





CHAPTER 7

Search and seizure

Learning objectives for Chapter 7

After completing this chapter you should be able to:

91

- *Explain the prohibition on arbitrary interference with privacy*
 - *Explain the responsibilities of police officers during searches, and the role of police officers in respecting and protecting the right to privacy*
 - *Describe the rights of persons whose person, property or buildings are being searched*
 - *Explain the use of force during searches*
 - *Explain the consequences of unlawful searches*
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Chapter 7

Search and seizure

Contents

- 7.1. Introduction**
 - 7.2. Searches – ‘P.L.A.N.’**
 - 7.3. Search with a warrant**
 - 7.4. Search without a warrant**
 - 7.5. Results of unlawful searches**
 - 7.6. Searching persons**
 - 7.7. Use of force during search and seizure**
 - 7.7.1. Use of force to enter and search premises and property
 - 7.7.2. Use of force to search persons
 - 7.8. Seizure of property**
 - 7.9. Summary**
 - 7.10. Questions for self-evaluation**
-



7.1. Introduction

Police actions of search and seizure are often fundamental to the investigation, prevention or apprehension of crime. However, the conduct involved in such cases carries the potential for very serious infringements of a person's rights. Fundamental rights include the right to freedom and security of the person, and to privacy. In Article 12 of the *Universal Declaration of Human Rights* (also Article 17, ICCPR) it is stated that:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

The existence of these rights means that the State (that is, police officers) may not search a person's home, property or body and cannot seize their belongings, or (for example) open their mail or tap their phones, without being authorised by law to do so.

It is important to realise that these rights are not absolute as they can be, and are, limited by the same law that creates the power to search. Police officers have lawful powers to search and seize property. The power to search persons, private property and buildings is a power essential to prevention and detection of crime, and other police functions.

As a matter of general principle, if police officers have reasonable suspicion that a person has committed a crime, or there are reasonable grounds to believe that a specific article was used to commit a crime or can provide evidence that a crime was committed or that it will be used in the commission of a crime, a person's right to privacy and freedom and security may be limited by police officers, by conducting searches or by seizing property according to the applicable law. All interference with privacy should be reasonable in each particular circumstance and should, therefore, only take place when absolutely necessary, taking into account the principle of proportionality.

Police officers should always act in an ethical and dignified manner. Search and seizure, especially on a large scale, has the potential to disrupt and frustrate people, who might then be less inclined to then or later help the police with their investigations.

What follows below is not a lesson on the operational aspects of how to conduct a search or seize operation, but rather a focus on the human rights principles applicable during these police activities. Domestic legislation may differ on specific procedures and guidelines.

7.2. Searches – 'P.L.A.N.'

When searching a person or property, police officers should always act within the law (**Legality**). They should only act when it is necessary to act (**Necessity**); they should, for example, only search when absolutely necessary, using only the minimum force or action that is required to solve or deal with each situation or problem (**Proportionality**). It is also important for police officers to act in an ethical way and to realise that after any action of a police officer there will be the question of accountability for these actions (**Accountability**). Altering the order of these phrases, one encounters the 'P.L.A.N.' concept again.



7.3. Search with a warrant

Depending on domestic legislation, when a police officer wishes to conduct a search, he or she must normally have a pre-issued warrant to search. This is a basic safeguard for the rights of individuals, and to ensure that police officers act lawfully.

The warrant is normally obtained from a judicial officer (judge, magistrate or even a commissioned police officer, depending on domestic legislation). The judicial officer will assess the information placed before him or her in the form of affidavits and use his/her discretion to decide if the search is justified, in which case a search warrant will be issued. A search warrant serves as a safeguard against unreasonable and unjustified infringements of the right to privacy, as the information on which a search will be conducted will be subject to independent scrutiny.

The search warrant will normally authorise the search of a specific person or premises or specific article. Where the operation allows the opportunity, it is always better to search with a warrant than without one. This has consequences for obtaining or not obtaining a conviction on any evidence uncovered.

The following procedures should be followed when effecting a search warrant:

- A warrant will normally be executed by day unless otherwise stated and where good reasons were given why it must be done at night.
- A warrant will normally be in force until executed, unless cancelled by the person who issued the warrant or a person with the same authority.
- After a search has been executed, all the items that were recovered should be listed on the warrant and a witness should sign the warrant. This will normally be the owner or occupier of the premises.
- A warrant should be executed only within the strict specifications mentioned within the warrant.
- A search must, as a general principle, be conducted in the presence of the owner or occupier of the premises.

There are, however, exceptions, which will be discussed under the following sections.

7.4. Search without a warrant

The general rule, as noted above, is that searches should be conducted with a warrant as a safeguard against unnecessary infringement on a person's basic human rights, especially the right to privacy. However, if the police officer believes on reasonable grounds that a search warrant will be issued to him or her if he/she applies for such warrant, and that the delay in obtaining such warrant would defeat the object of the search, he or she can execute the search.



Reasonable grounds can be described as follows:

"A police officer will be considered to have 'reasonable grounds' (grounds or facts) to suspect something or to believe that something is necessary to achieve a particular purpose only if:

- (a) He or she truly 'suspects' or 'believes' it;
- (b) His or her suspicion or belief is based on 'reasonable grounds'; and
- (c) Any reasonable person in the same circumstances, and in the light of the grounds that exist, would have entertained the same suspicion or would have believed the same thing.
- (d) Where a police officer searches under a specific legislative provision that does not require a search warrant."

There are also other instances in which a police officer can search without a warrant:

● **Upon arrest**

Police officers may search a person upon arrest. The reason for this is to secure the situation, to secure the arrested person in order to prevent him or her to injure himself or herself, to prevent a situation in which a police officer or any other person may be attacked, and to gain evidence against the arrested person. A search of any person must be conducted with strict regard to decency and order.

● **Consent**

Persons can consent to being searched. The courts would normally make very sure that all the requirements were met when acting without a warrant. The courts will be stricter because of the fact that an independent party did not form part of the decision-making process and so as to avoid unnecessary infringements on basic human rights.

7.5. Results of unlawful searches

Searching individuals and their property can be degrading to human dignity. Unlawful searches can amount to harassment of individuals or groups, and can also undermine trust in the police. The infringement will only be tolerated if it is reasonable, justifiable and necessary.

Unlawful searches may result in civil actions against the police, or even criminal charges against the police officer for common law crimes such as assault, malicious damage to property and theft, or disciplinary action against the police officers who conducted the unlawful search. The procedures and consequences may, however, differ from country to country.

Evidence obtained through unlawful searches may be deemed to be inadmissible in a court of law because of the fact that it was obtained in violation of an entrenched right and must, therefore, be excluded. Admission of evidence obtained in such a way would render a trial unfair and will be detrimental to the administration of justice. The result of unlawful searches can be acquittal of the accused person.



7.6. Searching persons

Searches should always be carried out having due regard to respect the human dignity of the person being searched.

The most common instance where persons are searched is after arrest (see 7.4. above). There are a few important aspects to remember when searching a person.

- A woman must be searched by a woman only, and if no female police officer is available, the search must be made by any woman designated for the purposes by a police officer. Men should also be searched by men.
- Personal searches (for example, cavity searches like vaginal and anal ones) may be undertaken only in private, and only by a medical practitioner. This is a very serious infringement on a person's right to privacy and human dignity. Such searches may be undertaken only if there are reasonable grounds to believe that an article that was involved in a crime, or that may be used in committing a crime, is hidden in that part of the body. This depends on domestic legislation. Modern technology like X-rays or non-intrusive measures may lower human rights infringements.

The principles of legality, necessity and proportionality should always be taken into consideration when searching a suspect. The principle of minimum force should also be taken into account during searches.

7.7. Use of force during search and seizure

Police who may lawfully search a person or property, or who may enter premises for the purposes of obtaining evidence, may use the reasonable force necessary to overcome any resistance against such search and entry to seize property. This means that police officers may use such force as may be reasonably necessary in the circumstances. The principles of proportionality and minimum force should lead the actions of the police.





7.7.1. Use of force to enter and search premises and property

Before any force may be used by police officers, they should first audibly demand entrance and provide reasons why they wish to enter the premises. If the circumstances permit, police may break down a door or a window to gain entrance. Police should not cause unnecessary damage to property. Force should be used only when resistance is offered, and then only as a last resort. It is not always necessary to damage property or use force in order to enter premises to conduct a search. Such conduct, as well as being wrong, puts the community off-side vis-à-vis the police. Police may, afterwards, have to give reasons to show why it was necessary, that it was proportional, and that they acted legally under the circumstances.

Use of force can only be lawful if the search was lawful.

Search of Premises and the Use of Force - Notes

- Do not cause unnecessary damage to property.
- If you do not need to use force, you should not use force at all.
- Search only in places where articles may possibly be found.
- Inform the owner or occupier that you intend to conduct a search.
- Searches should normally take place in day-time.
- Provide a copy of the search warrant to the occupier of the building upon request or after the search.
- Minimum force and proportionality should guide the actions of police officers.

7.7.2. Use of force to search persons

As noted, police officers may search an arrested person upon arrest. If an officer needs to use force to search the person, it should only be the force necessary to overcome any resistance and to conduct the search. The principle of minimum force should, therefore, always be observed. Escalation of force and de-escalation of force should lead police actions. The more the resistance, the more force that can be used; if the person submits, police should immediately use less force (de-escalate).

7.8. Seizure of property

Seizure of property should be conducted in accordance with domestic legislation, and taking into account the basic rights of the person whose property is seized.

7.9. Summary

Search and seizure are important police functions, enabled by law but also limited by law and by human rights considerations. Searches can be executed with or without a warrant, depending on the circumstances. Police officers should always respect and protect the basic rights of the person being searched.



7.10. Questions for self-evaluation

- *Why is it good practice to obtain a search warrant before a search is undertaken?*
- *What can be the results of an unlawful search?*
- *May police officers search without a warrant?*
- *May police officers use force to conduct a search or to enter property in order to seize property? If so, what principles have to be taken into consideration?*
- *Why may male police officers not search female suspects?*