

Written evidence submitted by Germany (Bundestag)

Introduction

The Committees of Inquiry in the German Bundestag¹ are not standing committees. “The Bundestag shall have the right, and on the motion of one quarter of its Members the duty, to establish a committee of inquiry...” (Article 44 (1) of the Basic Law²). The appointment decision of the Bundestag must determine the subject of the inquiry. “The committee of inquiry shall be bound by its inquiry mandate. Subsequent change to the inquiry mandate shall require a decision of the Bundestag.” (Section 3 of the Committees of Inquiry Act³).

The committee of inquiry “shall take the requisite evidence at public hearings”; the public may be excluded. “The rules of criminal procedure shall apply mutatis mutandis to the taking of evidence.” (Article 44 (2) of the Basic Law). All kinds of evidence that can be taken in criminal court, can be taken by a committee of inquiry, notably material evidence like documents, papers, and records, examination of witnesses, visual inspections, and hearings of experts. Most relevant are the presentation of evidence by the Federal Government, the federal authorities and the federal public corporations as well as the hearing of witnesses, especially public servants.

But not only governmental institutions are required to deliver material evidence. “Whoever has custody of an item that may be relevant to an inquiry is required to present and surrender it at the request of the committee of inquiry.” (Section 29 (1) of the Committees of Inquiry Act).

1. What powers do investigative committees in your Parliament have to summon witnesses and call for the production of documents?

Are these powers set out in legislation or in standing orders?

Under section 20 (1) sentence 1 of the Committee of Inquiry Act, witnesses are obliged to appear if they are summoned in due form by the committee. In the summons, witnesses shall be informed of the matter on which they will be asked to testify, of their legal rights and of the legal consequences of failure to appear as well as of their right to call on the assistance of a legal counsel of their choice for the hearing.

In principle witnesses are obliged to testify. Section 22 of the Committee of Inquiry Act lays down the requirements for rights to refuse to give evidence or information. Persons with an obligation of professional confidentiality and their assistants have a right to refuse to give evidence, as in criminal proceedings (section 22 (1) of the Committee of Inquiry Act in conjunction with sections 53, 53a of the Code of Criminal Procedure⁴). In addition, a witness may refuse to answer a question if the witness or a relative would by answering the question be in danger of being subjected to an investigation under lawfully instituted proceedings,

1 Committees of inquiry of the 19th electoral term established in accordance with Article 44 of the Basic Law <https://www.bundestag.de/en/committees/bodies/inquiry>

2 German Basic Law (Grundgesetz für die Bundesrepublik Deutschland) http://www.gesetze-im-internet.de/englisch_gg/index.html.

3 Gesetz zur Regelung des Rechts der Untersuchungsausschüsse des Deutschen Bundestages vom 19. Juni 2001 (BGBl. I S. 1142), das durch Artikel 4 Absatz 1 des Gesetzes vom 5. Mai 2004 (BGBl. I S. 718) geändert worden ist (Untersuchungsausschussgesetz - PUAG) <https://www.gesetze-im-internet.de/puag/>.

4 German Code of Criminal Procedure (Strafprozeßordnung – StPO) https://www.gesetze-im-internet.de/englisch_stpo/

section 22 (2) of the Committee of Inquiry Act. Lawfully instituted proceedings include not only criminal proceedings, but for example also proceedings for regulatory offences and disciplinary proceedings under civil service law.

The powers of the committee of inquiry to require material evidence to be released depends on the person to whom the demand is addressed. Section 18 (1) of the Committee of Inquiry Act provides that the federal public authorities must release material evidence (in particular files) which relate to the subject of inquiry. Land authorities and courts are obliged to release files as part of their duty of inter-agency and judicial assistance under Article 44 (3) of the Basic Law in conjunction with section 18 (4) of the Committee of Inquiry Act. The committee of inquiry may require private natural and legal persons to present and release evidence which may be important for the inquiry and which is in their custody, sections 29, 30 of the Committee of Inquiry Act. However, there is no obligation to release where the object has a strictly personal character and the holder could therefore not reasonably be expected to pass it on.

These powers are set out in legislation: the Committee of Inquiry Act⁵.

2. Are there any recent examples from your Parliament of contempts relating to investigative committees, including non-compliance of witnesses summoned to appear before a Committee?

In several cases the Federal Government refused to deliver documents to the committee of inquiry on the BND/CIA-scandal concerning extraordinary renditions (2006 to 2009). Also the government partially refused to give permission to its servants to give evidence.

The Federal Constitutional Court stated on June 17th 2009 that this was illegal⁶.

3. What sanctions are available to your Parliament in cases of non-compliance or other contempts on the part of witnesses?

If despite being properly summoned and without a valid excuse witnesses fail to appear, the committee of inquiry may order that they are forcibly brought before the committee without a judicial decision or may impose an administrative fine of up to 10,000 euros (section 21 (1) sentence 1 of the Committee of Inquiry Act). The witness may also be ordered to bear the costs of failure to appear.

If, without a legal reason, a witness refuses to testify an examining judge of the Federal Court of Justice, on the application of the committee of inquiry, may order imprisonment for contempt (section 27 (2) of the Committee of Inquiry Act).

False testimony by witnesses before the committee of inquiry is an offence under sections 153, 162 (2) of the Criminal Code. Any criminal investigations are the responsibility of the public prosecutor's office.

If the federal executive refuses to release files or releases them only as classified matter, the committee of inquiry may apply to the Federal Constitutional Court or the Federal Court of Justice (section 18 (3) of the Committee of Inquiry Act). Under section 18 (4) sentence 2 of the Committee of Inquiry Act, disputes on the release of files by federal courts (judicial assistance) or by Land authorities and courts (inter-agency assistance) are decided by the examining judge of the Federal Court of Justice on the application of the committee of inquiry.

5 Untersuchungsausschussgesetz vom 19. Juni 2001 (BGBl. I S. 1142), das durch Artikel 4 Absatz 1 des Gesetzes vom 5. Mai 2004 (BGBl. I S. 718) geändert worden ist; <https://www.gesetze-im-internet.de/puag/>.

6 BVerfG, 17. 6. 2009, [2 BvE 3/07](#).

If items are not voluntarily released by private natural or legal persons, the committee of inquiry may impose an administrative fine of up to 10,000 euros, section 29 (2) of the Committee of Inquiry Act. On the application of the committee, the examining judge of the Federal Court of Justice may order imprisonment for contempt or the confiscation of evidence in order to enforce the release, section 29 (2) and (3) of the Committee of Inquiry Act. Here too the requirements for criminal proceedings apply. If the person with custody asserts that the item requested is not important for the committee or relates to a secret, means of coercion may only be used if the evidence contains no information the passing on of which could not reasonably be expected because it is strictly confidential in nature and the committee of enquiry decides that evidence should have the security classification "SECRET" (section 30 (1) of the Committee of Inquiry Act).

4. What rules and guidelines do you have to ensure witnesses and potential witnesses before select committees are treated with fairness and due respect?

There are no comprehensive guidances for fair treatment of witnesses. The Committee of Inquiry Act states some rules:

Witnesses have the right to call on the assistance of a legal counsel of their choice for the hearing (section 20 (1)).

At the beginning of the examination of the facts, witnesses shall be given the opportunity to provide a contextualised statement of what they know about the subject of their examination (section 24 (4)).

Section 25 of the Committee of Inquiry Act governs the permissibility of questions to the witness. Thus, for example, questions which are inappropriate or not relevant to the matter in hand are to be rejected by the committee chair. Witnesses may ask the chairperson to rule questions out of order (section 25 (1)).

The witness has a right to examine the record of the hearing (minutes) and can add supplements or adjustments. Under section 26 of the Committee of Inquiry Act, the transcript of the witness's examination is to be delivered to the witness. This gives the witness the opportunity to review the testimony within two weeks and if necessary to correct it or to obtain a new examination. Only after this is it possible for the examination to be formally concluded. This is also important against the background that until the examination is concluded, a witness who corrects false testimony is exempted from punishment.

As in criminal proceedings too, methods of examination which impair free decision and the free exercise of will by deception, threat or similar means are prohibited (section 24 (6) of the Committee of Inquiry Act in conjunction with section 136a of the Code of Criminal Procedure).

5. What is your assessment of the effectiveness of your Parliament's powers and sanctions to deal with contempts?

The powers and sanctions addressing witnesses and private persons having custody of items that may be relevant to an inquiry seem to be adequate and effective.

Concerning the federal public authorities' obligation to release material evidence there remains an incertitude: In most cases the subject of the inquiry is the Federal Government and its conduct. And it is the government itself that decides which material evidence seems to be relevant to the inquiry.