

# Finding the Right Balance and the Primacy of Rights

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What does the right balance look like?



# What does the right balance look like?




What does the right balance look like?



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# What does the right balance look like?



Individual Rights

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

# 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])



# Primacy of Privacy Rights

- 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 before 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.

# Primacy of Privacy Rights

- 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)

# Primacy of Privacy Rights

- 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)

# Primacy of Privacy Rights

- 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)

# Primacy of Privacy Rights

BUT, on the **proportionality** test, I cannot agree that it is appropriate to ask the lighter test of whether the restriction was “*manifestly without reasonable 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

Individual Rights

A balance scale is shown against a blue gradient background. The scale consists of a wooden beam balanced on a triangular wooden base. On the left side of the beam, a dark, textured stone is placed. On the right side, a lighter, smoother stone is placed. The scale is tilted slightly to the right, suggesting that the items on the right are heavier or more significant in this context.



**RIGHT TO PRIVACY**

**THANK YOU**

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