, however this does not entitle the state to infringe the right to privacy beyond what is reasonable.

The OECD has maintained that the MCAA is concluded under Article 6 of the Convention and therefore affords the most efficient procedure for widespread exchange of information.[189] The OECD argues that this method saves the time and resources that would need to be invested in bilateral negotiations with each single exchange partner.[190] Although the CRS saves time and money for participating countries, the Constitutional Court has held that the principle that administrative convenience and the saving of costs should not, generally be permitted to predominate fundamental rights.[191] In *Phopo v National Commissioner of the South African Police Services and Others* Tlhotlhalemaje J stated: "[I]n a nutshell, administrative convenience cannot lightly be allowed to override the exercise of a Constitutional right…"[192]

In conclusion, the CRS has a legitimately important purpose, however, the mere fact that it saves the government time and money will not be a substantial justification in the infringement

[186] OECD (2018) *Automatic Exchange of Information*. Available at http://www.oecd.org/tax/transparency/automaticexchangeofinformation.htm.
[187] *Ibid*.
[188] *Ibid*.
[189] OECD (2018), *Standard for Automatic Exchange of Financial Information in Tax Matters – Implementation Handbook – Second Edition*, OECD, Paris. Available at https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf.
[190] *Ibid*.
[191] *S v Williams and Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR (CC) at [78]-[79].
[192] *Phopo v National Commisssioner of the South African Police Services and Others* (P275/16) [2019] ZALCPE 15 (20 August 2019).

of the right to privacy. There must be substantial evidence provided that the AEoI has actually assisted SARS in recovering revenue due.

(d) The nature and extent of the limitation

The more severe a limitation is, the more powerful the justification needs to be.[193] This assessment is essential because the infringement of rights should not be more extensive than is demanded by the purpose that the law seeks to accomplish.[194] Section 36 does not allow a sledgehammer to be used to crack a nut.[195]

In appraising the nature and extent of a limitation, the court must determine whether the limitation affects the 'core' values underlying a particular right.[196] As stated above, the information which is exchanged in terms of the CRS is of a personal and private matter and the OECD has placed safeguards in order to protect the confidentiality of such sensitive information. It can therefore be concluded that the limitation is a serious infringement of the right to privacy and that if the information were to be leaked, there could be devastating consequences for the taxpayers whose information is leaked.

Recently, in August 2019, the computer systems of Bulgaria's National Revenue Agency were breached by hackers who stole the personal tax information of not only Bulgarian citizens, but also of citizens with which Bulgaria exchanges tax information under the CRS.[197] The leaked information included names, addresses, personal identification numbers and dates of birth of Bulgarian and foreign nationals, individuals' annual tax returns, records of their income, acts of administrative violations, health and social insurance status and tax information exchanged with foreign governments.[198] The personal information of 189 people was publicly disclosed

[193] *Mlungwana and Others v S and Another* (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) at [82].
[194] *Supra* note 91 p. 168.
[195] *S v Manamela and Another (Director-General of Justice Intervening)* (CCT25/99) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000) [34].
[196] *Supra* note 167 at chapter 34.8 p. 79.
[197] MEG International Counsel, *CRS Tax Information is Stolen from Bulgaria – Citizens and Residents of Canada and New Zealand are Affected Also*. Available at https://en.megastelum.com/blog/crs-tax-information-is-leaked-in-bulgaria.cfm.
[198] STEP (2019) *Switzerland Suspends Automatic Information Exchange with Bulgaria following Data Leak*. Available at https://www.step.org/news/switzerland-suspends-automatic-information-exchange-bulgaria-following-data-leak.

and these people are now at grave risk of impersonation by fraudsters.[199] Not only are these people at risk of impersonation by fraudsters but they are also at potential risk of being kidnapped or murdered. Switzerland suspended cooperation with Bulgaria after the leak, however it has named 11 other countries who are party to the AEoI that it believes does not have the satisfactory security requirements.[200] It is also worrying that the OECD has not come out and let its position known about this leak especially now that there is overwhelming evidence of the risks involved with the automatic information exchange.[201]

In *S v Makwanyane* the Constitutional Court held that the death penalty had severe and irreparable effects on the right to life. The State argued that the death penalty acted as a deterrence and prevention of recurrence of violent crime and was fitting retribution. The Constitutional Court agreed that it deterred and prevented the recurrence of violent crime, however it did not agree that the death penalty was proportional to the harm done. In applying this principle to the current practice of the AEoI it is suggested that while the purpose of the AEoI may be to deter and prevent tax evasion and non-compliant taxpayers, the risks involved as stated above are overwhelming and should further leaks of taxpayer information occur, the AEoI will have grave and irreparable effects on not only the right to privacy but also the safety and dignity of taxpayers. It is therefore submitted that the AEoI in terms of the CRS seriously impacts on the right to privacy.

(e) The relation between the limitation and its purpose

This enquiry requires that the Court consider whether the means employed to achieve the purpose are rationally connected to, or reasonably capable of achieving, the proposed objective.[202] This means that the law must tend to serve the purpose that it is designed to serve. If the law does not serve the purpose which it was formulated, then it cannot be said to be a reasonable limitation of the right.[203] For example, in *South African National Defence Force Union v Minister of Defence*[204], the Constitutional Court held that the prohibition in s 126B(1) of the Defence Act 44 of 1957, a provision that prohibited members of the defence force from

[199] *Ibid*.
[200] *Ibid*.
[201] *Supra* note 196.
[202] *Supra* note 167 at chapter 34.8 p. 84.
[203] *Supra* note 91 p. 169.
[204] *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC).

joining a trade union, failed the limitation test because there was no rational connection between the limitation and its purpose. If the state wishes to show that a law tends to serve the purpose for which it was designed, then it must adduce evidence in support of its contention. For example, in *Minister of Justice and Constitutional Development and Others v Prince*, the High Court held that the State bore the burden to justify the limitation of the right privacy and that the State had offered very little further evidence of persuasion and weight to counter the evidence which was already placed before the Court.[205]

This enquiry must firstly consider whether the AEoI is actually effective in reducing offshore tax evasion. Secondly it must consider the causal link between taxpayer confidentiality and compliance. Thirdly it will examine the numerous loopholes under the current practice of the AEoI in terms of the CRS and finally whether the law has actually been designed to combat tax evasion and not another purpose.

The AEoI in terms of the CRS is fairly new in its implementation and therefore evidence as to its effectiveness in deterring and preventing tax evasion is rather limited. It is also significant that the AEoI must not only be effective upon a global scale, but it must also be effective in reducing tax evasion in South Africa specifically. It is submitted that comparisons to previous OECD tax regimes cannot be utilized because the previous regimes do not infringe upon the taxpayers' right to privacy so severely. Comparisons as to the effectiveness of FATCA will be employed as the two regimes are very similar.

According to Casi, Spengel and Stage, there has been a significant decrease of deposits owned by European Union ("EU") and OECD residents in major offshore locations pursuant to the implementation of the CRS.[206] However, according to the authors, tax evaders seem to respond even stronger.[207] The authors assert that they did not find that the CRS puts an end to tax evasion but rather that there has been a drastic change in the dynamics of cross-border tax evasion.[208] As stated previously, one of the main weaknesses of the CRS is that countries who

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[205] *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) at [29].
[206] Casi, E, Spengel, C, & Stage, B. (2018) *Cross-Border Tax Evasion after the Common Reporting Standard: Game Over?* p. 40. SSRN Electronic Journal. 10.2139/ssrn.3245144.
[207] *Ibid.*
[208] *Ibid.*

are not signatories to the regime are not obliged to report in terms of the CRS. There has been an increase in directly and indirectly owned cross-border deposits in the US as well as round-tripping tax evasion through US shell companies pursuant to the CRS enactment.[209] In order for the CRS to be effective the US would have to commit to the CRS, however, even with worldwide pressure the US have stated that it will not swap FATCA for the CRS and tax evaders will continuously be able to take advantage of this loophole.[210]

Beer, Coelho and Leduc assert through empirical evidence that AEoI has been effective in limiting the use of offshore jurisdictions to evade taxes as deposits in offshore jurisdictions have decreased by 25 percent pursuant to the implementation of the CRS, however, they caution that the implications of this observation are ambiguous because a reduction in one offshore jurisdiction may indicate an increase in more attractive jurisdictions.[211] The authors also confirm that offshore deposits in the US have increased and that the US has become an attractive location to hold and perhaps conceal income.[212]

Many account holders also acquire citizenship or residency certificates, not to genuinely emigrate to a different country but merely to deceive their bank that they do actually reside there and therefore their information is not reported to the correct jurisdiction or it is not reported at all.[213] This is another major loophole in the CRS regulations and severely undermines its effectiveness.

While there is no evidence as to the additional tax revenue raised by the CRS in South Africa or the costs of compliance, since the CRS is very similar to FATCA it is possible to draw estimations as to its efficacy in South Africa by comparison with FATCA.

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[209] *Ibid*.
[210] Angeloni, C. (2019) *US Will Not Swap FATCA For Common Reporting Standard*. Available at https://international-adviser.com/us-will-not-swap-fatca-for-common-reporting-standard/.
[211] Beer, S, Coelho, M, Leduc, S. (2019) *Hidden Treasures: The Impact of Automatic Exchange of Information on Cross-Border Tax Evasion*, p. 27. IMF Working Paper. Fiscal Affairs Department. WP/19/286.
[212] *Ibid*.
[213] Knobel, A, Heitmuller, F. (2018) *Citizenship and Residency Investment Schemes: Potential to Avoid the Common Reporting Standard for Automatic Exchange of Information*. Available at SSRN: https://ssrn.com/abstract=3144444 or http://dx.doi.org/10.2139/ssrn.3144444

FATCA was enacted on the basis that the US loses an estimated amount of $100 billion in tax revenue due to offshore tax abuses.[214] The enactment of FATCA projected to raise $870 million annually which means that there will still be a tax recollection shortfall of about $99 billion.[215] The incoherence between the costs and benefits of FATCA is illustrated by Australian Banker's Association Inc who have estimated that FATCA will raise an additional $20 million in revenue for the US at an estimated enactment cost of about $1 billion.[216] The Financial Crimes Enforcement Network ("finCEN") of the US Treasury Department has also estimated that the US will spend around $54 million annually on its domestic due diligence rules in order to identify the beneficial owners of accounts.[217]

Switzerland is no longer the jurisdiction of choice; instead the world is hoarding its assets and investments in the US. According to Byrnes and Munro the primary purpose of FATCA appears to be more sinister, namely for the US government to obtain otherwise private financial information and control of the global financial industry.[218] The authors state that while FATCA has been widely quoted to recapture tax revenue, it in fact was never proposed to close the US revenue gap.[219] Former Senator Levin has stated that the purpose of FATCA is to "force foreign financial institutions to disclose their US account holders or pay a steep penalty for non-disclosure".[220]

Based on the above estimations of the benefits and costs of FATCA it is unlikely that the benefits of the CRS outweigh the compliance costs in South Africa. Given that the CRS is based very closely off FATCA, it is also debatable whether the real purpose of the CRS is to

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[214] U.S. Senate Permanent Subcommittee on Investigations (2008) *Tax Haven Banks and U.S. Tax Compliance,* p. 1. Available at https://www.hsgac.senate.gov/imo/media/doc/REPORTTaxHavenBanksJuly1708FINALwPatEliseChgs92608.pdf.

[215] *Supra* note 47 p. 1-4.

[216] Testimony of James Bopp, Jr. Before the Subcommittee on Government Operations of the House Committee on Ways and Means Regarding the Foreign Account Tax Compliance Act (2017) p. 11. Available at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Bopp%20Statement%20FATCA%204-26.pdf.

[217] Prop Rules, Fed Reg, Vol 79, No 149 (August 4 2014). Available at https://www.fincen.gov/sites/default/files/shared/CDD-NPRM-Final.pdf. Cited in Byrnes and Munro *supra* note 47 p.1-112.

[219] *Ibid.*

[219] *Ibid.*

[220] HIRE Act, 156 HIRE Act, 156 Cong Rec § 1745, § 1745 (daily ed Mar 18, 2010) (Statement of Sen. Levin). Cited in Byrnes and Munro supra note 47 p. 1-4.

reduce tax evasion – the purpose may be to gain personal financial information of individuals which those countries would not otherwise have access to.

It is submitted that, given the current status of SARS, it is unlikely that, even with the personal financial information collected, SARS will benefit from this information. According to the Nugent Commission of Inquiry, the panel of the Chief Officer in charge of SARS information technology systems, Ms Makhekhe-Mokhuane, consisted of only one that had qualifications in information technology, but there was none with exposure to the SARS technology.[221] According to Ms Makhekhe-Mokhuane, there was no material development of the information technology systems during her tenure and all that is being done is to 'keep the lights on'.[222] This is extremely concerning given that the OECD has allowed South Africa to be a party to the AEoI and is further evidence to show the inadequate safeguards and information systems required by the OECD in order to be a party to the CRS.

The AEoI is an example of enforced compliance by tax authorities. Enforced compliance, however, creates an antagonistic climate and can result in a "cops and robbers" situation.[223] If tax authorities assume that taxpayers are inclined to evade taxes and handle them accordingly, taxpayers will view them as attempting to penalize and criminalize them even if a tax offence has not been committed.[224] Given that the majority of taxpayers in South Africa have negative attitudes towards paying tax because they believe waste and corruption in the government to be high, the increased enforced tax compliance by the AEoI could further increase South African taxpayers' negative attitude towards paying taxes and encourage more taxpayers to evade taxes through different means.

According to New World Wealth ("NWW"), South Africa has experienced a substantial outflow of wealth in 2018.[225] There are many reasons for the increased emigration rates of High Net Worth Individuals ("HNWI") from South Africa but consideration must be given to the fact that most of these HNWIs have vast wealth and assets offshore which they do not wish

[221] Nugent Commission (2018) *Commission of Inquiry into Tax Administration and Governance by SARS* p. 105.
[222] *Ibid* at p. 107.
[223] Muehlbacher, S, Kirchler, E, Schwarzenberger, H. (2011) *Voluntary vs Enforced Tax Compliance: Empirical Evidence for the "Slippery Slope" Framework*, p. 91. Eur J Law Econ (2011) 32:89-97.
[224] *Ibid*.
[225] AfrAsia Bank (2019) *South Africa Wealth Report*, p. 21. NWWealth. Available at https://issuu.com/newworldwealth/docs/south_africa_2019.

to disclose and as a result of the AEoI they are now forced to disclose these assets to SARS. The tax rate for these wealthy individuals is extremely high in South Africa and because they do not wish to pay such high taxes in South Africa on these offshore moneys and assets, it is beneficial for them to emigrate to more attractive locations where they pay far lower taxes. A growing number of wealthy South Africans have emigrated to Mauritius in order to escape the exchange control regulations and for the benefit of tax purposes.[226] Over the past decade about 3000 HNWIs have emigrated from South Africa and this causes many negative effects on the economy. If the AEoI is encouraging wealthy South Africans to emigrate to lower tax jurisdictions, then it will be difficult to argue that it is actually fulfilling the purpose for which it was designed.

(f) Less restrictive means to achieve the purpose

If the court finds that there is a legitimate objective and a rational connection between the means employed and the said objective, it must then consider whether less restrictive means to achieve the purpose exist.[227] The reasoning behind this is that if the government wishes to limit the exercise of a constitutional right it should attempt to do this in the most narrow method feasible.[228] The limitation will not be proportional if there are other means to limit the right which do not restrict the right to the same degree.

According to Senator Rand Paul, "FATCA is a textbook example of bad law that doesn't achieve its stated purpose but does manage to unleash a host of unanticipated destructive consequences … FATCA should be repealed and Congress should find a less onerous means of enforcing tax laws."[229]

According to the CRS agreements financial institutions are not required to obtain consent from its customers because they are required by law to share this data with relevant tax authorities. Many argue that by opening accounts with a financial institution that you tacitly consent to having your information reported to the relevant tax authorities.

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[226] Gonçalves, P. (2019) *Mauritius Attracting Wealthy South Africans*. Available at https://www.internationalinvestment.net/news/4006583/mauritius-attracting-wealthy-south-africans.
[227] *Supra* note 167 chapter 34.8 p. 85.
[228] *Ibid*.
[229] Byrnes and Munro, *supra note* 47 p. 1-83. (citing Senator Paul Introduces Bill to Repeal Anti Privacy Provisions in FATCA. May 8, 2013).

The problem with the AEoI in terms of the CRS is that it is an international agreement and the provisions are drafted by the OECD. It is therefore not possible for South Africa to determine its own laws and regulations regarding the AEoI in term of the CRS. It must also be considered that even if the AEoI is found to be an unjustifiable limitation of the right to privacy and therefore unconstitutional, because the CRS is a policy initiated by the OECD, should South Africa refuse to be a party to the CRS then there is the potential risk of being blacklisted by the OECD. South Africa is currently experiencing economic difficulty and the effect of being blacklisted by the OECD would have grave consequences to our economy. Even if it is found that the AEoI is not a justifiable limitation of the right to privacy, the effects of being blacklisted by the OECD could be far worse for South African residents and citizens than having their right to privacy unjustifiably infringed.

5.5 APPEAL AGAINST FATCA AND CRS

Over the years the South African judiciary has adopted a comparative law approach with regard to foreign precedent.[230] The South African judiciary has consistently pursued guidance from foreign high court judgments, particularly in the Commonwealth countries such as the USA, the Netherlands, Germany and other parts of Western Europe where Roman law was received.[231] Section 39(1) of the Constitution provides for the consideration of international and foreign law:

> "When interpreting the Bill of Rights, a court, tribunal or forum –
>
> (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) Must consider international law;
> (c) May consider foreign law."

In *S v Makwanyane*[232] the Constitutional Court held the following in respect of comparative law:

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[230] Rautenbach, C. (2015) *The South African Constitutional Court's use of foreign precedent in matters of religion: Without fear or favour?*. PER: Potchefstroomse Elektroniese Regsblad, 18(5), 1546-1570. https://dx.doi.org/10.4314/pelj.v18i5.10.
[231] *Ibid*.
[232] *Supra* note 114 para 39.

> "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 circumstances, and law and foreign case law, but we are in no way bound to follow it."

In relation to the CRS, in July 2018 legal action against the CRS and the beneficial ownership registers has been brought by law firm Mishcon de Reya.[233] It is believed that this is the first legal action taken against the CRS in Europe, and possibly anywhere in the world.[234] According to Mishcon de Reya:

> "Our contention is that the publication of sensitive data concerning the internal governance and ownership of private companies by the Beneficial Ownership Registers is not necessary to achieve the stated objectives. Similarly, we believe that the exchange of information under the CRS is excessive, as information is exchanged indiscriminately and affects all account holders regardless of the size of the account. The information exchanged under the CRS includes sensitive personal data (such as the name, date/place of birth, and tax identification number of the account holder) as well as financial data about the financial account itself such as the account number and balance. This exposes compliant account holders to risk of hacking and data loss: it could lead to identity theft on a grand scale."[235]

The complaint is currently pending before the United Kingdom's data protection agency.

In relation to FATCA, on 14 July 2015, a number of Plaintiffs, including Senator Rand Paul, filed a claim in the United States District Court for the Southern District of Ohio, challenging the constitutionality of FATCA and the IGAs. The case is known as *Crawford v U.S. Department of the Treasury*, Case no. 3:15-cv-00250. The Court did not rule on the constitutionality of FATCA or the IGAs because it wrongly dismissed the case reasoning that none of the Plaintiffs had standing to challenge FATCA or the IGAs. The Court argued that the harm done to the Plaintiffs were not the fault of the government but that of third-party bank

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[233] Noseda, F. (2019) *CRS v GDPR: Watch This Space*. Available at https://www.mishcon.com/news/crs-v-gdpr-watch-this-space.
[234] *Ibid.*
[235] Noseda, F. (2018) *Legal Challenge to Common Reporting Standard (CRS) and Beneficial Ownership (BO) Registers*. Available at https://www.mishcon.com/news/legal-challenge-to-common-reporting-standard-crs-and-beneficial-ownership-bo-registers.

action. According to James Bopp, Jr, an attorney who was named one of the 100 Most Influential Lawyers in America by the National Law Journal, the Court's reasoning was flawed because it failed to consider that banks would not have reported on US account holders nor denied US account holders were it not for FATCA or the IGAs.[236] The case has been appealed and is currently pending in the United States Court of Appeals for the Sixth Circuit under Crawford v U.S. Department of the Treasury, Case No. 16-3539.

Mr James Bopp, Jr continues to give a number of reasons as to why FATCA and the IGAs are unconstitutional. A few of the reasons given are procedural in nature and this paper will only examine the substantial arguments. Mr Bopp, Jr argues that the heightened reporting requirements for foreign financial accounts deny US citizens living abroad equal protection of the laws.[237] This is because the information reported on foreign accounts is far more invasive than domestic accounts and that the fact that the local bank accounts of citizens living abroad are not held in the US bears no correlation to any legitimate state interest of the governments snooping into the private affairs of citizens living abroad.[238] He further states that FATCA and the IGAs information reporting requirements are unconstitutional under the Fourth Amendment of the United States Constitution. The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Mr Bopp, Jr asserts that the Amendment is infringed where the Government through 'unreviewed executive discretion' is permitted to make a wide-ranging inquiry that unnecessarily invades intimate areas of a person's individual affairs.[239]

Although the challenges to the CRS, FATCA and the IGAs are still pending it will be interesting to see the effect it shall have if they are declared unconstitutional outside of South Africa. Being sources of international law our Court will be obligated to consider the decisions reached in other countries.

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[236] *Supra* note 216 p. 18.
[237] *Ibid* p. 21.
[238] *Ibid*.
[239] Ibid.

6. CONCLUSION

The question as to whether a violation can be justifiable is best demonstrated by Currie and de Waal[240]:

> "Once it is established that a law of general application infringes a right protected by the Bill of Rights, the State or the person relying on the law may argue that the infringement constitutes a legitimate limitation of the right. Rights are not absolute. They may be infringed, but only when the infringement is for a compellingly good reason. A compellingly good reason is that the infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy that values human dignity, equality and freedom above all other considerations. The infringement must however not impose costs that are disproportionate to the benefits that it obtains. This will be the case where a law infringes rights that are of great importance in the constitutional scheme in the name of achieving benefits that are of comparatively less importance. It will also be the case where the law does unnecessary damage to fundamental rights, damage which could be avoided or minimized by using other means to achieve the same purpose."

The research report has critically analysed whether the AEoI violated the constitutional right to privacy and whether the violation of the right to privacy is justifiable.

The background of the development of AEoI to the current regimes of FATCA and the CRS was discussed, and it was posited that the OECD has persistently pushed for greater international tax transparency at the expense of taxpayers' right to privacy and confidentiality. The right to privacy, its rationale and its significance in a democratic society was assessed and it was suggested that being such an important right in our Constitution that it cannot be easily violated.

The challenge is to ideally balance the right to privacy against the need for greater tax transparency in order to reduce tax evasion. The limitations analysis comprised in section 36 of our Constitution provides a framework to our Courts in performing this exercise.

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[240] *Supra* note 91 p. 172.

The evidence presented in this research paper suggests that the right to privacy is unjustifiably violated by the Automatic Exchange of Information for the following reasons: 1) it was concluded that the right to privacy is an extremely important right entwined with the right to dignity and because it is of particular importance it carries a great deal of weight in the balancing exercise 2) although the need to reduce tax evasion is compellingly important this does not entitle governments to unreasonably violate constitutional right to achieve the said purpose 3) The limitation imposed by the AEoI is extremely invasive and requires extremely personal information to be shared 4) There is no concrete evidence that the AEoI has actually reduced tax evasion and that SARS is collecting more tax revenue as a result of the AEoI. It was submitted that there are overwhelming risks involved to the safeguards of taxpayers' sensitive information and a leak could result in irreparable harm to not only taxpayers' privacy but also their safety 5) governments should explore more effective methods of reducing tax evasion without violating constitutional rights so severely and without assuming that all taxpayers are criminals attempting to evade taxes.

The most disturbing issues surrounding FATCA and the CRS are the corruption of constitutional sovereignty and the erosion of limited government. South Africa will ultimately lose its constitutional independence if it blindly conforms to the policies set forth by the OECD, which is a fundamental principle that South Africa has fought for years to achieve. One must also take into account that the OECD is unaccountable to South Africa. Furthermore, no country should be entitled to force and pressurize another country to adopt certain tax laws which ensures that its greed may continue unrestrained.

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