



Constitution Brief

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Summary

This Constitution Brief introduces the concept of self-determination and its evolution over time, and provides a survey of different approaches to self-determination from comparative constitutional practice.

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Self-determination

Amanda Cats-Baril

1. Background

Self-determination can be defined as (a) the act or power of making one's own decisions and determining one's own political status; or (b) the state of being free from the control or power of another.

The right to self-determination is a fundamental tenet of international law, influencing relationships between states and amongst the subunits and peoples who make up those states. Rooted in the politics of decolonization, the right to self-determination is now invoked by groups in a variety of political contexts around the world to support claims for secession, increased autonomy and democratic participation. It is used to support the coming together of nations, as in the reunification of Germany (1990), as well as the breaking up of nations, such as the former Yugoslavia.

Implementing the right to self-determination has always been complicated, involving a careful balancing of fundamental human rights and state interests, plus a perceived global interest in maintaining territorial integrity and sovereignty. International law principles such as *uti possidetis juris* (derived from the Latin phrase 'as you possess under law'), which holds that new states created in the wake of colonial empires should maintain old boundaries for the sake of stability, are raised as constraints on self-determination. As such, much of the international and constitutional practice of self-determination has centred on balancing state interests with peoples' rights.

2. Evolution of the concept of self-determination

The scope of self-determination depends in large measure on who or what is defined as the right-holder of self-determination. Given its historic ties to decolonization, self-determination was originally interpreted as a right that belonged to nations—that is, that each nation had a right to constitute an independent state. This is known as the 'principle of nationalities' and served as the basis for the foundation for many new states, including Austria, Estonia and Yugoslavia, in the decades following World War I.

With its incorporation in the Charter of the United Nations (1945), however, self-determination was defined as a right for all *peoples*, with no reference to nations. The term 'peoples' as an alternative to 'nations' represented a critical shift in understanding of who the true

beneficiaries of international law are generally, and who has a right to self-determination specifically.

In 1966, the right of all peoples to self-determination was also enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 1, common to both covenants, reads: 'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

This entailed another shift in the understanding of self-determination, according to which self-determination became a fundamental human right, held by all 'peoples', and a central right on which the realization of other rights depends. Still, 'peoples' has never been properly defined under international law, complicating implementation of the right to self-determination. As noted by Thürer and Burri (2008), the claim of a particular group to constitute a people often goes unchallenged. This is particularly true in cases involving former colonies, where boundaries outlining a population are relatively clear. Defining who constitutes a people with the right to vote in a referendum, however, is often more contentious (e.g. in Catalonia, Quebec and Western Sahara).

However, most confusion around self-determination is tied to how the right is exercised. In its most traditional form, self-determination was usually exercised through a referendum for independence or secession, as in Quebec (1980), Timor-Leste (1999) and Scotland (2014). In accordance with UN General Assembly Resolution 1541 (XV) (1960), self-determination 'should be the result of the freely expressed wishes of the territory's peoples acting with the full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage' (Principle IX).

Over time, as the international human rights system has evolved, the exercise of self-determination *within* existing nation states has also come to be a critical right for minority groups. The ICCPR originally recognized this link, as self-determination was explicitly cited as a basis for ethnic, religious or linguistic minorities to protect and preserve their own culture, religion and language. Self-determination has also been used to support claims to classic democratic rights like voting, participating in peaceful protest and association, and political participation.

3. Types of self-determination

States have an active and affirmative duty to promote peoples' right to self-determination in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (UN General Assembly Resolution 2625, October 1970). This duty can be fulfilled in a wide variety of ways.

Self-determination has two dimensions: internal and external. Internal refers to the exercise of self-determination within an existing state; external refers to the right of peoples to define their place within the international community. The opinion of the UN Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation No. 21 on the right to self-determination is critical in defining these two dimensions.

Internal self-determination is often a tool for conflict mitigation, and the recognition of the right can reduce the risk and potency of secessionist movements, although governments often fear that self-determination will spur such movements.

Internal self-determination

CERD defines internal self-determination as the rights ‘of all peoples to pursue freely their economic, social and cultural development without outside interference; linked with the right of every citizen to take part in the conduct of public affairs at any level’ (General Recommendation No. 21 1996). Often, people equate self-determination with secession and understanding internal self-determination can help distinguish the two issues and answer questions around what self-determination offers when secession is not a constitutionally available mechanism.

Internal self-determination includes a wide range of democratic practices that can be used to open space for managing diversity and multiculturalism, as well as addressing historic claims for sovereignty and self-governance. In this way, internal self-determination is often a tool for conflict mitigation, and the recognition of the right can reduce the risk and potency of secessionist movements, although governments often fear that self-determination will spur such movements. One example of this can be seen in Indonesia. In 2005, after an armed independence movement that began in the 1970s, the Indonesian Government recognized Aceh’s right to self-determination promising the region special autonomy in exchange for disarmament. Since then, through the elaboration of the legislation, autonomy has been achieved and the movement for secession in Aceh has lost ground. For further examples of how internal self-determination can be realized in practice, including in relation to peace processes, see Section 4 of this Constitution Brief.

Internal self-determination can be realized in conjunction with the implementation of other fundamental rights recognized under international law, for example cultural rights, the right to political participation, and rights to equality and non-discrimination. It can also be implemented through self-government and devolution arrangements, like the creation of autonomous regions or the establishment of federal systems. Finally, internal self-determination can require institutional reform, for example the establishment of new public bodies, commissions, or other non-territorial authorities that advance pluralism and address minority groups’ concerns.

In 2007 a specific right to internal self-determination for indigenous peoples was codified in article 3 of the UN Declaration on the Rights of Indigenous Peoples. The Declaration built on rights to consultation, culture and political participation that were guaranteed to indigenous peoples in International Labour Organization (ILO) Convention 169 (Indigenous and Tribal Peoples Convention). ILO 169, however, stopped short of recognizing indigenous peoples’ right to self-determination. Practices for implementing this right are still evolving but have included autonomy arrangements, the recognition of collective rights to language and culture, and the right to free prior informed consent and consultation.

External self-determination

CERD defines external self-determination as the rights ‘of all peoples to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation’ (General Recommendation No. 21 1996).

Self-determination is based on the idea that people should have recourse against a government that is systematically abusing their human rights and that is therefore violating the underpinnings of a social compact between the governing and the governed. Indeed, originating

as it did from the American Independence, French Revolution and era of decolonization, self-determination was first invoked as a basis to overthrow colonial governments and to freely determine one's political status, which in theory gives rise to a right to secession. Self-determination was the base right for secession in former Republics of the Soviet Union and served as the basis for referendums on independence—secession—in Canada (1995) and Scotland (2014) (Ginsburg 2018b). Simply put, self-determination can in certain circumstances support a right to secede.

Self-determination is broadly assumed to hold that states and peoples need not tolerate utter repression, genocide, or other systemic violations of human rights in the name of territorial integrity and that, therefore, secession would be a legal option in these cases. That said, the secessionist aspect of self-determination is severely constrained both by international law and principles and by most domestic instruments (constitutions and legislation) that recognize self-determination. International and domestic courts alike have set the standard high for when abuses give rise to a right to self-determination that would extend to secession. For example, **Kosovo's** case for independence was not justified on a principle of self-determination explicitly (and nor was the International Court of Justice's (ICJ) 2010 opinion clear-cut), so it cannot be taken to necessarily prove this point.

Importantly, while self-determination has been recognized and reaffirmed as a right belonging to all peoples and not just in colonial contexts—for example, in the ICJ's 1995 decision concerning **Timor-Leste**—there has been no corollary right to secession established under international law. As Carley (1996: vi) notes, this means that 'the right to self-determination must be separated from the right to secession and the establishment of independent statehood, with the understanding that there are intermediate categories short of statehood that can address a minority group's interests and aspirations, such as membership in various international forums or regional organizations'. The same author also argues that, while self-determination is an international law issue, secession is ultimately still determined by national frameworks.

A broad understanding of the right to self-determination supports its use as a critical tool in constitution-building and conflict resolution. Especially in multicultural societies, acknowledging self-determination (even excluding secession) can serve as the basis for negotiated solutions to historic grievances, as well as broader governance and development challenges. Much of the resistance to the concept of self-determination is based in fear of secessionist movements. However, in many cases—including many of those identified below—self-determination has in fact been a cure and not a cause of these movements. For more information on secession see International IDEA's Constitution Brief on this topic (Ginsburg 2018b).

4. Comparative international practice

There is no singular body of practice or 'right' interpretation of self-determination. Countries have codified and implemented the right in various and evolving ways over the years to respond to a number of challenges, including war and ethnic diversity. Several examples from global experience are provided below.

Constitutional recognition

Many countries' constitutions recognize the right to self-determination as a well-known principle of international law and nationhood, while some recognize self-determination as the basis of the state's existence. For

example, the Constitution of **Bangladesh** (1972) states that Bangladeshi independence came about ‘in due fulfilment of the legitimate right of self-determination’ (Preamble); and **Ukraine’s** Constitution (1996) holds that the constitution is adopted based on ‘the right to self-determination realized by the Ukrainian nation’ (Preamble).

Other constitutions recognize self-determination as a primary principle for international relations. For example, the Constitution of **Timor-Leste** (2002) states: ‘on matters of international relations, the Democratic Republic of East Timor governs itself according to the principles of national independence, the right of the Peoples to self-determination’ (Part I, article 8), while the Constitution of **the Philippines** (1987) states: ‘In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination’ (article 2, section 7).

External self-determination, including secession

Recognition of the full right to internal and external self-determination is extremely rare in constitutional practice.

Ethiopia’s Constitution (1995) recognizes the right to external self-determination. Article 39 (‘Rights of Nations, Nationalities, and Peoples’), defines a nation, nationality or people as ‘a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory’ (section 5).

This definition clearly envisions self-determination as a collective right, belonging equally to all groups within Ethiopia which share common cultural/ethnic characteristics, as well as—importantly—existing in an identifiable and contiguous physical area of the country. All the groups recognized in this section are ensured an ‘unconditional right to self-determination, including the right to secession’ (section 1), making Ethiopia a unique case among current constitutions where the right to external self-determination is constitutionalized.

Article 39 also codifies internal self-determination as follows:

(2) Every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history.

(3) Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.

Indeed, self-determination served as the basis on which Ethiopia was federalized in accordance with an ethnic federal system, the merits of which are heavily debated. At the same time, in practice power is highly centralized in Ethiopia, making the possibility of meaningful self-determination—let alone secession—remote.

Internal self-determination as a foundation for peace

Self-determination can be a critical basis for resolving historic conflicts, particularly those that have ethnic/religious dimensions supported by historic treaties, or that involve claims to historic territories or homelands.

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historic grievances or claims. This can be seen in the cases of Bangladesh and the Philippines, although both highlight the need for devolution that is meaningful in practice and adequately financed, if a sustainable peace dividend is to be realized.

Muslim Mindanao has been engaged in a struggle for autonomy since the colonial era of the Philippines. Self-determination has played a vital role in continued efforts to resolve this conflict. While Muslim Mindanao-based groups used to use self-determination as a synonym for secession, peace negotiations have succeeded in moving the conversation towards autonomy arrangements. The 1976 Tripoli Agreement signified a move towards a negotiated solution that centred on increased autonomy for the people of Muslim Mindanao within the territorial integrity of the Pilipino state. This negotiated agreement was reflected in the Constitution of the Philippines (1987): ‘There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines’ (section 15).

This provision amounts to a recognition of internal self-determination through autonomy and devolution of powers, as a way to dilute the secessionist claims put forward by the Mindanao movement in its various (sometimes violent) forms. True to its word, the Philippine Government did establish autonomous regions as per the Constitution, but change did not reach Mindanao. People were frustrated by the continued lack of development in the area and the lack of meaningful devolution of power, and conflict persisted. The 1996 Final Agreement on Mindanao committed the Government to amend or repeal the framework for Mindanao’s autonomy under the Constitution and to submit a new framework to plebiscite. A new law was passed in 2001 on Mindanao’s autonomy and current constitutional debates in the Philippines contest how and if federalism can advance peace in Mindanao.

The conflict around the right to self-govern in the Chittagong Hill Tracts (CHT) of **Bangladesh** also illustrates how negotiated agreements around self-determination can support non-violent conflict resolution and quell secessionist movements. The CHT enjoyed a special degree of autonomy even under British colonial rule over Bangladesh, as evidenced by the 1900 Regulations that safeguarded CHT’s right to self-determination, including the rights of tribal chiefs to administer civil and criminal law. When Bangladesh became independent, however, the state refused to recognize the special status of CHT.

Violent contestations over the right to self-determination and autonomy raged for 20 years (1977–97), until the signing of the CHT Peace Accord. The Peace Accord recognized the distinct ethnicity and status of the peoples in CHT and devolved power through the establishment of a Regional Council bringing together the local governments around CHT, ensuring tribal representation, and obligating the Government of Bangladesh to consult with the council whenever decisions were made regarding the CHT. The Government also committed to institutional reform—namely the creation of a Commission and a Ministry to look after CHT specifically. In this way, the agreement met the demands of CHT representatives for increased self-determination and control over their political status within the existing framework of the state, thereby negating secessionist claims. While the CHT Peace Accord has never been constitutionalized, many of its tenets are legislated and institutionalized.

Internal self-determination as a foundation for autonomy arrangements

Territorial autonomy

Decentralization and autonomy arrangements may take the form of federalism, but autonomy arrangements can be realized in non-federal states as well (Ginsburg 2018a). They can be helpful in the context of peace negotiations but there are numerous other cases that do not relate to conflict resolution per se. Many of these involve indigenous communities, who were granted a specialized internal right to self-determination with the passage of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.

Greenland is a former colony of Denmark which was given status as a ‘constituency’ under the Danish Constitution in 1953. However, Greenlandic people wanted increased economic and political independence, and based these claims on a right to self-determination. In 1979, the Danish Government held a referendum which resulted in a 63 per cent vote in favour of establishing home rule for Greenland. The Home Rule Act was replaced by the Self-Government Act in 2008 and self-government was constituted the following year.

In a speech to the Greenland Parliament during the ceremony to honour the initiation of self-government on 21 June 2009, Danish Prime Minister Lars Løkke Rasmussen captured the spirit of internal self-determination, saying:

Today is a day of freedom. A day where we continue to build on the sound principle that decisions are best made by the people they directly affect. Today is a day of responsibility. A day where we continue to build on the sound principle that a people should take responsibility for their own fate and future. Today is a day of solidarity, when we loosen the ties that might be too tight, but keep hold of those that strengthen.

At the same time, Løkke Rasmussen also explicitly stated that ‘the Self-Government Act acknowledges that the Greenlandic people are a people with the right to self-determination in accordance with international law’. Through the Self-Government Act, while remaining part of the Danish state, Greenland is guaranteed representation in the central Parliament and can realize its right to self-determination by electing its own parliament, and administering its own education, health and environment policies and services.

Canada recognizes self-government arrangements as a way to fulfil its duty to protect and promote the right to self-determination of its indigenous populations. Canada has signed more than 22 self-government agreements recognizing a number of indigenous jurisdictions on the basis of its Constitution Act (1982) Part II, Section 35, rights of aboriginal peoples of Canada (Government of Canada 2018). These agreements range in scope. Some allow for indigenous jurisdiction over limited government competencies in their territories (e.g. the Education Partnership with Mi’kmaq communities in Nova Scotia) while others grant self-government and legislative rights, recognizing traditional authorities and forms of government.

Still others are tribal governments, such as the Nisga’a Lisims Government which signed the first modern-day treaty in British Columbia (agreed with the provincial and national governments in 2000). In 2018, the Canadian Government issued ‘Principles respecting the Government of Canada’s Relationship with Indigenous Peoples’, as a ‘starting point for the Crown to engage in partnership, and a significant move away from the status quo’ and to guide legislative review and

reform in an effort to better comply with UNDRIP. The Principles begin by recognizing that indigenous nations are ‘self-determining [and] self-governing’. Two of the most relevant principles state that the Government of Canada recognizes: ‘(1) All relations with indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right to self-government’; and ‘(4) Indigenous self-government is part of Canada’s evolving system of cooperative federalism and distinct orders of Government’. Principle 4, particularly, speaks to how self-determination is intimately linked to state structures and territorial-based devolution of powers.

Based on article 5 of **Panama’s** Constitution (1972), which allows the state to create ‘political divisions by law, either to be subject to special rules, or for reasons of administrative convenience or public service’, the Panamanian Government created the special autonomous Kuna Yala region in 1938. Its powers were defined by legislative Act. No. 16 (1953); under the agreement, Kuna Yala pays no income taxes in Panama, has its own Government and police force, and controls tourism in the region.

Broader autonomy

The Constitution of **Mexico** (1917) holds that: ‘Indigenous people’s right to self-determination shall be subjected to the Constitution in order to guarantee national unity’ (article 2). While this right is specifically limited to indigenous peoples, it is a particularly illuminating example because article 2A goes on to elaborate that self-determination, in practice, means that indigenous peoples have a right to autonomy to:

- decide their own social, economic, political and cultural organization;
- apply their own legal systems to solve internal conflicts, within the framework of the constitution and human rights (i.e. with respect to the ‘dignity and safety of women’);
- elect authorities and representatives in accordance with traditional rules, procedures and customs;
- preserve and enrich their cultures, languages and identities;
- maintain their environment and lands, including preferential use of natural resources within the bounds of the constitution; and
- have their cultural practices taken into account in all trials and procedures involving them, including the right to have interpreters and lawyers familiar with their languages and cultures.

By identifying the specific elements of self-determination, the Constitution makes it easier for government officials and the state to understand how the right should be implemented in practice. This means self-determination is actionable and does not remain a mere constitutional principle.

Importantly, the Constitution also calls on all states within the Mexican union to establish elements of self-determination and autonomy in their own constitutions and laws. This provides a good example of how self-determination can be practically realized in a federal system.

The **Bolivian** Constitution (2009) recognizes indigenous peoples’ right to self-determination and therefore self-governance, again stressing the existence of self-determination within ‘the setting of state unity’. Article 2 states: ‘Given the pre-colonial existence of nations and original indigenous peoples and their ancestral control over their territories, one guarantees their self-determination in the setting of State unity, that consists of their right to autonomy, to self-governance, to their culture, to the recognition of their institutions and the consolidation of their territorial identities, which conform to this Constitution and to the Law’.

While self-determination is often held up as a right to protect minority and marginalized groups against dominance and repression, it is sometimes viewed with scepticism not only by dominant groups but also from ‘minority-within-minority’ communities.

Internal self-determination in the form of an associational right

The Constitution of **South Africa** (1996) recognizes self-determination as a foundation for group identity, while protecting territorial integrity and allowing the legislature to delineate what the right means:

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation. (article 235)

In 1996, when the Constitution was being drafted, the newly established Constitutional Court was asked to clarify the proposed provision and held that as a constitutional principle, self-determination embodied an ‘associational right’, defined as the foundation upon which people could come together for collective action, including to promote the protection of their rights. In this example, self-determination is a principle that supports other fundamental democratic rights, like those of equality, freedom of speech and freedom of association. In post-conflict contexts, and especially in contexts and countries in which groups have been systematically vulnerable to human rights abuses, this right can be particularly important.

Notably, article 235 explicitly mentions that the right to self-determination will not only be circumscribed by an interest in maintaining the territorial entity of the Republic but also ‘in any other way’ as determined by national legislature. This gives wide discretion to the legislature and requires a careful involvement of the Constitutional Court to ensure that a balance is struck between peoples’ and the State’s interest. It also suggests that the scope and limitations of the right could vary over time.

5. Other considerations: minorities-within-minorities

It is rare to find a minority community that is homogeneous within any concentrated territorial area. While self-determination is often held up as a right to protect minority and marginalized groups against dominance and repression, it is sometimes viewed with scepticism not only by dominant groups but also from ‘minority-within-minority’ communities.

For example, in **Nepal** the right to self-determination of the peoples known as Madheshis was a primary issue in the federalism debate. Madheshis are a national minority but a local majority in the Southern region of Nepal. Muslims in the Madheshi communities (minority within minority) fear what a right to self-determination would mean for them. Some Muslims express a preference for Madheshis to *not* have self-governing powers because they fear that local leadership will suppress them more than the centralized state has. This is the issue that the Ethiopian Constitution anticipates and tries to prevent from surfacing, with its requirement that communities that secede must be territorially contiguous self-rule is not granted to one minority group over another. In absence of such a requirement, self-governing arrangements can threaten the rights of minorities within minorities.

A secondary issue is that of groups—like women, young people, the elderly, and persons with disabilities—who constitute a continual ‘minority-within-minority’ challenge around the globe. These groups cross-cut all other minority groups and may suffer discrimination and marginalization on multiple fronts of their identity. For example, while indigenous women are part of tribes (minorities) that are often suffering

violations of the right to self-determination, indigenous cultures can be patriarchal and as such may violate the autonomy and human rights of their female members (subgroup within minority).

These issues present challenges in designing solutions based on the right to self-determination. If a minority is granted full rights to self-govern, and decides to forbid women from participating in politics, what recourse is available for these women? Minorities-within-minorities often see the central state and its institutions as protective of their interests and so may fear increased vulnerability and potential repression in the event of devolution of power to the minority groups among whom they live. A liberal democratic approach to resolving this challenge is to have a strong bill of rights that protects individuals' interests and freedoms, for example their right to be free from discrimination or to freedom of religion, which in theory allows an individual to continue to 'be who they are' in line with the right to self-determination. However, many criticize this approach for denying the collective nature of what many ethnic and other minority groups are suffering from and aspiring to (see, generally, Kymlicka 1995).

Protection of cultural rights in a constitution (in addition to individual rights) may better protect members of minority-within-minorities groups. Commissions set up to protect human rights, women and other defined groups can also serve as a safeguard for minorities within minorities. Lastly, principles of legal hierarchy—where the right to self-govern is limited on the basis of international regimes and/or constitutions—can serve to ensure that human rights protections are primary, putting clear limits on the scope of self-governing rights. So, while areas might be self-governing they cannot pass laws that would put constitutional and international human rights at risk. Hierarchy of this kind is seen in several of the examples above, including the constitutions of Bolivia, Mexico and South Africa.

6. Conclusion

Self-determination is a fundamental right under international law but despite years of development in practice it remains a sensitive, often controversial, and complex right to implement and fulfil. It is important to distinguish between internal and external self-determination. As discussed in this brief, there are many ways to ensure internal self-determination: whether through the development of legislative and/or territorial autonomy arrangements, the protection of constituent, associational, and cultural rights, or protections for democratic participation and consultation. These different methods, when well designed and implemented, can help to mitigate and manage conflict within a nation state and diffuse demands for secession and external self-determination. Understood this way, self-determination is not antithetical to territorial integrity but rather provides a framework for balancing state interests and human rights.

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