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The Performance of Local Government in East Germany Evaluating Legal and Institutional Transfer: The Example of Local Building Authorities

Abstract: A study on implementation and legal facts has provided the basis for this examination of the capacity for action and performance of East German local authorities, measured against the criterion of rule-bound application of the law over time (1990-2000) and in comparison with West Germany. Taking the example of local building authorities, an evaluative issue that transformation research has hitherto neglected is to be addressed: the impact of institutional system change in East Germany. The article examines whether and under what conditions East German authorities have adapted to West German normal procedures in dealing with legal regulations and attained Western implementation quality, and what singularities and distinctive features are apparent. Special attention is given to actors' capacity and inclination to use the law strategically in bargaining processes.

1. Background and Issue: The "Evaluation Gap" in Transformation Studies

Given the timing of system change and its investigation, research into institutional transformation in East Germany and other post-socialist countries in central eastern Europe has mainly investigated the conversion and construction of the institutional world and key determining factors.¹ Although problems with transformation and integration have persisted, the future course of institutional change in East Germany and the effects of the new institutional and regulatory world have no longer been the focus of attention. Little empirical evidence has been forthcoming on the performance of East Germany

1 Cf. Berg et al. (1996); Goetz (1993); also Wegrich et al. (1997) and the work produced by the Konstanz research programme initiated and coordinated by Wolfgang Seibel, cf. Reulen (1998); Frenzel (1995); Eisen (1996); Seibel (1996).

authorities and whether the new institutions and their personnel have proved capable – major evaluative issues of particular interest for administrative policy, political science, and public administration. Despite repeated moves by transformation studies to take account of actual action patterns in institutional change and thus of the effects of change, little progress has been made in such policy and process research.

This article hopes to remedy some aspects of these shortcomings. It is based on a study of local building authorities,² which have faced a greater challenge than almost any other branch of administration in having to apply a particularly complex set of legal regulations. In order to throw light on both institutional change and on the effects of transformation, the study combines implementation and evaluation research approaches. The focus is on the performance of East German local authorities, measured against the criterion of law-bound function performance.³

The study proceeds in three steps:

- First, the development of rule-of-law performance by East German local authorities over the last decade (1990-1999) is traced with the aid of suitable indicators,⁴ positing a three-phase model of local implementation practice (section 2).
- Second, findings are explicated in terms of institutional, historico-cultural, and actor-related variables. Three competing lines of argument on relations between institutions and action are followed, drawing on recent neo-institutionalist approaches (section 3).
- Finally, conclusions are drawn and prospects considered (section 4).

2 The study was carried out by the author between 1999 and 2001 and submitted as a dissertation (cf. Kuhlmann 2001a).

3 To establish a standard for comparison, East and West German local authorities were included in the study and compared, a hitherto neglected perspective thus being adopted. From a methodological point of view, the study combines quantitative analyses (e.g., susceptibility to conflict and litigation success rates in building proceedings to establish procedural or material correctness) with qualitative procedures (especially interviews with important actors and case studies). Interviews (based on the oral history method) with “founder” administrative judges who had accompanied and cooperated in developing the system of administrative courts since the summer of 1990 proved a fruitful source, hitherto scarcely tapped by transformation studies.

4 This article does not go into detail on the debate about performance measurement and performance measurability in public administration, which is concerned with, among others matters, indicator formation and measurement for evaluating administrative action (cf. Nullmeier 2001, De Bruijn 2002; Kuhlmann 2003b; Kuhlmann et al. 2004).

2. Phases and Indicators of Performance Development

2.1 “Phase of Radical Change” (1990–1993): “Depletion” of Law⁵

To obtain useful indicators for evaluating the legal quality of administrative action,⁶ a result dimension of application practice gauged by the material correctness of building permit decisions is to be distinguished from a process dimension dealing with the correctness of planning permission procedure.

In the result dimension, the quality of building law decisions (building permits) must be considered unsatisfactory during the early phase of transformation. A good example is the interpretation of indeterminate legal concepts – particularly often required in building law – which, for instance in applying Section 34 Building Code in building permission procedure, often simple ignored legal precedent,⁷ sometimes resulting in a proliferation of permits and explicit indulgence towards developers. Serious material legal deficiencies in building permission activities in the period immediately following regime change are manifest in mushrooming construction on the periphery of settlements or even outside their bounds, and in the tendency to convert so-called “datcha (weekend cottage) settlements” for residential purposes – problematic from both a legal, development, and planning point of view (cf. IfS 1996: 62 ff.), in the (legally inadmissible) constructional consolidation of “locality splinters,” and in the unlawful approval of investment building projects.⁸

“I have set a very big exclamation mark behind the question whether the distinction between core area and outlying area generally corresponds to legal regulations. The answer must be a clear “No” until about 1993. And the second question whether building permission pursuant to Section 34

5 The term “Depletion of law” (Versickerung des Rechts”) was coined by Frido Wangener (1979: 216), originally with reference to “implementation deficiencies” resulting from “overregulation.” The term was later used in connection with application of the law in East German local authorities after reunification (Wollmann 2000a).

6 See also Geißel (2003) for a comparison of performance by East And West German local authorities.

7 Building permission proceedings pursuant to Section 34 Building Code require application of a number of indeterminate legal concepts referring to concrete building-law facts (e.g., “insert,” “built-up,” “areas,” “splinter settlement,” etc.). This being the case, Section 34 Building Code has proved a major source of conflict (cf. Wollmann et al. 1985), regularly provoking informal administrative action (Bohne 1981)

8 The most recent example, and a particularly blatant case of building and planning law transgressions during the period of regime change was the unlawful development of riparian land in Saxony, the residents of which subsequently had to be paid financial compensation for damage suffered during the flood disaster in the summer of 2002.

was granted much too often must, in contrast, be answered with “Yes” (administrative judge / East, 29.04.98).

“As far as the period of radical change is concerned, I feel that decisions weren’t made in accordance with legal criteria. It was really an unlegislated area” (administrative judge / East, 02.12.99).

Another possible indicator for measuring the legal correctness of building permission decisions or the liberality or strictness of implementation practice is the number of lawsuits in relation to the number of building permits granted.⁹ Many more urban development legal proceedings per 1000 building permits were instituted in West Germany in the early and mid-1990s than in East Germany (cf. table 1)¹⁰

Table 1 : Lawsuits in Urban Development Law* per 1000 Building Permits 1993 to 1995

| Year | Old states | New states** |
|---------|------------|--------------|
| 1993*** | 41.7 | 29.1 |
| 1994*** | 40.8 | 28.2 |
| 1995 | 47.8 | 28.8 |

* Administrative court cases dealing with “building planning, building regulations, and urban development promotion law.”

** incl. East Berlin.

*** Excluding Saxony-Anhalt.

Source: Statistisches Bundesamt: Verwaltungsgerichte, Arbeitsunterlagen 1990–1998; Statistisches Bundesamt: Fachserie 5: Bautätigkeit und Wohnungen. Reihe 1: Bautätigkeit (1992–2001); own calculations and compilations.

⁹ It can be assumed that, in the field of urban development law (especially as regards building permission) the mainly strict, legally correct application of norms increases the number of cases coming before the administrative courts, since applications for building permission are more often rejected and objections are accordingly more frequently lodged (albeit with little chance of success) and legal action taken.

¹⁰ Owing to the circumstance that the figures reflect all urban development litigation in relation to the number of building permits, the data in table 1 do not show the share of building permits against which legal action was taken, which is likely to be much lower. The data can nonetheless be used for comparative purposes.

This invites the conclusion that East German administrative actors had a strong tendency to decide building law matters in the interests of developers and investors – even circumventing or ignoring the legality principle. The free-handed building permission practices of East German building supervisory authorities in the period immediately following regime change had given developers little cause to take legal action against official acts because they usually benefited. But East Germans also showed a reluctance to take legal action against what they considered unlawful official decisions.

“When we started here in September 1990 we really had nothing. It didn’t really matter, because there were practically no cases pending even before the existing administrative divisions of the county courts. ... And in early 1990, and practically also in 1991, no new proceedings were instituted. Don’t ask me why. Naturally, there were no plaintiffs. And I maintain that there were also no practices by the authorities that could have led to litigation” (administrative judge / East, 29.04.98).

In the process dimension of local practice, there was a tendency to “deplete” the law through recourse to obsolete implementation procedures following “normal local practices” in the GDR. Instead of following the new institutional requirements and competence rules, local authorities often based their decisions on participatory and approval rules familiar to them from the East German past, for example in the issue of building permits and rulings on objections by mayors. Furthermore, in the early phase of radical change, East German administrative actors tended strongly to circumvent or even ignore the formal requirements of rule-of-law implementation, such as complete records and complete determination of facts pertaining to decisions, as well as legally well-founded reasons for decisions.

“Naturally, in dealing with cases we also had to do with administrative authorities, and came across decisions whose legal quality was more or less zero. There’s no hiding the fact. In our view, this had to do with the absence of administrative records, with the failure to determine the facts relevant for the decisions to be made” (administrative judge / East, 30.11.99).

Major gaps in rule-of-law performance at the local authority level in East Germany during the early transformation period have been confirmed by other research. East German actors themselves claimed no more than “relative assurance” in dealing with the new rules and legal regulations, and pointed to shortcomings in law-bound and procedural administrative action. And many administrative staff assessed their legal knowledge

critically,¹¹ considering protracted familiarisation to be needed if they were to cope with the new rules and regulations. It appeared “that East German staff did not recognise the effects of the principles of democratic administrative action subject to the rule of law” (Beckers 1997: 153; Beckers/Jonas 1997), and the density of administrative regulations, coupled with the generally written nature of instructions for action met with serious acceptance problems.

Grunow et al., who interviewed some 2000 West German administrative assistants who had been deployed at various points in time between 1989 and 1994 in East German authorities, came to the same conclusion. The authors inferred that there were persistent problems of adjustment and a lack of requisite skills. Assessment of shortcomings in the law-bound performance of functions did not change significantly between 1989 and 1994, and, in the view of the administrative assistants interviewed, there was no essential change in the situation (Grunow 1996). On the contrary: investigators assume that continuous willingness to learn among East German actors with regard to rule-bound decision making cannot be expected for the future, either, because critical distance towards Western advice and training has grown markedly in the course of time. These findings bring Grunow et al. to conclude that “the usual ‘performance’ criteria must be judged as constant and largely critical.” They cannot see any “marked progress and improvement in quality as regards staff qualifications, efficiency, the handling of regulatory details, professional decision-making capacity, human resources management, etc” (ibid: 6).

2.2 “Learning and Consolidation Phase” (1993–1996): Rule-Boundedness and “Inflation” of the Legality Principle

Research findings suggest that quality shortcomings in the rule-of-law performance of East German local authorities were largely *temporary* in nature. A remarkable *enhancement of legal quality* in administrative action developed little by little.

“It happened very fast. ... The learning achievement is quite tremendous. ... The quality of public authority decisions in building law is not worse than, for example, in the West... So it has been a very short learning process. And it ended well” (administrative judge / East, 30.11.99).

11 About a quarter of 80 staff members interviewed in East Berlin district authorities assessed their legal knowledge as “not so good/bad” (cf. Beckers/Jonas 1997).

“Well, perhaps it should be said that the differences from the West are now no longer very great. ... Meanwhile, I should say, there aren’t any differences left” (administrative judge / East, 04.12.99).

In the results dimension of local authority implementation practice there was a transition to more restrictive and rule-oriented decision-making by local authority actors, reflected in the growing material-law quality of building authority decisions. The authorities abandoned their earlier free-handed, only partly law-bound building permission practices. Instead, they increasingly rejected applications for permits in the careful application of valid (especially planning law) provisions. Owing not least of all to this stricter practice, the number of building suits filed each year with the courts of first instance, which were mostly “developer actions,” increased rapidly between 1993 and 1996,¹² a sign that people wishing to build came up against rule-conscious and restrictive building authorities more and more frequently. But the “success rate” of public authorities before the administrative courts also vouches for the quality enhancement of law-bound action (cf. table 2).

12 Between 1993 and 1998, urban development litigation frequency before East German administrative courts increased by 76 per cent, whereas in West Germany it declined slightly (-3 per cent) (cf. Kuhlmann 2003a: 89 ff.).

Table 1 : Outcome of Main Proceedings Involving Public Authorities* (% of Outcomes)

| Year | Authority wins | | Authority partly wins | | Authority loses | | Court rulings involving public authorities total | |
|------|----------------|------|-----------------------|------|-----------------|------|--|------|
| | West** | East | West** | East | West** | East | West** | East |
| 1995 | 77.7 | 79.9 | 6.0 | 3.7 | 16.3 | 16.4 | 29674 | 2860 |
| 1996 | 80.9 | 78.8 | 5.2 | 3.9 | 13.8 | 17.3 | 30804 | 3894 |
| 1997 | 79.0 | 77.2 | 5.6 | 5.0 | 15.5 | 17.7 | 25032 | 3925 |

* Excluding disciplinary and appeal proceedings as well as parallel cases; excluding proceedings before asylum divisions.

** incl. East Berlin.

Source: Statistisches Bundesamt: Verwaltungsgerichte, Arbeitsunterlagen 1990–1998; Statistisches Bundesamt: Fachserie 5: Bautätigkeit und Wohnungen. Reihe 1: Bautätigkeit (1992–2001); own calculations and compilations..

The numbers in table 2 show clearly that the vast majority of cases were decided in favour of the authorities. In East Germany, about three-quarters and in West Germany some 80 per cent of all court decisions were for the authorities, which lost in less than 20 per cent of cases. This suggests that a high level of legal quality had meanwhile been achieved in public authority decisions.

With regard to the process dimension of implementation performance in this phase, East German actors in administrative procedures sometimes tended to “inflate” the legality principle. In an effort to put distance between themselves and the free-handed and irregular decision-making practices of the GDR and the immediate post-regime change period by adopting the legalistic action and enforcement model in almost unadulterated form, local actors often pursued a legally narrow, sometimes even “over-meticulous” or “super-obligatory” implementation pattern (Dose 1992; Kuhlmann 2003c). In view of the widespread fear of losing employment, this behaviour also reflects endeavours by East

German administrative actors to make as few errors as possible that could jeopardize their jobs (Paffrath 1996: 258).

“Sometimes – if I may say so – I find them somewhat too pettifogging. Once a case is pending before the court, the room for manoeuvre becomes more limited. The authorities can do a great deal. In my view – at least in K. county – an about-turn has taken place that we didn’t want to provoke at all. Now the available leeway for decisions is not recognised. They simply say, not possible, although on closer inspection and taking specific circumstances into account it might very well be possible” (administrative judge / East, 29.04.98).

In all, the “consolidation phase” can be said to have experienced a marked approximation of performance to the “normative model” of rule-of-law implementation, and to the empirical reality of law-bound action by West German authorities. While this contradicts the sceptical assessments and evaluations of East German transformation so frequent in the literature, there are also studies that clearly counter the critical view of “transformation success.” The East German institutional system is now said to “function remarkable well” (Wollmann 1996: 146), with reference to the remarkable learning, adjustment, and professionalisation achievements of political and administrative actors. Certain observers of the East German transformation process attest to rapid progress in the practice of administrative action, and are convinced that the East German authorities “whose functional adequacy is now equal to that of the West German model” (Banner 2001: 126), “are now hardly to be distinguished from administration in the old federal states.”¹³ Not only remarkable harmonization in the procedural treatment of administrative matters (Holtschneider 2001: 223) is reported but also a marked rise in the legal quality of administrative decisions by East German public authorities.

Furthermore, administrative staff have gained a new self-image adapted to new role requirements. They understand themselves increasingly as “correct appliers of administrative rules,” whereas in the early period “much had been decided without reference to legal provisions” (Rogas 2000: 105 f.). The “emphasis on personal professionalism in applying administrative provisions,” “the new self-image as competent and skilled enforcers of administrative rules,” and the view that “one is now just as competent as administrative staff in the old federal states, if not more so” (ibid.: 107) point to rapid progress in the adjustment of administrative

13 Assessment of financial administration in Thuringia by Eisold (1994: 268, quoted from Wollmann 1996: 146), who, as an early administrative assistant and competent contemporary witness, has recorded his experience in the process of East German administrative transformation in a number of (often critical) reports.

action. The conviction that the legal understanding of administrative staff now reflects “skilled sovereignty,” and that “West German law and the organisational structures largely adopted from West Germany ... are no longer felt to be ‘foreign bodies’” (Osterland et al. 2000: 199) is a clear sign for harmonization of rule-of-law performance by East German administrative authorities with Western standards.

Finally, reference should be made to several representative surveys conducted since 1991 on confidence in institutions among the East German population, according to which public authority performance is judged increasingly favourably (Derlien/Löwenhaupt 1997). Public attitudes towards the administrative authorities improved markedly in East Germany between 1993 and 1995 from a low initial level, whereas in West Germany the trend has been negative (since as long ago as 1980), thus approaching the East German figure.

2.3 (Provisional) Final Phase (1996–1999): Cooperative Administrative Action and “Useful Illegality”

With reference to the typology of reception, persistence, and innovation¹⁴ often used in transformation research, empirical findings suggest that certain particularities and specificities that developed in the East German institutional practices, especially in handling the law, can be interpreted as “specifically East German” (cf. Jann 1995) “innovations” going beyond the West Germany model. In local authority implementation practice, action patterns can be considered “innovative” and “promoting modernity” primarily if policy implementation is tackled as a problem-oriented, strategic, formative task involving a range of public and private actors rather than as strictly rule-bound, sovereign-bureaucratic enforcement of the law. This shifts the focus from the normative criterion of correct compliance with the rules towards the substantive, qualitative aspects of local administrative activities.

East German actors began increasingly to exploit the leeway and “grey zones” below the transferred basic institutional model for strategic and cooperative action. They were therefore coming closer to the long familiar pattern of strategic legal practice in West German administrative authorities, a balancing act between legality and “useful” or “pragmatic”

¹⁴ According to this typology, tried and tested in transformation studies dealing with the genesis of institutions, the outcome of institutional transformation is to be judged on a scale going from “reception” via “own development” and “persistence” to “innovation” independently of the extent to which institution formation is governed by exogenous or endogenous factors. On the various classifications and typologies used in the literature see Wollmann (1996: 52 with further references).

illegality.¹⁵ On the other hand, a number of (endogenous) determining factors specific to local East German arenas can help explain the remarkably rapid acquisition of informal and cooperative administrative action skills, which sometimes exceeded the frequency and scope of West German “normal procedures.”

First of all, the transfer of Western rule systems to largely different East German problem structures (in urban development, settlement structures, planning policy, etc.) generated numerous abortive arrangements which had to be compensated by local actors through pragmatic treatment of the law. For example, actors involved in building permission proceedings used a range of strategies (informal public participation, hearings, etc.) to achieve flexible compensation for the (strategically necessary) renunciation of (“major”) formal urban land-use planning, which, given the urgency of the problems and the pressure to take action, was often regarded as too long, too complicated, and too conflictual.

“We had to proceed unbureaucratically. Because you have to try to argue and find solutions. And then we have cases where partial solutions, which are really amenable to compromise, lead to a solution – for instance, postponing connection to a street. ... And then in principle you get a solution without bending the law. You’re still operating – although close to the borderline – in an acceptable area” (planning authority director (Eastern county, 18.12.97).

In this sense, local policy is not implemented in the spirit of hierarchical, authoritarian enforcement of the law but as a bottom-up process strongly determined by the local situation and local actors (Peters 1993), permitting adaptation of policy programmes to local difficulties.

Modernity-promoting particularities and specificities in East German implementation practice also show that the actors – again motivated and encouraged by the specifically East German nature of the urban development problems they faced – largely adopted cooperative, informal strategies to find appropriate solutions in collaboration with policy addressees, thus ensuring their approval from the outset.

“You have to assume, if someone files an application and you don’t talk and don’t know why he’s done so, that the decision is often felt to be bureaucratic. But if the developer and the authority have the opportunity

15 While the former generally refers to behaviour by organisational members that breaches formal expectations in the “grey zone of an intermediate area” but is nevertheless “useful” (Luhmann 1976: 204), the latter – so-called pragmatic violations of the constitution – tends to refer to implementation deficiencies due to overregulation (Wagner 1979: 245).

to explain and justify their positions, you usually end up with acceptance” (planning authority director (Eastern county, 09.12.99).

With this consensual and formative implementation pattern aimed at satisfying the spirit of the Building Code by flexibly “adapting” legal rules to local problems, local actors complied with a role image and understanding very different from the rule-oriented, “classical bureaucrat,” personifying the more “modern” type of expert and problem-conscious local policy maker.¹⁶

These findings diverge markedly from those of transformation studies investigating administrative culture, which – although focussing largely on the state administration level – have categorized East German administrative actors as “classical bureaucrats” (cf. studies by Schröter 1995; Damski/Möller 1997; Beckers 1997). Since this role image implies an orientation on technically neutral, unpolitical administration, it is seen as detrimental to administrative problem-solving ability and capacity in (post) modern societies. At the government department level, a “deficiency of strategically oriented problem-solving and of overall problem-solving competence with regard to networking, overarching approaches, and flexible strategies” is diagnosed, and the far-reaching inability of both East and West German ministerial officials to engage in “intelligent” administrative action criticized (Schimake 2001: 186).

This picture cannot be confirmed for the domain of local building authorities under study in the (provisional) final phase of the transformation process. The literature provides a range of evidence and indications in this direction. For example, the view is taken that East German authorities are increasingly subject to a “process of cultural disassociation and self-reflection” that “(could strengthen) the chances for independent innovation owing nothing to the Western model” (Reichard 1997: 319). Implementation studies have, for instance, scrutinised forms of active implementation to discover that East German public authority officials developed an independent engagement reaching beyond their administrative activities in approaching certain groups of addressees to offer information, advice, and motivation, thus deliberately abandoning the “bureaucratic application mentality” which leaves it up to the addressee to take the initiative (Meisel 1997: 234 ff.).

¹⁶ Cf. Steinkemper (1974)M Aberbach et al. (1981) on typologies. Although the typology of policy maker and “classical bureaucrat” can be transferred to the local level only to a limited degree, because the authors developed them with reference to the government department level and particularly to the upper echelons thereof, it seems useful for heuristic reasons to apply it to implementing authorities. According to the studies mentioned, (West German) federal government departmental administration is strongly characterised by the politically committed policy-maker type in contrast to the “classical bureaucrat” who keeps his distance from politics. See also Benz/Bogumil (2003).

This assessment is in line with the strongly consensus-oriented and cooperative decision-making style among East German actors discovered in a number of other policy areas, too.¹⁷ Furthermore, the self-image of East German administrative officials is in keeping with this practice. They consider themselves not to be “as distant and formalist as in the West,” but “more fact and practice oriented,” “more tolerant” and “more flexible” in using their discretionary powers. And they seek to set this favourable self-perception in positive contrast to a view of their “enemy” West German counterparts, who are seen as being “formal,” and uncommitted (cf. Rogas 2000: 98 ff.). In an empirical study on the citizen friendliness of East German implementing authorities (cf. Osterland et al. 2000), it was also discovered that actors, especially those in local public order and registration authorities, were extremely keen “not to be held up in traditional bureaucratic fashion by matters of legal detail but to act pragmatically, even at the risk of conflict with municipal legal departments or supervisory authorities in an effort to “do something for the public” in concrete matters as rapidly as possible (ibid: 94). Against this background, it is likely that the tendency of East German implementers to simplify the complicated sets of rules laid down by West German laws and regulations through “more pragmatic application,” could give impetus to a fundamental re-examination of such regulatory systems,” possibly promoting the moves towards legal and administrative simplification that have repeatedly ground to a halt in West German states” (Grunow 1996: 14 f.).

3. Explanation of Study Findings: Institutional, Historico-Cultural, and Actor-Related Determinants of Performance Development

3.1. “Rival” Hypotheses on Rule-Of-Law Performance: Persistence, Harmonization, or Innovation¹⁸

In formulating research hypotheses on the performance and action capacity of the new politico-administrative institutions, measured against the performance criterion of law-bound administrative action, several,

¹⁷ On housing promotion policy see Meisel (1997: 236); on local government promotion of economic development see Giese (1997), McGovern (1996); on urban development law Lorenz (Kuhlmann) et al. (2000); on residents registration Osterland et al. (2000). Also empirical studies in association research (cf. Eichener et al. 1992: 31 ff.) point out the tendency towards corporatist forms of policy formulation and interest mediation “that conform to informal, cooperative or conflict-avoidance patterns of action and relations among policy actors” (Damskis 1996: 137).

¹⁸ On this typology cf. footnote 14.

partly competing lines of argument can be pursued. From a conceptual point of view, the more recent neo-institutional theory debate can be drawn on (cf. Peters 1999), which is guided by the fundamental idea that institutions have a significant – enabling and restrictive – impact on action (structural suggestion, Dowding 1995: 44), which nevertheless does not completely decide or determine the action in question. Three variants of neo-institutional approach are to be distinguished (cf. Hall/Taylor 1996; Kaiser 1999),¹⁹ of which the more economically oriented rational choice institutionalism constitutes the one pole and the more structure-theoretical/culturalist variant of sociological institutionalism the other.

The programme of historical institutionalism, which examines the long-term determinants of institutional choices for policy development would come between these two poles (Kaiser 1999: 190).²⁰ These three “institutionalisms” suggest differing impact scenarios for legal and institutional transfers to East Germany:

- According to the “institutional hypotheses” (based on “classical” political science and rational choice institutionalism), East German local government institutions rapidly adapted their capacity to act and performance to Western “normality” in obedience to a functional logic of action standardisation intrinsic to the transferred Western institutional systems. Institutional structures are believed to have affected individual administrative action even where familiarization with the new rules was still superficial and a more thorough understanding of the rule of law was lacking (Wollmann 1996: 142).
- The thesis of rapid adaptation through institutional transfer can be countered by the objection – theoretically and conceptually in keeping with the views of new (sociological and historical) institutionalism – that the socio-cultural environment indispensable for the functioning of the institutional rules and “embedment in societal microstructures” cannot simply be generated along with the transfer of formal institutions (Eisen 1996: 41). Instead, considerable incompatibilities between West German institutional structures and East German socio-cultural legacies must be assumed which, in the longer term, have blocked the speedy harmonisation of (rule-of-law) performance.
- The “actor-oriented (will and skill) hypothesis”²¹ – which draws on rational choice institutionalism – focuses on (only qualifiedly rational)

19 Peter (1999), in contrast, distinguishes six variants of neo-institutionalist approach

20 For a comprehensive treatment of the three neo-institutionalist theory approaches and their relevance for transformation studies see Kuhlmann (2003a: 124ff.); Lorenz (Kuhlmann)(2004:

21 The concept of political will and skill was coined by Andrew Shonfield (1965: 63). It is used in the literature primarily to emphasise the aspect of subjectivity and contingency in actor-related concepts to explain political action (see also Wollmann 2000a).

actors' freedom of choice and preferences, postulating both deviation from rules and thus deficient rule application even under the threat of sanctions if the actor believes this will maximise ("local, egoistic") advantages. On the other hand, the actor-related perspective focuses attention on the scope available for strategic and tactical decisions within institutional contexts, which can be the point of departure for cooperative, negotiatory and adaptive, flexible patterns of action "within the shadow of the hierarchy" (Scharpf 2000: 323 ff.). Against the background of the political science debate on transition to "post-modern" negotiating government (Heinelt 2001; Kuhlmann 2004) or to "post-classical bureaucracy" (König 1992: 549, the "actor-oriented (will and skill) hypothesis" puts the focus on the innovative potential of East German actors.

3.2 Testing the "Institutional Hypothesis"

In the early transformation phase, the new institutional "rules of the game," legal and procedural rules, appeared to have very little impact on roles and behaviour, seemingly in contradiction to the "institutional (adaptation) hypothesis." On the one hand, transferring the elaborate regulatory complexes developed over the years in the West to the new federal states more or less overnight had put enormous pressure on implementing authorities. For a transitional period, "complicated legal material had been introduced from various sources that made the highest demands on the application of the law in the territory of the former GDR" (Brachmann 1991: 14). Furthermore, East German local authorities were preoccupied with personnel and organisational reorganisation and conversion and found themselves under enormous "institutional stress" (Fürst/Martinsen 1996) in the field of building supervision, so that while the amount of work to be done rapidly increased they lacked both legally trained staff and the relevant planning material. The number of building permits issued in East Germany increased almost six-fold between 1991 and 1999.²² It is not surprising that the transferred rules and procedural guidelines had little initial impact on behaviour.

²² In addition, the number of building permits issued per head of building authority staff in the field of urban development rose over the same period from 0.7 to 5.1, thus overtaking the West German figure, which was 4.5 in 1999. The "building amount" (estimated costs of approved buildings) per head of building authority staff in urban development was DM 4,000,000 in 1996, almost twice the figure for the old federal states (DM 2.2 million) cf. Statistisches Bundesamt 1992-2001; also Kuhlmann 2003a: 168 with further references).

On the other hand, the introduction of (full) guaranteed recourse to the courts in East Germany and the increase in judicial control and sanctions gave decisive impetus to the legal and institutional learning process that set in in the mid-1990s, reflected in enhanced local authority performance in applying the law. Thus, rulings by courts of first instance had a growing impact on local implementation.²³ Local authority implementers not only kept an increasingly watchful eye on court rulings when interpreting building law provisions but also made more and more of an effort to anticipate the practice of the administrative courts by explicitly considering potential contestability. The authorities learned particularly “thoroughly” – on a trial and error basis – whenever a faulty decision had been sanctioned by an administrative court and, for example, a complaint had been allowed (cf. Kuhlmann 2003c).

“I believe that the learning effect is greater in the case of an individual decision if one really suffers a total disaster and is called in by the director. I believe the effect is then greater. And I believe they’ve really also learned from us. I do think so. And in a brief space of time” (administrative judge / East, 21.03.00).

The transition to more strongly rule-oriented and norm-conscious decision-making was – from an institutional point of view – also decisively advanced by the far-reaching acceptance of basic Western institutional patterns by building authorities as institutional transfer proceeded. The institutionalisation of legal expertise needs to be particularly stressed. The quality of law-bound administrative action was very much enhanced by the establishment of special divisions (e.g., “legal building supervision”) with legally trained staff within building supervisory authorities to deal with legal conflicts and problems and process objections. Since the now institutionally consolidated and differentiated administrative and judicial supervisory and control structures were increasingly effective, the transferred institutional and implementation system was better able to influence roles and behaviour, thus confirming the “institutional (adaptation) hypothesis” for the “consolidation and learning phase.”

With increasing internalisation of the new institutional rules, local actors also gained greater scope and options for action (cf. also section 3.4 below). The better local actors were able to sound out and exploit the room for manoeuvre and “loopholes” in normative rules for strategic action, the easier it became for them to go beyond “mere application of

²³ This increase in importance can naturally be explained not least of all by the fact that in the immediate post-regime change period very few decisions were handed down and the number of cases heard and court rulings increased only in the course of time (Kuhlmann 2003c).

the law” in implementing local policy. Since the transferred regulatory structures – cut to measure for Western problems – often proved misguided (“false theory”), adaptation, improvisation, and situational “programme correction” were needed. Institutionally determined, continuous standardisation of action – in the sense of the “institutional (harmonisation) hypothesis” is therefore unlikely in the most recent phase of the transformation process.

3.3 Testing the “Historico-Cultural (Legacy) Hypothesis”

In many areas, administrative action by East German public authorities was still determined and affected by “old institutional” patterns and orientations (legacies), which made the transition to rule-of-law administrative action more difficult. Such policy legacies (Lehmbruch 1996) from the defunct GDR system, problem-solving strategies and persistent patterns of institutional action, still had a strong influence on “old staff.”²⁴ The formalisation, legal and administrative professionalisation and rationalisation fundamental to the traditional institutional model of Max Weber and German legalistic administrative culture (cf. Wollmann 2000b; Sommermann 2002), which demanded, for example, complete records, cooperation through official channels, and strict observance of legal requirements, collided with the “legacy” orientations that still largely guided action (Berg et al. 1996: 81). Insistence on a chiefly technical role understanding of building supervisory functions, in particular, caused deficient application of the law in view of the new, primarily law-application and enforcement function and role profile in the policy area under study.

“The question is no longer how do I have to construct a building but how can I approve a building. That it conforms with building regulations, that’s the usual difficulty, and that’s often forgotten. And because you then supplement and modify building plans, you still always feel you’re the person who wants to put up the building. ... You’re happy when you can install a T30 door somewhere. I say to them every time: you’re not allowed to do that, you have to reject the applications” (lawyer/head of division “legal building supervision” / Eastern municipality, 15.11.99).

In the early phase, East German public authorities were often guided by considerations of expediency in applying the law, relying strongly on the “subjective discretion” of local implementers, especially when interpreting

24 The percentage of “old staff” (people employed in the “government machinery” even before system change) was about 30 per cent in counties and county boroughs (cf. Berg et al. 1996: 191). The figure is similar in lower echelons of building supervision (cf. Kuhlmann 2003a: 225 ff.).

indeterminate legal concepts in building permission proceedings. This is an undeniable legacy of GDR “legal culture” practice, characterised by the power of the “informal,” by personalised exchanges instead of formalised procedures (Neckel 1992), and by subjective equity instead of due application of the law (Bernet/Lecheler 1990: 40).²⁵

“The attitude was more or less ... that the authority felt it could also make an expedient decision which would hold up in court. Decisions were simply made at the more or less political or expediency level: ‘do we want it or don’t we want it.’ We got together and made a decision on how best, or most agreeably or expediently it could be done” (administrative judge / East, 12.11.99).

What was more, there was great mistrust of the administrative courts as new institutions, indicative of a blatant lack if not total absence of confidence in the functioning of the rule of law.²⁶

“To begin with I had the impression that it was still as in GDR times, that people had no understanding for having to take everything to court. No sign of transparency in public authorities: ‘They’re our files! And what do you want all that for?’ ... You always had to point to the provision – we have an extra sort of standard formulation when an action is entered stating all the original documents the authority has to submit and why. In the West I’ve never given reasons” (administrative judge / East, 12.11.99).

Thus, in the early phase of transformation, the rapid adaptation of policy-specific action patterns and decisions to Western “normality” postulated by the “institutional hypothesis” faced powerful “cultural persistence tendencies” (Bürkling 1995), which doubtless confirm the “historico-cultural (legacy) hypothesis.”

However, these cognitive cultural legacies of the GDR past have manifestly faded. In the first place, the administrative courts and judicial decisions came to be viewed with increasing favour by the East German public and authorities (cf. also Kemper 2001: 217). In particular, local administrative actors abandoned their negative attitude and overcame

25 This tendency to circumvent if not ignore legal regulations in the GDR administration, which was still widespread in the early phase of transformation, has been pointedly described as “legal nihilism” (Pohl 1991).

26 This is shown by representative surveys on East German confidence in institutions (cf. IPOS surveys 1984-1995 for the old federal states and 1991-1995 for the new federal states; ALLBUS surveys 1989 and 1994 and KSPW survey 1995; see Derlien/Löwenhaupt 1997: 453). Between 1991 and 1995, confidence in institutions in the new federal states was almost everywhere lower than in the old federal states, and the courts (with the exception of the Federal Constitutional Court) scored particularly badly, being relegated to the penultimate place among 13 institutions evaluated in 1991. In West Germany, by contrast, they have ranked very high in all surveys conducted since 1984 (1991: place 2; cf. Gabriel 1996: 259).

their initial fear of novelty and sometimes exaggerated “subordination stance” towards the courts. Interactional relations between the courts and public authorities normalised and a level of trust comparable to that in West Germany was achieved.²⁷

“The public authorities now know where they are. They now know where they stand in the structure of government. That they’re quite clearly subject to the unconditional control of the administrative courts and accept the fact. ... So there’s no more discussion on the subject. And there’s no longer any confusion about it” (administrative judge / East, 12.11.99).

Since local executive officials increasingly abandoned the model of situational, legally relativistic practices typical of the early phase, it can be argued that the explanatory power of the “historico-cultural (legacy) hypothesis” weakened steadily as East German transformation proceeded. On the other hand, the pattern of cooperative administrative action and problem-oriented application of the law points – at least partly – to persisting, longer-term path-dependencies in the sense of the “historico-cultural (legacy) hypothesis.” For the (administrative) cultural legacy of the GDR past proved a very fertile breeding ground for such informal, cooperative action patterns in East German administration. Precisely because formal rules and legal provisions tended to play a subordinate role, non-hierarchical interactional relations on a reciprocity basis between public authorities and their clientele were very important (Rogas 2000). Both in the local government machinery and in other areas of GDR society, bureaucratic bargaining was just as usual as improvisation in the face of functional deficiencies and political constraints.²⁸ As the transformation process ran its course, East German implementers were able to revive this “old-institutional” conditioning and experience (“role renaissance,” cf. Damskis/Möller 1997) and to apply them in the local implementation process as special social skills. There is much to be said for regarding these action positions and behaviours inherited from the East German past as favourable points of departure for the rapid abandonment of the legalistic basics of exclusively sovereign-hierarchical administrative implementation and the increasing

27 The substantial increase in confidence in rule-of-law institutions is evidenced by the rise in the courts’ rank among institutions from place 12 on the scale to place 5 and an improvement in median value from 0.1 in 1991 to 0.6 in 1995 (Gabriel 1996: 260 f.). Approximation to the “trust pyramid” in the old federal states is indicated by the top ranking of rule-of-law institutions responsible for the maintenance of law and order (Federal Constitutional Court, courts, police) (Gabriel 2001: 112).

28 Cf. Neckel (1992) on the “structural analogy” between local authority and corporate action logics in the GDR.

adoption of (modern) forms of cooperative and conflict-avoidance administrative action.

This is also indicated by the finding that East German administrative staff see themselves as very much public-focussed and cooperative, and consider this closeness to the public (Osterland et al. 2000) a cultural legacy of the GDR past worth preserving. They regard their talent for improvisation and their reservations about narrow “administrative juridical notions of legality ... as a positive consequence of their GDR past” regardless of the fact that the concrete benefit for the citizen is therefore given higher priority than safeguarding legal stringency (ibid.: 94). East German actors also distinguish themselves clearly from the “classical-bureaucratic,” rule-fixated “administrator” type, whom they (rightly or wrongly) see embodied in the West German public servant (Rogas 2000). It can therefore plausibly be argued that the transition to problem-oriented, adaptive policy implementation has been encouraged and favoured by this emerging partial return to established “old-institutional” patterns of informal, cooperative administrative action.

3.4 Testing the “Actor-Oriented (Will and Skill) Hypothesis”

For the early phase of transformation, particular plausibility and validity can in many regards be claimed by the “actor-oriented (will and skill) hypothesis, which, positing breaches of rules and situational action, focuses on local actors’ scope for action and intentions. On the one hand, local building authorities suffered dramatic staffing problems in the early period. Urban development authorities in the old federal states initially had almost twice the staff available to authorities in the new federal states.²⁹ As far as qualifications are concerned, building supervisory authorities were largely staffed by new personnel, i.e., people who were employed only after system change in the fields of local building, building administration, or building supervision and who generally held high university or technical college qualifications as civil engineers, architects, or planners.³⁰ The almost complete lack of legally

29 In 1991 in West Germany, there were five local authority urban development officials per 10,000 residents, whereas in East Germany at the same period there were only three. Local authorities in the old federal states employed about 2.4 per cent of their entire staff in urban development, whereas the figure in the new federal states was only 0.6 per cent (cf. Kuhlmann 2003a: 249 ff.).

30 The follow-up survey in 35 subordinate county building supervisory authorities showed that the share of civil engineers in the total staff of building supervisory authorities in the two East German states covered was one-third in Mecklenburg-West Pomerania and almost one half in Saxony. The proportion of lawyers was 1.4 per cent in Saxony, whereas in Mecklenburg-West Pomerania there were no lawyers at all in building supervisory authorities (cf. Kuhlmann 2003a: 257).

qualified staff, especially people conversant with building law, left a serious skills gap in East German local authorities.

On the other hand, local implementers – encouraged and driven by the difficult economic situation in East German communities – showed a marked inclination for interest-driven decision-making inspired by local policy. For local authorities were existentially dependent on winning investors and attracting companies, which they considered priority necessities even if this meant having to circumvent or ignore valid law. This willingness of local actors to break institutionalised rules in the pursuit of certain instrumental goals was encouraged and strengthened primarily because the “opportunity structure” for “rule-breaking” behaviour was extremely favourable in the early transformation period. Because state government was still in the throes of institutional reorganisation and development, local actors found themselves factually without supervision (Wollmann 1996). Moreover, judicial control became effective only at a later point in time, and the sanctionary powers of the courts were limited from the outset with respect to the criticised “political” building permission decisions.³¹ Although West German local authorities have at times also shown an inclination to adopt “legally relativistic” behaviour in the case of building projects important for local policy, it can be assumed that, in keeping with the “actor-oriented (will and skill) hypothesis,” the chances of attaining interest-driven political goals outside the sanctioned institutional system of rules was extremely good and often used at the local level in East Germany.

However, as the new local supervisory and control institutions took shape and “showed their teeth” (Wollmann 2000a), the “opportunity structure” for situational action was curtailed. In addition, noteworthy changes in staff qualifications occurred over time with higher staffing figures in building authorities.³² The comprehensive training and continuing education measures should also be recalled, which sought – initially indiscriminately – to convey the fundamentals of the legal system, especially administrative law, to officials completely unversed in

31 The reason is that, in the case of politically important permit decisions, potential objectors had often been fed financial compensation prior to proceedings. In some projects, for example in undesignated outlying areas or on the urban periphery, there were simply no neighbours entitled to take action, so that permits were in effect not contestable. Finally, it should be recalled that major investors also tend to “swallow” even illegal conditions imposed by the authorities (or to change location) rather than get involved in protracted litigation.

32 Between 1991 and 1999 staffing levels in East German local building authorities almost doubled (111 per cent rise, whereas levels in West German authorities fell by 10 per cent. In 1999, urban development staff represented 2.6 of total municipal employees in East German public authorities, a figure higher than in West Germany (2.4 per cent), whereas in 1991 (0.6) the figure had been much lower (Statistisches Bundesamt 1991-1999; cf. Kuhlmann 2003a: 249 f.).

federal German law within a brief space of time. The capacity to apply the law in local authorities was also enhanced – from a staff point of view – through the growing recruitment of people with legal training, especially in building law. Furthermore, East German actors showed astonishing flexibility in learning and adapting, rapidly learning on the job to cope with the new institutional demands.

“I think it was mainly an independent learning process ... because, as I just said, they got so many bloody noses from us so fast that they soon saw how they really had to go about it” (administrative judge / East, 12.11.99).

The explanatory power of the “actor-oriented (will and skill) hypothesis” could therefore be considered weakened, especially as regards the learning and consolidation phase. But it should be remembered that, even with the strongest institutional control mechanisms, actors have a certain, albeit narrow, independent scope for action (Bogumil/Schmid 2001: 57), which permits them to choose from among a range of strategies or to break sanctioned rules. Thus, deviations from the rules have sometimes been accepted, deliberately exceeding the institutional context, if costs and sanctions have seemed unlikely or tolerable. The non-appealability of decisions – sometimes deliberately contrived by local actors – and thus the absence of judicial control in the case of certain building permission decisions,³³ which, despite their illegality are not or cannot be rescinded, therefore produces situations in which no sanctions are to be expected. In important local administrative decisions, this encourages operating at the outmost edge of legality if not beyond. In the case of politically important projects, the legal quality of decisions thus depended strongly on local conjunctions of actors, action orientations, and on the (micro-political) “game strategies” of local actors.³⁴

Furthermore, there is much too suggest that actor-related factors were very important – and increasingly so – especially in the development of “modernity-promoting” (cooperative, problem-oriented, etc.) implementation patterns in East German public authorities. As we have seen, the holders of leading positions in East German local authorities were recruited in their majority from occupational areas outside public administration, especially from industry, educational, and scientific

33 Cf. footnote 31 above.

34 Interaction between local political and administrative leaders and frontline implementers in urban development law has particularly influenced building law decision-making. Whereas the former are usually policy and result oriented, the latter tend to be rule and procedure oriented. Typically, implementers in the East German local authorities under study proved to be less assertive in the face of irregular political influence on building permission decisions than their counterparts in West Germany.

institutions (Cusank/Weßels 1996; Berg et al. 1996). The new leading people in East German public authorities hold mainly technical and natural science or medical qualifications, almost a mirror image of the staff situation in West German local authorities, where people with legal and administrative qualifications predominate.³⁵ This skills profile is reflected in the action orientation and practice of East German actors, who, as trained technicians and scientists, are more inclined to look for pragmatic, flexible solutions than to apply the law in strict subservience to norms. This is also how administrative officials tend to judge themselves, claiming that a problem-oriented, fact and practice-related view of administrative action was fostered primarily by a less profound legal knowledge and rule orientation and by the circumstance that East German administrative officials mostly came from outside, bringing “no knowledge of administrative law” (Rogas 2000: 98) and who consequently identified more easily “with the cause” than with strict application of the law. On the other hand, precisely because of consolidating legal knowledge and certainty as to the law, local actors understood increasingly how to sound out and tactically exploit the scope for action hidden in the pertinent regulations.³⁶ They managed with increasing success to reconcile the material and formal legal quality of decisions with substantive (policy) quality. The “actor-oriented (will and skill) hypothesis” therefore clearly gained in importance and explanatory force as transformation proceeded.

4. Conclusions and Prospects

East German local authority actors (in the municipal and county building authorities under study) are now largely in a position to combine rule-of-law application of the law with a problem and policy orientation. In somewhat ideal-typical terms, it could be said that East German local authorities have completed the transition in double-quick time from a legally relativistic, if not legally nihilistic, quasi “pre-modern” administration to an informal, cooperative “post-modern administration”

35 Cf. Wollmann (1996: 124ff.); Lorenz (Kuhlmann)(1999: 95 with further references).

36 This was also helped by steady improvement in the personnel position of East German local authorities. Higher staffing levels allowed them to pursue negotiatory strategies that required greater time and work input than simple, hierarchical application of the law (cf., for example, Dose 1994). The scope for action required for intensive negotiations and cooperation with the clientele (organisational slack) thus became available (Cyert/March 1963: 37f.) to public authorities through an increase in building authority staff (1996-1999 by 6 per cent) accompanied by an only gradual increase or even a decline in work and applications (decline in annual building applications 1996-1999 of 14 per cent) continued until the late 1990s (cf. Kuhlmann 2003a: 169 ff., 249 ff.).

or “post-classical bureaucracy” (König 1992: 549), in which the legality principle has become a strategic resource. The East German public authorities under study are therefore far removed from the ideal-typical model of bureaucracy advanced by Max Weber, characterised by strict rule-boundedness and unconditional formal obedience. But they clearly, though slightly, differ from the real-typical Western reference model in that they have sometimes moved even farther away from the “classical-hierarchical” enforcement model than West German local authorities (Kuhlmann 2004). This suggests that developments and learning processes in East Germany have indeed had an “innovative” impact on the West. The tendency of East German local authority actors to comprehend and practice public administration as a problem-solving and goal-oriented activity rather than one closely tethered to law could prove to be a special innovation resource in the transition from “administrative government” to “post-modern” functional government (Böhret 2001: 48; Heinelt 2001).

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