

Challenges and Comparisons The Rigidity of the Australian Constitution and Lessons from Germany's Flexibility

Shiyao Wang

Abstract

This essay examines the claim that the Australian Constitution is too difficult to amend by comparing it with the German Constitution (Basic Law). The Australian Constitution, enacted in 1901, requires a double majority in both national and state referenda, making the amendment process complex and challenging. In contrast, Germany's Basic Law allows amendments through a two-thirds majority in both houses of Parliament, presenting a more flexible and efficient model. By evaluating both constitutional frameworks, the essay argues that while the Australian process ensures broad support for changes, it also limits the ability to adapt to evolving societal needs. On the other hand, Germany's amendment procedure offers a more responsive and dynamic approach, allowing for constitutional changes that reflect modern developments. The comparison underscores the potential benefits of a more adaptable amendment process, suggesting that the rigidity of the Australian Constitution may impede necessary reforms.

Keywords: Constitutional amendment, Australian Constitution, German Basic Law.

I. Introduction

It is imperative to analyse any claims about Australian constitution being too difficult to alter for verification of validity. Australian Constitution was written into existence by its founding Fathers in 1901 and requires approval of two-thirds of both people and states for any changes, making the amendment process complex and challenging. Compare this claim against another jurisdiction such as Germany which employs an alternative model for constitutional amendment, known as Grundgesetz (Basic Law). Germany allows amendments with two-thirds majority approval in both houses of Parliament. This essay seeks to evaluate this claim by contrasting constitutional amendment processes between Australia and Germany, in terms of both flexibility and efficiency

of amendment. By studying Germany's constitutional model further it may also be possible to discern whether its approach provides more efficient constitutional change processes.

II. Validity of Claim Regarding Australian Constitution

To a large degree, claims about the Australian Constitution being difficult to change are true; amending requires an extensive process that includes national referendum voting with two-thirds majority support as part of any amendment process. Since its adoption over one century ago, there have only been eight successful amendments. However, it should be noted that other jurisdictions, like Germany, allow easier constitution amendments through parliamentary processes¹, suggesting this model offers more flexibility when amending constitutions.

Analysis of Amendment Process within Australian Constitution

Critics have often complained of the difficulty involved with amending Australia's constitution, leading them to believe it's too complicated. Under Australian Constitution law, amendments require approval by two-thirds of voters in both national and individual state parliaments for approval. This process has generally been seen as difficult and has led to only limited amendments since Australia's Constitution came into being on 1 January 1901². By comparison to Germany, where amendments require approval by two-thirds majority vote of both houses of German Parliament, Australia's process appears more stringent and suggests some difficulty would arise when trying to amend our Constitution; German cases offer more effective approaches towards constitutional change than Australia does.

1. Double Majority Requirement in Referenda

This provision of Australia's Constitution ensures a vote requires two thirds support before passing in referendums or elections. According to Section 128 of the Australian Constitution, for

¹ Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Bursa: Ekin Press, 2008) 126.

² Constitution of Australia, 1900, sec 128

an amendment proposal to pass must receive majority support in at least half the states across Australia as well as an overall majority vote (Australian Government, 2015). This provision ensures any constitutional change is representative of a wide cross-section of Australians, providing protection from changes that might not meet with widespread approval. This differs significantly with Germany's Constitution, where amendments only require two-thirds majority approval in both houses of Parliament for proposed amendments to be approved³ while in Australia this additional step adds another level of difficulty during constitutional change proceedings and can further contribute to claims that its contents is difficult to change.

2. High Success Threshold in Referenda

In Australia's Constitution, amending provisions requires meeting an exceptional threshold in referendums for amendment. As set forth by Section 128, any constitutional changes require approval by two-thirds of states in terms of both voters and legislature. Referenda are not without difficulty, with only eight out of 44 proposed amendments having passed since 1901. Comparing Australian and German constitutions reveals that Germany also boasts a high threshold for referendum success - known as its proposal system. This system requires two-thirds majority votes in both chambers of parliament to propose constitutional changes, followed by another two-thirds majority vote from either Bundestag or Bundesrat to implement them. Overall, both Australian and German constitutions possess similar high thresholds for referendum success.

Evaluation of Claim on Analysis

Making claims that amending the Australian Constitution can be difficult requires a comprehensive analysis. Any such claim needs to be carefully assessed for validity before being accepted as valid. An assessment of legal issues related to constitutional reform in Australia can shed light on this debate; comparative law research with non-common law jurisdictions like

³ International Journal of Constitutional Law, Title" (2016) 14(2) 411

Germany is especially illuminating in this respect. Australian constitutional amendment involves an intricate process comprising multiple steps and hurdles - for instance obtaining double majority in a referendum vote - before any decisions can be made on changes to our nation's laws. Germany follows suit by mandating that any proposed constitutional changes require two-thirds majority votes in both houses of Parliament for amendment to be passed into law. Therefore, the claim that Australian Constitution changes are difficult is valid as can be seen from their legal structures and German equivalents. "The Australian Constitution has proved too hard to change" can be considered valid to an extent. One non-common law jurisdiction which offers an alternative model would be Germany. Australian constitutional amendment requires two-thirds majority to change, which has proven difficult. German constitutional changes can be brought forward via two-thirds majority vote from both parliamentary chambers; this allows for a more flexible and efficient change process than Chile's constitutional process.

III. Comparative Review with German Constitution

Australian's constitution has often been criticized for being difficult to amend and too rigid, leading some people to accuse it of being outdated or static. Germany offers an alternative which has more flexible constitutional amendment rules. Amendments require two thirds majority votes in both houses of Parliament compared with an absolute majority vote for changing social needs within Australia's referendum process for constitutional change.

Overview of German Constitution (Basic Law)

Since 1949, Germany's Basic Law or "the Basic Law", has served as its supreme law and has established principles such as democracy, federalism and legal order throughout its borders. It establishes its values of democracy, federalism and rule of law throughout Germany's territory. The Basic Law provides for a parliamentary system with an executive branch known as the federal government and bicameral legislature that safeguards fundamental rights and freedoms to ensure equality before law, freedom of speech and upholding human dignity for German people. The Federal Constitutional Court is charged with upholding and interpreting Australia's Basic Law as it has proven more flexible to adapting with changing circumstances compared to

Australia's Constitution.

Discussion of Amending Process in German Constitution

The Basic Law of Germany provides for an expansive amendment process in their constitution. Article 79 details this opportunity through formal legislative procedures; certain provisions such as dignity cannot be amended which restricts flexibility to alter fundamental principles. A two-thirds majority vote by both Bundestag and Bundesrat must pass for any constitutional change to pass, showing its rigorous process involved with amending this legal document.

1. Comparative Review of Australian Constitution

The Australian Constitution can be evaluated against that of Germany to evaluate any claims about difficulty changing. For this, comparison can be made with regard to their amendment processes. Australia's constitutional amendment process demands approval by two-thirds of voters nationally and across at least half the states; this has proven challenging due to only six successful amendments since 1901 being approved successfully by voters and state lawmakers alike. Contrastingly, Germany allows amendments through a legislative process requiring two-thirds majority votes; by comparison, Australian Constitution amendment procedures appear more rigid and difficult. Therefore, claims about Australian constitutional difficulty have merit.

2. An analysis of how flexible is Germany's constitution when adapting to social changes

The German Constitution, commonly referred to as the Basic Law, displays remarkable flexibility when adapting to social changes. While Australian constitution amendment processes can often require complex amendment processes for change to occur, while Germany's Basic Law contains provisions which facilitate comprehensive approaches towards alteration. Article 79 provides for amendment of any constitutional provision to reflect current societal developments, providing an

avenue to modernise our constitution as societies develop further. German Constitutional Court plays an invaluable role in interpreting and applying constitutional provisions, creating a more dynamic and responsive legal environment. Thanks to this pliancy, German constitution remains relevant with society progress - serving as an excellent model for constitutional amendment by other jurisdictions seeking flexible changes.

Examining Successful Amendments in the German Constitution

The German Basic Law has proven itself as an inspiration for Australia when it comes to amendment processes - specifically with Article 146 allowing East and West Germany's unification in 1990. Additionally, the reform of Article 16 to include European Union citizenship highlighted Germany's commitment to European integration. Such changes signify the flexibility and adaptability of the German Constitution, indicating that it is possible for a constitution to evolve with the changing needs of society⁴ .

1. Examples of significant amendments in the German Constitution

There have been several significant amendments In the German constitution which demonstrate the flexibility and adaptability of the document. The Basic Law was amended in 1990 thereby integrating the unification of East and West germany. Moreover in 2006 an amendment introduced a comprehensive reform of the federal finance system in which the federal government re-deployed financial responsibility between the central government and the states. These amendments emphasise the ability of the German Constitution to respond to changing circumstances and address the needs of the nation (Bundestag, 2021; Bundeszentrale für politische Bildung, n. d.).

2. Comparison with the limited success in amending the Australian Constitution

The comparison between the Australian and German constitutions reveals significant differences

⁴ Sachar, 'Program for the Study of Germany and Europe Working Paper No. 9.3: The Grundgesetz After 50 Years: Analyzing Changes in the German Constitution' .(2006), p. 60

in their respective processes for amending the constitution. Australian constitutional amendment processes have historically proven challenging and unsuccessful⁵. Many attempts at amending Australia's Constitution have proven futile, most recently the 1999 referendum on republicanism and Indigenous recognition. Meanwhile, Germany's Basic Law has proven more accommodating of amendments. Since 1949, Germany's Constitution has undergone several amendments that address various matters like gender equality and European integration. These disparate success rates demonstrate the necessity of conducting an in-depth evaluation of alternative models to enhance amendability of Australia's Constitution. It can be argued that amending Australia's Constitution can be challenging due to requiring both voters and states to give consent for any major amendments to be implemented. Compare that to Germany's Basic Law Constitution which features an amendment process with more flexibility: any proposed change requires approval by two-thirds majority vote and this can be found in Article 79 which details this procedure for constitutional changes.

IV. Comparison to Non-Common Law Jurisdiction

An interesting comparison can be drawn between the German Constitution and Australian Constitution due to their different structures and legal systems. Germany's Basic Law shows a more flexible approach towards constitutional change when compared with Australia. For instance the German Constitution has been amended more than 60 times since its adoption in 1949 which indicates a greater willingness to adapt to societal and political developments⁶. This comparison suggests that the rigidity of the Australian Constitution may impede its ability to effectively respond to changing circumstances while the more adaptable approach of the German Constitution provides a better example for constitutional change.

V. Conclusion

The last assumption is to some extent valid that The Australian Constitution is far too difficult to

⁵ [Harry Hobbs and Andrew Trotter, "Constitutional Conventions and Change: Making Sense of Multiple Intentions"(2017)]

⁶ Werner Reutter and Astrid Lorenz, 'Explaining the Frequency of Constitutional Change in the German "Länder": Institutional and Party Factors' (2010)

change ". The stringent amendment process that requires a double majority of both The Australian electorate and The states has been challenging and led to but a few successful amendments. For example the unsuccessful attempt to amend Section 51 (xxvi) in the 1967 referendum to include indigenous Australians as citizens highlights the difficulty of amending the Constitution. In regard to the German Constitution though some a potential alternative it presents a flexibler and more adaptable model. The Basic law of The German constitution permits amendments through a relatively simpler process of a two-thirds majority in The Bundestag and The Bundesrat. This provides a more responsive means of adapting to societal changes and ensures that the constitution remains relevant in modern times .