Singapore Law Review
(2013) 31 Sing L Rev

PRIVACY LAW: A CASE FOR THE PROTECTION OF INFORMATIONAL PRIVACY IN SINGAPORE

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"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection"
Samuel Warren & Louis Brandeis[1]
"The Right of Privacy"

I. INTRODUCTION

This article argues for the creation of a law protecting informational privacy in Singapore. Although many major jurisdictions have laws that protect informational privacy, an individual's right to protection under Singapore law remains unclear.The Singapore Parliament and courts have not adequately addressed the issue, which has become more significant in recent years due to the advent of technological and social changes.

The absence of an informational privacy law evinces a lacuna in Singapore law, and it is "necessary … to define anew the exact nature and extent of [the] protection"[1] of informational privacy law in Singapore. This article thus argues for the creation of a general informational privacy law in Singapore, either by statute or the common law, by examining the approaches adopted by other jurisdictions and how they can contribute towards the growth of an informational privacylaw in Singapore.

Part II provides background information on informational privacy by defining it. Parts III and IV analyse the approach presently adopted in Singapore and the reasons reform is required to adequately protect informational privacy in Singapore. Part V then proposes reform by examining the comparative approaches adopted in both civil and common law jurisdictions to protect informational privacy, and applying them to Singapore's context. Part VI offers concluding observations.

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1 Samuel Warren & Louis Brandeis, "The Right of Privacy" (1890) 4 Harv L Rev 193.

II. INFORMATIONAL PRIVACY EXPLAINED

Informational privacy is one of the four areas of privacy that exists. It is the second interest described by William Prosser in *Handbook of the Law of Torts*[2] as "public disclosure of private facts";[3] and the third limb of the tort of privacy under the United States' Second Restatement of the Law of Torts.[4] The other areas of privacy are (i) the intrusion on the seclusion of another, (ii) the appropriation of another's name or likeness, and (iii) publicity that places another in a false light.[5]

Informational privacy has been regarded by the philosopher Immanuel Kant as a fundamental human right[6] which allows all human beings to determine their own destinies in accordance with universal rules of rational behaviour.[7] It allows individuals to explore and develop their character, personality and capabilities to the full,[8] by buffering them from societal pressures to conform, and the ridicule and censure that might follow.[9] It also provides the moral capital in inter-personal relationships, which allows individuals to develop relationships with different degrees of informational intimacy.[10]

For the purposes of this article, informational privacy shall be defined as "the right to determine for oneself how and to what extent information about oneself is communicated to others",[11] and shall include the dissemination of true information and pictures of the victim.[12]

Furthermore, since the purpose of this article is to argue for the creation of a general law pro-

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2 William Prosser, *Handbook of the Law of Torts*, 4th ed (St Paul: West Publishing Company, 1971)

3 *Ibid* at 804.

4 *Restatement (Second) of the Law of Torts* § 652 A (1977).

5 *Supra* note 2 at 804; *Ibid*.

6 Fundamental human rights may still be subject to limitations. For instance, under Article 9 of the *Constitution of the Republic of Singapore* (1999 Rev Ed Sing), a person can be deprived of his fundamental right to life and personal liberty if he commits certain crimes under the *Penal Code* (Cap 224, 2008 Rev Ed Sing).

7 Roger Sullivan, *An Introduction to Kant's Ethics* (Cambridge, UK: Cambridge University Press, 1994) at 15.

8 Nicholas Barber, "A Right to Privacy" [2003] Public Law 602-610, cited in George Wei Sze Shun, "Pre-Commencement Discovery and The *Odex* Litigation: Copyright Versus Confidentiality Or Is It Privacy?"(2008) 20 Sing Ac LJ 651 at [176].

9 Disa Sim, "The Right to Solitude in the United States and Singapore: A Call for a Fundamental Reordering"(2002) 22 Loyola of Los Angeles Entertainment Law Review 443 at 446, cited in George Wei Sze Shun, "Pre-Commencement Discovery and The *Odex* Litigation: Copyright Versus Confidentiality Or Is It Privacy?"(2008) 20 Sing Ac LJ 651 at [176].

10 George Wei Sze Shun, "Pre-Commencement Discovery and The *Odex* Litigation: Copyright Versus Confidentiality Or Is It Privacy?" (2008) 20 Sing Ac LJ 651 at [176].

11 UK, *Report of the Committee on Privacy* (London: Her Majesty's Stationery Office, 1972) at 10, cited in Mark Lunney & Ken Oliphant, *Tort Law: Text and Materials*, 4th ed (Oxford, UK: Oxford University Press, 2010) at 800.

12 James Gordley & Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law* (Cambridge, UK: Cambridge University Press, 2006) at 266.

tecting informational privacy in Singapore, the enactment of specific laws[13] addressing the invasion of privacy on the Internet will not be discussed.

III. SINGAPORE'S POSITION ON INFORMATIONAL PRIVACY LAW

There is no expressed right of informational privacy in Singapore, and a person will not commit a wrong (under statute or the common law) merely because he unreasonably invades the personal privacy of another.[14] The *Constitution of the Republic of Singapore*[15] remains silent on the existence of a right of privacy, and there is at best an inferred right of informational privacy under the Singapore Constitution. The Singapore courts have also avoided the protection of informational privacy *per se*, and have relied on other proxy causes of action to provide relief to a victim of an invasion of informational privacy.

Hence, a victim of an invasion of informational privacy in Singapore does not have a direct remedy under the law, and would instead have to adopt a "scatter-gun" approach, and base his claim upon other well-established causes of action.

A. *There Is No Expressed Constitutional Right of Privacy*

Although Part IV (Fundamental Liberties) of the Singapore Constitution recognises the existence of fundamental rights such as the right to life and personal liberty,[16] and the freedom of speech,[17] it remains silent on the existence of a right of privacy. Hence, there is no expressed constitutional right of privacy, and informational privacy, in Singapore.[18]

Notwithstanding the above, it is arguable that the emergence of a right of privacy can be derived from Article 9(1)[19] of the Singapore Constitution. In India, where there is no express constitutional right of privacy, the courts have adopted a wide and liberal construction of the Indian Constitution, and determined that a right of privacy can be inferred from the right to personal liberty under Article 21[20] of the Indian Constitution (which is similar to Article 9(1) of the Singapore

13 These laws include the *Computer Misuse Act* (Cap 50A, 2007 Rev Ed Sing), the *Spam Control Act* (Cap 311A, 2008 Rev Ed Sing) and the *Personal Data Protection Act 2012* (Act No 26 of 2012).

14 *Halsbury's Laws of Singapore*, vol 18 (Singapore: LexisNexis, 2009) at [240.579].

15 *Constitution of the Republic of Singapore* (1999 Rev Ed Sing).

16 *Ibid*.

17 *Ibid*.

18 Thio Li-Ann, *Pragmatism and Realism Do Not Mean Abdication:A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law* (2004) 8 SYBIL 41 at 46.

19 Article 9(1): No person shall be deprived of his life or personal liberty save in accordance with law.

20 Article 21: No person shall be deprived of his life or personal liberty except according to procedure

Constitution).[21]

A similar approach should be adopted in Singapore, as in *Ong Ah Chuan v Public Prosecutor*,[22] the Privy Council (on appeal from Singapore) determined that the courts should adopt a "generous interpretation [of the Singapore Constitution] avoiding … the austerity of tabulated legalism, [and] suitable to give individuals the full measure of the fundamental rules of natural justice".[23]

Following from *Ong Ah Chuan*, there has been a line of cases which suggests that a generous interpretation of Article 9(1) should not be adopted. In *Public Prosecutor v Mazlan bin Maidun*,[24] Yong Pung How CJ adopted a restrictive and literal approach towards the interpretation of Article 9(1), and determined that there had been no breach of the defendant's constitutional rights under Article 9(1) when the police had failed to inform him of his right to remain silent, which was merely an evidential rule that could not be accorded constitutional status because it was not given explicit expression in the Singapore Constitution.[25] In *Jabar bin Kadermastan v Public Prosecutor*,[26] Yong Pung How CJ again adopted a restrictive and literal approach towards the interpretation of Article 9(1), and determined that "any law which provides for the deprivation of a person's life or personal liberty is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well".[27]

However, this restrictive and literal approach is unlikely to affect the existence of an inferred right of informational privacy in Singapore, as the Singapore Court of Appeal has since rejected its application and reaffirmed the adoption of a generous interpretation of Article 9(1) of the Singapore Constitution. In *Nguyen Tuong Van v Public Prosecutor*,[28] the Court of Appeal adopted the approach in *Ong Ah Chuan* and determined that "the phrase 'in accordance with law' in Article 9(1) connotes more than just Parliament-sanctioned legislation … [and] incorporates fundamental rules of natural justice".[29] Similarly, in *Yong Vui Kong v Public Prosecutor*,[30] the Court of Appealalso adopted the approach in *Ong Ah Chuan* and determined that "law" under Article 9(1) would

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established by law.

21 *Karak Singh v State of Utter Pradesh* AIR 163 SC 1295 and *Govind v State of Madhya Pradesh* AIR 1975 SC 1398.

22 [1981] 1 AC 648 [*Ong Ah Chuan*] .

23 A similar approach was adopted by the Privy Council (on appeal from Singapore) in *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49, where they determined that "law" under Article 9(1) of the Singapore Constitution refers to the "fundamental rules of natural justice" and seemed to have suggested that the courts should not be limited strictly to the text when determining an individual's rights.

24 *Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR(R) 968.

25 *Ibid* at [15].

26 *Jabar bin Kadermastan v Public Prosecutor* [1995] 1 SLR(R) 326.

27 *Ibid* at [52].

28 *Nguyen Tuong Van v Public Prosecutor*[2005] 1 SLR(R) 10.

29 *Ibid* at [82].

30 *Yong Vui Kong v Public Prosecutor*[2010] 3 SLR(R) 489.

not include legislation which violated fundamental rules of natural justice.[31]

Consequently, the adoption of a generous interpretation of Article 9(1) of the Singapore Constitution (as determined in *Ong Ah Chuan*) remains good law today, and although there is no expressed right, there may still be an inferred right of privacy, and informational privacy, in Singapore.

B. *The Adoption Of Proxy Causes Of Action Under The Common Law*

There is also no expressed right of informational privacy under the common law in Singapore, as there are no causes of action in Singapore that specifically protect against an invasion of privacy. Instead, the Singapore courts seem to avoid the creation of a general law of privacy (such as a general tort of privacy), by creating laws that address specific problems (such as the tort of harassment), or adapting existing causes of action (such as the breach of confidence) to provide remedies for an invasion of privacy.

1. Malcomson v Mehta: *Creating a narrow law of harassment*

In *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta*,[32] the defendant was an ex-employee, who persistently and relentlessly harassed the plaintiff by, *inter alia*, making phone calls, and sending annoying e-mails and text messages requesting for reinstatement. Although the High Court recognised that there had been an invasion of the plaintiff's privacy,[33] Lee Seiu Kin JC avoided creating a general tort of privacy. Instead a new tort of harassment was created to cover the specific scenario where "a person's mobile phone can be ringing away at all times … He may get a flood of SMS messages … [and] His inbox can be flooded with unwanted emails" which may cause displeasure, distress or debilitation.[34]

While this case shows clear judicial recognition of the need to provide measures to protect privacy, the manner in which protection was granted was inadequate.In "Harassment and Intentional Tort of Negligence",[35] Associate Professor Tan Keng Feng explains that the grounds for protection under the tort of harassment created in *Malcomson* were extremely narrow and merely sufficient to encompass the harassment in the case – repeated interference with an individual's privacy would be required before protection would be granted.[36] Consequently, protection would only be

31 *Ibid* at [14]-[16].
32 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 4 SLR 454 [*Malcomson*].
33 *Ibid* at [56].
34 *Ibid* at [52].
35 Tan Keng Feng, "Harassment and Intentional Tort of Negligence" (2002) Sing JLS 642 at 644.
36 *Ibid* at 646, where Professor Tan compares the narrow approach with a broader and more general law

granted in cases with analogous facts, and there would be no protection for claims arising from a single instance of an infringement of privacy.

The narrow approach adopted in *Malcomson* is an indication of the Singapore courts' attitude towards the protection of privacy, and hence informational privacy in Singapore. The adoption of a similarly restrictive and narrow approach towards the development of an informational privacy law in Singapore is a cause for concern, as it would be subject to the specific facts of each case, and it could take many years before the law in Singapore would be able to effectively protect informational privacy.[37]

2. *Breach of confidentiality: Adapting existing laws*

The Singapore courts have also relied on an action for a breach of confidence to avoid the creation of a general law of privacy, or informational privacy.

In *X Pte Ltd v CDE*,[38] the High Court granted an injunction to prevent the defendant from revealing information that was personal to the plaintiff based on an action for a breach of confidence. The defendant was having an affair with the plaintiff, and threatened to disclose information about the affair to the plaintiff's wife and the public at large. Although the case clearly involved information that was private rather than confidential in an ordinary sense of the word,[39] the court imposed an equitable duty of confidence on the defendant, and adapted an action for a breach of confidence to protect informational privacy.

Since *X Pte Ltd v CDE*, there has been a dearth in case law in Singapore discussing the protection of informational privacy. Consequently, the approach adopted in *X Pte Ltd v CDE* still remains good law today, and it is likely that the Singapore courts will continue to protect informational privacy through the law of confidence.[40]

Yet, this approach is unsatisfactory as it over-stretches the boundaries of the law of confidence. In *What Next in the Law*,[41] Lord Denning explained that the existence of a duty of confidence is fundamental to the law of confidence, and that a victim's recourse against an invader, who had planted a recording device to record and publish the victim's private information, should come

(such as under a statute) that would grant protection even in the absence of repeated interference.

37 George Wei Sze Shun, "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression" (2006) 18 Sing Ac LJ 1 at [21]. See also Michael Tugendhat & Iain Christie, *The Law of Privacy and the Media*, 2ded (Oxford, UK: Oxford University Press, 2011) at [1.02]. See also *supra* note 35 at 646, where Professor Tan explains that it would "take too many cases and too much time" to "[develop] a new tort with its proper scope and relevant defences under the common law".

38 [1992] 2 SLR(R) 575.

39 See also *Campbell v MGM* [2004] 2 AC 457 at [14], where Lord Nicholls explained that "information about an individual's private life would not, in ordinary usage, be called 'confidential'".

40 *Supra* note 37 at [86].

41 Alfred Denning, *What Next in the Law* (Oxford, UK: Oxford University Press, 1982).

.from an infringement of privacy and not a breach of confidence, as the invader "had not been entrusted with any confidence".[42] The construction of "an artificial relationship of confidentiality between intruder and victim"[43] under this approach thus goes beyond the scope of the law of confidence, which should not protect "information about an individual's private life [which] would not, in ordinary usage be called 'confidential'".[44]

Hence, it is evident that the law in Singapore does not allow for the protection of informational privacy *per se*.

IV. THE NEED FOR REFORM – THE VALUE OF INFORMATIONAL PRIVACY

The absence of an informational privacy law evinces a lacuna in Singapore law, as the protection of informational privacy is necessary to protect an interest which is "sacred [to] private and domestic life".[45]

First, in the absence of protection of informational privacy, the media would be able to circulate private and intimate information freely, and victims who have suffered mental pain and distress, or been subjected to ridicule and embarrassment, would have no remedy or way to protect the "sacred precincts of private and domestic life".[46] This is especially important due to the rapid development of informational technology, which has been abused by, *inter alia*, media groups to obtain and publish private information about individuals. For example, newspaper groups have begun to use more advanced technologies such as telescopic camera lenses[47] and illegal phone-hacking devices[48] in order to obtain private information about public figures to boost the sale of their products. Consequently, informational privacy law is necessary to deter such intrusions, and provide victims a remedy against the intruder.[49]

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42 *Ibid* at 224. See also Michael Tugendhat & Iain Christie, *The Law of Privacy and the Media*, 2d ed (Oxford: Oxford University Press, 2011) at xi.

43 *Douglas v Hello! Ltd* [2001] 2 All ER 289 at [126]. See also *supra* note 39 at [14], where Lord Nicholls describes the artificial imposition of a "duty of confidence" as "awkward".

44 *Supra* note 39 at [14].

45 *Supra* note 1.

46 *Supra* note 1.

47 *Bundesverfassungsgericht*, BVerfG 101, 361 (15 December 1999), cited in *supra* note 12 at 273, where the defendant German publishers had secretly taken photographs of Princess Caroline of Monaco from a distance.

48 The News of the World phone-hacking scandal, where the newspaper group had illicitly hacked into the voicemail messages of prominent people to find exclusive stories to boost sales (see *News of the World phone-hacking scandal* (17 August 2011), online: BBC <http://www.bbc.co.uk>).

49 Although Singapore seems to have been insulated from such practices (by the media), it is only a matter of time before they begin, and pre-emptive measures should be adopted to ensure that informational privacy is protected in Singapore, should the need arise. In fact, the 2011 Presidential Elections indicate that there is beginning to be more invasions of informational privacy in Singapore, as private information about

Second, the creation of an informational privacy law will provide legal certainty, as it will allow claimants and defendants to predict whether liability will be imposed under their circumstances. Consequently, this will prevent claimants from adopting a "scatter-gun" approach, where they make up for the lack of an effective informational privacy law by pleading as many specific causes of action (in tort) as possible, insofar as they might plausibly provide a remedy on the facts.[50]

Third, the creation of an informational privacy law will help protect the right to reputation which has been recognised by the Singapore courts.[51] In addition to libel law, informational privacy law can protect the right to reputation by preventing private information that would bring an individual into disrepute from being revealed to the public.[52] Hence, given that Singaporean culture (and Asian culture in general) places a great emphasis on an individual's reputation,[53] it is all the more crucial that an informational privacy law is created in Singapore.

Hence it is clear that the creation of an informational privacy law is necessary, and measures must be taken by the Singapore Parliament and courts to ensure the protection of informational privacy law in Singapore.

V. REFORM: CREATING A QUALIFIED RIGHT OF INFORMATIONAL PRIVACY IN SINGAPORE

There are two main approaches to creating an informational privacy law in Singapore – by statute or the common law. This part will discuss the two approaches, by examining the laws in foreign jurisdictions and international conventions, and the extent to which they can assist the Singapore

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Presidential candidate Tan Kin Lian's involvement in lotteries was published during the campaigning period (see *Tan Kin Lian defends TOTO, 4D applications by his firm* (29 July 2011), online: Channel NewsAsia <http://www.channelnewsasia.com>). Private informational about Presidential candidate Dr Tony Tan's sons completion of his National Service was also published in local newspapers and over the Internet (see *Tony Tan refutes allegations of preferential treatment for son* (30 July 2011), online: Channel NewsAsia <http://www.channelnewsasia.com>).

50 Mark Lunney & Ken Oliphant, *Tort Law: Text and Materials*, 4th ed (Oxford, UK: Oxford University Press, 2010) at 798.

51 *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 at [61], where the Court of Appeal stated that "every person has a right to reputation and that right ought to be protected by law. Accordingly, a balance has to be maintained between the right of free speech on the one hand, and the right to protection of reputation on the other". See also *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [270], where the Court of Appeal discussed "how the balance between constitutional free speech and [the] protection of reputation should be struck".

52 Michael Tugendhat & Iain Christie, *The Law of Privacy and the Media*, 2d ed (Oxford, UK: Oxford University Press, 2011) at [3.08]. See also David Feldman, "Privacy-related Rights and Their Social Value" in Peter Birks, ed, *Privacy and Loyalty* (London, UK: Clarendon Press, 1997) 15 at 21.

53 See *supra* note 51 and *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [270]. See also Xiaoying Qi, "Face: a Chinese Concept in a Global Sociology" (2011) 47:3 Journal of Sociology 279.

Parliament or courts in creating an informational privacy law (by statute or the common law).

A significant number of jurisdictions recognise the right of privacy and have laws that protect informational privacy. These include Australia (*Privacy Act 1988*),[54] Canada (*Federal Privacy Act*),[55] France (the Civil Code), Germany (the Constitution; the Civil Code; and the Art Copyright Act), New Zealand (*Privacy Act 1993*),[56] the United Kingdom (*Human Rights Act 1998*;[57] and the common law), and the United States (the common law). International law instruments such as the *Universal Declaration of Human Rights*[58] ("UDHR") and the *Convention for the Protection of Human Rights and Fundamental Freedoms*[59] (commonly known as the European Convention on Human Rights ("ECHR") also provide for the protection against an interference on privacy, and hence informational privacy.

Notwithstanding, these laws only confer a qualified right of privacy, and not an absolute right. Protection against the invasion of informational privacy is limited, and must be balanced against other competing interests such as the right to freedom of expression,[60] national security,[61] and other public interests.[62] This is necessary, because the exercise of one's right of informational privacy does not exist in a vacuum – it will often be engaged with other interests and should not have automatic pre-eminence.[63] For instance, where a reporter has obtained private information that alleges that a nation's leader was involved in graft and corruption, the latter's right to informational privacy should not automatically trump the public interest (and arguably greater good) in knowing of the allegations.

Consequently, any informational privacy law in Singapore (under statute or the common law) should only confer a qualified right of privacy, and the protection of informational privacy should be balanced against other competing interests such as the right to freedom of speech under Article 14 of the Singapore Constitution, national security, and other public interests.

54 *Privacy Act* 1988 (Cth).
55 *Federal Privacy Act*, RSC 1985, c P-21.
56 *Privacy Act* 1993 (NZ), 1993/28.
57 *Human Rights Act 1998* (UK), c 42.
58 *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948).
59 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, [*ECHR*].
60 *ECHR*, Article 10.
61 *UDHR*, Article 8(2); *German Art Copyright Act*, section 24.
62 *German Art Copyright Act*, section 24.
63 Council of Europe, PA, *Resolution 1165: Right to Privacy*, Debates, 24th Sitting (1998) at [11], cited in *supra* note 12 at 276. See also *supra* note 10 at [95].

A. *The Ideal Approach – Creating A General Informational Privacy Law By Statute*

The Singapore Parliament should spearhead the reform and creation of a general informational privacy law in Singapore. Compared to the courts, Parliament is better placed to ensure that a comprehensive and effective law is enacted in Singapore, as they can commission a more extensive study of International Law instruments such as the ECHR and the statutes or codes adopted in foreign countries such as France and Germany, which have been successful in the protection of informational privacy.[64]

The creation of a general informational privacy law by statute will also provide a more expedient protection of informational privacy as compared to a common law development, which would depend on the specific facts of the cases brought to court, and hence take years to provide a comprehensive and effective protection of informational privacy.[65]

The qualified nature of the right will also be better entrenched under this approach, because the statute can include a provision (like in the ECHR) that reflects the need for the protection of informational privacy to be balanced against other competing interests.

Notwithstanding the above, there are still objections to the creation of a general informational privacy law by statute. In *Wainwright v Home Office*,[66] Lord Hoffmann preferred a case-by-case approach to the development of informational privacy law, as he doubted "the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case".[67] In "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression",[68] Professor George Wei also argues that any informational privacy law in Singapore should be developed on a "case-by-case, step-by-step [basis which would lead] to greater clarity and coherence", as "the establishment of [an informational privacy law] on the back of policy (as opposed to close case law analogy) by way of contrast is said to open the door to a period of uncertainty".[69]

Yet, these doubts are unjustified, as the experiences of the ECHR, France and Germany show that it is possible to have a general law that sufficiently protects informational privacy without resulting in uncertainty.[70] The ECHR has established itself as one of the most effective instru-

64 *Supra* note 43 at [229], where Lindsay J concluded that "so broad is the subject of privacy and such are the ramifications of any free-standing law in the area that the subject is better left to Parliament which can, of course, consult interests far more widely than can be taken into account in the course of ordinary *inter partes* litigation".

65 *Supra* note 37 at [21]. See also *supra* note 52 at [1.02].

66 *Wainwright v Home Office* [2004] 2 AC 406.

67 *Ibid* at [18].

68 *Supra* note 37.

69 *Ibid* at [21], [84] and [88].

70 The uncertainty that arises is not a result of the adoption of a general law vis-à-vis a case-by-case approach, but rather the balance that the courts must strike between the protection of informational privacy

ments for the protection of human rights, and in particular the right of informational privacy, in the world.[71] In France, although informational privacy law is merely one area protected by the more general right to respect for private life under Article 9 of the Civil Code, there is sufficient certainty in the law, and claimants can predict the outcome of their cases.[72] Likewise in Germany, there is sufficient certainty even though the protection of informational privacy is by virtue of a general law which is found collectively under the German Constitution, Civil Code and Art Copyright Act.[73]

1. *The European Convention for the Protection of Human Rights and Fundamental Freedoms*

The ECHR was the first comprehensive international human rights treaty,[74] and entered into force in September 1953. It expressly requires contracting states to secure the rights and freedoms under the convention to everyone within their jurisdiction.[75] This includes the protection of the right of privacy, and informational privacy, under Article 8, which is often balanced against the right to freedom of expression under Article 10.

Article 8

> (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 a democratic society in the *interest of national security, public safety or the economic well-being of the country*, for the prevention of disorder or crime, for the protection of

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and the freedom of expression (i.e. the fact-sensitive nature of informational privacy law) which exists regardless of the approach adopted. Hence, a general informational privacy law does not result in greater uncertainty as compared to a case-by-case approach, and critics have misplaced their understanding of the uncertainty that lies in a general informational privacy law. In fact, the case-by-case development of the law in the UK has led some sections of the media to call for comprehensive legislation on privacy because of the uncertainty of "judge-created" law (see s*upra* note 52 at [1.02]).

71 Peter Danchin & Lisa Forman, "The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities" in Peter Danchin & Elizabeth Cole, eds, *Protecting the Human Rights of Religious Minorities in Eastern Europe* (New York: Columbia University Press, 2002).

72 *Supra* note 52 at [3.178]-[3.187]. See also Gordley & von Mehren, *supra* note 12 at 269-270 and 290-291.

73 *Supra* note 52 at [3.188]-[3.203]. See also Gordley & von Mehren, *supra* note 12 at 270-275 and 291-292.

74 See *Halsbury's Laws of England*, vol 8(2), 4th ed(London, UK: Butterworths, 1996) at 123.

75 *Supra* note 63 at [12] cited in *supra* note 12 at 276. See also *Costello-Roberts v The United Kingdom*, No 13134/87 (25 March 1993).

health or morals, or for the *protection of the rights and freedoms of others*.

Article 10

(1) Everyone has the *right to freedom of expression*. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In balancing the protection of private life against the freedom of expression, the European Court of Human Rights considers the contribution that the information has to the debate of general interest to be the decisive factor.[76] For instance, the European Court of Human Rights has found that there was a violation of Article 8 where information relating to an individual's private life was not "a matter of general importance and of public concern",[77] but not where the information was a news item of "major public concern" such as the comparison of monthly subscription rates of newspapers.[78] In *Von Hannover v Germany*,[79] the European Court of Human Rights also expressly held that "the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, could not be deemed to contribute to any debate of general interest to society despite the applicant being known to the public".[80]

Hence, the protection of the qualified right of informational privacy under the ECHR is fact-sensitive, and largely dependent on the circumstances, in particular the public interest of the information in question, of each case.

76 *News Verlags GmbH &Co. KG v Austria*, No 31457/96 (11 January 2000); *Krone Verlag GmbH & Co. KG v Austria*, No 34315/96(26 February 2002); *Von Hannover v Germany*, No 59320/00 (24 June 2004).
77 *Tammer v Estonia*, No 41205/98(6 February 2001).
78 *News Verlags GmbH & Co. KG v Austria*, No 31457/96 (11 January 2000).
79 *Von Hannover v Germany*, No 59320/00 (24 June 2004).
80 *Ibid* at [65].

2. *France*

A similarly broad approach has been adopted in France, and French law provides an extensive protection of informational privacy by virtue of Article 9 of the French Civil Code (*Code Civil*):

Article 9

> Each person has the *right to respect for his private life*.
>
> Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an *invasion of personal privacy*; in case of emergency those measures may be provided for by interim order.

The "right to respect for [one's] private life" in the first paragraph, and the reference to the prevention of "an invasion of personal privacy" in the second paragraph of Article 9 clearly establishes the right of privacy, which necessarily includes the protection of informational privacy.

This protection is recognised by the highest court in France, the Court of Cassation (*Cour de Cassation*), which has granted the protection of information (including photographs) regarding a person's love life,[81] emotional life,[82] friendships, family circumstances, leisure activities, political opinions, trade union or religious affiliation and state of physical[83] and emotional[84] health.[85]

Notwithstanding, this right is still qualified, and must be balanced against the right to freedom of expression under Article 11 of the Declaration of the Rights of Man and of the Citizens (*Déclaration des droits de l'Homme et du Citoyen*):

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81 Cass civ 2e, 8 July 1981, arrêts no 1.013, pourvoi No 80-12.286, 80-13.079.The *Cour de Cassation* held that the plaintiffs (a famous singer and his companion) could recover damages from the defendants (the newspaper *Paris-Match*) for publishing a picture of the plaintiffs embracing in a public place, as this constituted an injury to their right to their image and personality.

82 Cass civ 2e, 5 December 1979, arrêts no 1.032, pourvoi No 78-13.614.The *Cour de Cassation* held that the defendant (the newspaper *Paris-Match*) was liable for a violation of privacy for publishing an article that "discussed the emotional life of Mrs. Sukarno [widow of the president of Indonesia]", who was involved in an altercation with Beatrice Chatelier (the former wife of Eddie Barclay), "for the handsome eyes of a Parisian playboy".

83 Cass civ 1e, 10 June 1987, pourvoi No 86-16.185. The *Cour de Cassation* held that the defendant (a newspaper company) had violated the plaintiff's right to respect for her private life, by publishing a photograph of the plaintiff with her eyes protected by glasses and her face showing signs of suffering and the effects of her illness, because it showed the actress marked by "suffering and wasting physically".

84 Cass civ 2e, 27 April 1988, pourvoi No 86-13.303. The *Cour de Cassation* held that the defendant (the journal *La Haute-Marne Libérée*) had violated the plaintiff's right to a private life, by "divulging information on the health" of the plaintiff who had been suffering from nervous depression.

85 *Supra* note 12 at 269.

Article 11

> The free communication of ideas and opinions is one of the most precious of the rights of man; every citizen can then freely speak, write, and print, subject to responsibility for the abuse of this freedom in the cases is determined by law.

3. *Germany*

Germany has adopted a slightly different approach from the ECHR and France, where a general informational privacy law has been encapsulated in a single provision. Instead, a general informational privacy law in Germany has been collectively created by virtue of multiple sources of law – the German Constitution, Civil Code and Art Copyright Act ("the German Codes").

(a) *The Constitution and Civil Code:* Informational privacy is protected in Germany under the Constitution and the Civil Code, which recognise a general right of personality.

The Constitution of Germany: Basic Law for the Federal Republic of Germany (*Grundgesetzfür die Bundesrepublik Deutschland*)

Article 1: Human Dignity

> (1) *Human dignity shall be inviolable*. To respect and protect it shall be the duty of all state authority

Article 2: Personal Freedoms

> (1) Every person shall have the *right to free development of his personality* insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

The German Civil Code (*BürgerlichesGesetzbuch*)

§ 823: Liability in Damages

> (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or *another right* of another person is liable to make compensation to the other party for the damage arising from this.

The general right of personality, which includes the right of informational privacy, is a basic right constitutionally guaranteed by Articles 1 and 2 of the Constitution, and is regarded as "anoth-

er right" protected under the § 823(1) of the Civil Code.[86] For instance, in a case involving the wife of Prince Friedrich Wilhelm of Prussia (the plaintiff) and a newspaper company (the defendant), which had published an article about the plaintiff's intention to divorce, the Higher Regional Court of Hamburg (*Oberlandesgericht*, *Hamburg*) determined that there was an infringement of the plaintiff's informational privacy under Articles 1 and 2 of the Constitution read with § 823(1) of the Civil Code as "the private or intimate sphere is protected in principle by Articles 1 and 2 of the Constitution".[87]

Like the position under the ECHR and French Civil Code, the right of informational privacy under the German Constitution and German Civil Code is merely a qualified right, and its protection may be limited by the freedom of expression[88] and the public interest in receiving information concerning, *inter alia*, figures of contemporary history.[89]

(b) *The German Art Copyright Act*: The German Art Copyright Act also protects informational privacy by preventing the dissemination of pictures (photographs) of an individual without his consent under § 22. Like the Constitution and Civil Code, the Art Copyright Act does not provide absolute protection of informational privacy, and is limited by the public interest in areas of contemporary history (§ 23(1)(1)) and the administration of justice and public security (§ 24).[90]

86 *Bundesgerichtshof*, 1 ZR 49/97 (1 December 1999).

87 *Oberlandesgericht, Hamburg*, 1970 NJW 1325 (26 March 1970), cited in *supra* note 12 at 291.

88 The Constitution of Germany: Basic Law for the Federal Republic of Germany, Article 5.

89 A figure of contemporary history is an individual or group of individuals who play a role in public life, such as in art, politics, science or sport. See *Oberlandesgericht, Hamburg*, 1970 NJW 1325 (26 March 1970).

90 Although §§ 22-24 require a balancing of interest, the Federal Court of Justice of Germany (German: *Bundesgerichtshof*) seems to have tilted the balance in favour of the right to privacy. For instance, although § 23(1)(2) permits the dissemination of images of people who appear incidentally in a landscape, the Federal Court has restricted this exception, and found that the taking of "street pictures of people who are visible to journalist in their everyday appearance" would be a violation of the right to one's image in so far as there was no public interest concerned (*Bundesgerichtshof*, 165 NJW 1374 (15 January 1965), cited in *supra* note 12 at 270).The Federal Court has also restricted the exception under § 23(1)(1). In the highly publicised privacy case involving Princess Caroline of Monaco (the plaintiff) and various German publishers (the defendants) who had published various photographs of the plaintiff, the Federal Court determined that although the plaintiff was a person belonging to the contemporary history, "the use of pictures of persons belonging to the contemporary history without their consent [under § 23(1)(1) was] not without its limits". The court held that the "legitimate public interest ends with the house door of the person affected", and that they can also "reserve a place outside their own home from which the larger public is excluded … such as an exclusive part of a restaurant or hotel, sports box, telephone booth or under some circumstances even in open nature, so far as it does not appear to the person affected as a public place" (*Bundesgerichtshof*, BGHZ 131, 332 (19 December 1995),cited in *supra* note 12 at 271). This judgment was upheld by the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) who explained that "the development of personality cannot be properly protected unless, irrespective of their behaviour, the individual has a space [including outside the home] in which he or she can relax without having to tolerate the presence of

The German Art Copyright Act, also known as the German Act on the Protection of the Copyright in Works of Art and Photographs (*Kunsturhebergesetz*)

§ 22: Right to One's Own Image

Images shall be disseminated or publicly displayed only with the consent of the person portrayed. In cases of doubt, consent is deemed to have been given when the person portrayed accepts payment to allow himself to be portrayed. For ten years after the death of the person portrayed, the consent of his relatives is necessary. Relatives in this sense include the surviving wife and children of the person portrayed, and, if neither the wife nor children are available, the parents of the person portrayed.

§ 23: Exceptions to § 22

(1) It is permitted to disseminate or to publically display without the consent required by § 22:

1. Images in the *area of contemporary history*;

2. Images in which the people appear only as an incident in a landscape or similar locale;

3. Images of gatherings, processions, and similar events in which the person in question was a participant; or

4. Images that are not made upon order insofar as their dissemination and display by which a legitimate interest of the person portrayed is violated, or, in the event of his death, the interest of his relatives.

(2) Nevertheless, this authority does not extend to a dissemination and display by which a legitimate interest of the person portrayed is violated, or, in the event of his death, the interest of his relatives.

photographers or cameramen" (*Bundesverfassungsgericht*, BVerfG 101, 361 (15 December 1999), cited in *supra* note 12 at 273). The fact that the photographs in question were taken from a distance also persuaded the Federal Constitutional Court's decision that images had violated the plaintiff's informational privacy; and since a majority of photographs invading personal privacy are likely to be taken secretly from a distance, it seems that the German courts have tipped the balance of interest in favour of one's right to privacy.

§ 24: Exceptions in the Public Interest

> Public officials may duplicate, disseminate or publicly display images for purposes of the *administration of justice and public security* without the consent of the person entitled, that is, the person portrayed or his relatives.

Hence, German law allows for the protection of the qualified right of informational privacy by virtue of the German Codes, which collectively create a general informational privacy law.

4. *Singapore – Drawing from the experiences of the ECHR, France and Germany*

The experiences of the ECHR, France and Germany evince the effectiveness of statutory protection of informational privacy, and thus support the creation of a general informational privacy law by statute in Singapore.

The clear examples of the codification of informational privacy law under the ECHR, French Civil Code and the German Codes provide guidance for the Singapore Parliament in the drafting of a statutory provision to protect informational privacy in Singapore. The ECHR and French Civil Code illustrate how a general informational privacy law can be encapsulated in a single provision, whilst ensuring that there is sufficient protection; and the German Codes show how provisions can collectively create a general informational privacy law.

The Singapore Parliament should pay particular attention to the ECHR, as it seems to be the best drafted of the three.The ECHR encapsulates their general informational privacy law under a single provision (Article 8), and unlike German law, the reader will be able to ascertain the extent of his rights without having to refer to other laws and codes – there will be the elimination of incidents involving the misconstruction of the scope of protection of informational privacy under codes that only address specific areas (i.e.the German Art Copyright Act which only protects images and not information *per se*). The ECHR also goes further than French law,[91] as the qualified nature of the right is clearly highlighted to the reader under Article 8(2), and the reader would immediately be aware of the limits of his right of informational privacy.

Furthermore, the adoption of the ECHR would be accompanied by the decisions of the European Court of Human Rights, which would provide guidance in the interpretation of the qualified right of informational privacy, and further ensure certainty in the application of a general informational privacy law in Singapore. Although the adoption of the French Civil Code or German Codes

91 As shown above with reference to Article 11 of the French Declaration of the Rights of Man and of the Citizens (*Déclaration des droits de l'Homme et du Citoyen*): The qualified nature of the right in France is only made known when Article 9 of the French Civil Code is read with Article 11 of the Declaration of the Rights of Man and of the Citizen.

would also be accompanied by the decisions of their courts,[92] the decisions of the European Court of Human Rights would be of greater value because of its influence on the extent of the protection of informational privacy in the 47 member states of the ECHR, as compared to the intra-territorial influence of the French and German decisions.[93] This would ensure that the development of informational privacy law in Singapore would be consistent with the general development of the law in multiple jurisdictions, rather than with the unique developments of the law in an individual jurisdiction.

Hence, a general informational privacy law in Singapore should be created by statute, and the Singapore Parliament should consider drafting the provisions in a similar fashion as the ECHR.

B. *The Alternative Approach – A Common Law Development Of Informational Privacy Law*

In the absence of action by Parliament, a common law development of the law would also suffice, as the experiences of the United Kingdom ("UK") and the United States ("US") reflect the ability of the courts to create law that adequately (albeit more slowly[94]) protects informational privacy.

1. *United Kingdom*

The experience of the UK in developing informational privacy law is particularly useful to consider, as it provides a clear example of how the law may evolve to protect informational privacy.

English law on informational privacy has undergone a drastic change-over the last 20 years. The present law in the UK ("English law") recognises a right of informational privacy under the *Human Rights Act 1998*[95] and the common law. This is a significant departure from the position in the twentieth century, where the courts had unequivocally expressed the absence of the right of privacy.

(a) *The old law – The absence of a right of privacy*: The position of English law on the protection of informational privacy prior to 2000[96] was discussed in *Kaye v Robertson*[97] where the Court of Appeal unanimously agreed upon the absence of a right of privacy under English law:

> "It is well-known that in English law there is no right to privacy, and

92 Case law in civil law jurisdictions is not binding precedent, and is merely of persuasive value.
93 *Supra* note 63 at [14] cited in *supra* note 12 at 277.
94 *Supra* note 37 at [21]. See also *supra* note 52 at [1.02].
95 *Human Rights Act 1998* (UK), c 42.
96 The year in which the *Human Rights Act 1998* came into force.
97 [1991] FSR 62 [*Kaye*].

> accordingly there is no right of action for breach of a person's privacy."[98]
>
> Glidewell LJ
>
> "This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens."[99]
>
> Bingham LJ
>
> "[The right of privacy] has so long been disregarded here that it can be recognised now only by the legislature."[100]
>
> Leggatt LJ

In *Kaye*, the plaintiff was injured in a car accident and sought an injunction to prevent the Sunday Sport newspaper (the defendant) from publishing an article which claimed that he had agreed to give an exclusive interview to the paper following the accident. In the absence of a right of privacy, the plaintiff had to adopt a "scatter-gun"[101] approach, and base his claim upon other well-established causes of action, including libel, malicious falsehood, trespass to the person, and passing off.

Although an injunction was ultimately granted based on the claim of malicious falsehood, the use of the "scatter-gun" approach clearly highlighted the "the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens".[102]

(b) *The transitional period – The right of privacy as an underlying value*: The enactment of the *Human Rights Act 1998*, which gave effect to the provisions of the ECHR, brought about a change in the approach towards the right of privacy, and informational privacy, under English law.

Whereas the right of privacy was previously not acknowledged to exist under English law, the right was now considered by the House of Lords to be an underlying value of the law. In *Wainwright v Home Office*,[103] the House of Lords had the opportunity to determine the effect of the

98 *Ibid* at 66.
99 *Ibid* at 70.
100 *Ibid* at 71.
101 *Supra* note 50 at 798.
102 *Supra* note 97 at 70 per Bingham LJ.
103 *Supra* note 66. The plaintiffs sought damages for the invasion of their privacy when the prison authorities had submitted them to a strip search in breach of the prison's own rules. Although the facts of the case do not specifically involve informational privacy, the judgment is useful for its discussion on the

Human Rights Act 1998 on the judicial remedies available for the invasion of privacy, and decided against the creation of a new tort of privacy. They explained that there was "a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself",[104] and claimed that such an approach would be in compliance with Article 8 of the ECHR insofar as the plaintiff has an adequate remedy such as an action for trespass to the person, breach of confidence or malicious falsehood.

Prior to the House of Lords judgment in *Wainwright*, the lower courts in the UK seemed to have also recognised the right of privacy as an underlying value of the law. In *Douglas v Hello! Ltd*,[105] the Court of Appeal[106] upheld the trial judge's decision that although the plaintiffs could not rely on any general law of informational privacy, there had been a breach of confidence that entitled the plaintiff to damages. In coming to his judgment, the trial judge seemed to have imposed a constructive obligation of confidence on the defendants, which was rooted in the recognition of the right of privacy under the *Human Rights Act 1998*. Hence, it seems that the UK courts had adapted the action for a breach of confidence to provide a remedy for the invasion of the plaintiff's privacy.

Consequently, although English law during this period was slowly evolving to allow a greater protection of informational privacy, it still lacked an adequate and effective remedy.

(c) *The current position – The emergence of a right of privacy*: A right of informational privacy was finally recognised under English law in *Campbell v MGM*,[107] where the House of Lords expressly referred to the protection of informational privacy in order to prevent "distress and potential harm"[108] to the victim.

In *Campbell v MGM*, the plaintiff was a famous fashion model (Naomi Campbell) who brought proceedings for damages against the defendant newspaper for publishing private information about the therapy she had undergone for drug addiction. The House of Lords avoided an analysis of the issues under an action for a breach of confidence, and determined that informational privacy

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creation of a general tort of privacy.

104 *Ibid* at [31] per Lord Hoffmann.

105 [2003] 3 All ER 996 (Ch); [2006] 4 All ER 128 (CA). The plaintiffs had sold the exclusive right to publish photographs of their wedding to OK! Magazine, and took measures to exclude public viewing of the wedding and to prevent guests from taking any photographs. However, the defendants still managed to obtain photographs of the wedding secretly taken by a freelance photographer, and the plaintiffs sought an injunction to prevent the publication of the photographs by the defendant.

106 Although the case subsequently went to the House of Lords, the issues appealed did not involve the Douglas' claim for a breach of confidence.

107 *Supra* note 39.

108 *Ibid* at [158] per Baroness Hale.

would be protected under a new species of tort[109] which dealt with informational privacy through the framework of the ECHR (namely Articles 8 and 10), which was incorporated under the *Human Rights Act 1998*.[110] In coming to their judgment, Lord Nicholls established a two-stage test to determine whether there was an invasion of informational privacy, which was later affirmed by the House of Lords in *Re S (A Child)*:[111]

> (1) Whether the subject matter of the publication would be such as to give rise to a "reasonable expectation of privacy"; and
>
> (2) Whether the publication was justified in light of any countervailing considerations.

Based on this test, it is evident that the right of informational privacy under English law is qualified, as the second stage of the test requires a balance to be struck between the right of informational privacy (i.e. under Article 8 of the ECHR) and other rights (i.e. the freedom of expression under Article 10 of the ECHR).

The UK courts have subsequently adopted this approach to protect informational privacy.[112] For example, in *Mosley v News Group Newspapers Ltd*,[113] the High Court explained that there was a right of informational privacy under English law that existed outside of the law of confidence, and awarded damages for the injury to feelings, embarrassment and distress suffered by the former President of the Formula 1 governing body, Mr. Max Mosley, when the defendant newspaper published an article with photographs showing the plaintiff involved in a private sado-masochistic "Nazi" orgy with five women. In *CTB v News Group Newspaper Ltd,*[114] the High Court recognised the right of informational privacy, and granted an unnamed footballer[115] an interim injunction against the defendant newspaper from publishing private details of his alleged extra-

109 *Ibid* at [15].

110 Note that although the House of Lords ruled in favour of the plaintiff by a bare majority (3:2), they had agreed on the need to protect informational privacy outside of the framework of an action for a breach of confidence, and the division in opinion was on whether the balance was in favour of the right of informational privacy or the right to freedom of expression (see *supra* note 39at [36] per Lord Hoffmann).

111 [2005] 1 AC 593.

112 See *McKennitt v Ash* [2008] QB 73; *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57; *Lord Browne of Madingley v Associated Newspapers* [2008] QB 103; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777; *Murray v Express Newspapers* [2009] Ch 481; *CTB v News Group Newspapers Ltd* [2011] EWHC 1232; and *Jonathan Spelman v Express Newspapers* [2012] EWHC 355.

113 [2008] EWHC 1777.

114 [2011] EWHC 1232.

115 The footballer's identity was subsequently revealed to be Welshmen Ryan Giggs. Liberal Democrat MP John Hemmings had used parliamentary privilege to name Giggs in the House of Commons (see *Ryan Giggs named by MP as injunction footballer* (23 May 2011), online: BBC <www.bbc.co.uk>).

marital relationship with Ms Imogen Thomas. In the recent case of *Jonathan Spelman v Express Newspapers*,[116] the High Court also recognised the right of informational privacy,[117] and dismissed the claimant's application for an interim injunction, as although the claimant had a reasonable expectation of privacy, there were public interest considerations that justified the publication of the private information obtained by the defendants.[118]

Hence, it is certain that English law now allows for the protection of informational privacy.

(d) *Relevance to Singapore*: The present state of informational privacy law in Singapore seems to reflect an intermediate position between *The Old Law* and *The Transitional Period* in the UK. In the absence of a law protecting informational privacy *per se*, a victim of any invasion would have to adopt a "scatter-gun" approach, and base his claim upon other causes of action including the tort of harassment in *Malcomson* and a breach of confidentiality in *X Pte Ltd v CDE*. Yet, as discussed in Parts III and IV, such an approach is insufficient because it fails to provide an adequate and effective remedy for an invasion of informational privacy.

Consequently, the Singapore courts should follow the approach of the UK courts, which have abandoned their position under *The Old Law* and *The Transitional Period*, and created a new species of tort to protect informational privacy. The evolution of English law evinces the inadequacy of the "scatter-gun" approach and the adoption of proxy causes of action (including the breach of confidence) to protect informational privacy, and highlights the need for the development of a tort of informational privacy in Singapore. In particular, the two-stage test espoused by Lord Nicholls should be adopted, as it clearly establishes the scope and limitations of the protection of informational privacy.

Furthermore, although the experience of the UK is distinguishable as its evolution was the result of the enactment of the *Human Rights Act 1998* which is inapplicable in Singapore, the absence of an equivalent statute is unlikely to affect the creation of a tort to protect informational privacy in Singapore, because:

a. The Singapore High Court in *Malcomson* and *X Pte Ltd v CDE* has already implicitly recognised a right of privacy in Singapore,[119] and any evolution of the law to protect informational privacy would merely be an extension of the law; and

b. It is arguable that there is already an inferred right of privacy under Article 9 of

116 [2012] EWHC 355. The judgment was published on 24 February 2012.

117 *Jonathan Spelman v Express Newspapers* [2012] EWHC 355 at [31] where the High Court applied Lord Nicholls' two-stage test.

118 *Ibid* at [100]-[108].

119 See above, Section B: The Adoption of Proxy Causes of Action under the Common Law.

the Singapore Constitution.[120]

Hence, the Singapore courts should seek the guidance of the UK courts in their creation of a tort of informational privacy in Singapore.

2. *United States*

The experience of the US also evinces the ability of the common law to successfully protect informational privacy.

Informational privacy in the US is protected under the tort law of each individual state. Notwithstanding the differences between the specific informational privacy laws of each state, the general principles of the tort of privacy in the US can be found in the Restatement (Second) of Torts (1997):[121]

§ 652 A: General Principle

> (1) One who *invades the right of privacy* of another is subject to liability for the resulting harm to the interest of the other.
>
> (2) The right of privacy is invaded by:
>
> (a) unreasonable intrusion upon the seclusion of another, as stated in § 652 B; or
>
> (b) appropriation of the other's name or likeness, as stated in § 652 C; or
>
> (c) *unreasonable publicity given to the other's private life*, as stated in § 652 D; or
>
> (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652 E.

§ 652 D: Publicity Given to Private Life

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for *invasion of his privacy*, if the matter published is of a kind that:
>
> (a) would be *highly offensive to a reasonable person*; and

120 See above, Part III, Section A: There Is No Expressed Constitutional Right of Privacy.

121 Restatements of the Law in the US are not a form of statute or legislation, but merely a codification of the legal doctrines developed under the common law in the US.

(b) is not of *legitimate concern to the public*.

Like the informational privacy laws discussed above, the protection of informational privacy in the US is not absolute, and must be balanced against the "legitimate concern [of] the public". For example, in *Cape Publications Inc v Bridges*,[122] the District Court of Appeal of Florida allowed the disclosure of private information, and determined that "just because the story and the photograph may be embarrassing or distressful to the plaintiff does not mean the newspaper cannot publish what is otherwise newsworthy"; whereas in *Diaz v Oakland Tribune*,[123] the Court of Appeal of California upheld the plaintiff's right of information privacy because there was no connection between the information disclosed and the public interest alleged by the defendants.

Notwithstanding, the position adopted in the US seems to be narrower than that of the UK, as the requirement under § 652 D that the information must be "highly offensive to a reasonable person" further limits the scope of protection of, the already qualified, right of informational privacy. The US approach draws a distinction between private information that is highly offensive to the reasonable person (and protected by the law), and private information that is not highly offensive (and hence publishable). It suggests that an intruder would be allowed to invade the privacy of a victim insofar as he avoids the category of private information that would be highly offensive to a reasonable person, and weakens the protection of informational privacy that is already limited by other competing interest such as the freedom of expression and national security.[124] Hence, the adoption of the US approach would result in an inadequate protection of informational privacy.

Consequently, the Singapore courts should avoid the narrow approach adopted by the US, as informational privacy and the "sacred precincts of private and domestic life"[125] should be protected regardless of whether the information is highly offensive or not.

C. *Summary of Part V*

The experiences of the foreign jurisdictions examined thus evince the effectiveness of either a statutory or common law approach towards the protection of informational privacy. The ECHR,

122 423 So 2d 426 (Fla App 1982); 431 So 2d 988 (Fla 1983). The defendant newspaper had published an article of a "typical exciting emotion-packed drama" where the plaintiff had been abducted by her estranged husband at gunpoint and forced to disrobe in her husband's home to prevent her escape, and a photograph of the plaintiff clutching a dish towel to her body in order to conceal her nudity as she was escorted to the police car in full public view.

123 139 Cal App 3d 118 (1983). The plaintiff was the student body president at the College of Alameda, and the defendants had disclosed informational that the plaintiff was a transsexual. The court determined that the right of privacy should be upheld, as the fact that the plaintiff was a transsexual did not adversely reflect on her honesty or judgment, and her ability to act as the student body president.

124 *Supra* note 52 at [3.61]-[3.89].

125 *Supra* note 1.

French Civil Code and German Codes are clear examples of how informational privacy is protected under codified laws, and the experiences of the UK and US show how protection is provided under the common law.

Hence, the adoption of either approach (under statute or the common law) will ensure the sufficient protection of informational privacy and the "sacred precincts of private and domestic life"[126] in Singapore, and represent a huge step forward in informational privacy law in Singapore.

Yet, it would be ideal for a general informational privacy law to be created by statute, as compared to a common law development, an informational privacy law created by statute would be more comprehensive because of Parliament's ability to commission extensive studies of the laws in foreign jurisdictions, and more expedient because it does not require a case-by-case development of the law. Hence, the Singapore Parliament should spearhead the reform and creation of a general informational privacy law in Singapore.

VI. CONCLUSION

It is evident that the development of informational privacy law in Singapore has fallen behind many of the major jurisdictions today. While a continued reliance on a "scatter-gun" approach and a course of action for a breach of confidence can provide "substituted" relief for victims of an invasion of informational privacy, such an approach merely circumvents the problem, and delays the creation of a law which, as evinced in the other jurisdictions, is necessary to cope with the advent of technological and societal changes.

The experiences of the civil law and common law jurisdictions examined in this article have shown that informational privacy can be adequately protected either under a statutory or a common law regime, and the author has argued that it would be ideal for the Singapore Parliament to spearhead the creation of an informational privacy law in Singapore due to their ability to commission a more extensive study of the laws adopted in foreign jurisdictions. Informational privacy law should also only confer a qualified right of privacy, and the protection of informational privacy in Singapore would have to be balanced against other competing interests such as the right to freedom of speech under Article 14 of the Singapore Constitution and national security.

This article has thus made a case for the protection of informational privacy in Singapore, and it is time that the Singapore Parliament or courts created an informational privacy law in Singapore.

126 *Ibid*.