



**INFORMACIÓN DEL PROYECTO DE INVESTIGACIÓN**

CÓDIGO DEL PROYECTO	1818021		
TÍTULO DEL PROYECTO	TO WHAT EXTENT DO JUDGES MAKE LAW IN THE AUSTRALIAN COMMON LAW SYSTEM?		
PROGRAMA/S ACADÉMICOS	Derecho		
GRUPO/S DE INVESTIGACIÓN	Estudios en Derecho Privado		
ÁREA DEL CONOCIMIENTO	Derecho privado		
FECHA INICIO PROYECTO	1 de enero de 2018	FECHA FINALIZACIÓN PROYECTO	21 de noviembre 2018

RESUMEN Y PALABRAS CLAVES	<p>Dentro 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 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 de la coherencia 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 calificar los límites de competencia de las distintas autoridades y la interacción entre la ley realizada por el Parlamento y aquella producida por los jueces.</p> <p>Palabras claves: Potestad legislativa, estado de derecho, supremacía parlamentaria, desarrollo legislativo paso a paso, desarrollo legislativo de repente , división de poderes, los precedentes judiciales, legitimidad , límites.</p>
PROBLEMA	<p>Dilucidar la forma por medio los jueces hacen ley en el Common Law para entender las limitaciones que deben tener los jueces en dicho sentido</p>
JUSTIFICACIÓN	<p>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.</p> <p>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.</p> <p>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.</p> <p>In this context, law could be understood as a "body of enacted or customary rules recognized by the community as binding", as well as "the subject matter of the discipline of jurisprudence". At the same time, Jurisprudence</p>

	<p>can be understood to be “the theory of law; the study of the principles of law and legal system and their fundamental philosophical basis”.</p> <p>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.</p> <p>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.”</p> <p>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”. The law that is made by the judges is the first step of this laying down process.</p> <p>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. 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.</p> <p>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 taught. 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.</p> <p>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.</p>
<b>OBJETIVO GENERAL</b>	<p>Analizar jurídicamente la potestad que tienen los jueces respecto a la creación de reglas de obligatorio cumplimiento dentro del Common Law, para dilucidar los límites que tienen los mismos al no tener representatividad y crear en la práctica normas vinculantes.</p>
<b>OBJETIVOS ESPECÍFICOS</b>	<ol style="list-style-type: none"> <li>1. Describir la forma en que los jueces crean normas de conducta vinculantes en el Common Law.</li> <li>2. Analizar las formas en que dichas normas son incluidas en el ordenamiento jurídico</li> <li>3. Verificar las limitaciones que tienen los jueces en dicha tarea</li> <li>4. Conclusiones.</li> </ol>
<b>METODOLOGÍA</b>	<p>Esta investigación no pretende realizar un estudio comparado entre el Civil Law de Colombia y el Common Law. En consecuencia, al ser un análisis de las instituciones propias de un sistema extranjero, abordará la creación legal desde en un enfoque cualitativo, analizando la forma en que los jueces producen leyes con base en la constitución Política Australiana, para así contrastar dicha figura con la doctrina existente sobre la materia y la problemática que genera el activismo judicial en dicha legislación. Luego a través del método deductivo y del estudio en profundidad de los límites a la creación legal, obtendremos los suficientes elementos conceptuales que permitan esclarecer dicha prerrogativa especial como fuente de análisis o comparación para otros sistemas.</p>

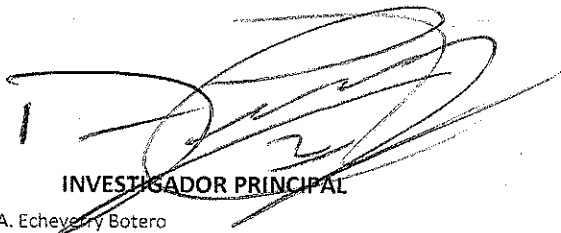
<p><b>RESULTADOS Y DISCUSIÓN</b></p>	<p>Artículo publicable en revista indexada o capítulo de libro</p>
<p><b>INCONVENIENTES PRESENTADOS DURANTE LA EJECUCIÓN</b></p>	
<p><b>CONCLUSIONES</b></p>	<p>Understood from a Civil Law perspective, Common Law judges have a subsidiary law making power that provides 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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>

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<p>ANEXOS DE PRODUCTOS COMPROMETIDOS</p>	

Este informe final se suscribe en la ciudad de Bogotá, el día 22 de noviembre de 2018



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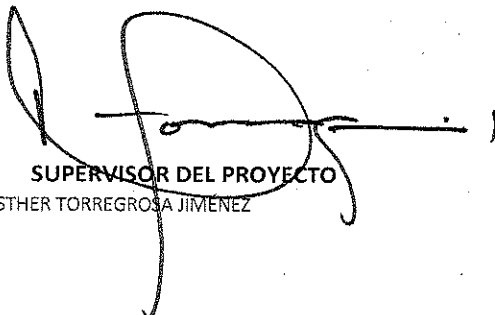
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