“JUDICIAL DIALOGUE”

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EL MODELO ESTADOUNIDENSE

Printz v. U.S. 1997; Knight v. Florida 1999; Atkins v. Virginia 2002; Foster v. Florida 2002; Roper v. Simmons 2005

JUSTICE’S BREYER DISSENT IN KNIGHT V. FLORIDA (1999) – Legitimidad constitucional de la pena de muerte después de un largo periodo de detención

Referencia al derecho extranjero:

A growing number of courts outside the United States— *courts that accept or assume the lawfulness of the death penalty*— have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel.
Pratt v. *Attorney General of Jamaica*, Privy Council
Sher Singh v. *State of Punjab*, A. I. R. 1983 S. C. 465The Supreme Court of India
Catholic Commission for Justice and Peace in Zimbabwe v. *Attorney-General*, [1993] 1 Zimb. L. R. 239, 240, 269 (S) (Aug. 4, 1999), http://www.law.wits.ac.za/salr/catholic.html.**The Supreme Court of Zimbabwe**
Soering v. *United Kingdom*, 11 Eur. Ct. H. R. (ser. A), pp. 439, 478, ¶111 (1989).European Court of Human Rights
Kindler v. *Minister of Justice*, [1991] 2 S. C. R. 779, 838 (joint opinion).The Supreme Court of Canada

Obviously this foreign authority does not bind us.
this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances. In doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment.
Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a “decent respect to the opinions of mankind.”

Dra. Silvia Bagni

REACCIONES DEL CONGRESO ESTADOUNIDENSE

Propuestas de resoluciones para prohibir el uso de las sentencias extranjeras, tanto en la Cámara cuanto en el Senado (nunca en vigor).
S. Res. 92, 109th Cong. (2005) ("Resolved, That it is the sense of the Senate that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.")

House Representative Tom Feeney (R-Fla.) also proposed a bill, known as the Feeney Amendment, that would expose judges to impeachment for referring to foreign law in their opinions

FOREIGN LAW BAN IN THE STATES' LEGISLATIONS

http://www.ncsl.org/research/civil-and-criminal-justice/2017-legislation-regarding-the-application-of-foreign-law-by-state-courts.aspx

LAURENCE V. TEXAS (2003) – Ilegitimidad constitucional de la penalización de la sodomía

Due process clause (XIV em.)
"… nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

OPINION (JUSTICE KENNEDY)	DISSENT (JUSTICE SCALIA)
VALOR SUBSTANCIAL DEL DUE PROCESS the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.	And if the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweetmystery-of-life passage, *ante*, at 13 (At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life): That casts some doubt upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one's right to define certain concepts; and if the passage calls into question the government's power to regulate *actions based on* one's self-defined concept of existence, etc. it is the passage that ate the rule of law
Bowers v. *Hardwick 1986*. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger	State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication,

and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. 478 U. S., at 199 (opinion of Blackmun, J., joined by Brennan, Marshall, and STEVENS, JJ.); *id.*, at 214 (opinion of STEVENS, J., joined by Brennan and Marshall, JJ.).	bestiality, and obscenity are likewise sustainable only in light of *Bowers*. validation of laws based on moral choices. Every single one of these laws is called into question by today.s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.
It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. **The liberty protected by the Constitution allows homosexual persons the right to make this choice**.	To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*.s extraordinary deference to precedent for the result-oriented expedient that it is.
Argumentos historicos y sociológicos The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions.). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. American laws targeting same-sex couples did not develop until the last third of the 20th century.	But there is no right to liberty. under the Due Process Clause, though today's opinion repeatedly makes that claim. Our opinions applying the doctrine known as substantive due process. hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.
The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behaviour, and respect for the traditional family The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code. *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 850 (1992).	I do not know what acting in private means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by acting in private. is .on private premises, with the doors closed and windows covered,. it is entirely unsurprising that evidence of enforcement would be hard to come by.
Referencias comparativas 1) The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963) 2) European Convention on Human Rights. *Dudgeon* v. *United Kingdom*, 45 Eur. Ct. H. R. (1981) 3) To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers*	**En contra del uso del derecho extranjero:** Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behaviour. **Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct**. The *Bowers* majority opinion *never* relied on values we share with a wider civilization **The Court's discussion of these foreign views (ignoring, of**

but its own decision in *Dudgeon* v. *United Kingdom*. See *P. G. & J. H.* v. *United Kingdom*, App. No. 00044787/98, ¶56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos* v. *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v. *Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11.12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.	**course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta**. **Dangerous dicta, however, since this Court . . . should not impose foreign moods, fads, or fashions on Americans**. *Foster* v. *Florida*, 537 U. S. 990, n. (2002) (THOMAS, J., concurring in denial of certiorari).
Overruling The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons	Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. **But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else**. **But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.**

ROPER V. SIMMONS (2005) – Ilegitimidad constitucional de la pena de muerte a los menores

VIII em.
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

OPINION (JUSTICE KENNEDY)	DISSENT (JUSTICE SCALIA)
Stanford v. Kentucky, 492 U. S. 361 (1989) es el precedente a abrogar	**In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary . . . ha[s] neither FORCE**

	nor WILL but merely judgment." What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," **Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent (ORIGINALISM)**
The next year, in Stanford v. Kentucky, 492 U. S. 361 (1989), the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18	Of course, the real force driving today's decision is not the actions of four state legislatures, but the Court's "own judgment" that murderers younger than 18 can never be as morally culpable as older counterparts **By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation**?
	To support its opinion the Court looks to scientific and sociological studies, picking and choosing those that support its position. In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends. We need not look far to find studies contradicting the Court's conclusions.
The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence Atkins held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. today our society views juveniles, in the words Atkins used respecting the mentally retarded, as "categorically less culpable than the average criminal	To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in Stanford.
Once the diminished culpability of juveniles is recognized, it is evident that the phenological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: " 'retribution and deter-rence of capital crimes by prospective offenders.' "	
Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. For the reasons we have discussed, however, a line must be drawn.	
Argumentos de derecho comparado:	**Argumentos en contra del uso del derecho comparado:**

1) the United States is the only country in the world that continues to give official sanction to the juvenile death penalty 2) This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in Trop, **the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments**." 3) Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. 4) only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. 5) the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689 6) It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, **The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions**	**Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.** More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. [siguen ejemplos en donde el derecho constitucional estadounidense es más garantista que en otros Estados] **The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.**

EL MODELO SUDAFRICANO

THE NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY (1998) – Ilegitimidad constitucional de la penalización de la sodomía

Section 9 of the 1996 Constitution

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

El argumento de la igualdad:

Discriminación entre gay de una parte y etero y lesbianas de la otra

differentiation constitutes unfair discrimination "unless it is established that the discrimination is fair."

The desire for equality is not a hope for the elimination of all differences. To understand "the other" one must try, as far as is humanly possible, to place oneself in the position of "the other".
It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.

El argumento de la dignidad

In my view, however, the common-law crime of sodomy also constitutes an infringement of the right to dignity

I would emphasise that in this judgment I find the offence of sodomy to be unconstitutional because it breaches the rights of equality, dignity and privacy. The present case illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy.

El argumento de la privacidad

The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

Referencia al derecho extrnjero y comparado:

1) The European Court of Human Rights
2) So has the Supreme Court of Canada in *Vriend v Alberta*
3) p. 39 **There is nothing in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom which would lead me to a different conclusion. In fact, on balance, they support such a conclusion. In many of these countries there has been a definite trend towards decriminalisation**.
Referencia al Reino Unido, a la **CEDH (because of the "margin of appreciation" allowed to the national authorities by the European Court of Human Rights, the jurisprudence of the European Court would not necessarily be a safe guide as to what would be appropriate under section 33(1) of the interim Constitution**), Alemania, Australia, Canada, Nueva Zelanda

The above survey shows that in 1967 a process of change commenced in Western democracies in legal attitudes towards sexual orientation. This process has culminated, in many jurisdictions, in the decriminalisation of sodomy in private between consenting adults.

4) Laws prohibiting homosexual activity between consenting adults in private have been eradicated within 23 member states that had joined the Council of Europe by 1989 and of the ten European countries that have joined since (as at 10 February 1995) nine had similarly decriminalised sodomy either before or shortly after their membership applications were granted
5) P. 53 An exception to this trend is the United States of America, as illustrated by the judgment of the Supreme Court in Bowers v Hardwick.77 In this case, a sharply divided Court, by a majority of five to four, declared itself unpersuaded that the sodomy laws of some 25 states should be invalidated. ***Our 1996 Constitution differs so substantially, as far as the present issue is concerned, from that of the United States of America that the majority judgment in Bowers can really offer us no assistance in the construction and application of our own Constitution.*** The 1996 Constitution contains express privacy and dignity guarantees as well as an express prohibition of unfair discrimination on the ground of sexual orientation, which the United States Constitution does

not. Nor does our Constitution or jurisprudence require us, in the way that the United States Constitution requires of its Supreme Court, in the case of ". . . rights not readily identifiable in the Constitution's text," to ". . . identify the nature of the rights qualifying for heightened judicial protection

6) There are other democratic countries beside the United States which have not yet decriminalised sodomy in private between consenting adult males. Unlike the constitutions of these countries, however, our 1996 Constitution specifically mentions "sexual orientation" as a listed ground in section 9(3) on which the state may not unfairly discriminate

THE STATE V. T MAKWANYANE AND M MCHUNU (1995) – Ilegitimidad constitucional de la pena de muerte

Section 11(2), it prohibits "cruel, inhuman or degrading treatment or punishment."
section 9, "every person shall have the right to life",
section 10, "every person shall have the right to respect for and protection of his or her dignity",
section 8, "every person shall have the right to equality before the law and to equal protection of the law."

Referencias al derecho comparado:

1) Kentridge AJ, who delivered the judgment of the Court, referred with approval[7] to the following passage in the Canadian case of R v Big M Drug Mart Ltd:
The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

2) sobre el uso de los trabajos parlamentarios:

In England, the courts have recently relaxed this exclusionary rule and have held, in Pepper (Inspector of Taxes) v Hart
a similar relaxation of the exclusionary rule has apparently taken place in Australia and New Zealand
In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process: The United States Supreme Court, The German Constitutional Court, The Canadian Supreme Court, In India, The European Court of Human Rights and the United Nations Committee on Human Rights

3) Sobre la interpretación de la disposición «cruel, **inhuman** or degrading treatment or punishment»:

p. 33: **una parte intera de la sentencia dedicada a “International and Foreign Comparative Law”**

The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone, they require our attention. They may also have to be considered because of their relevance to section 35(1) of the Constitution,

p. 37 Comparative "bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. **Although we are told by section 35(1) that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter Three**

decision of the Hungarian Constitutional Court

Capital Punishment in the United States of America
The United States jurisprudence has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishments, but also permits, and contemplates that there will be capital punishment. The acceptance by a majority of the United States Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigation. Considerable expense and interminable delays result from the exceptionally-high standard of procedural fairness set by the United States courts in attempting to avoid arbitrary decisions. **The difficulties that have been experienced in following this path, to which Justice Blackmun and Justice Scalia have both referred,[86] but from which they have drawn different conclusions, persuade me that we should not follow this route**.

The International Covenant on Civil and Political Rights
The European Convention on Human Rights
Capital Punishment in India

p. 86 The fact that in both the United States and India, which sanction capital punishment, the highest courts have intervened on constitutional grounds in particular cases to prevent the carrying out of death sentences, because in the particular circumstances of such cases, it would have been cruel to do so, evidences the importance attached to the protection of life and the strict scrutiny to which the imposition and carrying out of death sentences are subjected when a constitutional challenge is raised. The same concern is apparent in the decisions of the European Court of Human Rights and the United Nations Committee on Human Rights
p. 90 The United Nations Committee on Human Rights has held that the death sentence by definition is cruel and degrading punishment. So has the Hungarian Constitutional Court, and three judges of the Canadian Supreme Court. The death sentence has

also been held to be cruel or unusual punishment and thus unconstitutional under the state constitutions of Massachusetts and California
p. 100 a "two-stage" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three, and limitations have to be justified through the application of section 33. In this it differs from the Constitution of the United States, which does not contain a limitation clause. The practical consequences of this difference in approach are evident in the present case.
Limitation of Rights in Canada
Limitation of Rights in Germany
Limitation of Rights Under the European Convention
Is Capital Punishment for Murder Justifiable under the South African Constitution?

The Judgement of the Tanzanian Court of Appeal (que apoyaba la constitucionalidad de la pena de muerte) → The relevant provisions of our Constitution are different. It is for the Court, and not society or Parliament, to decide whether the death sentence is justifiable under the provisions of section 33 of our Constitution.[149] In doing so we can have regard to societal attitudes in evaluating whether the legislation is reasonable and necessary, but ultimately the decision must be ours. If the decision of the Tanzanian Court of Appeal is inconsistent with this conclusion, I must express my disagreement with it.

p. 145-146 conclusiones

EL MODELO INTERMEDIO: ITALIA

SENT. 138/2010 – Sulla legittimità costituzionale delle norme del codice civile che prevedono il matrimonio solo fra uomo e donna

È sufficiente l'esame, anche non esaustivo, delle legislazioni dei Paesi che finora hanno riconosciuto le unioni suddette per verificare la diversità delle scelte operate.

Ulteriore riscontro di ciò si desume, come già si è accennato, dall'esame delle scelte e delle soluzioni adottate da numerosi Paesi che hanno introdotto, in alcuni casi, una vera e propria estensione alle unioni omosessuali della disciplina prevista per il matrimonio civile oppure, più frequentemente, forme di tutela molto differenziate e che vanno, dalla tendenziale assimilabilità al matrimonio delle dette unioni, fino alla chiara distinzione, sul piano degli effetti, rispetto allo stesso.