

A HANDBOOK FOR PRACTITIONERS | GERMANY

Civil Liability for Human Rights Violations



AUTHOR

Michael Bader

Bertha Justice Fellow and Legal Advisor
European Center for Constitutional and Human Rights, ECCHR, Berlin

[PROFILE](#)

I would like to thank Ekaterina Aristova, Miriam Saage-Maaß, Hannah Mangel, Nicolas Raitzsch and an anonymous peer reviewer for valuable feedback on and assistance with the text. All errors are mine.

FREQUENTLY USED ABBREVIATIONS

AGG	General Act on Equal Treatment (<i>Allgemeines Gleichbehandlungsgesetz</i>)
ArbSchG	Occupational Health and Safety Act (<i>Arbeitsschutzgesetz</i>)
ArbStättV	Workplace Ordinance (<i>Arbeitsstättenverordnung</i>)
BGB	Civil Code (<i>Bürgerliches Gesetzbuch</i>)
GG	Basic Law of the Federal Republic of Germany (<i>Grundgesetz für die Bundesrepublik Deutschland</i>)
LkSG	Supply Chain Due Diligence Act (<i>Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten</i>)
StPO	Criminal Procedure Code (<i>Strafprozessordnung</i>)
VersG	Law on Assemblies and Processions (<i>Versammlungsgesetz</i>)
ZPO	Civil Procedure Code (<i>Zivilprozessordnung</i>)

Legal Disclaimer: The information materials and opinions contained in this publication are for general information purposes only, are not intended to constitute legal or other professional advice and should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. We do not accept any responsibility for any loss which may arise from reliance on information or materials contained in this publication. You should consult a suitably qualified lawyer on any specific legal problem or matter.

Publication Information: This country report is one of the 19 reports prepared for a [comparative project on civil liability for human rights violations](#) led by the Bonavero Institute of Human Rights. It follows a unified template, and some terms in this report were defined consistently for the purposes of the project. To access other country reports and introduction from the project team, please [click here](#).

All online resources cited and/or referenced in this report were accessed on 1 April 2022. Publication Date: October 2022

Cover photo by Andreas Weber (courtesy of iStock).



CONTENTS



RETURN TO THIS
TABLE OF CONTENTS



VIEW THE START OF
THE CURRENT SECTION



INTERACTIVE

TABLE OF CONTENTS

Page	Content	Average Read Time
P4	Overview of Jurisdiction	1 minute 
P5	Introduction	2 minutes
P6	General Questions	1 minute
P7	Question 1	4 minutes
P8	Question 2	5 minutes
P11	Question 3	2 minutes
P12	Question 4	2 minutes
P13	Question 5	1 minute
P13	Question 6	1 minute
P14	Question 7	1 minute
P14	Question 8	1 minute
P15	Case Scenarios	1 minute
P16	Case Scenario 1	10 minutes
P21	Case Scenario 2	6 minutes
P25	Case Scenario 3	9 minutes



GERMANY



The German law of delict is a potential tool for claimants seeking to claim damages for human rights violations. However, significant procedural hurdles hinder access to effective remedies. Litigation involving corporate defendants with complex business structures or supply chains is particularly problematic. However, the German Supply Chain Due Diligence Act 2021 is a promising legislative development. Without creating new avenues for civil remedy, the law expands corporate duties of care and potentially enables liability under the general law of delict. A separate regime of civil liability applicable to the State is another characteristic feature of German law.

4

INDICES

15/167

Democracy Index
2021 Ranking

94/100

Freedom House
2022 Score

10/180

Transparency International
Corruption Index 2021 Ranking

The focus jurisdictions within the scope of the project have been selected to maximise diversity and representativeness. They reflect both common law and civil law traditions, a wide geographic distribution, different political systems, and varying levels of socio-economic development. The latter factors may impact the overall efficacy of the law on civil remedies and respect for the rule of law as a value. To provide useful context about the jurisdiction, each report indicates the relevant ranking or score of that jurisdiction in three leading global indices on democracy and the rule of law: [Democracy Index](#) by the Economist Intelligence Unit (measures the state of democracy in 167 states and territories); [Freedom House](#) (rates people's access to political rights and civil liberties with 100 being an optimal score); and [Transparency International Corruption Index](#) (ranks 180 countries by their perceived levels of public sector corruption).



Introduction

1. In Germany, human rights claims under the law of civil remedies can arise through the law of delict – a legal body similar to the common law of torts. German law of delict is governed by [ss 823 et seq of the Bürgerliches Gesetzbuch](#) (BGB – the German Civil Code)¹ and protects against a range of violations that are also addressed by human rights law. However, procedural hurdles such as the burden of proof on the claimant, high discovery and trial costs, and expensive legal expertise make human rights damage claims rare in practice and hard to achieve. The most promising legislative development, despite explicitly leaving out a civil remedy pathway, is the [German Supply Chain Due Diligence Act](#) of 2021,² which expands corporate duties of care and thus enables liability for neglecting these duties of care under the general law of civil remedies.

¹ German Civil Code (*Bürgerliches Gesetzbuch*) (BGB). For an English translation, see Federal Ministry of Justice, '[German Civil Code: BGB](#)'.

² Supply Chain Due Diligence Act 2021 ([Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten](#)) (LkSG). The law was passed on 16 July 2021 and will successively come into force from 1 January 2023.



General Questions



Q1

Can a claim under the law of civil remedies in your jurisdiction be brought against public bodies, corporations and/or individuals when one of the three defined harms results in human rights violations?

German law of delict is based on the principle that not all types of negligently caused losses warrant civil liability. It protects only against certain types of damages and penalises only certain types of behaviour.

2. The centrepieces of German law of delict relating to liability of private persons are BGB [s 823\(1\)](#), [s 823\(2\)](#) and [s 826](#). These sections are complemented by a number of special provisions, such as that contained in [BGB s 832](#) which establishes liability of a person under a duty of supervision, or [BGB s 836](#) concerning liability of landowners for certain violations. According to [BGB s 832\(1\)](#), any person who is required by law to supervise a person in need of supervision [...] shall be liable to pay compensation for any damage that this person unlawfully causes to a third party. [BGB s 836](#) stipulates that if a person is killed, the body or health of a person is injured, or an object is damaged, as a result of the collapse of a building or other work connected to a plot of land, or as a result of the detachment of parts of the building or work, the owner of the plot of land is obliged to compensate the injured person for the resulting damage if the collapse or detachment is the result of faulty construction or poor maintenance. The obligation to compensate shall not apply if the owner has observed the reasonable care required for the purpose of averting the danger. The rules in BGB [ss 823\(1\)](#), [823\(2\)](#), [826](#), [832](#) and [836](#) address only the liability of private actors, but as they do not differentiate between natural and legal persons; they apply to both individuals and companies.³
3. [BGB s 823\(1\)](#) protects a list of **'absolute rights'**, ie rights that grant legal protection to everyone. These are, namely, the rights to life, bodily integrity, health, freedom of movement and property. It further includes an open-clause formulation of the so-called **'other rights'** which is among a variety of general norms found in the BGB that are open to interpretation and are therefore especially susceptible to human rights claims.⁴ 'Other rights' in [s 823\(1\)](#) however, do not provide a catchall for every other possible right – rather, 'other rights' denotes only those with an explicitly absolute character, such that they cannot be partially restricted, similar to the right to property mentioned above.
4. Depending on the exact harm resulting from assault, violations of the rights to life, bodily integrity, health and property can be claimed. Harm arising from unlawful arrest or detention may amount to the violation of the right to freedom of movement. In order to claim damages, the victim must claim that violation of any of the rights to life, bodily integrity, health and property occurred. Instances of harmful or unfair labour conditions may affect the rights to life, bodily integrity or health, for example. The environment itself does not fall within the scope of German law of delict and violations of absolute rights must be claimed in this regard.

³ For a company, an act of its managing body is treated as an act of the company ([BGB s 31](#)).

⁴ Leonhard Hübner and Luca Kaller, 'Germany: Tort Law's Potential to Remedy Human Rights Violations' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022).

Further, it seems possible to invoke an infringement of the right to 'privacy and the free development of one's personality' (*Allgemeines Persönlichkeitsrecht*), that is generally recognised as an 'other right' protected by [BGB s 823\(1\)](#).

If the alleged tortfeasor is the **State**, liability can only be established according to a specific set of rules.

5. The liability of State actors is exclusively regulated in [BGB s 839](#). Additionally, [article 34](#) of the Basic Law of the Federal Republic of Germany⁵ can be invoked to pursue claims of damage caused by government actions (*Staatshaftung*). [BGB s 839](#) foresees the possibility of claiming purely economic losses.

Germany has enacted specific legislation that aims at remedying particular kinds of human rights violations and sometimes includes civil remedies as compensation.

6. Beyond the general laws of delict, there are some **statutory provisions** governing particular areas that include civil remedies. For instance, in cases of discrimination, the General Act on Equal Treatment ([AGG s 15](#))⁶ stipulates a provision for a separate damages claim. Another example is the Law on Liability for Defective Products ([ProdHAftG s 1](#))⁷ according to which the manufacturer of a product is obliged to compensate an injured party for the resulting damage if a defect in their product causes death, bodily injury or damage to property.

Q2

What are the elements of the civil remedies that you have identified above that have to be established by a claimant seeking the remedy?

BGB s 823(1) and (2)

7. According to [BGB s 823\(1\)](#), any person who intentionally or negligently causes unlawful injury to the life, bodily integrity, health, freedom, property or any other rights of a person may be liable to compensate the other party for the resulting damage.
8. Beyond identifying a violation of a particular right, however, [BGB s 823\(1\)](#) further requires the establishment of a breach of a tortious duty of care. While a duty of care is usually breached by a direct harmful action, determining the violation of a right tends to be a more complex matter when there is an instance of omission, or indirect harm. The duty of care is established on a case-by-case basis, although some scenarios have emerged in German jurisprudence where such a duty of care can be generally assumed. This includes a duty of care for those who create or control a hazard, as they will have the duty to protect others from its consequences. Further, if one assumes responsibility for performing a certain task,

5 Basic Law of the Federal Republic of Germany ([Grundgesetz für die Bundesrepublik Deutschland](#)) (GG).

6 General Act on Equal Treatment ([Allgemeines Gleichbehandlungsgesetz](#)) (AGG).

7 Law on Liability for Defective Products ([Gesetz über die Haftung für fehlerhafte Produkte, Produkthaftungsgesetz](#)) (ProdHAftG).

a duty of care in a reasonable performance of that task will be assumed. Lastly, those who profit from a certain (hazardous) activity might face a tortious duty of care (*Vorteilsziehung*).⁸

9. According to [BGB s 823\(2\)](#), liability to compensate damage requires that there has been a breach of a statute intended to protect individual interests (so-called '**protective laws**'). If the statute recognises that a breach may occur without fault, then the obligation to compensate only exists where fault is established. The statutes that are relevant here include any with direct legal effect in Germany that protect individual interests, and, as a result, foreign legislation is not applicable.⁹ The typical examples of 'protective laws' are the rules of criminal law and some statutory provisions (eg environmental and labour protection laws).
10. Some of the 'protective laws' that are relevant to [BGB s 832\(2\)](#) can be applied to the three defined harms.
 - Assaults can amount to a crime according to the German Criminal Code ([StGB ss 223 et seq](#))¹⁰ and unlawful imprisonment is prohibited by [StGB s 239](#).
 - In the case of environmental pollution, if someone's property is harmed intentionally, the relevant criminal offence is found in [StGB s 303](#). The StGB itself also establishes offences for environmental pollution (see [ss 306 et seq](#) and [ss 324 et seq](#)).
 - Further, a number of labour laws are also considered 'protective laws' such as those covering youth employment ([JArbSchG](#))¹¹ and occupational safety ([ArbSchG](#))¹². These fall within the scope of [BGB s 832\(2\)](#).

BGB s 826

11. According to [BGB s 826](#), a person who intentionally causes damage to another in a manner contrary to morality is obliged to compensate the damage. To meet the test of 'immorality', an act or omission must violate the 'sense of decency of all those thinking fairly and justly' (*gegen das Anstandsgefühl aller billig und gerecht Denkenden verstoßend*).¹³ Unlike the other norms of delict, [BGB s 826](#) enables injured parties to claim pure economic losses, but it contains strict limitations as it requires intent in relation to the harm done, as well as immorality.

BGB s 831

12. [BGB s 831](#) stipulates that a person who appoints another to perform a task is obliged to compensate the damage that this person unlawfully causes to a third party while performing the task. The norm is similar to the common law concept of vicarious liability,¹⁴ but is much narrower in its application than the concept in

⁸ For a detailed overview, see Hübner and Kaller (n 4) 181–202; Hartwig Sprau, 'Introduction to Sec 823 et seq' in Christian Grüneberg, Gerd Bruder Müller, Jürgen Ellenberger, Isabell Gotz, Sebastian Herrler, Hartwig Sprau, Karsten Thorn, Walter Weidenkaff, Dietmar Weidlich, and Hartmut Wicke (eds), *Bürgerliches Gesetzbuch* (CH Beck 2021) para 11.

⁹ BGH NJW-RR 2014, 639 (Federal Court of Justice weekly law report); Hartwig Sprau, 'Sec 823' in Grüneberg et al (n 8) para 57.

¹⁰ Federal Ministry of Justice, German Criminal Code ([Strafgesetzbuch](#)) (StGB).

¹¹ Federal Ministry of Justice, Youth Employment Protection Act ([Jugendarbeitsschutzgesetz](#)) (JArbSchG).

¹² Federal Ministry of Justice, Occupational Health and Safety Act ([Arbeitsschutzgesetz](#)) (ArbSchG).

¹³ See, for instance, BGH, NJW 2014, 1098 (Federal Court of Justice). See also Hartwig Sprau, 'Sec 826' para 4 and 'Sec 138' para 2 in Grüneberg et al (n 8). For a detailed account, see Gerhard Wagner 'Sec 826' in Franz Säcker, Roland Rixecker, Hartmut Oetker and Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (CH Beck 2020) para 9.

¹⁴ See, for instance, discussion in the following project reports: [41] Canada; [22]-[23] England & Wales.

English tort law in that it does not follow the idea of *respondeat superior*. A textbook example of a relationship covered by [BGB s 831](#) is that of a master and his journeyman, where the former closely oversees and controls the work of the latter. Importantly, according to [BGB s 831\(1\)2](#), the principal has the possibility of legal exculpation when the appointing party can prove that they have carefully selected and supervised the agent who caused the damage. While the norm here is for the burden of proof to be placed on the principal as the alleged tortfeasor (this is an exceptional pattern for civil law where the burden of proof is conventionally placed on the claimant), the requirements for exculpation are rather easily achieved.¹⁵

BGB s 839 and GG Art 34

13. [BGB s 839](#) and [GG Art 34](#) operate together to impose liability on the State for damage caused by government actions (*Staatshaftung*). [BGB s 839\(1\)](#) stipulates that if a civil servant intentionally or negligently violates the official duty incumbent upon them towards a third party, they shall compensate the third party for the resulting damage. If the official is only guilty of negligence, a claim may only be made against him if the injured party is unable to obtain compensation in another way.
14. [BGB s 839](#) therefore imposes personal liability on civil servants when acting in their official capacity only. If they are not acting in such a capacity, the general rules of [BGB ss 823 et seq](#) apply. It must be noted that, taken in isolation, [BGB s 839](#) is insufficient to find the State liable for the actions of its civil servants. [GG Art 34](#) assigns the personal liability of the civil servant to the State. Thus, [BGB s 839](#) read in conjunction with [GG Art 34](#) enables a civil claim against the State.¹⁶ If a civil servant breaches an official duty owed to a particular individual (instead of a duty owed to the public at large), [BGB s 839](#) declares them liable for any damage caused as a result.
15. Whilst [BGB s 839](#) covers pure economic loss (giving it a significantly wider scope than [s 823\(1\)](#)), it also restricts liability in a number of ways.¹⁷ First, if the civil servant has merely acted negligently, they may only be held liable if the injured person cannot obtain compensation through other means (see further [BGB s 839\(1\)2](#)). Second, if the civil servant breached their official duties in deciding a legal dispute, they are only liable for damages if this breach of duty also constitutes a criminal offence (see further [BGB s 839\(2\)](#)). Once liability is established in terms of [BGB s 839](#), [GG Art 34](#) assigns this personal liability to the State. The State is therefore effectively vicariously liable for the actions of its civil servants.¹⁸

¹⁵ For a more detailed assessment, see Hübner and Kaller (n 4) 181–202; Hartwig Sprau, 'Sec 831' para 10 and 'Sec 138' para 2 in Grüneberg et al (n 8).

¹⁶ Patrick Reinert, 'Sec 839' in Wolfgang Hau and Roman Poseck (eds), *Beck'scher Online Kommentar BGB* (CH Beck 2022) paras 2–7.

¹⁷ *ibid* para 1.

¹⁸ For an example of the restrictive interpretation of these norms, see BVerfG, DÖV 2013, 946 (Federal Constitutional Court) (Varvarin); European Center for Constitutional and Human Rights (ECCHR), '[NATO Airstrike on Varvarin Bridge](#)'.