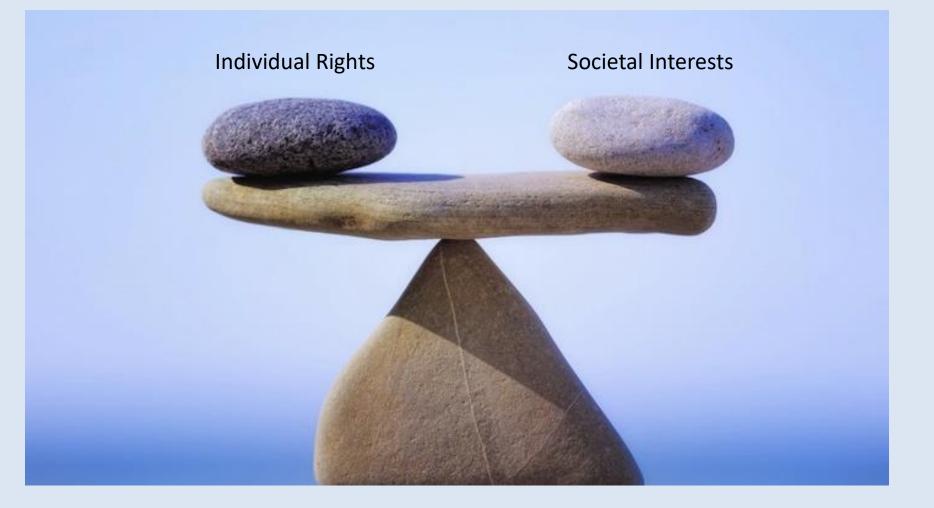
### Finding the Right Balance and the Primacy of Rights

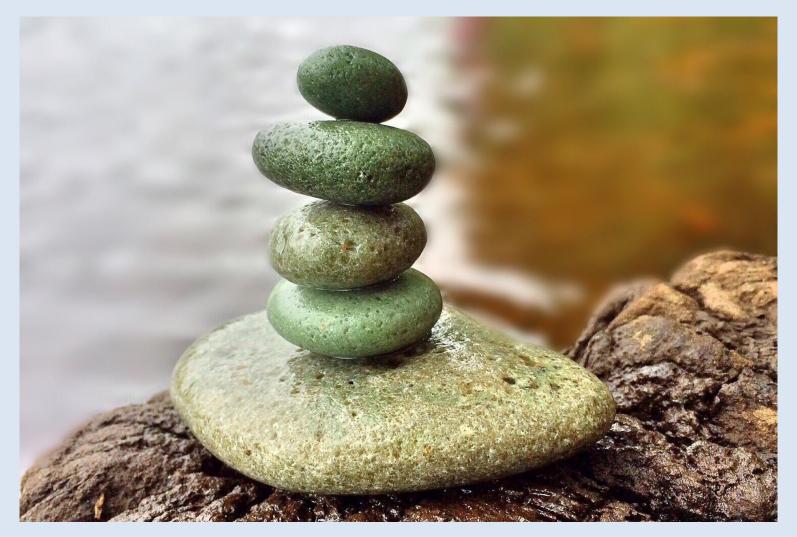
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Serious Crime Victim's Rights Protection of the Public Convicting the Guilty

**Individual Rights** 

## **Finding the Right Balance**

- In finding the right balance,
  - start with the primacy of rights, then
  - have regard to the nature of the interest at stake, then
  - justify by demonstrating the rationality and proportionality of the means and effects of the law

# **Primacy of Rights**

- Some rights are absolute and cannot be subject to restrictions, e.g. freedom from torture, cruel and degrading treatment and punishment, fair trial.
- Very serious violations of rights cannot be justified. Where "the impugned measure has destroyed 'the essence of the right'" (Hysan Development v Town Planning Board (2016) 19 HKCFAR 372, [113])

- Three recent cases from the CA and CFI have accorded primacy to privacy rights in relation to police search and seizure powers.
  - "Judicial gatekeeping": When the police search and seize, the balancing of individual privacy rights against societal interests must be done <u>before</u> the search by a person capable of acting judicially.
  - Any exception must be certain and ascertainable and be proportionate with adequate safeguards against executive abuse.

- Power of customs officers to enter and search non-domestic premises without a warrant is unconstitutional.
  - Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise [2016] 2 HKLRD 1372 (CA)

- Police power to search an apprehended person does not allow police to search person's mobile phone without a warrant unless there are exigent circumstances.
  - Sham Wing Kan v Commissioner of Police [2017] 5
    HKLRD 589 (CFI)

- Participant surveillance (e.g. secret recordings by undercover agents) authorised by law without judicial warrant is constitutional.
- Cameras and tracking devices used without trespass or other forms of intrusive interference also constitutional when authorised by law without judicial warrant.
  - HKSAR v Yu Lik Wai William [2019] 1 HKLRD 1149
    (CA)

BUT, on the proportionality test, I cannot agree that it is appropriate to ask the lighter test of whether the restriction was *"manifestly without* <u>reasonable</u> foundation".

 This is not giving rights primacy. Considerations of "operational efficiency of departments who are responsible for public safety and security" will always appear to be "reasonable".

#### **Outbalancing Right to Privacy**

Operational efficiency Serious Crime Victim's Rights Protection of the Public Convicting the Guilty

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#### **THANK YOU**

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