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LIMITS OF ENVIRONMENTAL LAW:

PROBLEMS IN THE ORIGIN, OPERATION AND SETTLEMENT OF LEGAL PROCEEDINGS

Is German environmental law a classic case of a merely *symbolic* policy, that is, a conscious *discrepancy* between appearance and reality?¹ In her study on the “manifestations of symbolic environmental law”², Gertrude Lübke-Wolff laments the existing enforcement deficit in the environmental area by pointing out in particular the lack of prerequisites for implementing environmental law as well as the barely sufficient funds for equipment and staff (pp. 28f). The *opportuneness principle*, which gives the authorities very high discretionary powers, goes even further in this regard – the authorities would even be able to tolerate emissions exceeding the permissible levels by 100 percent (p. 34).

The *limits* which environmental law encounters begin even earlier though, and they are far-reaching. The following remarks on the origin, operation and settlement of regulatory offence and criminal action cases relevant to environmental issues will review those limits which are revealed when environmental laws currently in force are applied. After an introductory overview of the *legal foundations* of environmental law (I), this paper will cover six points: *the construction character* of the offences (II), the problem of *identifying* violations of the law which are relevant to environmental issues (III), the difficulties in *assigning responsibility* (IV), the *inclusion of the authorities* in the execution of legal proceedings (in criminal cases) (V), the *settlement by the courts* of the latter (VI), as well as the still open question concerning the environment as a *legal entity*, i.e. the resulting limits of damage compensation (VII). The main focus of this analysis will be the possibilities and limits of *sanctions* against environmental offences.

I. Legal foundations

Environmental law takes a very odd place *alongside* law concerning persons and the law of property. Not only should man himself, his health and well-being be protected, but also natural resources, the landscape, the climate as well as wild plants and animals.³ Environmental law stands for the realization that our biological basic living conditions – just as our body – are subjected to self-induced danger. An ecological disaster not only damages nature. People are affected, too – people as well as, in a legal sense, things. However, environmental law is only the last link in a chain of state control elements, the first of which is information and public awareness, and which is complemented by instruments of control such as pollution limit ordinances, duties, taxes, but also promotional programs.

The best-known legal instruments in environmental law are the Federal Air Pollution Law (*Bundes-Immissionsschutzgesetz*, BImG), the Circulation Economy and Waste Law (*Kreis-*

¹ At least according to Bernd Hansjürgens and Gertrude Lübke-Wolff, "Symbolische Umweltpolitik - Einführung und Überblick" in: Hansjürgens/Lübke-Wolff (eds.): *Symbolische Umweltpolitik*, Frankfurt: Suhrkamp, 2000, p. 11.

² *Ibid.*, pp. 25-62.

³ Bernd Bender, Reinhard Sparwasser, Rüdiger Engel: *Umweltrecht. Grundzüge des öffentlichen Umweltschutzrechts*, Heidelberg: C.F. Müller, 4. Aufl., 2000, p. 4.

laufwirtschafts- und Abfallgesetz, KrAbfG), the Water Resources Act (*Wasserhaushaltsgesetz*, WHG) as well as the Federal Nature Protection Act (*Bundesnaturschutzgesetz*, BNatG).⁴ The legal framework of environmental protection includes *transnational conventions*, such as *Agenda 21*, European environmental law and national environmental law, and in the latter especially environmental criminal law and environmental regulatory offence law.⁵ Thus, in the middle of the nineties, the Federal Environment Protection Agency (*Umweltbundesamt*) counted a total of approximately 20 such laws, which are supplemented by 61 ordinances, 25 administrative regulations as well as 23 European Union ordinances.⁶ There are, in fact, plans for the creation of a uniform environmental law code which, however, has not yet become reality.⁷ With regard to sanctions, German law provides for the possibility of regulation through environmental criminal law as found in the Criminal Code (*Strafgesetzbuch*, StGB), the Regulatory Offence Law (*Ordnungswidrigkeitengesetz*, OWiG) as well as the Environmental Liability Law (*Umwelthaftungsgesetz*, UHG; see below).

Only after 1945 *regulatory offence law* (*Umweltordnungswidrigkeitenrecht*) has developed as a branch of law.⁸ It was the result of an effort to *limit* criminal acts to the cases that really deserved punishment. Thus, it began as a project to decriminalize, and from that point in time on, one has distinguished between mere infringement of *regulations* and *criminal* action. The typical instrument in this legal area is a fine. An important contrast to criminal law is found in the way infringements are prosecuted. The so-called *opportuneness principle* as found in § 47 of the Regulatory Offence Law (OWiG) gives the administration very high powers of discretion. The prosecution of an infringement is actually required. However, the administrative authorities can dispense with prosecution and sanctions in spite of the fact that an unlawful act has been identified.

The role which regulatory offence law played within the realm of environmental law at least well into the eighties was rather neglected for a long time, not only with regard to the number of cases but also the severity of the cases involved. This is especially the result of the fact that no statistics were kept here with regard to the number and type of cases, a situation which differs from the area of criminal law. In the meantime, however, it has been determined that, at least at the beginning of the eighties (1983/84), regulatory offence law was applied to even more than *three times* as many environmentally relevant cases as criminal law. Among these were a considerable number of more severe cases of environmental damage.⁹

The year 1980 marks an important date in *criminal law* due to the inclusion in the Criminal Code of a section dealing with *crimes against the environment*. Furthermore, in 1994 §§ 324 to 330 of the Criminal Code (StGB) were amended.¹⁰ In criminal law extensive statistical material published on a yearly basis is available in the Police Crime Statistics (*Polizeiliche Kriminalstatistik*, PKS) as well as in the criminal prosecution statistics (*Strafverfolgungs-*

⁴ Hans Schulte: *Umweltrecht*, Heidelberg: C.F. Müller, 1999, p. 8.

⁵ For an overview of the legal framework of environmental protection see Hans J. Hoch in: Wolfram Lutterer, Hans J. Hoch: *Rechtliche Steuerung im Umweltbereich*, Freiburg: edition juscrim, 1997, p. 6.

⁶ Adapted from Schulte, p. 8.

⁷ Cf. Werner Hoppe, Martin Beckmann, Petra Kauch: *Umweltrecht*, München: C.H. Beck, 2. Aufl., 2000, pp. 53ff.

⁸ Cf. Lutterer/Hoch, pp. 4ff.

⁹ See Lutterer/Hoch, esp. p. 168 and pp. 199ff.

¹⁰ See Hoppe et al., p. 327.

statistik), where one can read about the amount of cases as well as the type and severity of sanctions. Of central importance here with regard to the amount of cases are § 324 (water pollution), §324a (soil pollution), §325 (air pollution) and § 326 (waste disposal endangering the environment).

The inclusion of *offences against the environment* in the Criminal Code was also the reason for an extensive implementation study at the Freiburg Max-Planck-Institute of Foreign and International Criminal Law in the middle of the eighties. The contents of this research study, which extended over more than a decade, included an investigation of the implementation of environmental laws on the part of the authorities, the police and courts. This investigation involved conversations with experts, interviews and an extensive evaluation of files.¹¹ In addition, a comparative analysis of the handling of the proceedings in the regulatory and criminal offence areas was made.¹² The following remarks are particularly based on the results of the latter.

II. The construction of the offence

What does an environmental offence consist in? One answer to this question is that an environmental offence is not the same kind of offence as bodily injury or damage to property. Both the *damage* done and the *visibility* of an environmental offence are not always as clear as in the case of dead fish in a river. The “disposal” of a barrel of oil by pouring it into the soil will neither make the drinking water im potable the very next day nor even the following week. Thus, environmental offences often have a longer-term temporal aspect – and to this are attached a whole number of problems, which is why here is spoken of the *construction* of an offence.

One must also distinguish between a *legal* (i.e. particularly a *legalized*) and an *illegal* form of environmental damage. The whole discussion of permissible levels of pollution, no matter whether it concerns emissions from private cars or from the industry, does nothing but mark the boundary between *legalized damage* and “too much”. The permissible levels of pollution, which were set down in the course of difficult discussions dealing with the conflicting interests of various parties, do nothing more than mark a legal limit, a phenomenon which is not found in this form in the law of persons nor in property law. No one must tolerate - at least *de jure* - even an insignificant form of bodily injury, or even a couple of small scratches on a car.

The discussion about permissible levels of pollution, i.e. about their possible introduction, increase or reduction, represents a central issue in the environmental sector. Permissible levels of pollution are subject to constant evaluation and control. However, the difficulties concerning the legalization of environmental damage can hardly be resolved with regard to society as a whole for two reasons:

Firstly, the environment is a highly complex ecosystem, and that means no one knows exactly where the tolerance levels lie. It may be the case that the notorious synergy effects can arise, where the effects of two environmental pollutants are greater than the sum of each alone. Or it

¹¹ Hans J Hoch: *Die Rechtswirklichkeit des Umweltstrafrechts aus der Sicht von Umweltverwaltung und Strafverfolgung*, Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1994.

¹² Lutterer/Hoch, loc. cit.

may be the case that one simply underestimates nature's ability to cope. Thus, in the eighties, when the dying of the forests due to pollution became a matter of public attention, some people expected an "ecological worst-case scenario" to happen soon. Fortunately, the gloomiest forecasts had to be revised back then. This ignorance of the tolerance levels of nature is a matter of principle. Predictions can be improved, but can *never* completely rule out the factor of ignorance, i.e. the risk.

Secondly, the difficulties concerning the legalization of environmental damage can hardly be resolved for a completely different reason. This consists in the almost impossible balancing of future costs against current economic profits. Because of the practical economic constraints of unregulated competition, one always takes out a loan on the future, the interest payment of which one unfortunately knows just as little as the future assets needed to pay off this loan. The inclusion of this aspect in the overall economic picture would probably lead to almost insoluble problems, even in modern economic theory.

One will probably already be able to tell from these opening remarks why legal sanctions against environmental offences represent a rather difficult undertaking. This is even more the case as the amount of daily legalized emissions most likely far exceeds the amount of illegal emissions.

The construction of offences is carried out by means of two procedures, the simpler of which was not discussed further here, and which simply consists in forbidden actions, such as the disposal of an old car in a lake. Environmental offences of this kind can be defined without any great difficulty. Therefore, the question of permissible levels of pollution, the more difficult of the two procedures, was the central topic of this section.

III. Identifying violations of the law relevant to environmental issues

No one knows how many violations of environmental law are committed each year. At best, more or less well-founded estimates can be made about unreported cases. The reason for this is the fact that the visibility of an environmental offence is often limited to the committing of the offence itself, as well as its directly visible results. If the river police observe a ship dumping waste oil, this visibility is completely provided. If they see an oil slick next to a ship, they can still reconstruct how the crime was committed so that the offender can be arrested. However, if a half dozen ships had passed by in the meantime, then this becomes an increasingly difficult undertaking.

Thus, the question of identification means that the authorities must rely on the corresponding investigative and observation capacities of the police, as well as on reports made to the police by private persons. In the eighties¹³ almost half of all legal proceedings (45.6%) in the area of *criminal* proceedings were initiated by reports made by private persons, a little over one-fourth by administrative authorities (27.1%), as well as one-fifth by the police (21.3%).¹⁴ However, for *regulatory* offence proceedings, police reports (67%) clearly take first place, followed by reports from other authorities (16%), the observations of the regulatory offence authority itself (8%) and reports made by private persons, with just a very small percentage

¹³ More recent statistics are not available, which has to do with economic reasons in research as well as with data protection. With regard to the patterns of these deeds however, one can continue to assume at least a certain similarity.

¹⁴ Adapted from Lutterer/Hoch, p. 45.

(3%).¹⁵ The high percentage of reports by private persons in criminal proceedings stands in contrast to a high percentage of police reports in regulatory offence proceedings, whereby the latter, however, include a large percentage of petty cases.

On the basis of these percentages, one can ascertain two limits in particular of environmental law with regard to the origin of proceedings, i.e. with regard to making a report – *limits of awareness* on the part of the general public, as well as *capacity limits* on the part of the police and the authorities. Certainly, these limits also play a role in many other legal areas. In the environmental area, they are particularly critical because the results of a crime often just vanish into thin air.

IV. The offender: the problem of assigning responsibility

All of this is made more complicated by a further point: the problem of *assigning individual responsibility*. First of all, some aspects of *environmental liability law* will be discussed as it applies here, and after that, statistics on the area-specific settlement patterns in *criminal law* will be presented to supplement the discussion.

The German Environmental Liability Law (UHG) became effective in 1991. It is the result of the realization that the annual damage to the environment amounts to billions of marks. Thus, for example, the estimated environmental damage for the year 1992 alone was 203 billion marks.¹⁶ Keeping in mind the above-mentioned *loan on the future*, this figure could thus be added to the net borrowings of the federal government of 39 billion marks¹⁷ for that year. It exceeds the federal debt by a *factor of five*.

Besides prevention, the purpose of environmental liability law consists in the legal regulation of the liability for damage caused, in as much as an *object of legal protection* is damaged. However, the environment as such is not protected by it.¹⁸ In practice, this kind of liability – where it exists – comes up against various limiting factors. These are in particular questions of *causality*.¹⁹ In a simple example we can demonstrate the tendentious impossibility of such a liability. There is a dying spruce in my (unfortunately imaginary) garden. With a certain amount of scientific logic and effort, we can trace this “crime” back, in all likelihood, to the increased levels of nitric oxide in the air. However, it is difficult to legally prosecute all power plants, car drivers, private households and industry as a whole. If not just one tree is affected but rather a whole forest, then the state will provide a certain economic compensation if need be, and in turn will draw higher taxes even from those who live in low-energy houses and who ride a bicycle to work.

One can distinguish between four different case groups²⁰ with regard to causality, which are justiciable to differing degrees.

¹⁵ Cf. Lutterer/Hoch, p. 171.

¹⁶ Adapted from Wolfgang Kahl, Andreas Voßkuhle: *Grundkurs Umweltrecht: Einführung für Naturwissenschaftler und Ökonomen*, Heidelberg: Spektrum, 2. Aufl., 1998, p. 350.

¹⁷ *Statistisches Jahrbuch 1996 für die Bundesrepublik Deutschland*, Stuttgart: Metzler-Poeschel, 1996, p. 496.

¹⁸ Rüdiger Wolfrum, Christine Langenfeld: *Umweltschutz durch internationales Haftungsrecht*, (ed.: Umweltbundesamt), Berlin: Erich Schmidt, 1999, p. 193.

¹⁹ Mario Bunge: *Kausalität, Geschichte und Probleme*, Tübingen: Mohr, 1987.

²⁰ Adapted from Kahl/Voßkuhle, pp. 360ff.

(1) *Complementary causality*: This is the case where damage is brought about by *two* or more sources. Thus, perhaps fish begin to die only after chemicals from two different chemical companies have been illegally dumped into the water. In such cases, both are liable, even if each pollutant alone would *not* have been sufficient to cause the damage.

(2) *Competitive causality*: Once again, let us take the two chemical companies as an example. This time, however, each of the pollutants alone would have caused the fish to die. Whoever did the damage first is liable here. That means that, from a liability point of view, even a third and a fourth company could now get rid of their pollutants in a similar manner, as the catastrophe has already occurred. Such phenomena occur time and time again on a smaller scale in the area of waterway navigation.²¹ But, all in all, liability law can definitely handle these cases of complementary and competitive causality.

(3) Things become more difficult in the case of *alternative causality*. Now both chemical companies discharge pollutants into the river at the same time, whereby each discharge alone would be sufficient to cause the death of the fish. The law holds here both of the responsible parties liable for the damage. However, in practice, the formation of such groups of responsible parties is not easy, as each allegation of causality must be proven separately.

(4) Finally, there is the normal case of environmental damage, which probably makes up the largest part of the above-mentioned 200 billion marks per annum of environmental damage – *statistical causality*. Proof of statistical causality is not permitted in German courts, though, which is different from the USA.²² Statistical proof, for example, would consist in the fact that a *doubling* of the cancer rate²³ in the immediate vicinity of a nuclear power plant has been determined, and the company would be made liable for 50% of these illnesses.

So much for an overview of the problems of causality in liability law. In criminal law, these problems become even more difficult because here we have a higher degree of individual responsibility. Whereas in liability law the *company* itself as a *legal entity* can be held liable for damages, in criminal law an *individual* must be identified. The difficulty of this undertaking can be seen by looking at how public prosecutors decree for crimes of various categories (Table 1). Whereas here in particular agricultural cases and also cases dealing with private persons are only seldom dismissed for lack of evidence (§ 170 II Criminal Procedure Code – *Strafprozeßordnung*, StPO), this is true for a little more than half of all cases dealing with industry, followed by the public sector.

Furthermore, with regard to *sanctions* issued by the public prosecutors – that is, a conditional dismissal (§153a Code of Criminal Procedure, StPO), an order issued imposing punishment or an indictment issued – it can be clearly seen that while sanctions were issued in 71% of cases dealing with agriculture, these percentages went down to 28% and 27% for cases involving industry and public authorities, respectively (Table 2). The problems of assigning responsibility to an individual are readily apparent here. The actions of public authorities and industry are generally more complex than that of agriculture, i.e. there are more people involved, and thus the chance of actually finding the responsible persons declines.

²¹ See e.g. "Wenn Gift im Meer ist, fällt Öl auch nicht auf", *Süddeutsche Zeitung*, November 6, 2000.

²² Kahl/Voßkuhle, p. 362.

²³ This is not mere speculation. The reactor catastrophe in Chernobyl caused immense increases in stillbirths in certain localities the following year, even in Germany. ("Mehr Totgeburten im Jahr nach Tschernobyl", *Süddeutsche Zeitung*, March 4, 2000).

Table 1: Decision of the public prosecutor according to offender category (figures in percent)²⁴

Category	Private	Small and mid-sized business	Agriculture	Waterway navigation / Seafaring	Industry	Public
Dismissal due to lack of evidence	24.3	35.4	17.1	30.3	53.4	41.6
Dismissal due to trifling nature of offence	34.1	14.6	11.7	12.4	17.9	30.6
Conditional dismissal	21.0	17.7	21.2	13.0	13.7	8.1
Order issued imposing punishment	11.9	19.0	35.3	42.7	8.8	8.6
Indictment	8.7	13.3	14.7	1.5	6.1	11.0
Total (N = 3062)	100.0 (n=675)	100.0 (n=1021)	100.0 (n=572)	100.0 (n=323)	100.0 (n=262)	100.0 (n=209)
Rate of sanctions imposed	41.6	50.0	71.2	57.2	28.6	27.7

Table 2: Offender category and rate of sanctions imposed²⁵

Area of responsibility	Total Number Of Accused	Sanctions Issued by the Public Prosecutor		Sanctions Issued by the Court	
		Number	Percent (%)	Number	Percent (%)
Small and mid-sized business	1035	511	49	164	78
Private	678	281	41	75	89
Agriculture	571	407	71	106	74
Waterway navigation	323	185	57	13	100
Industry	267	75	28	15	65
Public	213	58	27	5	14
Total	3087	1517	49	378	75

In the courts of law, cases involving industry clearly have a higher rate of sanctions issued, even though still below average.²⁶ Cases involving public authorities, on the other hand, have a very low rate of sanctions issued. It is not surprising that, time and time again, there have been calls for supplementing classical criminal law with *criminal law pertaining to associations*.²⁷

Considering all the problems described here regarding the construction character of offences, the identification of environmental offences as well as the assigning of responsibility, it is not astonishing that the number of environmental offenders prosecuted in the end has been stagnant for years, despite a large increase in the number of identified cases (Diagram 1). In spite of all that, however, each year tens of thousands of such proceedings are dealt with, whereby in a couple thousand of these cases, the result is a *sentencing*²⁸ after all.

²⁴ Adapted from Lutterer/Hoch, p. 121.

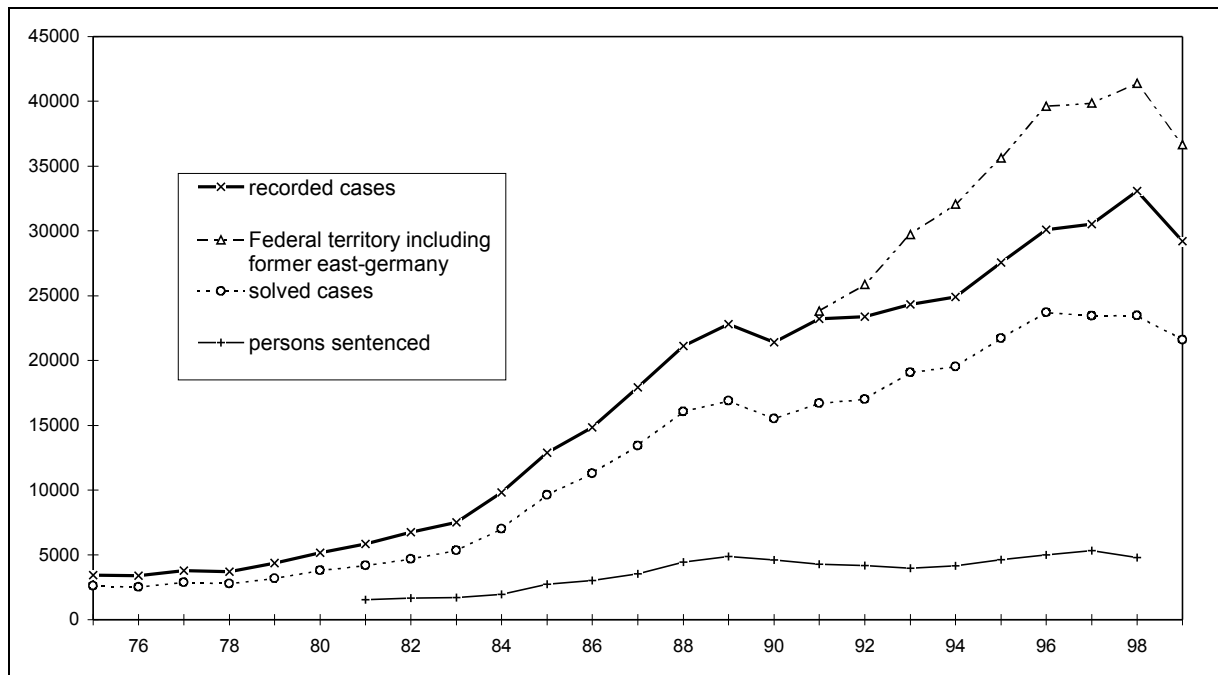
²⁵ Ibid., p. 126. Not taken into consideration are unidentified offenders and offenders who are not individual persons.

²⁶ Percentages for conditional stays of proceedings together with sentences.

²⁷ Cf. for example Günter Heine: *Die strafrechtliche Verantwortlichkeit von Unternehmen. Von individuellem Fehlverhalten zu kollektiven Fehlentwicklungen, insbesondere bei Großrisiken*, Baden-Baden, 1995.

²⁸ However, a sentencing is not a conviction, but rather only covers the cases of accused persons for whom an order imposing punishment was issued or whose cases were tried in a court of law. The latter, however, can have

Diagram 1: Criminal offences against the environment (1975-1999)²⁹



Clearly visible in the diagram is the high increase in the number of *recorded cases* during the eighties. However, this can at least be partly explained by the fact that cases of illegal waste disposal (§ 326 Criminal Code, StGB), which were still prosecuted as regulatory offences at the beginning of the eighties, were becoming more and more a matter of criminal law. It has been calculated that for the year 1983, that 97% (!) of the estimated 8000 cases dealing with waste in the states of Baden-Württemberg, Bavaria, Bremen and Hesse were still settled under regulatory offence law.³⁰ Whereas the number of cases dealing with water pollution almost doubled between 1983 and 1990, increasing from 5,769 to 10,073 cases, the number of cases dealing with waste not only increased *eightfold*, from 1,165 to 9,009 reported cases, but was almost the *same amount* as the water offences.³¹ In the nineties, the number of waste cases clearly surpasses the number of water offences.

Despite this increase in reported offences, however, the number of people actually sentenced³² remains remarkably constant and varies during the entire nineties between 4,000 and 5,000 cases each year. This can only mean that the ratio of reported cases to actually sentenced cases worsens from year to year. Whereas in 1990, 21.5% of all reported cases still resulted in sentencing, in 1998 it was only 14.5%. One can only speculate whether the decrease in reported cases in 1999 signifies a new trend, represents a statistical artifact, or simply represents waning efforts in solving cases.

ended in an acquittal.

²⁹ Adapted from the figures of the *Police Criminal Statistics* (reported and solved cases) as well as the *Prosecution Statistics* (persons sentenced) of the years in question. See also Lutterer/Hoch, p. 26ff.

³⁰ Adapted from Lutterer/Hoch, p. 221ff.

³¹ Adapted from the *Police Criminal Statistics*. See also Lutterer/Hoch, p. 30.

³² The figures for the people sentenced refer again to the old Federal territory including West Berlin..

V. The operation of legal proceedings – the inclusion of the authorities

In environmental criminal law, there is a close tie to the respective decisions of the administrative authorities, known as *administrative accessoriness*.³³ Administrative accessoriness in environmental law means that *not only* unclear or vague decisions can inhibit the possible application of environmental law³⁴, *but also* lack of clarity in the evaluation of pollution level regulations as well as documented toleration of illegal actions can have the same effect. Environmental criminal law can be divided into three types (Table 3).

Table 3: Types of administrative accessoriness³⁵

Category	No administrative accessoriness (normal case)	Functional administrative action	Dysfunctional administrative action
Percent of total cases	78%	16%	6%
Administrative steps threatened	none	yes	none
Administrative steps taken	none	Warning, tightening of restrictions, coercive measures	none
Knowledge of the offence	no	yes	yes
Offence against an official regulation applying to an individual case	no	yes	yes
Offence against a general pollution limit	no	no	yes
Express toleration	no	no	yes
Lack of monitoring	no	hardly	yes
Inconsequent administrative action	no	partly	yes
Assessment as a trifling matter	no	no	yes

In normal cases of environmental criminal proceedings, which comprise 78% of the total amount, administrative accessoriness plays no role. In a further 16% of the analyzed cases, functional administrative action can be observed, as is the rule. Administrative steps were threatened here first. Then warnings were issued, restrictions were tightened and coercive measures were taken. Lack of monitoring or inconsequent administrative action hardly occurs here or only partly. These cases usually (i.e. in 81%) result in the administration itself making a report to the police.

Completely different is the third type, which after all comprises 6% of all cases. Here we have a rather discouraging situation. Administrative steps were not even threatened although the offence was known to the authorities, who even expressly tolerated it. It is quite understandable then that the offence was assessed as a trifling matter. Very often in these cases there are also cooperation problems with the investigating authorities.

³³ Cf. Kahl/Voßkuhle, p. 399, Lutterer/Hoch p. 12 as well as Rüdiger Breuer: "Verwaltungsrechtlicher und strafrechtlicher Umweltschutz - Vom Ersten zum Zweiten Umweltschutzgesetz", *Juristenzeitung*, 49. Jg., 1994, p. 1083ff and Alexandra Pietrzak: *Umweltrechtliche Grundpflichten - Möglichkeiten und Grenzen*, Frankfurt: Lang, 1999, esp. p. 105ff.

³⁴ Concerning the problems of implementing environmental law from the perspective of the protagonists, i.e. the public prosecutor, police and environmental administration, see Hans J. Hoch, *Die Rechtswirklichkeit des Umweltstrafrechts aus der Sicht von Umweltverwaltung und Strafverfolgung*, loc. cit.

³⁵ Adapted from Lutterer/Hoch, p. 90.

So one can see that due to administrative accessoriness, environmental law can often only be as good as the workings of the administrative authorities allow. And luckily, one finds functional patterns in most of the cases. However, if the administrative authorities neglect their work, then the public prosecutor's hands are tied. Indictments then are very seldom brought in against someone, in only 0.5% of all cases.

VI. Legal settlement

Now we turn our attention to the question of the legal settlement of proceedings dealing with environmentally relevant cases. Environmental crime is for the most part so-called *white-collar* crime. Michael Kloepfer points out here that it is "similar to white-collar crime [...] however, the criminal energy of the offenders – at least with regard to crimes done intentionally – is by no means lower" in this group of people.³⁶ The typical environmental criminal is "44 years old, male (96%), German (87%), married (81%) and unpunished (89%). He has 1.9 children, has completed training in a manual trade and has a steady income."³⁷ Thus, he is – "in contrast to other criminals – *completely integrated into society*."³⁸ So this group of people should really be responsive to crime prevention measures, but in fact is so only to a limited degree, which is indicated by the rising number of cases over a long period of time.

The average environmental criminal might have his good reasons, though. The severity of sanctions against environmental offences can only be described as *disastrous* in comparison with other offences.

The Criminal Code (StGB) provides for punishment of up to five years in cases of offences against the environment, which is reduced to a maximum of three years in cases of negligence. From a sociological point of view it might be of great interest to find out how this punishment is actually applied – also in comparison with other offences. What about the question of *legal reality*? It was mentioned before that environmental law was considered as having a position *alongside*, or perhaps better, *between* the law of persons and property law. Here cases of bodily injury as well as property damage will be examined in comparison. This is in keeping with the special character of environmental crimes. If fish begin to die because chemicals enter the water, then this is a matter of property law. If I drink the water in question because the chemical has seeped down into the ground water, then my health is endangered.

Thus, it is with good reason that the legislature has provided for jail sentences of up to five years for environmental crimes. On the other hand, cases of property damage § 303 Criminal Code (StGB) carry a maximum punishment of only two years, and only in cases of property damage *endangering the general public* (§ 304) is the punishment increased to three years. If entire structures are destroyed, for example a bridge, the punishment is five years (§ 305). In cases of bodily injury (§ 223), by the way, the same maximum punishment is valid as in the environment paragraphs, namely five years. But by looking at these maximum punishments, one can at least recognize how serious the legislature considered environmental offences,

³⁶ Michael Kloepfer: *Umweltrecht*, München: C.H. Beck, 2. Aufl., 1998, p. 471.

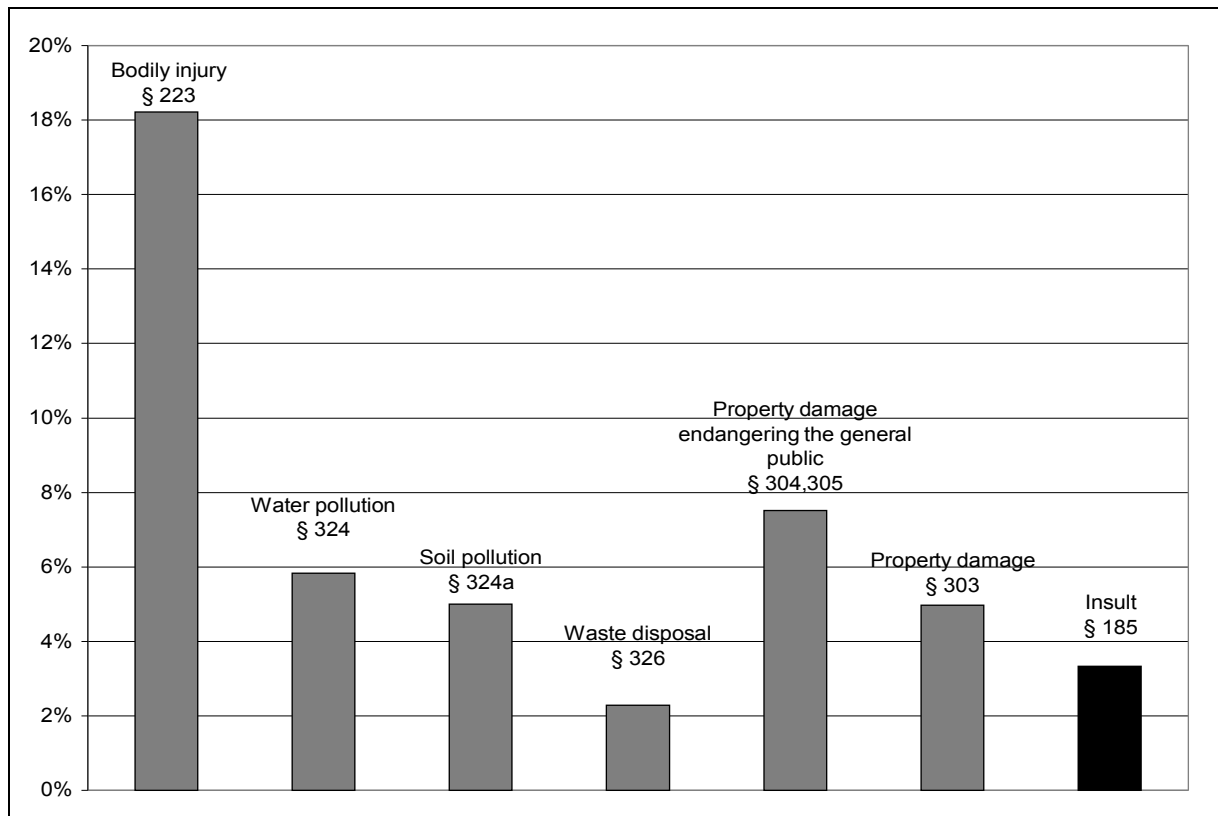
³⁷ Volker Meinberg: "Empirische Erkenntnisse zum Vollzug des Umweltstrafrechts", in: *Zeitschrift für die gesamte Strafrechtswissenschaft*, 100. Jg., 1988, p. 127; see also Lutterer/Hoch, p. 68ff.

³⁸ Michael Kloepfer, Hans-Peter Vierhaus: *Umweltstrafrecht*, München: Beck, 1995, p. 152.

whereby it is assumed that this is in fact not merely an act of *symbolic* politics as criticized by Lübke-Wolff.

The following comparison now deals with legally *convicted* persons. That means that all of the above-mentioned legal hurdles in environmental law have been dealt with, and an offender has actually been convicted. An indicator of this is the *percentage of prison sentences* imposed on the convicted persons, whereby only cases proven to have been committed intentionally were taken into account (Diagram 2).

Diagram 2: Percentage of prison sentences imposed in legal convictions (as of 1998)³⁹



In this comparison, cases of bodily injury⁴⁰ with 18.2% make up the largest group of jail sentences issued. The three largest categories of environmental offences clearly have lower percentages. A jail sentence is pronounced in 5.8% of water pollution cases, in 5.0% of soil pollution cases, and in 2.3% of cases of illegal waste disposal. In most cases a mere fine is issued. A relatively similar situation is found in cases of property damage. In 5.0% of the ordinary cases of property damage a punishment of a prison sentence of up to two years can be pronounced, thus similar to cases of water or soil pollution. Prison sentences for property damage endangering the public are clearly more often pronounced, namely in 7.5% of these cases.

The legal „significance“ of such offences can perhaps be best seen if one compares them to another offence which, unknown to many people, can also be punished with a jail sentence.

³⁹ Adapted from the *Prosecution Statistics*.

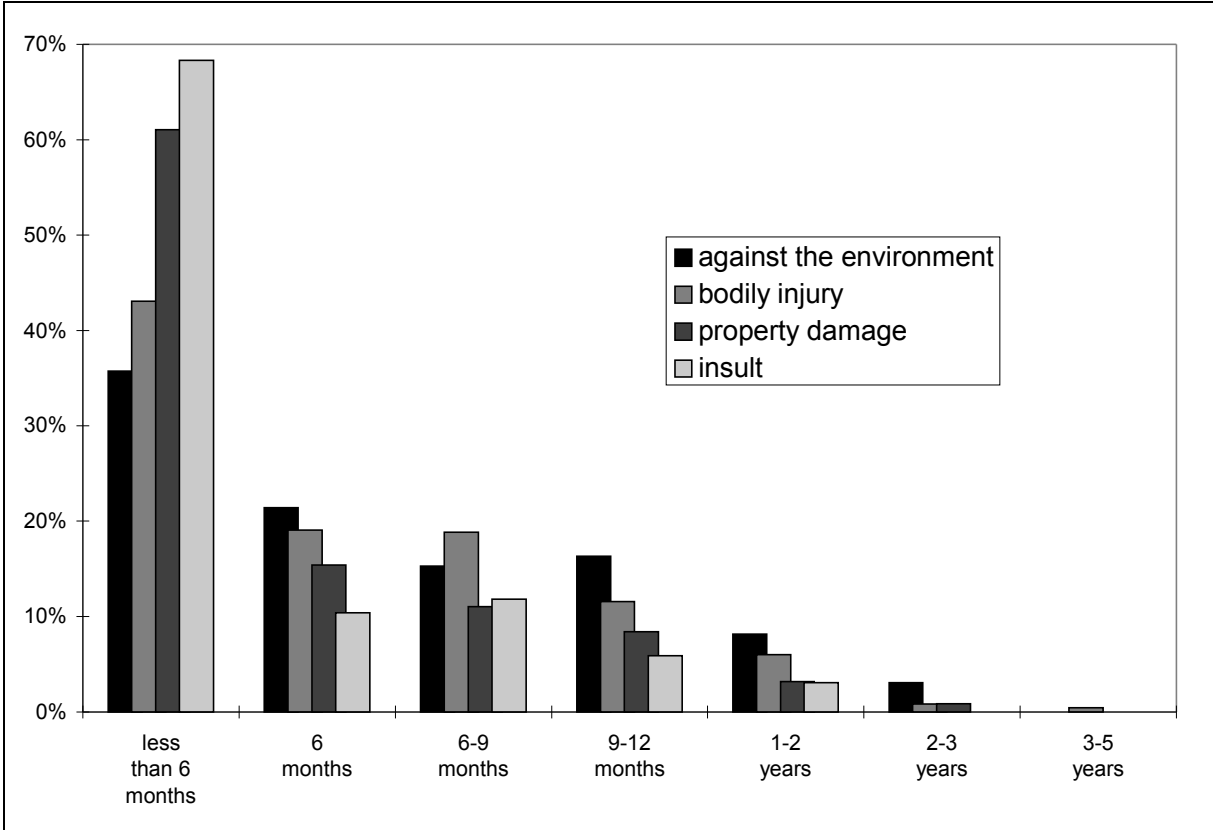
⁴⁰ Cf. § 223 Criminal Code (StGB). Not included here are cases of *dangerous* bodily injury, i.e. with a weapon (§ 223a), as well as cases of *grievous* bodily harm (§ 224).

These are cases of insult. The maximum punishment here is one year, and up to two years when combined with an act of violence. Convictions of this type are actually pronounced in 3.3% of all cases. To put it crudely, this means that there is a greater possibility of being sentenced to jail for an insult than for illegal waste disposal. Furthermore, the claim supported here that environmental law at least *indirectly* (this is not, however, a *terminus technicus*) represents crimes committed by individuals cannot be readily recognized in the actions of the courts. In terms of percentages, the courts do not even consider actual cases of severe ecological damage (i.e. of our natural basic living conditions) as being *dangerous to the general public*. One may also be of a different opinion here, though.

One could now speculate whether these 5% of environmental criminals do not simply represent, so to speak, the *hard core* of “environmental villains”, and that these will face the appropriate severity of the law in the end. Unfortunately, this is not the case either.

In the following overview (Diagram 3), *all* convicted persons who received a jail sentence in cases against the environmental law in 1998 are represented, a total of 98 persons. To recapitulate, these are 98 persons out of a total of 3,419 legally convicted persons whose convictions originated in the circa 23,000 solved cases and approximately 33,000 known cases in the former West German states. Thus, in approximately every tenth *known* case is there a conviction at all, and only one case in three hundred (0.3%) leads to a jail sentence. In view of these relationships, it is hardly astonishing that in most of the 98 cases, in 83 to be exact, the convicted person was placed on probation.

Diagram 3: Percentages of the length of pronounced jail sentences (As of 1998)



In the overview one can see that for cases of insult as well as for cases of bodily injury and property damage (without the cases of property damage endangering the general public), the maximum punishment is actually applied. Let us look at some details. Actually, rather mild jail sentences, for the most part, are pronounced in cases of insult. However, the percentage of probations granted, 62%, is clearly *lower* than in cases of environmental offences with 85%. In cases of bodily injury, 71% of offenders are placed on probation, similar to cases of property damage, with 72%.

In comparison, one can see, in fact, a tendency towards more severe punishment for environmental offences. In particular, the percentages of prison sentences of less than 6 months for the other groups of offences are clearly higher. But this situation must be seen in relative terms, as in 85% of these cases the offender is put on probation. And one must also keep in mind that fact that, in contrast to all three of the other groups of crimes, the maximum punishment is not even pronounced – a fact which is not only true for 1998.

On the basis of this case analysis, one can hardly draw any other conclusion but to describe the legal settlement of environmental crimes as disastrous. Environmental crimes are neither offences of a trifling nature nor petty offences, a fact to which the legislature has done justice.

In summary it can be seen that environmental offences are only seldom punished at all. And *if* they are punished, then usually only with a fine. If, however, a jail sentence is pronounced after all, the offender normally does not even have to serve his jail sentence. Therefore, it would only be ridiculous to call for harsher laws in the area of environmental protection. The problem is the legal settlement of these admittedly difficult cases – a quite well-known fact in criminological research.⁴¹

VIII. The environment as a legal entity: limits of damage compensation

Now we come to the last point of this overview: the question of damage compensation and of the environment as a legal entity. Punishment is not an end in itself. It may not have to take place at all if the criminal expresses regret and makes an effort to *make amends* for the damage he has caused – or at least a corresponding *equivalent* (dead fish remain dead).

However, damage compensation does not normally take place. The extensive investigation done as part of the Freiburg Implementation Study, with data based on the early eighties and which is unfortunately still the only more extensive empirical database, paints a desolate picture with regard to this question. Thus, the public prosecutor never once made use of the possibility, as set down in § 153a Code of Criminal Procedure, of a stay of proceedings on the condition of *damage compensation*.⁴² In addition, the fines issued usually only amounted to approximately *one-tenth* of the damage done. However, there was *one* single case heard by the courts in which the condition of damage compensation was applied. Parallel proceedings in civil law action, one *possible* place in any case to sue for damage compensation, took place in 1.6% of all cases at that time. However, hardly any information could be gathered as to the actual content or as to the results of these proceedings. The general results for that time period allow for scepticism, though, and despite the Environmental Liability Law, which has been

⁴¹ Cf. for example Kloepfer/Vierhaus, p. 141ff.

⁴² Lutterer/Hoch, p. 63.

passed in the meantime, there are hardly any reasons for a profound change since then. This can be explained by the following points:

1. From a legal standpoint, animals are not – just as nature itself – legal entities. If plant and animal life are damaged by an oil spill, that makes no difference to the polluter by and large. His damage mainly consists in the sunken tanker and the cargo lost.
2. In the end, *we* have just as little enforceable right as the animals and plants to a natural environment subjected to as little pollution as possible, and this inspite of the expressly documented freedom from bodily harm found in the Basic Code (Article 2, Section 2). The reason for this is as trivial as it is cynical. On the one hand, there is economic pressure. But on the other hand, potential damage, particularly with regard to nuclear energy, is not even seriously insurable at all.⁴³
3. The state, just as the authorities, abstains from initiating the corresponding civil law action for damage compensation, even though the corresponding legal instruments, e.g. in the Water Resources Act, exist. § 41 of this law, for example, allows for *full* liability for damage caused. However, the causality problems already discussed in the context of the Environmental Liability Law come into play here as well as their legal solutions up to now (statistical proof of causality not permitted in Germany).

Thus, one can rightly summarize that environmental crimes are normally more worthwhile for the offender than harmful. *Firstly*, with a little luck, he will not even be arrested. *Secondly*, in court there is a good chance of an acquittal or of a stay of proceedings. *Thirdly*, the punishments issued are light. *Fourthly*, the matter of responsibility for damage compensation is usually left undiscussed. And *fifthly*, the criminal also has an economic advantage from his crime.

Conclusion

This essay has analyzed limits of environmental law by looking at a sequence of six points. In the course of this analysis, all those cases in which breaches of this law were tried by the courts have been focussed upon. Not discussed here were the majority of those people who follow the rules set down by the state and thus do not come into conflict with the law – a limit of this essay, which in turn is necessitated by the limits of empirical social research.

The end results of this analysis are not really very optimistic, which in turn perhaps marks another limit of law already briefly mentioned – law can only be as effective as the general willingness to obey it and to respect its enforcement. And in the area of environmental law, one should certainly not underestimate the fact that an official warning of a punishment has a preventative effect in itself. Nonetheless, it must be kept in mind that, unfortunately, there are still large deficits particularly in the environmental area due to the difficult types of legal proceedings and the complex inclusion of different agents, such as administrative accessoriness. These deficits are found in the administration of justice and beyond that in the legislature, the political antechamber of law, which is demonstrated at the national level in the rather embarrassing anti-environment campaign against the so-called “energy tax.” At the

⁴³ According to the *International Doctors for the Prevention of Nuclear War*, the total amount of damage caused by a nuclear power plant accident of the size of Chernobyl in the Federal Republic ranges between 5,000 and 12,000 billion marks (“Ärzte warnen vor der Atomindustrie”, open letter, *Süddeutsche Zeitung*, April 26, 1999).

international level one may recall the periodic conferences on climate protection, which are nearly always a failure and whose worst accomplishment is the possibility of trading pollution *rights* they themselves have issued.⁴⁴ All of this reminds us once again of the difficulties in dealing with the *legalized* damage of our natural basic living conditions. How can we succeed in making a sensible decision regarding questions for which, in truth, *there are no answers*?⁴⁵

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⁴⁴ "Schwunghafter Handel mit heißer Luft", *Süddeutsche Zeitung*, October 23, 1999.

⁴⁵According to Heinz von Foerster, in: *Wissen und Gewissen*, Frankfurt: Suhrkamp 1993, p. 351ff.