

Judicial Control of Administrative Authorities: A New Development in Eastern Europe

On January 31, 1980, the Polish Parliament (*Sejm*) passed a statute establishing the Supreme Administrative Court and amending the Code of the Administrative Procedure. This statute, which entered into force on September 1, 1980, revived judicial review of administrative decisions in Poland, focusing attention upon the changing attitude of Eastern European governments toward this practice. Rejected at the beginning of communist statehood, judicial review of administrative action is slowly gaining recognition and acceptance in Eastern Europe.

I. The Changing Attitude Toward Judicial Review in Eastern Europe

In the pre-World War II period, some Eastern European countries had a well-developed system of judicial control of administrative action. The system was often patterned to a great extent after the model of the Austrian *Verwaltungsgerichtshof* (Supreme Administrative Court). Special tribunals were established to review the legality of administrative actions (*Verwaltungsakten*). These tribunals were entirely separate from ordinary courts and were authorized to decide private and criminal law cases. The strong Austrian influence was particularly evident in the countries that had formerly been part of the Austro-Hungarian Empire: Czechoslovakia, Hun-

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gary, and Poland. In fact, the Austrian influence extended to the entire system of administrative law in these countries, and is discernable even today.

After World War II, however, administrative tribunals ceased to exist in Eastern Europe. This occurred in 1944 in Bulgaria,¹ in 1948 in Romania, and in 1949 in Hungary. In Poland, after the end of the German occupation, the Supreme Administrative Tribunal was simply not reestablished. In Czechoslovakia the Administrative Tribunal in Bratislava was closed in 1952, but in fact had ceased to function even earlier. Article 137 of the Czechoslovakian Constitution of 1948 provided for administrative tribunals, but because no relevant statute was passed, that provision of the Constitution has remained a dead letter.² The situation was similar in the German Democratic Republic, where Article 138 of the 1949 Constitution provided that administrative tribunals and *Volksvertretungen* (equivalent to the USSR's "soviets") were to control the legality of administrative acts. But no specific statute was passed and no administrative tribunals were established.

There seem to have been several reasons for the effective abolition of judicial review of administrative actions in these countries. For example, it was stated that in the socialist state there are no conflicts between state (government) and individual. The socialist government always acts in the interest of the entire society; the interests of individuals and society are therefore identical, and there is no room for conflict between them.³ Some authors did not go so far in their arguments for abolishing judicial review. They simply stated that new methods of controlling administrative bodies were sufficient or even better than "capitalistic methods." These new methods, which were patterned after those used in the Soviet Union, consisted of the controls exercised by procuratura,⁴ and "citizens complaints." Both institutions have been fully described in American literature,⁵ so no further discussion of them here is necessary. A third, and related reason given for abolishing judicial review was that administrative author-

¹P. STAINOV & A. ANGELOV, *ADMINISTRATIVNOE PRAVO NARODNOI RESPUBLIKI BOLGARII* (The Administrative Law of People's Republic of Bulgaria) 481 (1960).

²Mikule, *Spravni soudnictvi—ano ci ne?* (Administrative Courts—Yes or No?), *PRAVNIK* 773 (9/1968).

³Morawski, *Zagadnienie knotroli administracji* (The Problem of Control over Administration), *PANSTWO I PRAWO* (2/1947).

⁴"Procuratura" or procuracy is a special agency somewhat comparable to the U.S. Department of Justice in that it performs similar tasks: first, it conducts investigations in criminal cases and acts on behalf of the state before courts in criminal proceedings; second, it supervises the compliance with law of all governmental authorities. Other eastern European countries established similar institutions after World War II.

⁵See W. GELLHORN, *OMBUDSMAN AND OTHERS* (1967). See also J.N. HAZARD, *THE SOVIET LEGAL SYSTEM* (1977).

ities are subordinate to the so-called "organs of state power," which are endowed with broad powers to control the administrative authorities.

Certainly there were also other, perhaps even more important reasons. In evaluating the activities of administrative bodies, emphasis was placed on their "effectiveness"⁶ (from the point of view of the new government, of course), not on their legality.⁷ Nearly all of the statutes and laws then in force were adopted in the pre-war period since Eastern European countries did not abolish their existing legal systems as did Russia during its revolution. Yet administrative authorities took actions that were not always authorized by the old statutes. There was thus a fear that aggrieved individuals might attack such administrative actions by seeking judicial review.

But the abolition of administrative tribunals did not mean the abolition of all possibilities for judicial review. In a few rare instances, statutes provided avenues for judicial review of decisions taken by administrative agencies. Review was performed not by special tribunals, but by ordinary courts. These possibilities were common to all the Eastern European countries, and also existed in the Soviet Union. Such possibilities for review were present in the following cases: First, decisions of executive committees of local councils (*ispolkomy sovetov* or the equivalent) concerning insertion of a voter's name in the list of voters; second, decisions of administrative commissions (or the equivalent) imposing penalties;⁸ and third, complaints of citizens to the court concerning the contents of civil status registers (registers of births, deaths and marriages). Other less frequent instances in which judicial review was possible included, *inter alia*, social security decisions and execution by the government upon the property of citizens for the purpose of collecting past due obligations (e.g., taxes). In some cases, expropriation of immovable property and decisions assigning an apartment from government owned stock were also subjected to judicial review.

Furthermore, it must be remembered that Eastern European countries still belong to the civil law world, though the traditional civil law institutions are clothed in a thick layer of new enactments. Thus if an administrative action causes a citizen material losses it has always been possible to file a tort action against the government before an ordinary court to challenge the action as illegal. The court, in determining whether such a tort action is well founded, must determine whether the action in question is in compliance

⁶"Effectiveness" means a willingness and ability to fulfill the tasks ordered by superior authorities.

⁷M. WYRZYKOWSKI, *SADOWA KONTROLI DECYZJI ADMINISTRACYJNYCH W. PANSTWIE SOCJALISTYCZNYM* (Judicial Control of Administrative Decisions in the Socialist States) 89 (Wydawnictwo Uniwersytetu Warszawskiego 1978) (hereinafter cited as Wyrzykowski).

⁸On administrative commissions see Barry, *The Development of Soviet Administrative Procedure*, in 3 *SOVIET LAW AFTER STALIN* Part III, *SOVIET INSTITUTIONS AND THE ADMINISTRATION OF LAW* (1974).

with the law. Such recourse to civil law remedies was sometimes limited by legislative or governmental enactments, or by judicial decisions, but was nevertheless a viable avenue for judicial review.

It must also be noted that all of these possibilities for judicial review relate only to "administrative" actions or decisions. During the postwar period in Eastern Europe it was not possible to challenge "normative" actions, i.e., actions which promulgated legal rules of general application. Also excluded from judicial review were actions addressed to subordinate authorities and agencies.

The only administrative actions that could be challenged by individuals were those which allegedly caused injury to the individual in question. Review by the court of these decisions was generally restricted to determining compliance with the law, rarely covering questions of fact.

In the late fifties the attitude in Eastern Europe toward judicial review began to change. This development was foreshadowed by the writings of Soviet and other authors which proposed the introduction of judicial review, or at least an expansion of the types of cases in which judicial review could be sought.⁹ These proposals reflected a fundamental change in attitude toward judicial review. But a change in the attitude of scholars does not mean an immediate change in the position of governments. Acceptance of judicial review by governments occurred much more slowly, and in some countries it did not occur at all.

In 1957, Hungary became the first country to pass a statute providing for judicial review;¹⁰ Romania followed in 1967,¹¹ Bulgaria in 1970,¹² and Poland in 1980.¹³ The Soviet Union slowly increased the number of cases in which judicial review could be sought.¹⁴ The new Soviet Constitution provided in section 58 what appeared to be another process for judicial review stating, "The acts of government officers violating law, overstepping their powers, diminishing rights of citizens, can be appealed to the court in the process established by statute." Yet no statute detailing what decisions may be appealed to the court has been passed. This section of the Soviet Constitution remains a mere declaration of political policy.

A similar situation exists in Czechoslovakia. Statutes have been enacted

⁹IAMPOLSKAIA, *VOPROSY SOVETSKOGO GOSUDARSTVA I PRAVA* (The Problems of Soviet State and Law) 226 (1958). Nedbailo, *O iuridicheskikh garantiakh pravil'nogo osushchestvleniia sovetskikh pravovykh norm* (About the Legal Guarantees of the Realisation of Soviet Legal Norms), 6 *SOV. GOS. I PRAVO* 26 (1957).

¹⁰Chapter VI of the statute IV 1957, *MAGYAR KOZLONY* 64/1957, later amended.

¹¹Statute 1/1967, *BULETINUL OFICIAL* (Official Bulletin) 67/1967, part I.

¹²Statute of June 24, 1970, *DRJAVEN VESTNIK* 53/1970.

¹³*DZIENNIK USTAW* 4/1980, sec. 8.

¹⁴N. SALISHTCHEVA, *ADMINISTRATIVNYI PROCESS V. SSR* (Administrative Process in USSR 130 (1964); 1964); N. SALISHTCHEVA, *GRAZDANIN I ADMINISTRATIVNAIA IURISDIKIIA W SSR* (A Citizen and Administrative Jurisdiction in USSR) 118 *et seq.*, (1970).

(including a 1969 amendment to the code of civil procedure which presaged the introduction of judicial review) but no regulations have been passed to put the statutes into effect.¹⁵ According to those who have studied this area the German Democratic Republic has made no attempt to introduce judicial review.¹⁶

II. Current Situation in Eastern Europe (Other Than Poland)

A. GENERAL

Only three Eastern European countries—Bulgaria, Romania and Hungary—have general statutes allowing judicial review. Of these three, only Bulgaria and Romania provide for the right to appeal final administrative decisions to the courts as a general rule, allowing only a few exceptions.

The Romanian statute provides for exceptions in the case of, administrative decisions relating, *inter alia*, to the following areas: national defense, security and public order, planning, tax and compulsory insurance, imposition of penalties, and extraordinary measures introduced in case of epidemic or other disaster.¹⁷ There are still other exceptions, which flow from separate statutes.¹⁸

In Bulgaria, the statute on administrative procedure excludes from judicial review decisions relating directly to the defense and security of the state, decisions taken according to the statute governing foreign currency exchange, decisions taken by the organs of state control, or so called “social” control, and decisions excluded by some separate statutes.¹⁹

Rather than providing a general right to judicial review subject to specified exceptions, the Hungarian law of 1957 enumerates five areas in which judicial review is permissible: decisions refusing to include or to remove data from registers of civil status; decisions assigning or refusing to assign an apartment; decisions rejecting a claim for the return of property taken into custody during an administrative proceeding; decisions pertaining to ex-

¹⁵Sec. 50 of statute no. 71 of June 29, 1967, concerning administrative procedure, *Sbirka Zakonu* (the administrative code), no. 27 (1967) provided: “Special statutes delineate the matters in which the courts are entitled to adjudicate the decisions of the administrative authorities”. See also Z. Cerveny, *New Rules Governing Administrative Procedure*, BULGARIAN-CZECHOSLOVAK LAW, 39–56 (26/1968).

¹⁶See WYRZYKOWSKI, *supra* note 7, at 90.

¹⁷Sec. 14–16 of statute 1/1967.

¹⁸Gherghescu, *Exceptarea de la dispozitiile Legi nr.1/1967 a actelor administrative jurisdictionale si a actelor administrative pentru controlul legalitati carora esteprevazuta a alto procedura jurisdictionala* (Exceptions from the Dispositions of Law no. 1/1967 Relating to Administrative Judicial Acts and Administrative Acts as far as Judicial Control is Concerned are Foreseen in Other Judicial Procedures), *Revista Romana de Drept*, 137 *et seq.* (8/1969). See also WYRZYKOWSKI, *supra* note 7, at 100, 101.

¹⁹DRJAVEN VESTNIK (90/1979).

propriation; and decisions relating to taxes. The scope of this list has been expanded by separate statutes enacted since the statute covering general principles of administrative procedure was adopted in 1957. In 1981 a new statute on general principles of administrative procedure was passed, replacing the old law of 1957.²⁰ This new statute does not contain a list of instances in which judicial review is permissible but does empower the Council of Ministers to issue an ordinance listing the areas in which judicial review will be permitted. In comparison with the situation in 1957, the number of instances in which appeal to the court is possible has been substantially increased.

In the remaining Eastern European Countries (the Soviet Union, Czechoslovakia, and the German Democratic Republic), special statutes provide for judicial review in limited circumstances. Among these three countries, the Soviet Union seems to allow the widest scope of judicial review, East Germany the narrowest. Collection of the provisions concerning judicial review is difficult because they are scattered throughout the entire body of legislation. Fortunately, writings of scholars from these countries provide some assistance.²¹

B. COMMON FEATURES

In spite of the fact that different Eastern European countries permit different scopes of review, there are several common features of the system of judicial review of administrative actions in this region.

First, assuming judicial review is allowed, the claims on appeal are filed with an ordinary court, not a special administrative tribunal.

Second, the procedure before the court is regulated by the codes of civil procedure with some modifications flowing from administrative law. The code of civil procedure in some countries, including the Soviet Union, includes special provisions for adjudicating administrative cases.²²

Third, the appeal may be filed only by a party whose rights were violated by the administrative decision.

Fourth, only individual administrative decisions may be appealed. Normative or rule-making acts by an administrative agency (by-laws, regulations, rules) may not be appealed. Nor will an appeal be granted to test the constitutionality of statutes and decrees. The underlying rule promulgated by the administrative body may be attacked indirectly in some

²⁰See Chapter VI of Statute IV 1957, *supra* note 10, and MAGYAR KOZLONY (107/1972).

²¹N. SALISHTCHEVA, GRAZDANIN . . . , *supra* note 14, at 129; Studenikina, *Sootnoshenie administrativnogo i sudiebnogo kontrola v. sovietskom gosudarstviennom upravlenii* (Relation between Administrative Judicial Control in the Soviet State Administration), *URCHONYE ZAPISKI* 75 (22/1970).

²²See art. 231 to 244 of the Code of Civil Procedure of RFSSR.

instances, however. For example, a court evaluating an administrative decision will sometimes find that the decision was issued in accordance with a by-law, but that the by-law violates the statute. But there are no statutes which would allow the courts to declare the by-law to be illegal or invalid or to set it aside. In such a case, the court might simply disregard the by-law and inform the authority that issued the regulation of the discovered illegality.

The fifth common feature is that in the countries having a developed system of judicial review—and to a certain extent in the other countries discussed—a procurator can take part in the entire procedure before the court. The procurator is also endowed with the right to appeal the administrative decision to the court. The procurator's position when appealing a decision is not much different than that of a citizen filing an appeal. The procurator can appeal the decision when, in his opinion, it violates the law. He may do so even when a party who suffers the wrong does not appeal the decision. He is not a representative of the interest of the government, or the public interest, but is considered and sometimes referred to as a "sentry of legality."

Sixth, as a general principle, to which there are several exceptions, a court finding a decision illegal may declare it void or set it aside, but cannot change the decision. The power to change decisions or to issue new decisions is vested exclusively in the administrative authorities. But, as has been indicated, there are exceptions to this rule in several countries, including Hungary and the Soviet Union.²³

Finally, decisions that are within the discretionary powers of an administrative authority are subject to judicial review, but since the scope of review is restricted to the question of legality, the practical role of judicial review in such cases is minimal. The American doctrines of "abuse of discretion," "error on the face of the record," "substantial evidence" and "arbitrariness" are unknown and do not have any equivalents in Eastern European administrative law.

III. Judicial Review in Poland

A. DEMISE AND REVIVAL

As mentioned earlier, the system prevailing in Poland between the world wars allowed broad judicial review and was patterned largely after that of Austria. Review was generally performed by the Supreme Administrative Tribunal (*Najwyższy Trybunał Administracyjny*), but was carried out in some countries by the lower administrative tribunals. The Supreme Admin-

²³Tchetchot, *Sudebnyi kontrol za administrativnoi deiatelnostiū v SSR* (Judicial Control over the Activity of Administration in USSR), *Sov. Gos. i PRAVO* 44 (1/1972).

istrative Tribunal was not recreated following World War II. This became a subject of criticism²⁴ with some authors maintaining that judicial review was still justified if not necessary.²⁵ Article 26 of the "Little Constitution" of Poland adopted in 1947 expressly provided for judicial review. There was some discussion about what form judicial review would take in the future, but it slowly died out because of the reluctance of the Polish government to subject administrative decisions to judicial scrutiny. In the end, the government took no steps to introduce judicial review.

The problem was raised again in 1956. In 1957 a draft of a new statute was prepared, but it was not even discussed by the *Sejm* (Polish Parliament) in plenary session. Another bill was written in the early seventies, but it met the same fate. This does not mean that judicial review did not exist at all in Poland during this period; there were a few instances in which it was permitted. But overall, the situation in Poland was not much different from that in the other Eastern European countries.

Beginning in the mid-seventies, increasing numbers of lawyers began raising anew the question of judicial review. The discussion was given a great boost by the sweeping reforms of local government that took place between 1972 and 1975. The reforms not only changed the Polish local government from a three to a two-tiered structure, but also established a wholly new system of local administrative authorities. The entire existing system of administrative law had to be adjusted to fit the new organization of administrative authorities in the country. This was particularly true of the code of administrative procedure (abbreviated K.P.A.).

During public discussion of the changes that would be required, lawyers stressed the need for the establishment of a system of judicial review.²⁶ A Codification Commission was created, which prepared several drafts of the new law on judicial review. The final draft was extensively discussed and passed by the *Sejm* on January 31, 1980, less than one month before the VIIIth Congress of the Polish United Workers Party and the change of the Prime Minister of Poland. It is also worthy of note that the initiative to pass the bill came not from the Council of Ministers, as usually occurs in Poland, but from a group of members of the *Sejm*. The new statute, which entered into force September 1, 1980, is entitled the Statute on the Creation of the

²⁴Walawski, *Kontrola administracji publicznej* (The Control over Public Administration), RADA NARODPWA, 6 (23-24/1945).

²⁵Iserzon, *Praworzadnosci w administracji i kontrola legalnosci aktow administracyjnych* (Rule of Law in Administration and the Control of Legality of Administrative Acts), GAZETA ADMINISTRACJI 6, (1-3/1945).

²⁶Zawadzki, *Teoretyczne i legislacyjne aspekty projektu nonwelizacji k.p.a.* (Theoretical and Practical Aspects of Amending of KPA), PANSTWO I PRAWO 14 (11/1979). See also articles of Borkowski, Jendroska, Janowicz, and Swiatkiewicz published in earlier issues of PANSTWO I PRAWO.

Supreme Administrative Court and Amendment of the Code of Administrative Procedure.

B. SUPREME ADMINISTRATIVE COURT (NSA)

1. *Organization and Composition*

The new statute creates a new court, called *Naczelny Sad Administracyjny* (Supreme Administrative Court,²⁷ hereinafter referred to as NSA). In spite of its name, this court is inferior to the Supreme Court. There is only one NSA, but the statute provides for the creation of sections of the NSA, called "*osrodki zamiejscowe*," which will have jurisdiction for the territory of one or more counties. Sections of the NSA have been established in Gdansk, Katowice, Krakow, Poznan, Wroclaw and Lubin.

The number of judges to be appointed to the NSA is not set by the statute. It is assumed that the number will depend on the volume of cases, which is difficult to predict in advance. As of this writing there are fifty judges. The judges hear and decide cases in panels. They are appointed by the Council of State on nomination by the Minister of Justice. To be eligible to be a judge of NSA, a person must be at least 35 years old, be graduated from law school, and have been employed as a lawyer in one of the administrative agencies for a minimum of 10 years. Full professors of law schools are exempt from the last mentioned requirement.²⁸ A judge is appointed for life but may be recalled if he or she resigns, passes 65 years of age, cannot perform the duties of office because of illness, or if his or her spouse is a practicing attorney. This last ground is based upon the concern that questions may be raised as to the impartiality of a judge whose spouse is retained to conduct a case before him or her. The judges of the NSA occupy a position equivalent to that of a county court judge, but receive the same salaries as Supreme Court judges.

The NSA has no counterpart in any other Eastern European country. As indicated above, the ordinary courts in these countries decide appeals from administrative decisions when judicial review is allowed. A similar solution was proposed in Poland but at the close of the Codification Commission's work the new system prevailed.²⁹ The reason for the different system is that

²⁷The Court is called "Naczelny" as opposed to "Najwyzszy." The latter adjective is used in the name of Polish Supreme Court (Sad Najwyzszy). Due to the lack of an equivalent expression in English, both adjectives must be translated as "supreme."

²⁸The titles of docent, extraordinary professor, and ordinary professor in Poland are equivalent to the position of full professor in American law schools.

²⁹The article written by two of the drafters of the bill, and published in September 1979, proposed that jurisdiction will be vested in ordinary courts. See Zwadaxki, *R. Orzechowski Przeslanki i kierunki aktualizacji k.p.a.* (The Reasons and Directions of Updating of KPA), PANSTWO I PRAWO (8-9/1980).

judges sitting in ordinary courts are usually experts on civil and criminal law while judges deciding administrative cases must have extensive knowledge of administrative law.

C. JURISDICTION AND PROCEDURE OF THE COURT

The subject matter jurisdiction, or competence, of the NSA is limited to the determination of the legality of administrative decisions. It may not decide tort claims against the government or claims based on contracts concluded with administrative agencies. These cases fall under the jurisdiction of the ordinary courts. Even if a tort claim is based on harm caused by an administrative decision set aside by the NSA, it must be brought in an ordinary court. Therefore, two courts may decide different aspects of the same case: the NSA will determine the legality of the administrative decision and the ordinary court will adjudicate any tort claims flowing from it. Thus the boundary between the jurisdiction of the NSA and the other courts remains clear.

The scope of the NSA's review of decisions of administrative authorities is limited: Only decisions on matters listed in the newly amended code of administrative procedure may be reviewed. This list is long, however, and covers decisions in 20 areas of administrative law. Included in the list are decisions authorizing the performance of a defined activity, those affecting employment and social security, and those concerning condemnation and other rights in immovable property. Despite the fact that the list is long, some decisions remain immune from judicial review. These include decisions on the issuance of passports and visas, those expelling foreigners from Polish territory, and decisions relating to the army (e.g., concerning conscription).

D. RIPENESS, STANDING AND APPEAL

A number of conditions must be met before an administrative decision can be reviewed by the NSA. First, the decision must be ripe for review. That is, except where review is sought by the procurator, all possibilities of appealing the decision to the superior administrative authorities must be exhausted. Second, review may be sought only by a party to the proceedings before the administrative authority, a person whose legally protected interests are at stake, a so-called "social organization" (a club or an association) which took part in the proceedings, or the procurator. Third, the decision may be appealed by a party other than the procurator within 30 days from the moment of delivery to the party or the time of oral announcement. The procurator may appeal decisions any time within six months, and may act either in favor of or against a party to the proceedings.

An appeal notice must be delivered to the administrative authority that issued the contested decision. This authority must, in turn, deliver the notice and the entire record of the case within 30 days to NSA. The administrative authority has the option to change or cancel its original decision if it considers the grounds of appeal to be just on the whole. In that instance the authority does not forward the notice with the record, but renders a new decision which amends or cancels the old one. This new decision, however, is still subject to judicial review.

E. PROCEEDINGS

In the proceedings before the NSA, the administrative agency becomes the defendant. The procurator may also take part in the proceedings, but he is not a party. His position resembles, to a certain extent, that of the *Commissaire du gouvernement* in France. The case is decided after a public trial. The procedure before the NSA is governed by the provisions of the code of civil procedure. The NSA is not restricted to examining the questions raised in the claim, but is to examine the legality of the entire decision. For example, when a party claims that the administrative decision violates a statute, the court may set the decision aside because of procedural problems even if the party did not raise the issue on appeal.

The NSA must set the decision aside if it finds that the law was violated. Such a violation may include procedural errors if they had an effect on the decision. In some instances, the court may declare a decision invalid, as contrasted with setting it aside. The degree of hardship caused by the errors committed by the administrative authority determines whether a decision should be set aside or declared invalid. From the point of view of the party and the defendant agency, the result is the same: the decision simply does not exist any more.

The new law also contains a statute of limitations for appeals to the court. A decision may not be set aside after five years or declared invalid after ten years. After the expiration of these periods the court may declare that the decision violates the law, yet it remains in force. In view of the fact that a decision must be appealed within 30 days, this provision may find use only where an agency neglects to inform the aggrieved party of its decision.

As indicated above, decisions declared to be in violation of the law—as distinguished from those declared invalid or set aside—remain in force. The party adversely affected by the decision may bring an action in tort for damages before an ordinary court.

The NSA has no power to issue a new decision or to amend the decision under review. These powers are vested exclusively in the administrative agencies. The court's decisions on questions of law are, however, binding on the agencies. Furthermore, the new statute provides that the court may

order an agency to make a decision without prescribing the decision's contents. This may occur, for example, when a party complains to the NSA that an agency did not issue a decision within the statutory time limit for issuance (usually one or two months).

The NSA judgment is final, and not subject to appeal by the parties. The Minister of Justice, First President (Chief Justice) of the Supreme Court and the Procurator General may, however, bring an extraordinary appeal (called *rewizja nadz-wyczajna*). The parties will usually petition the Minister of Justice, the Chief Justice, or the Procurator General to make an extraordinary appeal. The extraordinary appeal may be made only when the administrative judgment clearly violates the law or the interest of the state. It is within the scope of the discretionary powers of these authorities to make an extraordinary appeal. Once an appeal has been made, the Supreme Court must review the judgment of the NSA. Occasionally, an administrative decision is issued in accordance with an administrative regulation (by-law), but the party claims nevertheless that the decision violates the statute because the regulation is itself illegal. As is typical for the Eastern European countries, the court does not have the power to declare the regulation illegal. But the NSA does have the option of disregarding the regulation. The statute provides in article 4: "Judges are independent in making their decisions, and are subordinated only to the statutes." Therefore, the NSA should apply the statute and disregard the regulation (by-law) when it conflicts with the statute. In such a case the court has the duty to inform the defendant agency and the superior authority for that agency that the regulation violates the statute.

F. THE ROLE OF THE NSA AND RECENT DEVELOPMENTS

1. *Role Expansion*

The scope of jurisdiction of the NSA has been expanded twice. First in 1981, a new statute on the control of the press and publications³⁰ was enacted which provided that decisions banning printed matter may be appealed to the NSA. In 1982 a new statute on universities³¹ was passed, permitting universities to appeal some ministers' decisions to the courts. Both statutes were enacted as a result of strong public pressure. The right to appeal decisions concerning censorship was granted by the government in a 1980 agreement concluded by government representatives with striking workers in the Gdansk shipyard. In the same agreement many other concessions were made by the government, *inter alia*, the right to organize free trade

³⁰DZIENNIK USTAW (20/1981).

³¹DZIENNIK USTAW (14/1982).

unions. The new law on universities was drafted principally by university professors. These two examples demonstrate popular support for the idea of judicial review by the NSA of administrative action.

2. *Martial Law*

On the other hand, the government seems reluctant to introduce expanded judicial review. In fact, it sometimes seems that it is eager to narrow the scope of judicial review. The decree on martial law passed on December 12, 1981 excluded judicial review of decisions taken pursuant thereto. Later, when the decree was confirmed by a special statute, the parliament added the right to seek judicial review. But there have been very few cases in which judicial review of administrative decisions taken pursuant to the decree on martial law has been sought. This is due to the fact that most of these decisions are within the discretionary powers of the administrative authorities, restricting the role of the court to determine whether these decisions are within the limits of the authority's power. People realize this fact and thus in most cases have not sought review by the NSA. For this reason, the period of martial law was not marked by any special developments in the decisions of the NSA.

Nevertheless, the NSA plays an important role in Polish administrative law. Several of the court's decisions show that it considers itself to be fairly independent. When faced with the choice between the positions taken by scholars and the practice of administrative agencies, the court frequently rejects well established practice when it considers it to be unjust.

3. *Shaping of Judicial Review: NSA Decisions*

Before the NSA was established, there was no supreme body endowed with the power to interpret statutes and rule on how they should be applied. Every minister was the ultimate judge and supervisor of the administrative authorities under him, and could direct the manner in which administrative law was to be applied by the subordinate authorities. His interpretation was sometimes different from that of other ministers. Because of the high degree of centralization in Polish public administration, ministers felt quite free to determine what the law was. Sometimes they did so in disregard of existing statutes. This was usually done by issuance of circulars which were delivered only to subordinate authorities. The officers of the local authorities are almost entirely subject to the ministers' will. If they found a circular to be in conflict with a statute they would apply it, since if they disregarded it they could easily be punished.

On the other hand, many professors of administrative law suggested interpretations that were different from those of the ministers. The conflict related mostly to the question of the scope of the ministers' powers to restrict citizens' rights. This question was presented in some of the cases

brought before the NSA. In a case involving the rights and duties of cooperative associations,³² the court found that a resolution of the Council of Ministers taken without special statutory authorization cannot increase the duties of citizens or private organizations. And in another case, the NSA found that a circular issued by a county chief of administration (*wojewoda*) may not determine the contents of an administrative act.³³

NSA decisions are landmarks in the development of other aspects of Polish administrative law as well. For example, the court set aside an administrative decision because the presiding officer failed to inform a party about important legal and factual questions involved in the case.³⁴ The NSA found that lack of this information could have substantial influence on the final decision of the administrative authority. It held that in accordance with the code of administrative procedure, the presiding officer should inform parties about all questions of fact and law involved in a case.

In another case the court found an administrative decision invalid because it was taken not by the body prescribed by a statute but by a superior authority. Until this decision was rendered, it was a common practice that a superior authority considered itself authorized to issue decisions on matters over which inferior authorities were competent.³⁵

Very important during the martial law period in Poland was a case concerning the right of civil servants to seek judicial review of decisions concerning their employment. The NSA found judicial review permissible, but this holding was overruled by the Supreme Court of Poland.³⁶ Since this decision of the Supreme Court, it has been considered that a civil servant released from his or her position cannot appeal that decision to the NSA.

In spite of the fact that the jurisdiction of the NSA is very limited, the number of cases it has decided is quite impressive. In 1982 the NSA decided a total of 8,738 cases. This was the product of less than 50 judges sitting in panels of three and explains why judges complain about having an overload of cases.

IV. Summary

After the turn of history which brought about the change of the systems of government in the Eastern European countries, there was a great deal of reluctance to allow judicial review of administrative decisions. In fact, existing administrative tribunals were abolished. This mood began to

³²Decision of the N.S.A., no. SA 819/81.

³³Decision of the N.S.A., no. SA 2769/81.

³⁴*Id.*

³⁵Decision of the N.S.A., no. SA Gd. 12/81.

³⁶Joint decision taken by the Chamber of Labor and Social Security and the Chamber of Civil and Administrative Law of the Supreme Court, March 1, 1983.

change in the late fifties with some countries allowing judicial review for limited types of administrative decisions. Bulgaria and Romania introduced a broad system of judicial review. Some countries, particularly Czechoslovakia and the German Democratic Republic, have such limited judicial review of administrative decisions that the concept is almost non-existent. And even in the countries having broad judicial review, certain types of cases are still excluded from the court's jurisdiction.

The Polish statute providing for judicial review is the only one of its kind in Eastern Europe. Poland does not follow the pattern of other Eastern European countries which grant jurisdiction to review administrative decisions to the ordinary courts. Instead it follows the tradition of continental Europe, creating a supreme administrative court (the NSA) to review administrative decisions. The Polish statute is rather unique in the manner in which it separates the jurisdiction of the NSA from that of the ordinary courts. The NSA determines only the legality of the administrative decisions; any actions against administrative authorities are left exclusively to the ordinary courts, even if the harm was caused by an illegal administrative decision.

It is difficult to predict what influence the new Polish statute will have on the development of administrative law in the remaining Eastern European countries. It must be recognized that the social and political unrest that has shaken Poland since the beginning of the 1980's makes the rest of communist Europe rather hesitant to adopt Polish legal solutions. But the new statute would seem to be a salutary development, if only because of the principle it represents, and is one that should be of interest to observers abroad.

