To what extentd do judges make law in the Australian Common Law system?*: Basis from the common law judicial law creation for continental law systems

¿En qué Medida los Jueces Promulgan Leyes en el Sistema de Derecho Consuetudinario Australiano?: Bases para la Creación de la Ley en el Sistema de Derecho Consuetudinario para los Sistemas de Derecho Continental

*David Augusto Echeverry Botero***

Cómo citar este artículo: Echeverry Botero, D. A. (2020). To what extend do judges make law in the Australian Common Law System?: Basis from the common law judicial law creation for continental law systems. *Revista Verba Iuris, 15* (43). pp. 117-128.

Reception Date: July 6, 2019 • Approval Date: December 5, 2019

* Departing from the investigation FODEIN project 2018 done for the Santo Tomás University under the title "To what Extentd do Judges make law in the Australian Common Law System"

** Lawyer from the "Pontifical Javeriana University", Master in law and economics at the same university and Master of Commercial Law (LL.M) from the University of Melbourne. Professor of the investigation seminary and methodology at the Master of law and economics program at Javeriana University. It also works as director of investigation projects at Santo Tomás University, in the master program of contract law and as a professor of the commercial law, subjects of private law and political economics subjects at the same University. He has been litigator and advisor in many contractual process and judicial procedures highlighting his participation in the study of the financial viability of the Grancolombiana Comercial Fleet and the arbitration between Telecom Par vs Plescom. Has also worked as Law secretary at the Andean Parliament and investigator at the Institute of high studies created by that inter National organism and al an attorney for the Bogotá, specifically at the "Instituto Para la Economía Social – IPES" e-mail: davidaugustoecheverry@yahoo.es, CvLac: https://scienti.minciencias.gov.co/cvlac/visualizador/generarCurriculoCv.do?cod_rh=0001359192 ORCID https://orcid.org/0000-0003-1893-9836

Fecha de Recepción: 6 de julio de 2019 • Fecha de Aprobación: 5 de diciembre de 2019

* Artículo producto de la investigación del Proyecto FODEIN 2018 realizado para la Universidad Santo Tomás bajo el título " To what Extentd do Judges make law in the Australian Common Law System"

** Abogado de la Pontificia Universidad Javeriana, Master en Derecho y Economía de la misma universidad y Master of Commercial Law (LLM) de la Universidad de Melbourne. Profesor del seminario de investigación y metodología en el Programa de Maestría en Derecho y Economía de la Universidad Javeriana. También trabaja como director de proyectos de investigación en la Universidad Santo Tomás, en el Programa de Maestría en Derecho Contractual y como Profesor de Derecho Comercial, asignaturas de derecho privado y economía política en la misma Universidad. Ha sido litigante y asesor en muchos procesos contractuales y procedimientos judiciales destacando su participación en el estudio de la viabilidad financiera de la Flota Mercante Grancolombia

Abstract

In the Common Law system judges have the power to create subsidiary laws: they make rules in strict sense. This Kind of power responds to a special way in which the Common Law develops and adapts itself to achieve the best rules for a given society. Understanding how the Australian law system works, as an example of a common law structure, and how judges interact with the parliament in the creation of the best rules of law -which makes the process coherent- is paramount for other legal systems that have a mixture of legal institutions from both civil and common law systems, as Colombia. Colombia has an unclear mixture of law systems, which generates an uncertainty of the application of the law producing both by judges and parliament, and serious structural law problems; so, understanding the basis of the common law system it is important to clarify the limits in the competence of each authority and the interaction between the law made by the Parliament and the one that the judges produce.

Keywords: Law-making, Rule of Law, Parliamentary Supremacy, Step-by-step Development of Law, Sudden Development of Law, Division of Powers, Precedent, Authority, Legitimacy, Limits.

Resumen

Dentro del Sistema del *Common Law*, existe una potestad de creación legal (o de reglas de conducta) dada a los jueces. Dicha potestad responde a la forma especial en como el *Common Law* se desarrolla y adapta a sí mismo para lograr las mejores reglas para una determinada sociedad. El entender cómo funciona dicho Sistema, partiendo del ejemplo Australiano, y como dicho sistema es coherente a pesar de tener más de una autoridad que genera normas de conducta, es de suma importancia para otros sistemas jurídicos que tienen una mixtura de instituciones jurídicas, como en el caso colombiano, en donde la importación de las mismas va en detrimento del sistema. Colombia tiene una mixtura de sistemas jurídicos que genera una incertidumbre sobre la aplicación de la ley produciendo serios problemas estructurales; por ello, entender las bases del *Common Law* es importante para aclarar los límites de competencia de las distintas autoridades y la interacción entre la ley creada por el Parlamento y aquella producida por los jueces.

Palabras clave: Potestad Legislativa, Estado de Derecho, Supremacía Parlamentaria, Desarrollo Legislativo Paso a Paso, Desarrollo Legislativo Repentino, División de Poderes, Precedentes Judiciales, Legitimidad, Límites.

Introduction

Under the division of power theory, in Australia, the task of 'law making' was given to Parliament. Therefore, Judge's task was to apply the law, interpret the law, and to ensure that justice is spread over specific cases and as a consequence of that process, formulate a rule of the law in the absence of a statute. This division of tasks was implicit in the Australian Constitution (Dixon, 1942).

The term "law making" is not a technical legal term and is only part of the tasks assigned to legislative powers around the globe. Therefore, the Australian Constitution charges parliament with the law making power, but does not prohibit judges from creating behavioral rules under a Common Law system (Australia, 1955).

In order to adopt a suitable definition of the 'law making' task, this paper departs from two common definitions of law and a definition of jurisprudence. Afterwards explains what 'law

making' actually means (Gallego, 2014; Guarín, 2013).

In this context, law could be understood as a "body of enacted or customary rules recognized by the community as binding", (Allen, 1990) as well as "the subject matter of the discipline of jurisprudence" (Butt, 2010). At the same time, Jurisprudence can be understood to be "the theory of law; the study of the principles of law and legal system and their fundamental philosophical basis" (Butt, 2010).

In this order of ideas, 'law making' in this paper will be understood as the creation of binding rules of behavior that the society must obey, even if it is done by the legislative power or via jurisprudence (judges). That creation of law and the modifications of it, occurs sometimes suddenly or under a step-by step process, no matter if it's done by the Parliament or by other institution.

In this context, despite is not openly recognize that judges can create law and the Australian Constitutions does not give them this duty expressly, when Judges create binding rules of law, via jurisprudence, in the form of precedents, they are in fact making laws. *"Most common law judges today accept that it is an inevitable incident of the judicial process that, from time to time, a judge has to make, and not merely declare or restate, legal rules and principles."* (McHugh, 1988)

As a result, Common Law can be seen as *"a set or code of rules which have been laid down by somebody or other, and which owe their statutes as law to the fact that they have been laid down so"* (Simpson, 1986) (Eisenberg, 2007). The law that is made by the judges is the first step of this laying down process (Williams, 2006).

A relevant point that should be made is that the Australian Constitution was not a product of revolution, but of a colony's desire to conform a nation that was united under a federal system. (Williams, 2006) Therefore, the Constitution was based on all the local legal traditions, focused on regulating only the federal system, and it created the federal organisms that shape the Nation. As such, the Constitution did not change the powers invested in judges relating to the creation of legally binding precedents.

In this order of ideas, existing law making competences given to different authorities, it is vital to the coherence of the Australian legal system and the way of how the law is teached. Only under a system with strong institutions as the "BARS" the rule of law and the respect of the precedent can function correctly, because the young mind can understood the reasons why the precedent is the best rule of law for the society and why change it without enough analysis can generate a systemically instability and distrust in the judiciary power.

This research does not intend to conduct a comparative study between the Civil Law and the Common Law. Consequently, being an analysis of the institutions of a foreign system, will approach the legal creation from a qualitative approach, analyzing the way in which judges produce laws based on the Australian Political Constitution, in order to contrast this figure with the existing doctrine. Then, through the deductive method and the in-depth study of the limits to legal creation, we will obtain enough conceptual elements to clarify this special prerogative as a source of analysis or comparison for other systems.

Division of powers and differences in the law making function between judges and Parliament in the Australian legal system

To understand the law making power under the Australian Common Law, it is necessary first to understand how Parliamentary sovereignty works in that system, considering the historical evolution of it; under that perspective the Parliament legislative power *"in its broadest form (...) acknowledges no limits to the legislative power which can be exercised by the Parliament, which*

in theory can override both executive and judicial action" (Saunders, 1989).

This power comes from the principle of representation, whose justification rest on the limitations created by the people to the ancient power that the kings used to have. Congressmen, as representatives of the people, were invested with the great power to administer the State and to create binding rules that control and limit the community's freedom. (Saunders, 1989) In this context, Parliamentary supremacy is recognized by the Australian Constitution (Australia, 1955).

Therefore, *"Judges only had a supplementary role in the creation of binding rules, when there was not applicable statute"*, (Saunders, 1989, p. 297) *"under the common law system of adjudication, courts not only resolve disputes but formulate rules and principles that can be used to decide comparable cases"* (McHugh, 1988). In this order of ideas, the primary function of the judicial power is to interpret the law and apply it to a specific case in order to uphold justice and, doing so, create the best rule of conduct for the society, only when there is not a statute

Consequently, the rules created by the judges are governed by different principles and strong limitations (David Wood, 1995, p. 47) because they cannot *"usurp policy-making functions conferred on the executive [and legislative]"* (Allan, 2004, p. 294). Concluding, judges cannot formulate public policy when they are creating the best rule of law.

The supplementary judge's role in law making implies that the tribunals have to apply older authorities to similar cases in order to maintain the coherence of the system, unless they have strong reasons to challenge that specific authority, supported by a change of the social premises (Allan, 2004).

Concluding, Judges cannot create a public policy and 'make law' according to it. As the judges are appointed by the executive and not elected by the people, (Australia, 1955) they are not representatives of the people's will. They are only able to make a rule that applies in specific and similar cases (González, 2014; Sanger, 2015).

Importance of the reports in the Common Law

Common Law systems are not familiar with the codification process, understood as a compilation of laws under a unique text or code of an specific matter. This is one of the main differences between the Civil and the Common Law system, because the first are based on codes. Therefore it is paramount for the Common law systems to have some place or text where the applicable authorities appear, *"The importance of the reports, as the keepers of the precedents, is paramount to the coherence of the system and the knowledge of the rules of law, in contrast with the statutes publicity methods"* (Dawson, 1968, p. 80).

The task of the report is *"to ensure that these oral comments are reduced to readable English"*. (Dawson, 1968, p. 83) Although even there is no codification in Common Law, it is possible to find the applicable precedents or the rules of conduct in those texts in the form of Courts' decisions, because not all cases go into the legal reports but those important for the community. (Dawson, 1968, p. 84) Consequently, the relevant precedent can be found easily and it is the Courts responsibility the publication of the cases and the correct writing of them (Dawson, 1968, p. 87).

Differences in the creation of binding rules by judges

As seen before, there are two main different types of rules in the Common Law system. Since Parliament makes the law following parliamentary procedure (bill, debates, vote, etc.), judges generate rules of law in an unconventional way. This special kind of law is product of the *stare decisis* doctrine (doctrine of the binding precedent) (Rheinstein, 1952, p. 96) in which similar cases must be decided upon in the same way in order to preserve the legal coherence and

stability. (Rheinstein, 1952, p. 65) *"However, even the decisions of the courts are final and generate a binding rule, the Parliament can change it*" under the parliament supremacy principle (Dawson, 1968, p. 91).

The principle of *stare decisis* implies that, under the Court hierarchy, the lower Courts and judges must respect and apply the precedent generated by a higher Court and only, in exception, they can decide away from a precedent (MacAdam, 1998, p. 64) However the lower Courts are binding only by the *ratio* of those cases which are the authority but not by the *obiter dicta* (Kirby, 2007, p. 245).

> *"The binding precedent can be found in the ratio decidendi which is the reason that the Court gave to solve the case, in contrast with the obiter dicta which are the other elements necessary to take the decision"* (MacAdam, 1998, p. 66).

In Justice Michael Kirby's words

> *"the ratio must be derived from the essential areas of agreement legally necessary to the decision, found within the reasons of the judges in the majority"* (Kirby, 2007, p. 245).

Finally, The Highest Court is the One in charge of generating the law, since the cases that they decide are those with a great importance in which the law is absent or unclear (McHugh, 1988, p. 40). Therefore the intermediate Court's job is more concerned with the application of the actual principles and their possibility of generating a rule of conduct depends on the inexistence of a precedent and an statute (McHugh, 1988, p. 40).

In this context, eventhougth that subsequent Courts thought the years has same hierarchy (Speaking of the higher ones) than the ancient ones, for the stability of the system, is paramount to avoid sudden changes in the rule of law or the precedent because the members of a community usually change their behavior to accommodate themselves to the rule of law, and if there is no clarity or stability in the system, the entire social environment suffers. Therefore the High Courts, which are at the top of the Court hierarchy, must be very careful when deciding to overrule a precedent (Humbarita, 2015).

Judges' methods of generating a precedent

Judges' generate binding rules of conduct in two ways: under a step-by-step procurement, or by making sudden changes based on changes in the society premises.

The first one is preferred by the judges because it benefits the system stability: *"It may sometimes be best for the courts to move to the best possible rule in steps, even at the price of inconsistency during the transition. (...) For example, a court may believe that a rule adopted in precedent is not even reasonably good and yet may not be confident that its belief is correct."* (Eisenberg, 2007, p. 96) In this context a step by step process allows the Court to gradually adapt to the reality of the community in accordance with the society's standards and beliefs.

For example, the evolution of the product liability law in Australia started in 1816 with *Dixon v Bell,* and after more than hundred years of legal evolution, the best rule of law was created and recognized by the Parliament under the form of an statute after an strong evolution: *Langridge v Levy 1837, Winterbottom v Wrigth 1842, Longmeid v Holliday 1851, George v Skivington 1869, Heaven v Pender 1883),* the law was stated with *Donoghue v Stevenson 1932* and then finally by the Trade Practices Act 1974 (Cth) Pt VA (Dixon B., 2019).

In contrast, sudden changes are more controversial because the rule of conduct is not a product of years of the society evolution interpreted by the judges, but a decision or precedent created abruptly. Therefore, its legality and acceptability depends on the correct interpretation that the judge does of a specific change in the society (García & Fino, 2014; Quiroz, 2014).

One example of the sudden change in family law, when the values and beliefs of society changes, is related to the rights of the women in a marriage: the ancient law used to established that *"the husband so it was said, had a property in the body, and a right to personal enjoyment of his wife, for the invasion of which right the law permitted him to sue as husband"* (Dixon B., 2019) (Steinwall, 2003).

It was recognized by the law that married men had better rights than the woman's upon marriage. However, when equalitarian principles were developed in society, the idea of family and marriage changed in the sense that the ancient rule of law was not valid, so, even there was not a step by step process, a new rule of law was under construction: if a husband could bring such an action (sue his wife if she refused to intercourse with him), so could the wives, because even there was an ancient social proposition which justified it, was no longer defendable (Eisenberg M. A., 2007, p. 99).

The Court recognized the change in society and, as a way of precedent, created a new rule *"The High Court held that, despite earlier English authority to the contrary, the presumption that, upon marriage, a wife gave to her husband irrevocable consent to sexual intercourse could not be reconciled with modern attitudes"* (Eisenberg M. A., 2007).

However, sometimes, sudden changes in the law can produce social alterations that are not often well received; they are criticized and divide society. Examples of Australian decisions that had been criticised, as product of so-called "judicial activism", include the development of an implied Constitutional right to freedom of political communication [Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 1], the reversal of the previously accepted doctrine of *terra nullius* and acceptance of the continued existence of rights to native titles in the aboriginal peoples of Australia, [*Mabo v Queensland (No2) (1992)* 175 CLR 1] and the acceptance of the effective right of an indigent person to legal representation in a trial, for a serious criminal offense as an essential element of the right to a fair trial [*Dietrich v R* (1992) 177 CLR 292]. (McHugh, 1988, p. 41) (Kirby, 2007, p. 249).

Legitimacy of the law made by judges

The legitimacy of a binding rule made by a Court in a Common Law system depends on the social acceptance of that rule, since the rule is created without any kind of representation (Simpson, 1986).

The judicial creation of law is determined by four fundamental ideas: *"(1) Courts should make law concerning private conduct in areas where the legislature has no acted, (2) the principles of legal reasoning turn on the interplay between doctrinal propositions and social propositions, (3) Legal rules can be justified only by social propositions, (4) consistency in the Common Law depends on social propositions"* (Eisenberg M. A., 2007, p. 81).

Taking into account the first principle, judges can only generate laws in the private field. Since the policy making task is a restricted competence of the parliament, it is prohibited to the judges interfere in the public areas of the law. (Eisenberg M. A., 2007, p. 81) Therefore *"The courts in a Common Law system have two main tasks, the first one is to solve the disputes that the society has in their private relationships and, secondly, to create rules that control the duties and rights of the members of the society"* (Eisenberg M. A., 2007, p. 81).

By doing this, Courts make the law evolve according with the society changes, when there is not parliamentarian intervention *"(...) much of that capacity [of the legislative power] must be allocated to the production of public-law rules and to matters such as budgets, taxation, governmental organization, and public administration"* (Eisenberg M. A., 2007).

Concerning the second principle, it is important to make a distinction between the doctrinal

and the social propositions as well as how they determine the legitimacy of the law. Doctrinal propositions are *"(1) the official text (report) which has the ratio and constitutes the precedent, (2) the precedents or statutes of similar law systems that can be applied by analogy, (3) the rest of the text produced by professionals in law"* (Eisenberg M. A., 2007).

The doctrinal propositions have to interact with society's propositions to find if it is a good rule for the society. This interaction is the base from which new rules are generated by judges. For this to be done, the judge who is creating a new rule of conduct has *"[To] take into account only (1) moral standards that claim to be rooted in aspiration for the community as a whole (…); (2) policies that claim to characterize states of affairs as good for the community as a whole and have comparable support; and (3) experiential propositions that are supported, or appear to be supported, by the weight of informed opinion"* (Eisenberg M. A., 2007, p. 83).

In this context, to create a rule of conduct, judges must interpret society, identify its main values and generate the best law accordingly, as long as there is not an applicable statute or pertinent precedent. Nevertheless *"Formulating the governing principle or rule in a case sometimes involves a law-making function on the part of the judge, and it is often social, economic and even political factors stimulate or dictate the terms of this lawmaking function"* (McHugh, 1988, p. 38).

Though the good rule of law is that one made by that judge which really understood the social reality and solve a problem of it *"The legitimacy of a Law made by a judge without representation depends on the coherence of the interpretation that the judge does of both the doctrinal and the social propositions"*. (Eisenberg M. A., 2007) A doctrinal rule should be consistently applied and extended if it is the best possible rule because it is fully congruent with social propositions.

A doctrinal rule should also be consistently applied and extended *"(...) if it is a reasonably good rule because it is substantially congruent with the social proposition. However, a doctrinal rule should not be consistently applied and extended if it is a poor rule"* (Eisenberg M. A., 2007, p. 86).

Taking into account the system coherence and stability, even the judge thinks of a very good new law, it is preferred by the judges not to overrule a principle or authority as soon as is reasonably good (Eisenberg M. A., 2007, p. 87) proved by a gradual development of the law. *"The existence of this level of discretion is one of the reasons why it is essential for the judiciary to identify the values which are being recognised in individual cases and explain candidly why those values justify a development in the law"* (McHugh, 1988, p. 42).

In conclusion, judges have the important duty as part of their supplementary legislative role, to analyze the social environment and make evolve the law (doctrinal proposition) according to the social principles (social proposition) (McHugh, 1988, p. 42).

Problems with judge's law making prerogative in Australia

a. Division of powers

The first problem is concerned with the division of powers*. "It is almost unnecessary to tell you that the unsolved question of exactly what is judicial power and what are its limitations has received no answer in Australia"* (Dixon O., 1942, p. 6).

The critics said that the creation of the law is a task that should be undertaken by parliament and not judges. Moreover, when judges make law while they should be doing justice, they are acting in breach of the division of powers and usurping the legislative duties in policy creation which is prohibited by the constitution. Since judge's duty is with justice, there is a fundamental difference with the legislative duties. So they should not create binding rule of conduct but only apply justice to a specific case. Finally, even law creation

duty is not prohibited for the judges, that prerogative it is not recognized in the Constitution, so its applicability is under discussion (Patarroyo & Benavides, 2014).

b. Instability of the rule of law

Constant changes in the rule of law, make the system unstable. When the people do not know the rules they cannot change their behavior accordingly to fit the law. Therefore, the effectiveness of the law, as a model of conduct, is compromised: *"Sir Owen Dixon plainly believed that the common law judicial method was not compatible with a judge altering a legal rule or principle because it no longer meets or conforms to existing social needs. Change in legal principles had to be generated from existing doctrine"* (McHugh, 1988, p. 38).

As Australia was an English colony, all the ancient precedents were applied the same in both countries. Nevertheless, after Australia became a country but himself, judicial independence from England was necessary, thus English precedents were no longer legally binding in Australia. As such, the Australian Courts then had a wide berth and were able to act and created new law that changed customs and rules. This contributed to the instability of the law according to some authors (Heydon, 2003, p. 14).

Under the described Australian experience, in order to preserve system stability, law must be undertaken through a step-by-step process and not by any sudden change, to grant that is the best rule of conduct or at least the most reasonable one, (McHugh, 1988, p. 82) and only if a suddenly change is necessary as a cause of a change of the social proposition, this change of the rule of law must be done by a Court that respects its earlier decisions and departs from them to create a new rule (McHugh, 1988, p. 82) *"Though Sir Owen Dixon did not think that the law could never change, he was of the view, which remains the law, that the change could not be generated by a court bound by the earlier decisions of courts superior in the hierarchy – only by a court which, while respecting its own earlier decisions, was free to depart from them"* (McHugh, 1988, p. 82).

However, the suddenly changes could be influenced from other element rather than law and justice. Judges' desires to make history and appear in the newspapers can produce suddenly changes in the precedent that are against the probity and stability of the system, *"That is one core element in the 'rule of law'. (...) The rule of law prevents citizens being exposed to the uncontrolled decisions of others in conflict with them"* (McHugh, 1988, p. 82).

According to the previous statement, 'judicial activism' (understood as the excessive law making process done by judges without respect the step by step process or correctly interpret the social proposition) is destroying the rule of law in Australia accordingly with some critics. (McHugh, 1988, p. 81) The logic, coherence, structure, order, and technique that the Common Law system possesses, thanks to its gradual development, it's being broken down by sudden changes. (McHugh, 1988) Therefore, the court must be careful and only overrule a precedent in outstanding situations (Kirby, Precedent Law Practice and Trends in Australia, 2007, p. 247).

For that reason in order to overrule a precedent without social alteration or incur in judicial activism and to grant the judges are changing the law for the good reasons, it is necessary for the Court to demonstrate that: (i) the ancient precedent was *per incuriam*, (ii) make a contrast between the principles of the ancient rule with the principles that the court intend to include and decide if that change is desirable, (iii) consider how the new rule is going to affect the society, and (iv) if the new rule is more just and better resolves the conflict (Grundell, 2011).

c. Impartiality

Another problem is that judges are less impartial if they are aiming to generate a rule of conduct

rather than trying to achieve the best and fairest result in the case. *"A key factor in the speedy and just resolution of disputes is the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge"* (Heydon, Judicial Activism and the Death of the Rule of Law, 2003, p. 14).

d. Making law when they are interpreting

When a statute is not clear, it is necessary to interpret it. The problem is that, occasionally, when the Court makes an interpretation of a statute, it changes the meaning, either adding or removing parts from it (Rodríguez, 2016).

Under the Australian Common Law system, it is forbidden for the Court to change a statute under the principle of legislative sovereign. Statutes are clear expressions of the legislative power in which the Court cannot interfere. Consequently if Courts change or remove parts from a statute, they are usurping parliamentary functions.

Therefore, in Australia, Courts must be very strict with in the application of the Interpretation Act 1901 and only make the statute understandable without adding or removing anything (Grundell, 2011).

e. Complexity of the system means it is harder to find a rule

Another criticism is that judges, focusing on their role of law-makers, are making complex decisions. This means that it is almost impossible to find the *ratio* or the binding rule:

> *"Thirty years ago, a typical civil case would produce an ex tempore judgment of three or four pages. Now such judgments are commonly reserved, and are ten or a hundred times longer. Indeed, in all courts, ex tempore judgments are rarer, and so are short judgments (...) it seems hard to locate what is crucially important, easy to concentrate on what is marginal* (Heydon, Judicial Activism and the Death of the Rule of Law, 2003, p. 14).

If the judgement is complex and the *ratio* it is not easily found, that generates a panic to parts involved in the litigation in missing something relevant to the case.

When judges are focusing in the law making process rather than to solve the controversy, they tend to produce complex decisions. This practice makes the ratio finding a lot harder which, in fact, generates problems to lawyers and clients to know and understand which the applicable law is.

This complexity helped 'judicial activism' to destroy the rule of law and constituted an assault on the probity that judges must have. *"This rising public addiction to increasingly complex litigation has also tended to facilitate the role of judicial activism in damaging both the probity of the courts and in consequence the capacity of the courts to retain a sound grip on the applicable law in particular cases"* (Heydon, Judicial Activism and the Death of the Rule of Law, 2003, p. 14).

In conclusion, the gradual evolution of the precedent causes no disturbance in the law, but sudden changes do. Judicial activism is related to sudden changes in the precedent, but not with the step-by-step process of 'law making '(Rodríguez, 2014; Palomares, 2015)

Limits for the judges when they make law

Although gradual evolution is not a problem in relation to judicial activism, judges have limits when they are making law. These limits must be respected in both types of law creation in order to judges not interfere into the legislative sphere. (McHugh, 1988, p. 43).

Within these limitations judges are able to create law without interfering with the legislative power or contradict the Parliamentary supremacy: *"First, courts only make law in the context of determining legal dispute which is initiated by the parties to dispute"* (McHugh, 1988,

p. 43). Judges do not produce general rules that determine policy. They are limited to the case facts and only generate a precedent to solve similar cases. Therefore, in doing so, they are not creating a policy (Quintero & Molina, 2013)

The second limitation for the judges is the stability of the rule of law which implies that the rule should not be change so often, because constant changes in the law generate distrust in the legal system. For example, *"the natural inclination of most judges is to place a premium or certainty and predictability which are important legal characteristics of a stable legal system. Stability instills confidence in the institution of the judiciary and in the law"*. (McHugh, 1988, p. 43)

Judges should change the law only when the social proposition changes and when a change in the doctrinal proposition is required to adapt the law to the new social environment, *"judges make law only when changes in society require the law to be developed to meet the consequences of those changes"*. (Eisenberg M. A., 2007, p. 92) Also, the change can only be undertaken when the judiciary receives a case that sufficiently proves the existence of a need for change in society. (McHugh, 1988, p. 44) Finally, and not less important, it is prohibited for the judges to make law when they are interpreting a statute (Sarmiento, Medina, & Plazas, 2017).

Conclusions

Understood from a Civil Law perspective, Common Law judges have a subsidiary law making power that provides a way of adapting the law to the social reality without the required term that the Congress takes to produce a law. This work would not be possible without understanding the legal context in which the societal changes have been developing. The "BARS" create cohesion and stability for legal precedents in order to make the system coherent.

The modification of standard of conduct, in many cases, happens by a gradual evolution that involves an analysis and interpretation of society over a long period of time. By doing this judges can achieve the most effective rule of law for the whole of society. Sudden changes in the law made by judges are the exception and only occur when there is an abrupt change in society that justifies overruling the precedent.

However, it is necessary to note that the subsidiary work of law creation that is done by judges is subject to parliamentary supremacy. This means that judges cannot, for example, generate laws that go against positive legislation made by parliament or modify a particular provision by means of normative interpretation.

This process, subject to strong limitations and departing from the special characteristics and order that describe the common law legal system, permits the coherence of it. Therefore when another legal system with a different social characteristics implant those legal constructions could generate a problem because the misapplication of it without taking into account its limitation, produces the destruction of the rule of law and the confidence in the system.

Understanding how this very special type of legal creation works under Common Law provides us with tools to analyze the limits that courts should have in other legal systems (such as Colombia). In some of this countries courts generate rules of conduct without restrictions, respect for parliament or the legal context of the Common Law system, generating an instability that requires a fundamental legal change.

Referencias bibliográficas

Allan, T. (2004). Common Law Reason and the Limits of Judicial Deference. En D. Dyzenhaus, *The Unity of Public Law.* Oxford: Hart Publishing.

Allen, R. E. (1990). *The Concise Oxford dictionary of current English.* Oxford: Clarendon Press.

Australia. (1955). *Commonwealth of Australia Constitution Act.* Canberra: Commonwealth Government Printer.

Butt, P. (2010). *LexisNexis Concise Australian Legal Dictionary* (4th ed.). Chatswood: Butterworths.

David Wood, R. H. (1995). Themes in Liberal Legal and Constitutional Theory. En R. I. Hunter, *Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law.* New South Wales: Allen & Unwin.

Dawson, J. P. (1968). *The oracles of the law.* Ann Arbor: University of Michigan Law School.

Dixon, B. (8 de 2 de 2019). *legaldictionary.lawin.org*. Obtenido de https://legaldictionary.lawin.org/dixon-v-bell/

Dixon, O. &. (1942). The separation of powers in the Australian constitution. *American Foreign Law Association*.

Dixon, O. (1942). *The separation of powers in the Australian constitution.* New York: American Foreign Law Association.

Eisenberg, M. A. (2007). Te principies of reconing in the Common Law. En E. Douglas, *Common Law Theory.* Cambridge: Cambridge University Press.

Eisenberg, M. A. (2007). The Principles of Legal Reasoning in the Common Law. En E. D. E, *Common Law Theory.* Cambridge: Cambridge Studies in Philosophy and Law.

Gallego J (2014) Paradoja y complejidad de los derechos humanos en la sociedad moderna. Sentido y comunicación. *Revista IUSTA, N.º 40*, enero-junio de 2014, pp. 143-165

García, M & Fino G (2014). Los impuestos territoriales en Colombia y la inequidad social, ¿la voluntad de la clase dominante erigida en ley? En *Revista IUSTA*, N.º 41, julio-diciembre de 2014, pp. 61-75. Documento extraído el 2 de febrero de 2018 de HYPERLINK "http://revistas.usta.edu.co/index.php/iusta/article/view/2471/2408" http://revistas.usta.edu.co/index.php/iusta/article/view/2471/2408

González O. (2014). La Corte Constitucional como agente del campo jurídico colombiano: la omisión legislativa de principios constitucionales en *Revista IUSTA*, N.º 41 (2), pp. 123-137.

Grundell, E. (2011). Principles of statutory interpretation and the relationship between common law and statute. *Fundamentals of the Common Law.*

Guarín E (2013). Persona y realización efectiva de derechos en *Revista IUSTA*, N.º 38 (1), pp. 133-154.

Heydon, D. (2003). Judicial Activism and the Death of the Rule of Law. *Quadrant*.

Heydon, D. (2003). Judicial Activism and the Death of the Rule of Law. *Quadrant*.

Humbarita J (2015) Derecho Constitucional Hispanoamericano frente a la realidad institucional, manifiesta divergencia en *Revista IUSTA*, N.º 43 (2).

Kirby, M. (2007). Precedent Law Practice and Trends in Australia. *Australian Bar Review*.

Kirby, M. (2007). Precedent Law, Practice and Trends in Australia. *Australian Bar Review*.

MacAdam, A. (1998). *Judicial reasoning and the doctrine of precedent in Australia.* Sydney: Butterworths.

McHugh, M. H. (1988). The Judicial Method. *Australian Law Journal*.

Palomares J. (2015) El carácter vinculante de la jurisprudencia constitucional en el derecho alemán, en *Revista Via Inveniendi et Iudicandi*, Vol. 10, N.° 2 / julio-diciembre 2015, pp. 29-56. Documento extraído el 3 de enero de 2018 de evistas.usantotomas.edu.co/index.php/viei/article/view/2551/2483

Patarroyo S. & Benavides P. (2014). Rupturas Asignificantes: Revisiones críticas en torno al derecho, en *Revista Via Inveniendi et Iudicandi*, Vol. 9 (No.1) pp. 7 – 31.

Quintero S & Molina D (2013) La Ilegalidad: una herramienta de análisis para la naturaleza del conflicto en Colombia, en *Revista Via*

Inveniendi et Iudicandi, Vol. 8, N.° 1/Enero – Junio 2013, Documento extraído el 6 de marzo de 2018 de HYPERLINK "http://revistas.usantotomas.edu.co/index.php/viei/article/view/846/1127" http://revistas.usantotomas.edu.co/index.php/viei/article/view/846/1127

Quiroz M (2014). Acercamiento a las "oposiciones paradigmáticas" entre neoconstitucionalismo y positivismo jurídico en *Revista IUSTA,* **1**Vol 41 (2), pp. 77-97.

Rheinstein, M. (1952). Common Law and Civil Law: An Elementary. *Revista jurídica de la Universidad de Puerto Rico*(22).

Rodríguez E. (2016) El pasaje del estado y el derecho a la postmodernidad en *Revista Via Inveniendi et Iudicandi*, Vol. 11 (N. 2) pp. 11-37.

Rodríguez A. (2014) Indicadores de constitucionalidad de las políticas públicas: enfoque de gestión de derechos, en *Revista Via Inveniendi et Iudicandi*, Vol. 9, N.° 2.

Sänger R. (2015) La garantía de la propiedad y el principio de proporcionalidad como límites de la carga tributaria en Alemania en *Revista IUSTA*, **1** N.º 42 (1), pp. 73-99.

Sarmiento D., Medina S, & Plazas R (2017). Sobre la responsabilidad y su relación con el daño y los perjuicios en *Revista Via inveniendi et Iudicandi* Vol. 12, N.° 2 / julio-diciembre 2017 / pp. 101-115. DOI: http:// dx.doi.org/10.15332/s1909-0528.2017.0002.04

Saunders. (1989). Governments, Legislators and the Courts: Striking a Balance. En A. J. Bradbrook, *The Emergence of Australian law.* Sydney : Butterworths.

Simpson, B. (1986). The Common Law and Legal Theory. En W. Twining, *Legal Theory and Common Law.* Oxford: Basil Blackwell.

Steinwall, R. (2003). *Trade Practices Act 1974.* Chatswood: LexisNexis Butterworths.

Williams, G. (2006). *Learning the Law.* London: Sweet & Maxwell.

Cases consulted

Dixon v Bell (1816) 5 M & S 198.

Langridge v Levy (1837) 3 M & W 51; 152 ER 863.

Winterbottom v Wrigth (1842) 10 M & W 109; 152 ER 402.

Longmeid v Holliday (1851) 6 Ex 761.

George v Skivington (1869) LR 5 Ex 1.

Heaven v Pender (1883) 11 QBD 503.

Donoghue v Stevenson (1932) AC 662.

Australian Capital Television Pty Ltd And Others V Com-Monwealth Of Australia (No. 2) - (1992) 108 ALR 577.

Legislation consulted

The Australian Constitution Chapter I parts IV and V, and Chapter III.

The Trade Practice Act 1974 (Cth) Pt VA.