

The DigiRights project

Overview on virtual application of defence rights in Germany

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Structure

- I. Inspection of files
- II. Communication with a lawyer
- III. Right to be heard / Right to be present
- IV. Right of questioning / Right of confrontation
- V. Right to notify a relative / trusted person
- VI. Right to appeal



Inspection of files

Legal situation

- Since 2017: Possibility of electronic file

Section 32 (Electronic file management)

(1) Files **may be kept** in electronic form. [...]

- From January 1, 2026: Introduction of **mandatory** electronic file

Section 32 (Electronic file management)

(1) Files ~~may~~ **must be kept** in electronic form. [...]

Inspection of files

Legal situation

Section 32f (Inspection of files; authorisation to issue statutory instrument)

(1) Inspection of electronic files is granted by **making the content of the file available for retrieval or by transmitting the content of the file using a secure method of transmission.** [...]

→ <https://www.akteneinsichtsportal.de/>

Inspection of files

Legal situation

Section 32f (Inspection of files; authorisation to issue statutory instrument)

(1) [...] **A hard copy of the files** or a data carrier containing the content of the electronic file is transmitted on the basis of a **request, which must include specific reasons**, only if the person making the application has a **justified interest therein**. Where **important reasons constitute an obstacle to inspection of the files in the manner provided for under sentence 1**, such inspection may also be granted without a request in the manner provided for under sentences 2 and 3.

Inspection of files

Case law

Problem: Inspection of files by detained person

District Court Frankfurt a.M. (2015):

→ In certain (extensive) cases the **detained defendant** is to be **provided** with a **(non-Internet-enabled) laptop for file study**

Inspection of files

Empirical research

- Electronic file inspection is the rule
- 2020: Survey of members of the judiciary
 - Mixed opinions within the judiciary
 - **~50 %** consider the **benefits** of the e-file to be **high or even rather high**
 - **25 %** support the **return to paper files**

Communication with a lawyer

Legal situation

Section 148 (Accused's communications with defence counsel)

(1) The accused is **entitled to communicate with defence counsel in writing and orally even when he or she is not at liberty.**

→ Electronic communication is included

→ Problem: Electronic communication with detained persons



Right to be heard / Right to be present

Legal situation

Section 118a (Oral hearing for review of remand detention)

[...]

(2) The accused is to be brought to the hearing, unless he or she has waived the right to be present at the hearing or unless great distance or sickness of the accused or other insurmountable obstacles prevent his or her being brought to the hearing. The **court may order** that, under the conditions of sentence 1, the **oral hearing is to be conducted** in such a way that the **accused is located somewhere other than the court** and the **hearing is simultaneously transmitted audio-visually to the place where the accused is located and to the courtroom.**

[...]



Right to be heard / Right to be present

Legal situation

Section 136 (Examination)

[...]

(4) A **video and audio recording** may be made of the examination of the accused.

Such a recording **is to be made**

1. if the proceedings relate to **intentional killing** and **neither external circumstances nor the special urgency** of the examination **poses an obstacle** to the recording or
2. if the interests meriting protection of **accused persons who discernibly have reduced mental capacity or a serious mental disability** can be better protected by making the recording.

Section 58a (2) applies accordingly.

(5) **Section 58b applies accordingly.**



Right to be heard / Right to be present

Legal situation

Section 233 (Defendant's release from obligation to appear)

[...]

(2) Defendants who are released from the obligation to appear at the main hearing are to be examined on the charges by a commissioned or requested judge. In this connection, they are to be advised of the legal consequences which are admissible at the hearing in their absence and asked whether they uphold their application to be released from the obligation to appear at the main hearing. In lieu of a request or a commission referred to in sentence 1, **the court may also conduct the examination on the charges outside the main hearing in such a way that the defendant is located somewhere other than the court and the examination is simultaneously transmitted audio-visually to the place where the defendant is located and to the courtroom.**

[...]





Right to be heard / Right to be present

Case law

Section 454 (Suspension of remainder of sentence of imprisonment on probation)

(1) [...] **The convicted person is to be heard orally.**

Higher Regional Court Stuttgart:

→ In principle, the **hearing by video conference is permissible**



Right to be heard / Right to be present

Empirical research

- Mainly recourse to findings from English-speaking perception or testimony psychology
- **Concerns:**
 - Unfavorable influence on recipients
 - Unfavorable effects on the respondent's testimony behavior due to the technology-related framework circumstances





Right to be heard / Right to be present

Literature

- **Criticism of Section 118a (2) sentence 2**

“The new “service offer” in the detention review process [...] is not likely to achieve any significant practical relevance.”

- **Support for Section 136 (4) sentence 1**

“Step in the right direction”



Right of questioning / Right of confrontation

Legal situation

Right of questioning/confrontation: Legally fixed in Section 240 (2) and in Art. 6 (3) lit. d) ECHR

- Restricted by the **introduction of an audiovisual recording of the examination of witnesses in the main hearing** (Section 255a, 251, 58a)
- Restricted by **video examination of witnesses in the main hearing** (Section 247a (1))



Right of questioning / Right of confrontation

Legal situation

Section 58a (Video and audio recording of examination)

(1) A video and audio recording may be made of the examination of a witness. After evaluation of the relevant circumstances, the examination is, as a rule, to be recorded and conducted as a judicial examination

1. if the interests meriting protection of **persons under 18 years of age and of persons who as children or juveniles were aggrieved by one of the offences under section 255a (2)** can thus be better safeguarded or
2. if there is a **concern that it will not be possible to examine the witness during the main hearing** and the recording is required in order to establish the truth.

[...]



Right of questioning / Right of confrontation

Legal situation

Section 58a (Video and audio recording of examination)

(1) [...]

The examination must, following an evaluation of the relevant circumstances, **be recorded and conducted as a judicial examination** if the interests meriting protection of persons who have been **aggrieved by offences against sexual self-determination** (sections 174 to 184j of the Criminal Code) can thus be better safeguarded **and the witness consented**, prior to the examination, to the video and audio recording being made.



Right of questioning / Right of confrontation

Legal situation

Section 255a (Showing of audio-visual recording of witness examination)

[...]

(2) In proceedings relating **to offences against sexual self-determination** (sections 174 to 184k of the Criminal Code) or **against life** (sections 211 to 222 of the Criminal Code) or **to ill-treatment** of persons in one's charge (section 225 of the Criminal Code) or relating to offences against personal liberty under sections 232 to 233a of the Criminal Code, the examination of a witness under 18 years of age may be substituted by the showing of an audio-visual recording of his or her previous judicial examination **if the defendant and his or her defence counsel were given the opportunity to participate in such examination**, and if the witness of whose examination an audio-visual recording was made in accordance with section 58a (1) sentence 3 did not object, directly after the recorded examination, to the showing of the recording in the main hearing as a substitute for his or her examination. [...]



Right of questioning / Right of confrontation

Legal situation

Section 168c (Right to be present during judicial examination)

[...]

(2) The **public prosecutor, accused and defence counsel are permitted to be present** during the judicial examination of a witness or an expert. Following the examination **they are to be given the opportunity to comment or to ask the examined person questions**. Questions or statements which are inappropriate or of no relevance to the matter may be rejected. Section 241a applies accordingly.

(3) The judge **may exclude an accused from being present** at the hearing if his or her presence would **jeopardise the purpose of the investigation**. This in particular applies if **it is to be feared that a witness will not tell the truth** in the presence of the accused.

[...]



Right of questioning / Right of confrontation

Legal situation

Section 247a (Order for witness examination via audio-visual means)

(1) If there is an imminent **risk of serious detriment to the wellbeing of a witness** who is to be examined in the presence of those attending the main hearing, **the court may order that the witness remain in another place during the examination**; such an order is also admissible under the conditions of section 251 (2) insofar as this is necessary to establish the truth. The decision is not contestable. **Simultaneous audio-visual transmission of the testimony is to be provided in the courtroom. The testimony is, as a rule, to be recorded** if there is a **concern that the witness will not be available for examination at a future main hearing** and the recording is necessary to establish the truth. Section 58a (2) applies accordingly.

[...]



Right of questioning / Right of confrontation

Legal situation

Section 247a (Order for witness examination via audio-visual means)

[...]

(2) **The court may order** that the **examination of an expert** be conducted in such a manner that **the expert is located somewhere other than the court and the examination is simultaneously transmitted audio-visually to the place where the expert is located and to the courtroom**. This does not apply in the cases under section 246a. The decision pursuant to sentence 1 is not contestable.



Right of questioning / Right of confrontation

Case law

The Federal Court of Justice:

- **Section 247a in general compatible with Art. 6 (3) lit. d) ECHR**
- **Introduction of the recording pursuant to § 255a of a witness examination into the main hearing only permissible if defense counsel and the defendant actually had the opportunity to ask questions**
- **It is not necessary that the defense has inspected the files before participating in the recorded questioning**



Right of questioning / Right of confrontation

Empirical research

- Methodologically mainly **expert interviews**
- *Lucia Sommerer* (2021): “It is **clear** that there is a **need for interdisciplinary research** [...] and that **ignoring the psychological effects of videoconferencing by the law cannot offer a solution.**”
- E.g.: Study by *Tamara Rapo* focuses empirically on the **planned video recording of the main hearing → critical voices (from the judiciary)**

“American show trials are not needed in a constitutional state”

“The willingness to testify as a witness in court would certainly suffer even further”

“We don't want a courtroom show here like in the USA“

“Insecurity (what do I look like, etc.)[...], Acting and cockiness“





Right of questioning / Right of confrontation

Literature

- Mainly studies from the English-speaking area are taken as a basis
- The **use of videoconferencing technology** in criminal proceedings is viewed more critically than **audiovisual recording of interrogations**





Right of questioning / Right of confrontation

Literature

Aspects regarding recording of witness statements

- Recording of an interrogation **does not have a relevant negative influence** on the **testimony of the respondent**
- Risks are seen on the **side of the recipients** of an interrogation recording
- **Disagreement about the significance of non-verbal communication (practice vs. theory)**
- Consequently, a **sole sound recording** is required (by some)
- **Technical realization of the recording** (perspective, exposure, etc.) may have an **impact on assessment of credibility** of the testimony
 - Problem: No comprehensive legal requirements regarding the circumstances of the recording





Right of questioning / Right of confrontation

Literature

Aspects regarding video conferencing technology

- Even with proper use of video technology, nonverbal behavior is more noticeable
→ Reason: participation in a video conference requires more cognitive resources
- The **technical limitations create feelings of being cut off or isolated** for the person giving the testimony
- **Influence on testimonial behavior by inhibitions due to skeptical attitude regarding technology**



Right of questioning / Right of confrontation

Literature

Aspects regarding video conferencing technology

- **Reduced socio-emotional awareness** might promote **less sincere (testimonial) behavior**

*"For **judicial videoconferencing**, it must be assumed that **witnesses are more likely than in a traditional deposition to testify untruthfully**, so there will be **an increase in false testimony**." – Benjamin Glunz (2012)*

Right to notify a relative/ trusted person

Legal situation

Section 114d (Notification of relatives)

(1) Arrested accused **are to be given the opportunity** without delay to **notify a relative or a person trusted** by them, provided the purpose of the investigation is not significantly endangered thereby.

(2) If detention is enforced against an arrested accused after he or she is brought before the court, **the court orders that** one of the **arrested accused's relatives or a person trusted by him or her be notified** without delay. The same duty exists in respect of every further decision on the continuation of detention.



Right to appeal

Legal situation

Section 32d (Obligation of electronic transmission)

(1) Defence counsel and lawyers **are, as a rule, to transmit as electronic documents written submissions and their annexes, and applications and statements to be submitted** in writing to the prosecuting authorities and courts. **They must submit as an electronic document an appeal on points of fact and law and its grounds, an appeal on points of law, its grounds and the response,** a private prosecution and a declaration of joinder in the case of private accessory prosecution. If this is **temporarily not possible** for technical reasons, submission in **paper form is admissible**. The **temporary impossibility is to be substantiated** when making the submission in paper form or **immediately** thereafter; upon request, an electronic document is to be filed subsequently.



Right to appeal

Case law

The Federal Court of Justice:

- Electronic transmission is a **requirement of form and validity, non-compliance** with which results in **invalidity**
- Detailed requirements specified (especially in the case of technical failure)