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## **Evaluating the Transformation Process in East Germany: Institutional Performance of Local Administration**

**Sabine Kuhlmann**

### **Introduction: Institutional “Performance” as a “missing link” in Transformation Research**

On the basis of the Unification Treaty (*Einigungsvertrag*) practically the entire constitutional and legal world was extended from West to East Germany and drove a transformation process “that, in its mixture of demolition and reconstruction, bore many traces of what Joseph Schumpeter with regard to forces of capitalism once called ‘creative destruction’” (*schöpferische Zerstörung*; see Wollmann 2002: 3). The institutional transformation and reconstruction in East Germany, which has been likened to a gigantic case of “institution transfer” (Lehmbruch 1993, 1996) was from the very beginning propelled by external (“exogenous“) factors. This exogenously driven extension of the “old” FRG’s “ready-made state” (Rose et al. 1993) and the unprecedented suddenness with which it occurred sharply distinguish East Germany’s transformation from those in other post-communist countries in Central and Eastern Europe<sup>1</sup>.

In view of the singularity of this system change, a large number of researches were conducted with regard to the development and the building of the new institutions in East Germany in order to identify the determinants for the institution building process and its

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<sup>1</sup> Against this background, East Germany’s transformation has been interpreted as a specific and peculiar case (“Sonderfall”; see Wiesenthal 1996).

results<sup>2</sup>. The research on institutional transformation in East Germany has so far been guided by an “institution genetic” intention. At the same time, the effects of the “institution transfer” and the “performance” of the new organizational and personnel structures have largely been understudied. The question about the functioning of the new institutions and their performance has not yet been answered satisfactorily. Evaluation of the transformation process continues to be a “missing link” in transformation research. Although scholars have been urged to refocus transformation studies on the actual policy outputs, the decision making procedures and on the effects of the institutional change, these policy and process studies have not yet made visible progress<sup>3</sup>.

This paper attempts to remedy the above mentioned problems and deficiencies in previous transformation research by examining as a crucial dimension of institutional performance the practice of law application in East German local-level administrations<sup>4</sup>. The key questions of the paper are: Due to what constellation of factors law application practice in East Germany has adapted to West German patterns and “culture” (“*Rechtskultur*” see Pitschas 1991: 457 ff.)? Are there still remarkable differences between East and West German implementation practices? How can these differences be explained? In seeking answers to these questions, the paper tries to contribute to the transformation research of the “second generation” (see Wollmann 2000a).

The following remarks are based on the findings of an implementation and evaluation study picking as a policy field the issuance of building permits which, because of the complexity of the transferred legislation, serves as an instructive “case in point”. In order to obtain a longitudinal perspective of the implementation process, the administrative

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<sup>2</sup> See Berg et al. 1996; Goetz 1993; Wegrich et al. 1997 and the publications which derived from the research context in Konstanz, which was initiated and coordinated by Wolfgang Seibel: see Reulen 1998, Frenzel 1995, Eisen 1996, Seibel 1996.

<sup>3</sup> For a similar assessment of the “performance dimension” as being a largely neglected topic in transformation research so far, see, with regard to the post-Soviet transformation in Poland and Hungary, Wollmann/Lankina 2002.

<sup>4</sup> For the “rule of law principle” (*Rechtsstaat*) as being a characteristic feature of the legalistic administrative culture and tradition in Germany, see König 2000; Wollmann 2000b: 6ff and most recently Sommermann 2002.

practice was analyzed “over time” between 1990 and 2000<sup>5</sup>. The paper is structured as follows:

1. Drawing on New Institutionalism which has been one of the dominant theoretical trends in recent years, three hypotheses will be elaborated. These hypotheses will form part of the explanatory scheme. I will then identify relevant variables that account for and explain the varied patterns of actor behavior in the implementation processes (chapter 2).
2. Second, these hypotheses will be tested on the basis of the empirical findings which reveal an almost ideal-type sequential pattern of law application practice in East Germany between 1990 and 2000 (chapter 3).
3. The final part of the paper summarizes the findings and gives a brief conclusion (chapter 4).

## **2 Conflicting hypotheses on Institutional Performance in East Germany: Convergence, Persistence or Innovation?**

Drawing on New Institutionalism (see Peters 1999), I assume that institutions provide an important “structural suggestion” (Dowding 1995: 44) guiding and constraining individual action without entirely determining it. With regard to the questions treated here it makes sense to distinguish three types of “New Institutionalisms” (see Hall/Taylor

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<sup>5</sup> The study was carried out by the author between 1998 and 2002 and submitted as thesis (see Kuhlmann 2002). Methodologically it draws on 21 qualitative interviews with judges from East and West German administrative courts, who have been a largely neglected “source of information” in the transformation research so far. Besides, it is based on 20 Interviews with actors from East and West German local-level administrations, and on comparative case studies in two East German and West German local authorities. Following the approach of the “mix of methods” (“*Methodenmix*”, see Hucke/Wollmann 1980), which is common and well-tried in implementation research, broad secondary analysis, official statistics and relevant local data (“*Verwaltungsvollzugsdaten*”) were used as additional sources and complementary methods to obtain further empirical evidence. Finally, a standardized survey in 35 administrative units on county-level was carried out as a quantitative “follow up”. The study partly drew on the findings of a research project initiated by Hellmut Wollmann and funded by the German Science Council (DFG) (for the results see Lorenz u.a. 2000).

1996; Kaiser 1999)<sup>6</sup>. The economically oriented approach of the Rational Choice model lies at the one extreme of the wide range of institutionalist schools of thought. The more culturalist approach of the Sociological Institutionalism lies at the other extreme in emphasizing path dependencies (*Pfadabhängigkeiten*) and the importance of past policy choices in shaping policy outcomes far into the future, the approach of the Historical Institutionalism can be ranked as falling between these two bodies of thought. Referring to these three approaches of the New Institutionalism, each of which paints a quite different picture of the relationship between institutions and behavior, varied scenarios of the performance development in East German local-level institutions can be expected:

1. Rooted in the ideas of the “old” Institutionalism in political science (see Peters 1999: 3 ff.) and partly in those of the Rational Choice Institutionalism, the “*institutional hypothesis*” suggests a quick and swift adaptation of East German institutional performance to western standards as the transferred institutional structures presumably influence implementation practices most strongly and, hence, produce converging policy outcomes<sup>7</sup>. One might assume that the institutional setting and the formal rules transplanted from the West to the East affect East German actors’ behavior even if their trust in the newly arrived German “*Rechtsstaat*” (rule of the law) and their capabilities of applying the new legal provisions are still rudimentary (Wollmann 1996: 142). According to this line of thought, the transfer of West German institutional arrangements will serve to bind East German actors and to constrain their activities (Sundhausen 1995: 78) and, hence, will account for a fairly smooth process of learning and adaptation.
2. The second, sociological or historical approach of the New Institutionalism, would challenge such an assumption based on the fact that the functioning and performance of institutions are largely culturally “embedded” and depend on cultural imprints, cognitive scripts, and moral templates that provide “frames of meaning” guiding

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<sup>6</sup> Peters (1999), by contrast, identifies six different analytical approaches: the Normative Institutionalism, the Rational Choice Institutionalism, the Historical Institutionalism, the Empirical Institutionalism, the International Institutionalism, the Societal Institutionalism and the Sociological Institutionalism.

human action (Hall/Taylor 1996: 14). This underlying cultural authority and “embeddedness” of institutional arrangements is not bound to result from the transfer of formal rules and structures (Eisen 1996: 41). In contrast, the “*legacy hypothesis*” assumes that there is an awkward incompatibility of West German institutional structures and East German cultural legacies springing from, and ingrained in, the GDR past. The discrepancy between the newly arrived institutional system and the “socialist cognitive scripts”, inherited from the GDR experience, presumably account for sustained deficits in East German actors’ law application practice impeding and slowing down the process of adaptation in the long term.

3. The actor oriented and Rational Choice inspired “*will and skill-hypothesis*”<sup>8</sup>, stresses the importance of the strategic interaction and the actors’ freedom to make choices. Individuals, according to this approach, seek to maximize the attainment of a set of goals given by a specific preference function. In so doing, they behave strategically in order to achieve a maximum benefit<sup>9</sup>. This line of argument would suggest a violation of the newly “imported” law as far as the disregard of the „law on the book“ serves to maximize East German actors’ (“local-egotistic” political, economical etc.) benefits. At the same time the actor-centered approach also stresses the scope for tactical decision-making within institutional contexts making for a flexible, non-bureaucratic and cooperative administrative behavior in the “shadow of hierarchy” (Scharpf 2000: 323 ff.). With regard to the recent debate in political science concerning the transition to a “post-modern cooperative state” (Heinelt 2001) or to, what Klaus König called, a “post-classic” (post-Weberian) bureaucracy (König 1992: 549), the “*will and skill-hypothesis*” also bears East Germany’s potential for innovation in mind.

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<sup>7</sup> With regard to the foundation of parliamentarism in the “New German Länder” see Patzeld/Schirmer 1996.

<sup>8</sup> The notion of “political will and skill” goes back to Andrew Shonfield (1965: 63). In the relevant literature it is primarily employed in order to stress the aspects of subjectivity and contingency within actor-centered approaches when explaining political action.

<sup>9</sup> By stressing the fact, that behavior is not fully strategic but bounded by an individual’s worldview, which is to say that individuals behave as “satisficers”, rather than “utility maximizers”, the approach of “*bounded rationality*” (see Simon 1976: 81 f.) emphasizes the degree “to which the choice of a course of action depends on the interpretation rather than on purely instrumental calculation” (Hall/Taylor 1996: 8).

The following sections of the paper test these three hypotheses on the basis of the available empirical findings. In so doing, I will draw on the typology of “persistence”, “adaptation”, and “innovation” which has been widely used in transformation research<sup>10</sup>. The question will be taken up, as to whether and due to which factors there has been a significant adaptation of East German actors’ implementation practices and policy outputs to the West German model or, by contrast, to what extent the emergence of a specific East German model of law application practice can be observed.

### **3 Sequences and determinants of law application practice and performance development in East Germany**

#### **3.1 Transformation period (1990-1993): “Evaporation” of the law<sup>11</sup>**

##### *3.3.1 Process and output of law application*

In the period immediately following reunification, policy implementation in East German local authorities was largely marked by legal disdain and by, what has been called, “legal nihilism” (*Rechtsnihilismus*”, see Pohl 1991). This practice of “casual” and negligent law application had serious drawbacks for institutional performance in East German municipalities at that time. A good deal of the pertinent legal provisions, in particular those providing latitudes for interpretation<sup>12</sup>, but also the relevant jurisdiction tended to be not applied or to, as it were, “evaporate”. This disposition of East German

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<sup>10</sup> According to this typology, which is primarily used in “institution-genetic” transformation studies, the results of the institutional transformation can be ranked on an ideal-type scale going from “persistence” over “adaptation” up to “innovation” corresponding to the degree of “exogenous” or “endogenous” determination in the institution building process. For the various typologies and classifications being employed in the relevant literature see Wollmann 1996: 52 (with further references).

<sup>11</sup> The notion of “evaporation” of the law (*„Versickern“ des Rechts*) during the implementation process was suggested by Frido Wagener (1979: 216) who originally related it to deficit of law application (*„Vollzugsdefizite“*) resulting from over-regulation within the German *Rechtsstaat*. Later it has also been applied to the implementation practice in East German administrations after reunification (Wollmann 2000a).

<sup>12</sup> Within the pertinent law concerning the issuance of building permits, particularly § 34 BauGB is, because of its wide scope for interpretation, considered to be prone to lawsuits, to informal

administrative personnel to disregard the imperatives of the transferred legislation accounts for an implementation practice which strongly favored prospective house builders, building owners, and investors. There appears to have been an utmost low level of, if not a complete lack of legal correctness in this early phase<sup>13</sup>. To supply further evidence for this assumption, in the first place, I will single out as a relevant indicator the number of lawsuits per 1000 building permits. That will help measure the local actors' rigidity in applying the law or their „generosity“ in issuing building permits respectively<sup>14</sup>. In West Germany, around the early and mid-nineties, this figure was considerably higher than in East Germany at the same time (see table 1)<sup>15</sup>. It follows from this that East German local authorities apparently tended to make more decisions in favor of and in agreement with investors and building owners, even if they violated the “rule of law”-principle (*Rechtsstaatsprinzip*). In contrast, law application in West Germany was guided by a more strict and rule-bound attitude towards the law. This in turn produced more frequent conflicts (and lawsuits) between citizens and administration.

**Table 1: Lawsuits in building and urban planning law matters per 1000 building permits 1993-1995**

Year	West German Länder	East German Länder*
1993**	41,7	29,1
1994**	40,8	28,2
1995	47,8	28,8

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arrangements (*informales Verwaltungshandeln*, see Bohne 1981), and bargaining strategies (Wollmann et al. 1985).

<sup>13</sup> This is exemplarily evidenced by a huge number of illegal building projects on the outskirts of or even outside the towns, moreover by the inadmissible transformation of bungalow settlements into housing estates, and, not at least, by an – also legally undesirable – structural extension of „splinter districts“ (*Splittersiedlungen*).

<sup>14</sup> Here I submit that a predominantly stringent and correct law application makes, as regards our policy field, for an increasing number of lawsuits, because applications for building permits tend – in view of rigid legal provisions – to be more frequently refused.

<sup>15</sup> It must be taken into account that the data presented in table 1 includes *all* proceedings which have been instituted against administrative units in connection with building and urban planning law matters. Hence, these figures do not stand for the percentage of *building permits* being affected by lawsuits. The data can, however, plausibly be used for comparative purposes.

\* Including East-Berlin

\*\* Without *Land* Sachsen-Anhalt

Adapted from: Statistisches Bundesamt: Verwaltungsgerichte, Arbeitsunterlagen 1990-1998; Statistisches Bundesamt: Fachserie 5: Bautätigkeit und Wohnungen. Reihe 1: Bautätigkeit.

Making decisions by the majority in the citizens' interests, East German public employees gave hardly cause for going to law. Besides, the findings in table 1 reflect East German citizens' reserve in seeking redress for maladministration, which is largely rooted in their historical experiences, e.g. the lacking legal control and protection in the GDR-system.

*When we started here in September 1990, we had practically nothing. But this wasn't a big problem, as the number of proceedings in the already existing chambers for administrative law matters at the county-level courts tended to zero. (...) And at the beginning of 1990 and almost 1991, there have still no proceedings been instituted. Don't ask me why. Of course, there were no plaintiffs. And I assume that there was also no administrative practice leading to corresponding actions. (Judge of East German administrative court, 29.4.98)*

An "evaporation" of the law was also observed with regard to the formal dimension of administrative decision-making. East German actors tended to draw on procedures and organizational rules adopted from GDR past experiences, instead of following the new institutional targets and provisions. This was, on the one hand, indicated by the fact, that East German mayors in many places continued to issue building permits or even to decide on legal remedies ignoring that this was, now, a function of county-level authorities or of the administrative courts respectively. On the other hand, East German actors exhibited a conspicuously negligent attitude towards formal standards and the

imperatives of the codified administrative procedural law flowing from the German “rule of law”-tradition (*Rechtsstaat*)<sup>16</sup>.

*In the course of the proceedings instituted here, we naturally were faced with administrations and decisions, the legal correctness of which tended to zero. This is to be spoken frankly. It was mainly due – to our points of view – to the lack of filing in administrations and to the lack of investigating decisive facts. (Judge of East German administrative court, 30.11.99)*

These observations of limited institutional performance and a lack of legal correctness in East Germany’s local-level administrations during the first period after reunification are in conformity with other empirical findings and assessments. According to a study on administrative culture in East- and West-Berlin district-level administrations (see Beckers 1997), East German civil servants proved at the most, to have “relative capability” of dealing with legal provisions. They realized that law application practice, at that time, contrasted sharply with the model of rule-bound decision making. A large number of East German employees were assessing their own legal knowledge more critically<sup>17</sup> and were expecting a rather long process for training and learning which would strengthen their capabilities of coping with the new law. This skeptical assessment of East Germany’s legal rule-application practice is also supported by the fact that public employees were, immediately after reunification, offered only “crash courses.” These provided at best a superficial knowledge without the “spirit of the law” (Grunow 1996: 16). The density of regulation in association with the general requirement of written documentation met with particular disapproval on the part of the employees. Against this background, some scholars have noted that “East German personnel do not appreciate the effects of a rule-bound and democratic administration” (Beckers 1997: 153; Beckers/Jonas 1997).

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<sup>16</sup> This is relevant for instance to the requirement of completely filing administrative activities (*lückenlose Aktenführung*), the principle of exactly investigating the relevant facts of a case to decide (*Sachverhaltsermittlung*), and of giving sufficient reasons for these decisions (*Entscheidungsbegründung*).

Grunow et al. (1996) came to a similar conclusion based on a survey, carried out amongst 2000 West German “administrative aides” (*Verwaltungshelfer*), namely that East German administrations were plagued by difficulties in adapting to the new institutional setting and by shortages in legal training. This was indicated by the finding that the interviewees appeared not to have realized a remarkable decline of need for consultations and assistance on the part of East German actors within the concerned period (1989-1994). About 70 to 80 percent of interviewees almost continuously regarded a “consultancy in particularly difficult cases” and an “own treatment of difficult cases” as their main tasks (see Grunow et al. 1996: 5)<sup>18</sup>. Also in terms of a rule-bound administrative work East German employees have, in view of the West German interviewees, not made visible progress. In contrast, the authors registered a declining readiness for adaptation and law-training amongst East German actors, as the latter were becoming increasingly reserved towards West German consultancy and training. On the basis of these findings Grunow et al. came to the conclusion that “the usual criteria of performance have continuously been assessed critically“ and, hence, “an improvement of East German personnel’s qualification, of the organizational efficiency, law application practice, capabilities of professional decision-making, personnel management etc is not to be observed” (Grunow 1996: 6).

The above problems of East German actors in law application can be conceived as having been determined by three sets of factors which together largely shaped actor behavior in the implementation process. Accordingly, we must assess the explanatory power of our three aforementioned hypotheses as follows:

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<sup>17</sup> Roughly a quarter of 80 interviewed employees in East Berlin district-level administrations (*Bezirksverwaltungen*) were assessing their legal knowledge as “less good/bad” (see Beckers/Jonas 1997).

<sup>18</sup> Notwithstanding that the West German “administrative aides” had specially been sent to East Germany in order to remedy the lack of experience, there were no notable changes in assessment concerning the “lacking experience on the part of East German personnel”, which, over the time, remained at an almost constant level of 85 to 95 percent of the interviewees (Grunow 1996: 5).

### 3.1.2 *Testing the “institutionalist hypothesis”*

The transfer of practically the entire constitutional and legal world from West to East within an, as it were, “logical second” came to blatantly overstretch the bottom line administrative level. Vis-à-vis the specific situation in East Germany, there have, however, been some modifications of the law in details and, in addition, some selective adoptions of former GDR-law. As a result, an almost over-complex legal situation had temporarily emerged, springing from different sources of legislation and making high demands on law application practice in the territory of the former GDR (Brachmann 1991: 14).

*With regard to the early transformation period, decision-making was, to my mind, not based on legal standards. This was really a lack of rule of law. (Judge of East German administrative court, 2.12.99)*

Furthermore, East German local-level governments were almost entirely absorbed by rebuilding their organizational structures, that is, demolishing the old GDR-type institutional patterns and implementing new West German organizational blue-prints. On top of that, faced with an awkward lack of both law-trained administrative staff and relevant urban planning documents, and in view of a rapidly soaring scale of duties, East German authorities were put under tremendous “institutional stress” (Fürst/Martinsen 1996). This can be evidenced by the data shown in table 2 indicating the annual number of building permits issued by West and East German authorities, the latter of which increased more than six fold between 1991 and 1999<sup>19</sup>.

Against this background, there can be little doubt that immediately after reunification, the new institutional structures and legal provisions tended to have an, at best, slight

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<sup>19</sup> Moreover, the amount of building permits annually issued per public employee (in the local-level urban planning sector) rose from 0,7 to 5,1, and now came to exceed the comparative figure in West Germany, which, in 1999, amounted to 4,5. Still in 1996, the outlays on building projects annually authorized per public employee in East Germany, totaling 4 Mill. DM, were nearly twice as high than in West Germany (2,2 Mill. DM) (see Statistisches Bundesamt 1990-2001; Kuhlmann 2002 with further reference).

influence in shaping actor behavior as well as actual policy outcomes. Hence, the above “*institutional hypothesis*” does not explain well the early period of the East German transformation process.

**Table 2: Building permits in West and East Germany\*/ annual change 1991-1999**

Year/Change	West German Länder	East German Länder	Total
1991	258959	10710	269669
1992	277154	28139	305293
1993	297370	57834	355204
1994	322670	70345	393015
1995	269661	83501	353162
1996	267941	91113	359054
1997	282379	90306	372685
1998	304904	83228	388132
1999	302914	78032	380946
<i>Change 1991-1992 in %</i>	<i>7,0</i>	<i>162,7</i>	<i>13,2</i>
<i>Change 1992-1993 in %</i>	<i>7,3</i>	<i>105,5</i>	<i>16,3</i>
<i>Change 1993-1994 in %</i>	<i>8,5</i>	<i>21,6</i>	<i>10,6</i>
<i>Change 1994-1995 in %</i>	<i>-16,4</i>	<i>18,7</i>	<i>-10,1</i>
<i>Change 1995-1996 in %</i>	<i>-0,6</i>	<i>9,1</i>	<i>1,7</i>
<i>Change 1996-1997 in %</i>	<i>5,4</i>	<i>-0,9</i>	<i>3,8</i>
<i>Change 1997-1998 in %</i>	<i>8,0</i>	<i>-7,8</i>	<i>4,1</i>
<i>Change 1998-1999 in %</i>	<i>-0,7</i>	<i>-6,2</i>	<i>-1,9</i>
<i>Change 1991-1999 in %</i>	<i>17,0</i>	<i>628,6</i>	<i>41,3</i>

\* incl. construction measures on existing buildings

Adapted from: Statistisches Bundesamt: Fachserie 5: Bautätigkeit und Wohnungen, Reihe 1: Bautätigkeit, 1996, 2001

### 3.1.3 Testing the “legacy-hypothesis”

The empirical findings of the study suggest that East German actors’ administrative activities were, at the beginning, largely marked by “legacies” springing from and ingrained in the GDR-past. In shaping the personnel’s law application practice, particularly with regard to the “old” staffs taken over from the former GDR-authorities<sup>20</sup>, these cultural imprints and routines came to hamper and delay the transition to a rule-bound implementation process. Thus, the demand for legal rule-application, professionalization, and rationalization, being characteristic features of the traditional “Weberian” administrative model and also of the (West) German “legalistic” administrative culture (cf. Siedentopf et al. 1993), stood in marked contrast with attitudes and routines well entrenched in the East German actors’ past experiences (Berg et al.: 81). Especially in retaining a primarily “technical” attitude towards the fulfillment of their administrative functions, East German actors came to fail the imperatives of a correct and “loyal” application of the law flowing from the “rule of law”-principle.

*It is no longer the question, how to build a house, but how to issue a building permit in correspondence to pertinent regulations. This is a common problem which is very often being ignored. Also one tends to change or to complete building plans, one sees oneself as the one who is building the house. (...) On the one hand they are complaining about the, partly, outrageous building applications, which they are not able to deal with. But on the other hand, they are happy to sketch in a “T30-door” somewhere. Each time I tell them: you mustn’t do that! You just have to reject the application. (Lawyer, East German municipality G., 15.11.99)*

East German actors exhibited a “casual” practice of law application in following their subjective assessments about whether or not a certain decision was appropriate or

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<sup>20</sup> Approximately 30 per cent of the counties’ (*Landkreise*) and the “county-free” municipalities’ (*kreisfreie Städte*) public employees had worked in former GDR state and local-level institutions (Berg et al. 1996: 191). This share applies also roughly to the newly set-up local-level building supervisory boards (see Kuhlmann 2002: 227).

desirable. A prime example of the negligent attitude towards the law was the aforementioned interpretation of indefinite legal notions (*unbestimmte Rechtsbegriffe*), such as § 34 BauGB (see fn. 12), which frequently appeared to be left to administrative actors' subjectivity, if not arbitrariness.

*This was a little bit the public employees' opinion to be allowed to make decisions from an advisability point of view hoping that these decisions will also prove correct before the court. So, following the motto: We want to have it or we don't want to have it. This was probably also due to their unsureness of what were the citizens' legal claims, so that they simply decided on the basis of political considerations or according to the practicality of the decision: 'Do we want it or don't we want it?' They just got together and came to a decision on how it would be the best or the most beautiful or the most practical. (Judge of East German administrative court, 12.11.99)*

Furthermore, in retaining an, as it were, "culture of oral communication" when fulfilling official tasks, East German actors, at the initial stage of the transformation process, strongly relied on oral arrangements and agreements, which, however, were at odds with the demand for procedural correctness and transparency of administrative activities. Thus, East German employees obviously fell back to GDR-traditions and institutional practices, which had been characterized by informal and personalized patterns of social exchange instead of codified and formalized procedures (Neckel 1992), and, again, by "subjective justice" (*subjektive Gerechtigkeit*) instead of legal rule-application (Bernet/Lecheler 1990: 40).

*The decisions were really utmost unlawful. These locals simply said: 'We don't want that person here. And we don't care about the legal situation. We just don't want him here.' (judge of East German administrative court, 14.12.99)*

In addition, the trust in the newly set-up administrative courts was remarkably low, which indicates a lack of reliance on rule of law functions and procedures<sup>21</sup>.

*At the beginning, I also had the impression that, due to GDR-traditions, administrative actors didn't see the requirement to submit all relevant documents to the court. 'Transparent authority', that's what you think! These are our files! And why do you want to have them?' 'We always had to point to the relevant legal norm. (...) In West Germany I never had to justify my demands. (judge of East German administrative court, 12.11.99)*

Unlike the “*institutionalist hypothesis*”, which suggests a quick and swift adaptation to West German standards, a considerable “*cultural persistence*” (Bürklin 1995) was to be discerned. This reflected the sustained power of cognitive and mental legacies deeply rooted in the GDR-past. With regard to the early period of East German transformation process, the “*legacy-hypothesis*” does appear to have a strong explanatory power.

#### 3.1.4 *Testing the “will and skill-hypothesis”*

Immediately after reunification, East German local-level building supervisory boards were strikingly understaffed, which is confirmed by the fact, that West Germany's public administrations employed at that time significantly more civil servants in the local-level urban planning sector than East Germany's authorities<sup>22</sup>. As regards the public

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<sup>21</sup> This assumption is also being supported by the findings of several surveys on East German population's institutional trust (see IPOS-surveys 1984-1995 for the “old“ and 1991-1995 for the New German Länder; ALLBUS-surveys 1989 and 1994; KSPW-survey 1995; references: Derlien/Löwenhaupt 1997: 453). Institutional trust in the New German Länder between 1991 and 1995 was almost generally beyond West Germany's level. Particularly the courts (except for the Federal Constitutional Court) came off badly, ranking in 1991 only on the last but one position out of 13 relevant institutions. In West Germany, by contrast, the courts achieved in all surveys, which have been carried out since 1984, top positions (1991: second position; see Gabriel 1996: 259).

<sup>22</sup> In West Germany the number of public employees in the urban planning sector per 10.000 residents amounted, in 1991, to 5. East German administrations, by contrast, employed only 3 civil servants per 10.000 inhabitants. West German local-level authorities employed roughly 2,4 per cent of their whole personnel staff in the urban planning sector, whereas the comparative figure in East Germany was only 0,6 per cent (see Kuhlmann: 254 ff.). It should, however, be taken into account that the understaffed urban planning sector stands in marked contrast to the generally oversized personnel staffs of East

employees' qualifications and administrative skills, the majority of the staffs were newcomers to state and local administrations. Predominant among these were holders of degrees in technical subjects and natural sciences (see fn. 38), such as building or planning engineers, architects etc.<sup>23</sup>. Considering that according to the German "rule of law"-tradition policy implementation requires a profound knowledge of pertinent legal provisions and relevant jurisdiction as well as a certain training in juridical reasoning ("logic of juridical subsumption"), this lack of law-trained personnel proved to be a "qualification gap" vis-à-vis the unprecedented and novel tasks facing East German authorities.

Due to the awkward economic situation which the East German municipalities had to cope with, the local actors' policy implementation practice was also largely influenced by local (political, economic etc.) interests and visions. Since the municipalities vitally depended on investments and local settlements of enterprises, they sought economically favorable decisions regardless of the legal situation potentially restraining them. A prime example for this interest-bound or, as it were, "local-egotistic" practice of law application is § 36 BauGB<sup>24</sup>. This article was applied – incidentally not only in East Germany – in the way that local implementers estimated as to whether the decision is seen as politically or economically desirable. At the same time they tended to disregard the legal implications and constraints of § 36 BauGB<sup>25</sup>.

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German municipalities resulting from the transfer ("*Re-Kommunalisierung*") of social, health, recreational etc. organizations and units to the municipalities and counties when "dismantling" the Socialist state (see Lorenz/Wollmann 1999).

<sup>23</sup> Evidenced by the findings of the aforementioned "follow up" (see fn. 5), a third of or even nearly half the personnel staff in the local-level building supervisory boards respectively (*Land Mecklenburg-Vorpommern* or *Land Sachsen* respectively) are building engineers. By contrast, the share of lawyers amounts to 1,4 per cent in *Land Sachsen*, whilst in *Land Mecklenburg-Vorpommern* the building supervisory boards didn't employ any lawyers at all (see Kuhlmann 2002: 262).

<sup>24</sup> According to the principle of local self-administration (*kommunale Selbstverwaltung*), including the local autonomy in urban planning matters (*kommunale Planungshoheit*), the municipalities must be integrated into the decision-making on building permits as far as they have not yet expressed their planning intentions in urban plans (*Bauleitpläne*). This inclusion of the municipalities (*Gemeinden*) into decisions on building permits, which is in general a state administrative function of the counties (*Landkreise*) delegated to them by the *Land*, is legally guaranteed by § 36 BauGB, providing that the municipality has to give its „agreement“ with an envisaged building project (*gemeindliches Einvernehmen*) before the county is authorized to issue a building permit (Battis et al. 1996: 564).

<sup>25</sup> That is, the municipalities are, in giving or refusing their "agreement", bound to an exclusively *juridical* interpretation. They are (in general) explicitly forbidden to give any other but *legal* reasons for their decision (Battis et. al. 1996: 564).

The local actors' readiness to break institutional rules while following their own objectives and interests was particularly encouraged by the fact, that, in this early phase, there was a broad scope for legally "deviant" administrative behavior. First, the State authorities were at that time still in their formative stage, so that local-level governments were, in fact, operating without any State oversight (see Wollmann 1996). Second, the judicial review by the likewise newly set-up administrative courts came to function only at a later moment. Third, the judicial power of sanction generally tended to be limited with regard to those administrative decisions being of some political interest<sup>26</sup>. It is true that West German municipalities also seek to evade legal provisions in view of politically important building projects. One can, however, submit that East German actors were against this background exceptionally successful in putting their individual political interests into administrative action regardless of the laws potentially conflicting with these interests. This appears to lend general support to our "*will and skill-hypothesis*" which stresses the role of both the personnel's qualifications and skills and the interests and policy choices of relevant actors involved in the implementation process.

### **3.2        *Consolidation period (1993-1996): Rule-bound Implementation Practice***

#### **3.3.1      *Process and output of law application***

The findings of our implementation study clearly confirm that the described pattern of unlawful decision-making in public administrations was only a temporary matter, which is to say, that the legal correctness of public decisions has dramatically and swiftly improved over time.

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<sup>26</sup> This is primarily due to the fact, that when it comes to issuing building permits, to which a certain political importance is attached, the potential plaintiffs are already "calmed down" in the run-up to the official procedure, often by means of financial compensation. Sometimes, particularly in case of building projects located in the outskirts of or outside the towns, there is simply no neighbor being legally authorized to go to court. And lastly it should be mentioned that investors are more prone to "swallow" some even unlawful conditions made by the local authorities (or alternatively to change the location), rather than getting involved in lengthy legal proceedings.

*That was really quick. (...) So, the learning capacity is enormous (...) The quality of administrative decisions concerning building and urban planning law matters is not worse than it is in West Germany. (...) It was, then, a very brief learning process, which turned out well. (judge of East German administrative court, 30.11.99)*

*It should be mentioned, that compared to West Germany the differences have considerably decreased. Meanwhile, I should say, there are no more differences. (judge of East German administrative court, 4.12.99)*

Local actors proceeded to a more strict and rule-bound manner of decision-making which was indicated by a remarkably increased legal correctness of the handling of building permits. Instead of their previous “over-generous” and investor-oriented practice of law application they now tended to more frequently reject applications for building permits by carefully and sometimes even overly strictly applying the pertinent legal provisions. One result of this increasingly strict law application practice was the growing number of annually instituted first instance-proceedings in building and urban planning law matters observed between 1993 and 1996. Considering that these proceedings primarily dealt with actions of real estate owners and prospective house builders with regard to the refusal of a building permit, local policy implementators appear to have become more rule-oriented and cautious in applying the law and, indeed, less generous in issuing building permits. This improvement of legal correctness in the law application practice is also suggested by the authorities’ “prevailing-rates” in legal proceedings (see table 3).

**Table 3: Proceeding results in administrative law matters\* (proceeding results in %)**

Year	Authority is prevailing		Authority is partly prevailing		Authority is losing		Total number of judgements	
	West German Länder**	East German Länder	West German Länder* *	East German Länder	West German Länder**	East German Länder	West German Länder**	East German Länder
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

\* Only proceedings with participation of authorities; without asylum law matters, disciplinary and court of appeal proceedings

\*\* Incl. East Berlin

See table 1

According to the data displayed in table 3, there can be no doubt that by far the vast majority of legal proceedings are decided in favor of the authorities. In East Germany the public authorities prevail in 75 per cent, in West Germany in roughly 80 per cent of all cases annually decided in administrative law matters at first instance-courts, whereas in less than 20 per cent the authorities lose a case. These findings in general point to a remarkable legal correctness of administrative decisions, achieved in a short period of time.

As regards the process dimension of decision-making, East German actors, in this phase, were prone to “overemphasize” the “rule of law”-principle. They now applied the law in an exaggeratedly rigid and, as it were, “law-abiding” manner. Thus, the personnel began to almost “over-react” to the previous “casual” practice of law application by seeking to adopt an ideal-type (Weberian) legalistic model of policy implementation. In view of East Germans’ dread of getting dismissed, this behavior also reflects the administrative actors’ efforts to avoid any loss of job risk errors (Paffrath 1996: 258).

*One should also mention that they sometimes tend to be almost too nit-picking. When proceedings are finally instituted at court the room for maneuver gets limited. Public administration is capable of many things. But to my mind there has been a sort of reverse movement – at least in county K. – which we didn't intend at all. Now, the legally provided scope for decision-making has come to be unrecognized. They simply say: 'it is impossible', although it would be, presumably, feasible provided that they took a closer look to the special case and considered some further circumstances. (judge of East German administrative court, 29.4.98)*

Unlike the pronouncedly skeptical assessments and forecasts of many scholars (see chapter 3.1.1), our empirical findings reveal a remarkable learning process and adaptation to the “normative model” of rule-bound policy implementation. As a result East German authorities have clearly converged with West German standards of legally correct law application. These observations are in conformity with other empirical studies which likewise go against a predominantly critical evaluation of the transformation “success”. Scholars have argued that the East German institutional system has come to function considerably well (Wollmann 1996: 146), which testifies to the amazingly swift process of administrative personnel’s professionalization. This prompt adaptation has been recognized by knowledgeable observers of the transformation process, who concluded that the East German administration now equals its West German counterpart (Banner 2001: 126) and is, in effect, hardly to be distinguished from administrations in the West German Länder (Eisold 1994: 268).

Furthermore, there has been significant change with regard to the public employees’ self perception and role behavior in the direction of internalizing and, in fact, “enacting” their new roles<sup>27</sup>. They now perceive themselves more and more as “implementers of legal provisions”, whereas at the beginning “much had been decided regardless of legal norms”

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<sup>27</sup> Jepperson (1991) employs the term of “enacting institutions” with regard to highly institutionalized social patterns, within which institutional rules are “routine-reproduced” accompanied by “taken-for-granted accounts” (Jepperson 1991: 148 f.). That is, one does not take action and intervene in a sequence, but reproduces institutional rules by routine.

(Rogas 2000: 105 f.). Unlike the early period of the transformation process, they now emphasize their proficiency in applying legal provisions and see themselves as experienced implementers of legal rules. They have come to assess themselves as now being as competent or even more professional than West German civil servants (Rogas 2000: 107). Hence, East German local actors were assumed to no longer take the “rule of law“-principle as an extraordinary achievement, but – just like West German civil servants do – as a matter of course (Osterland et al. 2000: 199).

Finally, attention should be paid, again, to the surveys on institutional trust (see fn. 21), the findings of which indicate increasingly positive assessments of administrative performance on the part of East German citizens (Derlien/Löwenhaupt 1997). Proceeding from an initially relatively low level, East German citizens’ attitudes towards public administration have considerably improved between 1993 and 1995, while worsening (already since 1980) in West Germany and, thus, in the end converging with the East German comparative figure.

### 3.2.2 *Testing the “Institutionalist hypothesis”*

The full guarantee of the “course of law-principle” (*volle Rechtswegegarantie*) introduced in the New German Länder on the basis of the Unification Treaty and the growing importance of the now functioning administrative courts called upon to watch over the correct and “loyal” application of the law triggered and fueled the process of learning and adaptation in East Germany. The first instance judgments, thus, considerably gained in importance with regard to the local policy implementation<sup>28</sup>. Administrative actors did not only carefully take the pertinent jurisdiction into account when interpreting the law, e.g. indefinite legal notions (*unbestimmte Rechtsbegriffe*), they also increasingly sought to anticipate the judicial practice of judgment by reflecting on the potential legal vulnerability of their own decisions. Interestingly, local actors turned out to learn

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<sup>28</sup> This growing influence of the first instance jurisdiction is, however, not least due to the fact, that in the period immediately following reunification very few judgments had been made and the frequency of legal proceedings and judgments came to increase over time.

thoroughly by following the “trial and error”-principle of learning, which has always been the case when the courts proceeded to punish legally faulty decisions without any leniency, for instance by granting a citizen’s action.

*I believe, the learning effect is much more profound with regard to a specific decision, if one is really driving against the wall, and then has to answer to the head of office. I consider the effect then really to be stronger. And I have no doubt that they learnt from us, indeed, in no time at all. (judge of East German administrative court, 21.3.00)*

*Meanwhile things have come to a stage where we find, when reading their notices, which we are to check, word-to-word our own comments obviously taken from some previous judgments. (...) In the meantime, they do exactly know and also keep to the jurisdiction of our 4th chamber here. (judge of East German administrative court, 12.11.99)*

The transition to a more rule-bound and legally conforming decision-making in the policy field considered here was, from an institutional point of view, also propelled by the fact, that East German local governments were to adopt the West German institutional blueprints. This also affected the local building and urban planning authorities. A prime example is the setting-up of administrative units competent to deal with difficult legal questions which appears to have encouraged the local-level administrations to considerably improve the legal correctness of their decisions.

To sum up, the growing conformity of East German local actors’ decisions with the pertinent law is due to the increasing power of the newly set-up “rule of law”-institutions in shaping both actor behavior and actual policy outcomes. The strict judicial review by the now operative administrative courts as well as the functioning oversight by the State authorities came to constitute an institutional context and frame, which prodded the personnel to be (almost overly) cautious and punctilious in applying the law. The above

findings strongly confirm – with regard to the “consolidating period” – the “*institutional hypothesis*”.

### 3.2.3 *Testing the “Legacy-hypothesis”*

The cultural and mental legacies inherited from GDR-past experiences faded rapidly. This conclusion is suggested by the fact that East German citizens came to increasingly accept and trust the newly built-up administrative courts and their jurisdiction, which was also mirrored in a dramatic increase in legal proceedings<sup>29</sup>. The administrative actors also proceeded to more and more accept the administrative courts’ authority. They swiftly gave up their initially conspicuous “ignoring” and rejecting attitude towards jurisdiction and legal control. The impact of these changes appears to have driven an adaptation to West German political culture as regards the degree of institutional trust<sup>30</sup> and the relations between local authorities, administrative courts and citizens.

*Local authorities now know where their position is within the political system and between the other institutions of the state. There is no more doubt concerning the authority of the administrative courts in controlling their decisions unrestrictedly. This is now being accepted without any discussion. And, hence, there are no more confusions. (judge of East German administrative court, 12.11.99)*

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<sup>29</sup> Between 1993 and 1998, the number of legal proceedings annually decided at first instance-courts in urban planning matters rose by more than 70%, whereas in West Germany this figure was slightly declining (- 3%). In the New German Länder the number of legal proceedings per 1.000 building permits amounted to only 29 in 1993. By 1998 it had already increased to 36 and thus almost reached the comparative West German figure (which amounted to 39; see Kuhlmann 2002: 103 f.).

<sup>30</sup> Taking into account that the courts, at the beginning ranking on the 12th position (out of 13), jumped to the 5th position and improved their mean value from 0,1 (in 1991) to 0,6 (in 1995), there appears to have been a tremendous increase in trust towards legal institutions (Gabriel 1996: 260 f.). The adaptation to West Germany’s “pyramide of trust“ is, besides, indicated by the finding, that the “rule of law“-institutions (e.g. the Federal Constitutional Court, courts, police), standing for the maintenance of “law and order”, are now ranking on the top of the table (Gabriel 2001: 112; Gabriel/ Neller 2000: 80 ff.).

This change in institutional trust towards the administrative courts accounts for the currently functioning legal control of East German local authorities. It has thus largely affected the legal correctness of public decision-making. Against this background we have to conclude that the “*legacy-hypothesis*” has significantly weaker explanatory power.

#### *3.2.4 Testing the “Will and Skill-hypothesis”*

In terms of administrative staffing and the personnel’s qualifications, some remarkable changes have occurred which reflect East German local actors’ efforts at making up leeway. These can on the one hand (quantitatively) be seen from the increase in public personnel of the local level urban planning sector<sup>31</sup>. On the other hand one should recall the efforts at training and further qualification aimed at making East German administrative actors familiar with some basic structures of the German law, and in particular with the rules of administrative (procedural) law. Furthermore, the local actors in fact demonstrated an amazing capacity for adaptation in so far as they were quickly getting used to the new legal provisions and institutional rules by “learning on the job”.

*I suppose, it was primarily an independent learning process (...) Since, just as I said, in no time they have got so many “bloody noses” that they caught on quickly how actually to do it? (judge of East German administrative court, 29.4.98)*

Moreover, the local authorities came to employ law-trained personnel particularly experienced in the field of urban planning and building legislation, which, again, made

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<sup>31</sup> In the East German local level urban planning sector (including the local building supervisory boards) the personnel staff more than doubled between 1991 and 1999 (increase by 111%), whereas West German local authorities in this policy field experienced even a slight decline (by 10%). In 1999, the share of public employees working in local level building and urban planning authorities in the entire local level personnel amounted to 2,6% and, hence, surpassed the comparative West German figure (2,4%). By contrast, in 1991 this share had turned out to be much lower (namely 0,6%; see Statistisches Bundesamt 1991-1999; Kuhlmann 2002: 254 f.).

for visible progress in the local actors' law application capabilities. Some interviewees even considered the employment of West German lawyers to be the decisive requirement and condition for improvements in East German administrations.

*I know, that it sounds somewhat stuck-up. But from my point of view there has been no alternative to the employment of West German lawyers in these fields. Though, the import was conditioned on the transfer of the German Federal law. (judge of East German administrative court, 29.4.98)*

In as much as the oversight by the State and the legal control by the administrative courts came to function, the opportunities for “casual” and situative administrative behavior tended to get limited. Accordingly, local actors were bound to move to a more rule-following and precedent pattern of law application, whereas local interests and individual policy goals became less decisive in administrative activities. Yet, local actors even when faced with the strongest institutional controls have freedom of choice (Bogumil/Schmid 2001: 57) which allows them to choose between different strategies or even to break institutional rules. Thus, as far as the local actors were expecting no or only few institutional sanctions when issuing building permits against the pertinent law<sup>32</sup>, they were largely prone to move to the limits of what was legally acceptable. Against this background, there can be no doubt, that the specific constellations of local actors, their “strategies of the game” and attitudes were highly influential in the local decision-making process and on the legal quality of the policy output. This holds especially true with regard to politically important decisions on building permits. Here, the relations between the local politicians, executives and senior civil servants, on the one hand and the “frontline implementers” (Sorg 1983: 391) on the other, appear to have had a great impact on public decision-making. Whilst the former group usually behaves in a more policy-oriented and pragmatic fashion, the latter tend to act in a more rule-bound and precedent way. Typically, the “frontline implementers” in the East German municipalities

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<sup>32</sup> As mentioned above, in some situations an awkward lack of legal control was to be discerned, e. g. in the case of politically important decisions or of building permits in the outskirts of towns (see fn. 26).

turned out to be less powerful towards a rule-ignoring political intervention than it seemed to be the case in the West German authorities. Hence, as regards the “consolidating period” the “*will and skill-hypothesis*” still stands.

### **3.3 *Most recent period (1996-1999): Bargaining Strategies and “Pragmatic Illegality”***

#### **3.3.1 *Process and output of law application***

The empirical findings of the study, finally, reveal some specific patterns of East German actors’ behavior and law application practice which differ, at least partly, from the West German model and, thus, may be interpreted as “innovations” (see fn. 10)<sup>33</sup>. In terms of policy implementation these patterns of decision-making are to be referred to as “innovative”, suggesting a more strategic and problem-oriented, than just legally correct and strictly “law-abiding” implementation practice. We now turn to a more substantial and policy-related aspect of local law application practice.

In the most recent period of implementation practice East German actors proceeded to use legal provisions within the “gray zones” not ruled out by the administrative courts in order to pursue bargaining strategies and informal arrangements (with investors and citizens). In doing so they have come quite close to the West German pattern of law application, which is characterized by the administrative strategy of the so called “opportunistic or pragmatic illegality”<sup>34</sup>. At the same time, this remarkably swift embarkment of East German actors upon the “tightrope walk” between the formalities of

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<sup>33</sup> Innovative modifications of the West German model can also be discerned with regard to the GDR-Municipal Charter (*DDR-Kommunalverfassung*) of May 17, 1990, which had been passed by the democratically elected GDR Parliament (*Volkskammer*). This new Municipal Charter had made some remarkable moves to adopt a strong dose of direct democratic procedures by providing for local referendums and for procedural opportunities of citizen groups to play an active role in the deliberations of the local councils (see Wollmann 2001).

<sup>34</sup> Whereas the former generally refers to a behavior of an organization’s members which may - within the “gray zones” - violate the formal expectations of this organization but is still recognized as opportune (Luhmann 1976: 304), the latter more emphasizes the aspect of implementation deficit – the so called „pragmatic violation of the constitution“ (Wagener 1979: 245) - resulting from an “over-regulation” in a number of policy fields.

the rigorous Rechtsstaat and the informalities of the “negotiating” *Rechtsstaat* (see Wollmann 2002: 16) has largely been shaped by endogenous factors rooted in the specific East German context of policy implementation.

A number of “mis-regulations“ (“*Fehlereglungen*”) resulting from the extension of the West German legal world to the quite different East German urban planning context encouraged local government employees to pursue more pragmatic and flexible, rather than strictly rule-bound law application practices. This has been largely fostered by the awkward urban planning and building situation in East German municipalities. Administrative actors, for instance, drew on some specific adaptation strategies (e.g. informal hearings and citizens’ participation), in order to avoid the highly formalized urban planning procedures (*Bauleitplanung*) provided by the law. The latter, namely, had turned out to be lengthy and conflictive, and consequently unsuitable for effective compliance with local urban planning requirements and citizens’ building demands in East Germany.

Moreover, some innovative features of policy implementation are also to be recognized in the local actors’ cooperative and negotiating strategies. These have also largely been favored by the precarious urban planning and building situation in the municipalities of the former GDR. In seeking to remedy these problems of urban development on the one hand and to meet the citizens’ demands on the other, the administrative actors proceeded to a more consensual and consultative style of decision-making instead of a hierarchical and „supreme-power-like“ (*hoheitlich*) law application procedure.

*One has to consider that, if somebody applies for a building permit and one doesn't talk about it and doesn't know why he did it this way, then the decision is often regarded as being bureaucratic. But if, by contrast, the investor and the authority have the opportunity to explain and to give reasons, then there will usually be an acceptance. (head of the urban planning office/ East German municipality, 9.12.1999)*

In view of this adaptive and problem-focused pattern of policy implementation local actors appear to stand in marked contrast to the ideal-type “classic bureaucrat”. Instead, they obviously come closer to the modern type of a politically committed “policy maker”<sup>35</sup> who seeks to pursue the local policy goals and obtain the public’s consent.

*We must be less bureaucratic. (...) One must try to reason and to find solutions. And, indeed, there are cases, where we have made a compromise or developed partial solutions, for instance by making the connection to the street at a later moment and so on. (...) And then one finds, without violating the law, a solution. One is still moving – though on the utmost borderline - within a legally acceptable area. (head of the urban planning office/ East German county, 18.12.1997)*

*I believe that in East Germany – unlike the common assumption – the procedures of issuing building permits go by far less complicated than in West Germany. (head of the building supervisory board/ East German municipality, 4.11.1997).*

These observations are contrary to the findings of some primarily culturally oriented transformation studies which – although predominantly focused on the *Länder*-level – consider East German actors to resemble the ideal type of the “classic bureaucrat” (see Reichard/Schröter 1993; Schröter 1995; Damskis/Möller 1997; Beckers 1997). They therefore assume that East German bureaucracies are plagued by functional deficiencies and serious drawbacks vis-à-vis the demands on the administration’s capacity to effectively solve problems in a complex (post)modern society.

This assumption is, however, challenged by a good deal of the (more recent) transformation literature which appears to lend general support to our “innovation-

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<sup>35</sup> For a corresponding typology see Putnam 1976; Aberbach et al. 1990. According to these studies the German Senior Civil Service (*Ministerialverwaltung*) on the Federal level is conspicuously marked by the predominance of the politically committed “policy maker” standing apart from the ideal-type “classic bureaucrat” who thoroughly keeps his distance from the policy-making process.

hypothesis” – at least with regard to final period of the transformation process. It has been argued that in East German administrations a process of cultural “dissociation” and “emancipation” had taken place which could make for independent innovations and developments (Reichard 1997: 319). In policy studies patterns of “active implementation” have been observed in the way that public employees reached out of the administrative institutions and exhibited an independent commitment to the citizens, e.g. by informing, motivating and consulting certain client groups (Meisel 1997: 234 ff.). In other words, the administrative actors moved away from the “bureaucratic mentality” according to which initiatives are primarily left to the policy recipients. This assessment corresponds with the observation of a non-doctrinaire and consensually based style of decision-making in East German institutions, which has been registered in a number of policy fields<sup>36</sup>.

This policy-making and implementation practice is also reflected by the self-perceptions of East German actors who consider themselves to be less reserved and “formalistic”, more “practical and policy-minded”, more tolerant and flexible in matters of exhausting latitudes and “gray zones” than West German civil servants. Based on this self-perception they try to set themselves conspicuously apart from the image of the West German “bureaucrat”, who behaves from their point of view highly formal and far less committed to the citizens’ concerns than they assume they do (Rogas 2000: 98 ff.). According to the findings of an empirical study on client orientation (*Bürgerfreundlichkeit*) in East German local governments, administrative actors, particularly in the local registration offices, try not to get hampered in their decision-making by “bureaucratic objections”. Instead, they attempt to decide pragmatically even at the risk of conflicts with the local government’s lawyers or with the State oversight offices in order to quickly obtain substantial outputs for the citizens (Osterland et al. 2000: 94). Against this background, it has also been submitted that East German administrative culture could because of the actors’ pragmatic style of law application provide a major impetus for a general scrutiny

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<sup>36</sup> As regards housing policy see Meisel 1997: 236, local economic promotion Giese 1997; McGovern 1996; urban planning Lorenz et al. 2000; Wollmann 2000a: 26 ff., 2002: 56 ff. Drawing on empirical findings in corporatism research the informal, consensual style of policy making and the relations of

of the pertinent law. This, in turn, could possibly (re)encourage the efforts to deregulation and administrative simplification which in West Germany have repeatedly reached a deadlock (Grunow 1996: 14 f.).

### 3.3.2 *Testing the “Institutionalist hypothesis”*

Considering that the transferred legal structures, e.g. the federal urban planning law, originally tailored to the West German context, often turned out to be “mis-regulations” (*Fehlregelungen*) or “false theories” when being applied to policy problems in East Germany, local actors were bound to largely draw on strategies of improvisation and adaptation in the policy implementation process. Second, the complexity of the pertinent (urban planning, building and administrative procedural) law has, again, to be taken into account in view of which a “one-to-one-implementation” appeared neither feasible nor adequate with regard to East Germany’s local situation (see chapter 3.1.2). Third, as far as East German actors began to internalize and to “enact” the new institutional rules (see fn. 27), they came to increasingly recognize their scope for strategic action and free (policy) choice provided by the legal frameworks.

Hence, with regard to the most recent period of the transformation process, the explanatory power of the “*institutionalist hypothesis*” appears to be somewhat ambivalent. When it comes to the evaluation of the legal correctness and the basic features of law application practice, one can observe a further, institutionally propelled, adaptation to, if not a correspondence with West German standards (see table 3). This illustrates the power of institutional factors in shaping actor behavior. At the same time a seemingly declining power of institutional factors in restraining local decision-making might be discerned in that administrative actors came to flexibly and strategically use the “gray zones” not ruled out by the legislation and the courts. They increasingly became aware of their scope of action and choice within the institutional setting. This might stand in contrast to the former assumption of a growing, institutionally based standardization in

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mutual accommodation between political actors in East Germany has likewise been stressed (Damskis

administrative behavior. Against this background, there seems to be only a partial correspondence with the “*institutionalist hypothesis*”.

### 3.3.3 Testing the “*Legacy-hypothesis*”

The aforementioned patterns of mutual adaptation and bargaining in the policy implementation process appear to reflect some historical “path dependencies” in the sense of the “*legacy hypothesis*”. The cultural heritage of the former GDR local administration (*örtlicher Rat*) provided an appropriate breeding ground for informal and cooperative arrangements to (re)emerge. Corresponding with the general disregard of formal regulations and legal provisions in der GDR-system, the existence of highly personalized arrangements and networks had indeed produced some intransparent clientelistic relationships and dependencies between the local actors (Berg et al. 1996). Yet, these relationships made for a sort of “solidarity-mindedness” which – being largely unknown in the West German municipalities (Bernet 1993: 31) - prompted the public and private actors to rely on cooperative and negotiative interactions rather than on formal rules and contracts. In addition, non-hierarchical arrangements of mutual accommodation between public administration and citizens in the sense of “bureaucratic bargaining” (Neckel 1992), in East Germany played an important role in overcoming the rigidities of the political regime and in compensating for the material shortfalls<sup>37</sup>. East German actors came, at least partly, to revert to these past experiences and social skills in what has been called a “renaissance of roles” (“*Rollenrenaissance*”, see Damskis/Möller 1997). They, however, used this historic experience in the direction of a pragmatic and cooperative implementation practice. This, again, makes East German administrations contrast sharply from the ideal-type rule-bound model of law application.

Accordingly, East German actors see their cooperative behavior as a “cultural heritage of the former GDR worth being maintained” (Osterland et al. 2000), notwithstanding that

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1996: 137).

the achievement of substantive results for clients is often prior to the legal correctness of their decisions. In assessing their talent for improvisation and their reserved attitude towards strict juridical legality as a positive result of their GDR-past experiences local actors want to differ from the ideal-type “classic bureaucrat” which in their view is embodied by the West German civil servant (Rogas 2000). Proceeding from this line of reasoning, it can plausibly be submitted that East German actors’ preference for problem-focused and adaptive policy implementation has – partly - been fostered by recalling their skills of informal, cooperative and pragmatic decision-making which they inherited from the GDR past experiences. Hence, there seems to be some correspondence with the “*legacy hypotheses*”.

#### 3.3.4 Testing the “*Will and Skill-hypothesis*”

As to the actor-related factors being influential in the emergence of an “innovative” policy implementation practice, the administrative staff’s qualification structures and skills must be considered. These have strongly influenced the above mentioned policy- and output-orientation amongst East German public employees. It has to be taken into account that public employees holding top positions of East German local governments were predominantly coming from non-administrative businesses, e.g. from companies, educational or scientific institutions (see Cusack/Weßels 1996; Berg et al. 1996). They have therefore rarely had specific training in law application or administrative procedures. Thus, the degree and intensity of the staff’s “bureaucratic socialization” is obviously limited. Furthermore, the new administrative leaders in East German authorities mainly hold degrees in natural sciences and engineering (see also chapter 3.1.4) and, thereby stand in marked contrast to their West German counterparts, the majority of whom are trained in law or hold public administration-related degrees<sup>38</sup>.

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<sup>37</sup> For the so called “structural analogy” of decision-making and behavior in the former GDR between the local-level public administration on the one hand and the local companies on the other hand see Neckel 1992.

<sup>38</sup> Whereas the share of natural science-related degrees in East German administrative top positions on the local level (mayors, heads of department) amounted, in 1995, to nearly 70 per cent and the share of juridical and public administration-related degrees to only 14 per cent, the West German administrative “elites” on the local level consisted at almost 60 per cent of lawyers and public administration

This qualification profile of the East German administrative staffs is evident in the local actors' law application practice in the sense that they seek pragmatic and flexible policy solutions instead of strictly following legal rules. As mentioned above, the public employees' self perceptions point to the very same direction. East German actors see their lower legal expertise and "rule-consciousness" as being the cause of a more problem-focused and output-oriented administrative behavior. That is, the multitude of newcomers to the public administration "who had not the faintest idea of administrative law" (Rogas 2000: 98) tended to identify themselves more with the policy issues than with the law.

It should also be noted that, due to the increase in administrative staff (see fn. 31), the East German building supervisory boards and urban planning offices were, from the personnel point of view, more and more in the position to pursue bargaining strategies. Since, these strategies required a great deal of energy and comparatively more (personnel and time) expenditure than a strictly "supreme-power"-like application of the law (see Dose 1994). Thus, the "organizational slack" (Cyert/March 1963: 37 f.) required for negotiation and cooperation in administrative units tended to grow, not at least as a result of a gradually decreasing administrative work-load (number of applications for building permits) since the mid-nineties<sup>39</sup>.

Finally, the considerable change in the public personnel's qualifications (employment of lawyers, further education and training) strongly influenced the East German actors'

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specialists and at only 28 per cent of engineers and natural scientists. With regard to the head of office-positions (*Amtsleiter*) the corresponding figures were, in East Germany, at 64 per cent (engineers/natural scientists) and 20 per cent (lawyers/public administration specialists), in West Germany, by contrast, at 21 per cent (engineers/natural scientists) and 70 per cent (lawyers/public administration specialists). Moreover, West German administrative leaders have the advantage of an on average longer – as regards the head of office-positions nearly twenty-year-long – administrative practice over their East German colleagues (see Wollmann 1996: 124 f. with further references; data basis: 40 West German, 37 East German municipalities with a population of between 25.000 and 250.000 inhabitants).

<sup>39</sup> Whereas the number of public personnel in the local-level building and planning administrations in East Germany continued to increase up until the late nineties (by 6 per cent between 1996 and 1999) the number of annually issued building permits was, during this period, significantly declining (by 14 per cent) (see Statistisches Bundesamt 1996-2001; Kuhlmann 2002: 173, 255).

capabilities of law application in the sense that they now succeeded in reconciling the material “policy-quality” of a decision with its legal correctness. Accordingly, the local actors came to use their scope for free choice provided by the “gray zones” of the pertinent law while also complying with the legal requirements. Against this background, the actor-centered “*will and skill-hypothesis*” appears to (re)gain in explanatory power with regard to the most recent period of the transformation process.

#### **4 Conclusion**

The East German administrative actors (in the local building and urban planning authorities) are, today, largely in a position to combine a legally correct application of the pertinent law with a pragmatic, problem- and client-oriented implementation of local policies. In a somewhat ideal-type exaggeration it might be argued, that the East German local-level governments appear to have in a short period of time managed the transition from the initially legally nihilistic (“*rechtsnihilistisch*“, see Pohl 1991) or even “*pre-modern*” model of public administration to the current cooperative and “negotiating” one, which has also been labeled as a “*post-classic*” type of bureaucracy (König 1992: 549). As a result, the East German authorities are on the one hand very different from the ideal-type Weberian model of bureaucracy fundamentally marked by a strictly rule-bound and loyal law application and absolute formal obedience. On the other hand, there appears to be some evidence for a (gradual) difference to the (“real-type”) West German model in that the East German authorities have even more clearly than their West German counterparts departed from the “supreme power-like” model of public administration. One can therefore argue that the changes and learning processes which East German actors have experienced could have an innovative impact on the West German institutional world. East German local actors’ readiness and ability to conceive and to handle public administration in a more problem- and goal-oriented rather than rigid law-abiding manner could, in effect, stimulate innovation and aid the ongoing transition from the rigorous “administrative state” (“*Verwaltungsstaat*“, see König 2000) to the

postmodern “enabling” and “functional” “*Verhandlungsstaat*” (Heinelt 2001; Böhret 2001: 48).

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