

# **The fundamentals of Australian Legal System**

## **Introduction**

The Australian government declares that our legal system is based on a fundamental belief in the rule of law, justice and the independence of the judiciary. And it's not just a declaration. In the 2009 World Competitiveness Yearbook Australia's justice system was ranked 1st in the Asia-Pacific region – and 7th in the world (Department of Justice, 2009). What features of Australian Legal system guarantee that all people—Australians and non-Australians alike are treated equally before the law? Judicial precedent and the separation of powers are the main principals which are called to achieve the high standard of justice in Australia.

### **1. Westminster System.**

Both the principal of judicial precedent and the independence of judicial branch are features of the Westminster system. Westminster is the name given to the system of parliamentary democracy used in countries such as Britain, Canada, Australia and New Zealand. And though it varies from country to country, the rule of law prevails, with an independent judiciary, subject to the Constitution in all countries of the Westminster system (Hinchy, 2008).

### **2. The Common Law System.**

The common law system, as developed in the United Kingdom, forms the basis of Australian jurisprudence. Judges make laws by comparing similar situations and following sets of principles to determine outcomes. This is known as the doctrine of precedent and it creates common law. Judges in lower courts must follow decisions of higher courts. Judges *may* also take into consideration decisions of lower courts, equal courts and courts from other countries. The common law also fills in gaps where there is no parliamentary Acts and interprets Acts to apply them to specific cases.

### **3. The separation of powers.**

#### **3.1. The principal of separation of powers.**

While the Westminster system had largely developed because of the doctrine of separation of powers, the Australian system of government is largely based on. This doctrine of separation of

powers proposes that the three institutions of government, the legislature, the executive and the judiciary should be exercised as separate and independent branches, which is reflected in Australian Constitution (Australian Bureau of Statistics, 1961). It is this doctrine that stresses the need for the independence of the judiciary from the other two government institutions in order to protect the freedom of individuals. The independence of the judiciary is crucial of a democratic community because when judges are presiding over cases, there must be no interference and intimidation from the external forces. The doctrine of separation of powers offers several advantages, it proposes separate, specialized and efficient branches of government and it also reduces the abuse of government power by dividing it. The independence issues touches upon the conflict of authority and freedom. If the doctrine of separation of powers did not exist, the authority would not be prevented from interfering in the administration of justice, therefore the basic freedoms of the citizens would not be guaranteed.

### **3.2. How the independence of judiciary is guaranteed in Australia?**

The judiciary is the government branch that is concerned with the administration of justice. The judiciary is absolutely separate from the executive and the legislature, so it can check the concentration of government power.

There are three main elements of the independence of the judiciary they are, permanency of tenure, dismissal by parliament and fixed remuneration. Permanency of tenure means that judges are appointed by the executive government and have a permanent tenure until they have to retire at the age of seventy. It was a constitutional referendum in 1977 that placed this requirement on federal judges. Also state laws have been made, for the state judges to retire at the same age. The only exception is the Family court justices; they have to retire at the age of sixty-five. Judges can only be dismissed on the grounds of proved misbehaviour or incapacity and can only be dismissed by parliament representatives. This is a very serious undertaking and has been used in the Australian parliament, but no federal judges have ever been dismissed. The constitution provides that a salary of a judge cannot be reduced. This is to prevent manipulation of salaries to a low level, which

would force judges to retire from the bench. This would be suitable to an indirect interference in the independence on the judicature. However parliament can increase judges salary if the wish to.

Judges also must not interfere with each other's deliberations and decisions. While judges hear and make judgments and administer laws, the doctrine of precedent is so entrenched as a rule of conduct that it is the golden rule for judges to follow legal principles created as precedents in superior courts. Judicial independence is also necessary because a judge cannot hear an appeal from a case that she or he have just presided over, this would lead to an inconsistency in deciding the appeal. Judges also have judicial independence. They have a law that protects them from having threats of civil litigation for their statements in their judgments. It is also a criminal offence for a person to interfere with a judge's performance while they are performing their duties.

The Australian Constitution of 1901 established a federal system of government, under which powers are distributed between the federal government and the states (Gifford, 1997). The states and territories have independent legislative power in all matters not specifically assigned to the federal government. Where there is any inconsistency between federal and state or territory laws, federal laws prevail. Federal laws apply to the whole of Australia. Thus, Australia has nine legal systems—the eight state and territory systems and one federal system. However, it is the state and territory criminal laws that mainly affect the day-to-day lives of most Australians.

## **Conclusion**

Thus the rule of law and high standards of justice in Australia rest on a well developed system of separation of powers and the principal of judicial president that ensures equal treatment of all people.

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