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Administrative Discretion: Legal Approaches in Russia and China

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Abstract. Administrative discretion is one of the central concepts of administrative law. The administrative law systems of Russia and China share a common foundation and based on the civil law tradition. Socialist legal thought is also important for understanding certain features of governance in both countries. However, each country has its own characteristics which have shaped national administrative legislation and influenced the practice of executive authorities and courts. The concept of administrative discretion provides a useful analytical lens for revealing both the general and the distinctive features of Russian and Chinese administrative law. These features should be examined from three perspectives: legal doctrine, administrative legislation, and judicial practice. On this basis, the legislation on administrative discretion is fragmented in both Russia and China; however, Chinese legislators tend to be more cautious in adopting new laws, so Chinese legislation is, in practice, less restrictive of discretionary powers than Russian legislation. At the same time, judicial practice is the main means of constraining administrative discretion. The Supreme Court of the Russian Federation has adopted criteria for judicial review of discretionary acts and actions, including legitimate purposes, the limits of administrative powers and certain legal principles, especially proportionality. The Supreme People's Court of the People's Republic of China has issued guiding decisions that are binding on lower courts and influential for public authorities. At

the same time, classical criteria, such as objectives, limits, and principles, have only recently begun to be articulated more clearly in China.

Keywords: administrative discretion; discretionary powers; administrative act; administrative authorities; judicial review; comparative administrative law; Russia; China.

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Introduction

The doctrine of administrative discretion serves as a key indicator of the overall condition of a country's administrative law. This legal construction reflects legal and governance culture, historical development, current policies, and other factors. In this sense, administrative discretion at least indicates how the rights of individuals and organizations are protected by administrative authorities and courts. This term is closely related to many important concepts of administrative law, especially those that define the legal status of administrative bodies, including powers, governance functions, and purposes. The way discretionary powers are exercised can serve as an indicator of administrative law doctrine development: judges are required to employ sophisticated legal tools, including the principle of proportionality and the protection of legitimate expectations, to verify the legality of such exercises of power. Rule-makers also do not stand aside and are obliged to devise a way to introduce administrative discretion into legal texts. Finally, legal scholars interpret legal practice and formulate conclusions about administrative discretion in the governance system. Accordingly, the study of administrative discretion requires an analysis of legal doctrine, applicable legal rules, and practice, with particular emphasis on judicial practice.

A comparative analysis may reveal structural features of administrative discretion. Comparative material of administrative law, as Rose-Ackerman and Lindseth note, has

made it possible to “break down boundaries between scholars, not only those from different national or legal traditions, but also from different disciplinary or doctrinal perspectives.”¹ For a long time, it was difficult to study administrative law comparatively, because the institutional and doctrinal structures of different countries were too far apart to be meaningfully analyzed. The theory of administrative procedures arose in the last century, and by the beginning of this century had spread around the world. As a result, as Vincenzo De Falco shows, standardized units of analysis have been formulated for the comparison of administrative law institutions across various public law systems, and these units are designed to be applicable across different legal families.² A good example is the principle of proportionality, which exists in many countries, including Russia and China. Scholars can use similar approaches for comparison and proposals. Administrative discretion is not an exceptional concept in legal doctrine, and its comparative analysis may yield valuable insights.

The question may arise: why compare Russia and China, and what valuable findings can be obtained from analyzing and comparing administrative discretion in these countries? On the one hand, the countries' systems of administrative law were very different at all times, however, such a point of view would be overly simplistic in the contemporary context. On the other hand, several doctrinal positions may be advanced in response to this question. First, the legal systems of both countries are part of the Civil Law family.³ Second, the Soviet legal approach, including administrative law, was developed by the Russian government after 1917, and then the People's Republic of China implemented it into its legal system after 1947.⁴ Third, these two countries are currently actively cooperating, and one possible outcome of comparative research is a gradual convergence of their legal systems. Fourth, the analysis of various dimensions of governance can be useful to lawyers who work with each other when resolving practical cases. Fifth, micro-level legal comparison makes it possible to mitigate or bridge the differences between legal systems. In this way, administrative discretion in certain countries can be compared, even when they belong to different legal families.

1. Summary of Doctrinal Issues

The Russian legal doctrine of administrative discretion has been formulated during the discussion of whether discretionary powers should be limited and what

¹ Rose-Ackerman, S., & Lindseth, P. L. (2010). Comparative administrative law: An introduction. In S. Rose-Ackerman & P. L. Lindseth (Eds.), *Comparative administrative law* (p. 19). Edward Elgar Publishing.

² De Falco, V. (2018). *Administrative action and procedures in comparative law* (p. 11). Eleven International Publishing.

³ Van, Ch. (2010). The impact of Soviet law on the law of the People's Republic of China. *State and Law*, 4, 71–80. (In Russian).

⁴ Van, 2010.

the legislator or the courts should do to achieve this. Russian administrative law theory is a result of more than a century of sustained scholarly research. The first comprehensive works on this issue were published by Nikolay I. Lazarevsky⁵ and Aleksandr F. Evtikhiev.⁶ Administrative discretion has been studied from the civil law perspective and ideas of French, Austrian and German jurists were considered as part of the general legal doctrine, which formed the basis of public law in all countries employing this system. This doctrinal approach has been used by modern Russian legal scholars. The doctrine contains answers to several basic questions: (1) whether courts review discretionary administrative acts, (2) what types of acts can be reviewed by courts, (3) what are the courts powers to review these acts?

The answer to the first question is clearly affirmative, as the very existence of administrative justice has traditionally served for reviewing discretionary acts by courts, and every country has had its own time and way of such system's developing. Thereby, in the turn of the 19th and 20th centuries this idea was confirmed in the doctrines of administrative law in most civil law countries, including Russia. The Soviet period was no exception, though with significant specifics. Today, Russian courts' power to review discretionary administrative acts constitutes an important element of domestic administrative-law doctrine. Already in 1982, Yuri P. Solovey wrote: "when an administrative body adopts a suboptimal or even unlawful decision, the courts, the prosecutor, and higher administrative authorities must ensure the proper implementation of that decision."⁷ This proposition was suggested in the Soviet period, when the collapse of the USSR was not yet envisaged, so the idea of judicial review of administrative discretion existed in Russian legal doctrine throughout the 20th century. At present, Yuri P. Solovey focuses on how Russian public authority can more effectively implement judicial review in practice.⁸

Whereas the essence of judicial review in Russia is beyond dispute, the answer to the second question is considerably less clear. The fact is that in the Russian doctrine there are many typologies of administrative acts, but these types of acts are not necessarily tied to the discretion and judicial review. In many cases, scholars merely echo the legislator's presumed intent, and such an approach less productive in terms of doctrine of administrative discretion. As a result, the Russian doctrine reflects a general principle—all discretionary acts can be subject to judicial review. This principle is often

⁵ Lazarevsky, N. I. (1900). Administrative discretion (Beginning). *Law: Weekly Legal Newspaper*, 41, 1904–1912. (In Russian); Lazarevsky, N. I. (1900). Administrative discretion (End). *Law: Weekly Legal Newspaper*, 42, 1958–1964. (In Russian).

⁶ Evtikhiev, A. F. (1910). Discretion (das Freie Ermessen) of the administration. *Journal of the Ministry of Justice*, 5, 77–101. (In Russian).

⁷ Solovey, Y. P. (1982). *Discretion in the administrative activities of the Soviet police* (p. 162) [Unpublished candidate's thesis]. (In Russian).

⁸ Solovey, Y. P. (2019). Discretionary nature of administrative act as a circumstance precluding judicial review of its legality. *Law. Journal of the Higher School of Economics*, 4, 72–99. (In Russian).

evaluated as part of the Russian constitutional system, and some researchers interpret the “constitutionalization” of administrative discretion as adherence to the “spirit of the law” or general principles of law.⁹ For instance, Konstantin V. Davydov notes that the legislator has not enacted the Law on Administrative Acts or Procedures, though the subject of judicial review of these acts has been “proceduralized.”¹⁰ However, this principle has never been articulated explicitly in the doctrine; rather, it can only be inferred from the way scholars discuss the subject.

The third question is the most important among all three. In fact, the very existence of judicial review over discretionary acts is generally taken for granted; the real difficulties lie in the details. Judicial review may vary in scope in different cases. According to Yuri P. Solovey, the Russian Code of Administrative Procedure (2015)¹¹ does not allow courts to review discretionary acts in full. His conclusion is that there is one rule in this Code which empowers judges to deny a suit against a discretionary act, and that rule constitutes judicial discretion.¹² However, I am sure that in reality the judges would prefer not to exercise this power and would rather consider such a suit than deny it. Davydov presented the problem of the density of judicial review over discretionary acts as a “competition between legislative thought and judicial practice.” The legislator seeks to minimize discretion, while the courts attempt to create a set of tests to assess such discretion.¹³ It should be noted, however, that there is no single opinion on how to resolve the third question. What is clear, however, is that Russian legal doctrine does recognize the idea of limited judicial review over discretionary administrative acts.

The Chinese doctrine of administrative discretion has been similar to the Russian one. Zhou Youyong says that the rule of law is a modern concept that prohibits administrative authorities from being absolutely free from the law; they now do not have an “absolute” power.¹⁴ Generally, Chinese courts can review discretionary acts, but there may be problems with the interpretation of individual cases. It is no coincidence that legal scholars pay attention to legal tests that should help the judges consider discretionary administrative acts. Su Yu, for instance, argues that many disputes arise from pervasive uncertainty, and that rule-makers are simply

⁹ Tikhomirov, Y. A. (2000). Administrative discretion and law. *Journal of Russian Law*, 4, 32–35. (In Russian); Mitskevich, L. A. (2015). *Essays on the theory of administrative law: Modern content* (pp. 243–244). Prospekt. (In Russian).

¹⁰ Davydov, K. V. (2020). *Administrative procedures: Russian and foreign experience* (p. 379). Akademizdat. (In Russian).

¹¹ Administrative Judicial Code of the Russian Federation No. 21-FZ. (2015, March 8). *Collection of Legislation of the Russian Federation*, 10, Art. 1391. (In Russian).

¹² Solovey, 2019.

¹³ Davydov, 2020, pp. 378–380.

¹⁴ Zhou, Y. (2021). The “obviously inappropriate” standard for administrative action in judicial review. *Global Legal Review*, 3, 121–136. (In Chinese).

unable to anticipate such situations and enact laws capable of resolving all the problems generated by that uncertainty.¹⁵

Administrative authorities are the main actors in these cases, and achieving public goals without their discretionary powers is impossible. In his opinion, there are two main approaches to determining the legality of administrative acts: procedural control and substantive control. The state equips judges with specific legal tools to perform this role. Public authorities, for instance, must explain the reasons for the adoption of the administrative acts, and the process of adopting acts should be in the frameworks of administrative case law (guiding decisions); the addressee has the right to be informed that the authorities will make a decision affecting him or her; the authorities must apply the principle of proportionality and others.¹⁶ A set of these indicators can be examined in judicial proceedings, and judges have an opportunity to evaluate how officials comply with these rules.

Zhou Youyong described these indicators and paid attention to the problem of choosing the right test to suit the situation. For example, there is considerable uncertainty as to how two judicial tests should be understood: the “obviously inappropriate” criterion and the “misuse of authority” criterion. “Misuse of authority” is a subjective test, whereas “obviously inappropriate” is an objective one. The first is concerned with “anti-value acts” of administrative authorities, and the formula of “obviously inappropriate” allows to assess “anti-value results” of discretionary decisions. These criteria are independent, but are consistent with each other during judicial review. The author also examines the principle of balancing interests as a general test that courts may apply when reviewing discretionary acts, and supports this conclusion by reference to Chinese judicial decisions.¹⁷ Interestingly, this principle is well-known in the USA.¹⁸ However, the Chinese legal system is close to civil law countries,¹⁹ and the process of interests’ weighting based on the principle of proportionality has been widely accepted and represented throughout the world.²⁰

¹⁵ Su, Y. (2020). Administrative discretion for uncertainty and its legal control. *Economic and Trade Law Review*, 4(11), 69–70. (In Chinese).

¹⁶ Su, 2020.

¹⁷ Zhou, 2021.

¹⁸ See, for instance, Gottlieb, S. E. (1994). The paradox of balancing significant interests. *Hastings Law Journal*, 45(4), 825–866.

¹⁹ Rene David argued that in the early 20th century, Chinese authorities adopted some important features of the Civil Law system. As a result, new codes were passed in China, but legal tradition was preserved, and now the Chinese legal system contains its own traditions and Civil Law ones, as well as the legal doctrine of socialism as its understood by the Chinese authorities. See David, R., & Brierley, J. E. C. (1999). *Major legal systems in the world today: An introduction to the comparative study of law* (pp. 361–365). Simon and Schuster.

²⁰ Cohen-Eliya, M., & Porat, I. (2011). Proportionality and the culture of justification. *American Journal of Comparative Law*, 59(2), 465.

Proportionality has itself become a subject of scholarly debate in China, and there are judicial decisions in which courts have reviewed discretionary acts by applying this principle in its classical, German, form.²¹

It is apparent that Chinese legal doctrine incorporates theories borrowed from multiple legal traditions, and these competing models frequently collide rather than form a coherent system. Thus, Chinese legal scholars have discussed the concept of “misuse of authority” (the term “abuse of power” or in French “*détournement de pouvoir*” which is the French idea²²), “balancing of interests” (the US), and “proportionality” (Germany and others). Importantly, these approaches have not technically been implemented into the Chinese legal system due to the fact that researchers and public authorities rethought them, adapting to the Chinese legal and political context. Pavel V. Troshchinsky aptly notes that the Chinese authorities have acted in the interest of the state and have been in no hurry to have seeds of foreign doctrines planted in the Chinese legislative soil. As a result, Chinese legal characteristics contain socialist legal thought, traditional legalism, high Confucian morality, and some international legal principles.²³ The judicial tests of the review of discretionary acts are no exception; they are similar to their original versions, but have substantial Chinese specifics.

Wang Zichen’s approach is a good example of the Chinese view of the doctrine of administrative law and its interaction with foreign legal systems. The researcher describes a legal principle widespread around the world—“reliance protection” (or the principle of the protection of legitimate expectations). This idea is based on the experience of civil law countries, including, for instance, Germany, Japan and Taiwan. There are two main options for implementing trust protection: the first model is based on the concept of legal principles, and the second one requires the adoption of a law on administrative procedures. The author argued that Germany, for instance, followed the first model, and when the Law on Administrative Procedures was established in 1976,²⁴ this country switched to the second model. The Chinese way is similar but there are differences. The idea of the Law on Administrative Procedure exists, but recently the protection of legitimate expectations has been formed by courts. In parallel, this principle has become an important subject of legal doctrine.²⁵ Finally, the Chinese approach is one in which both models can operate

²¹ Su, 2020.

²² Bell, J., & Lichere, F. (2022). *Contemporary French administrative law* (pp. 307–320). Cambridge University Press.

²³ Troshchinsky, P. V. (2016). *Legal system of China* (pp. 39, 41). IDB RAS. (In Russian).

²⁴ Law on Administrative Procedures of May 25, 1976. (2003, January 23). *Federal Law Gazette I*, p. 102. <https://www.gesetze-im-internet.de/vwvfg/BJNR012530976.html>. (In German).

²⁵ Wang, Z. (2024). The concretization of the principle of reliance protection in administrative law. *Global Legal Review*, 2, 137–138. (In Chinese).

simultaneously, and this coexistence is not regarded as problematic, since legal doctrine is able to account for it by reference to Chinese characteristics.

Chinese scholars totally agree that courts have the powers to review discretionary acts, they understand that there are some difficulties, and pay attention to legal tools that judges can use in their actions. The question is what the Chinese characteristics of the concept of administrative discretion are. First, every official body, including courts, must publish the best decisions of administrative discretion (serving as guiding decisions), and other public authorities must follow them. Second, when applying discretionary powers, authorities must seek a solution that is as conflict-free as possible; it is important that officials act in a way that minimizes the risk of litigation arising from their decisions. Third, it is necessary to consider the public interest, but not to violate individual rights.

This overview shows that both Russian and Chinese legal scholarship on administrative discretion builds on a set of foundational ideas developed from the civil law tradition. According to Edmund Bernatzik, one of the founders of the Austrian doctrine of administrative law, legislation binds discretionary powers in the same way as other types of executive actions. In this sense, an administrative act is equal to a judicial decision, and such acts can be reviewed by a higher administrative body or court. The author raises the question whether an official can act contrary to the public purpose, even when exercising a discretionary power. The answer is clear: discretionary authority may not be used in a manner that frustrates the public purpose of the statute. The court can review a discretionary act and weigh it against the public purpose.²⁶

Rudolf Laun also wrote that legal objectives are the main test of administrative discretion; they are defined in legislation directly or indirectly, therefore executive authorities must follow them; discretionary acts must be taken to achieve these purposes, and the courts are able to review whether such acts are consistent with legal purposes. When public authorities adopt discretionary acts, they must be guided by general doctrinal postulates, evaluate facts and evidence, use general legal principles, etc. Judges can, of course, reconstruct and review the legal reasoning by which a discretionary decision was made, that is review the decision. Their conclusions must be framed in the legal terms laid down by statute, and once a court has determined the lawful solution, only that outcome is acceptable in law; alternative conclusions are to be regarded as incorrect and unlawful.²⁷ In Germany, similar ideas were introduced in 1931 by Walter Jellinek. In his opinion, discretionary actions must pursue a specific purpose, which is understood as the common good and is closely related to legislation; discretionary powers may also determine the

²⁶ Bernatzik, E. (1886). *Jurisprudence and substantive legal force: Administrative law studies* (pp. 39–41). Manz. (In German).

²⁷ Laun, R. (1910). *Free discretion and its limits* (pp. 258–262). Franz Deuticke. (In German).

choice of means, and discretionary powers are applied by law within its limits; the law sets the boundaries of official behaviour; administration must act properly, even if it has a free choice, but never according to whim and arbitrariness.²⁸ It is well-known that the French theory of administrative law has been fundamentally different from the theories which have been formulated in Austria and Germany, but there have been several common postulates. Leon Duguit, a famous French researcher in the field of public law, argued that the effect of an administrative act will exist if this act complies with the legal rules and only to the extent that it does so; from this time, the arbitrariness of the administration has been defeated.²⁹

My research shows that the doctrines of administrative law in Russia and China developed along the path of the Civil Law system. By now, all scholars have agreed that courts can review discretionary acts, but judicial review is limited. As a result, the doctrines have focused on the tools and criteria of such review. Applying the tools and criteria, scholars have used general approaches of civil law, and have introduced national specifics.

2. Administrative Discretion and Legislation

Russia lacks a general, system-forming legislation on administrative discretion, and there are two approaches to regulating discretionary powers. Rule-makers define the legal limits within which administrative authorities must operate, and any area not covered by prohibitions is treated as the sphere in which the administration enjoys discretion. Administrative discretion, to a certain extent, is seen as a "necessary evil." The classic example of this approach is anti-corruption legislation, under which anti-corruption standards have been adopted establishing a unified system of prohibitions, restrictions, and permissions for each sphere of public activity.³⁰ Provisions that create risks of corruption must be eliminated from legal texts; such risks include overly broad discretionary powers and legal constructs that give the authorities an unduly wide margin of freedom in decision-making.³¹ Another example is administrative regulations (in Russian, "*reglements*"), a type of regulations that detail the behaviour of executive authorities. The law, for instance,

²⁸ Jellinek, W. (1931). *Administrative law* (pp. 34–37). Springer. (In German).

²⁹ Duguit, L. (1909). *Social law, individual right and the transformation of the state* (pp. 77–80). Higher School of Social Sciences in Paris. (In French).

³⁰ Federal Law No. 273-FZ "On anti-corruption." (2008, December 25; amended 2023, December 19). *Collection of Legislation of the Russian Federation*, 52(part I), Art. 6228. (In Russian).

³¹ Government of the Russian Federation. (2010, February 26). On anti-corruption expert examination of normative legal acts and draft normative legal acts (Resolution No. 96, Article 3 of the Methodology for conducting anti-corruption expert examination of normative legal acts and draft normative legal acts). (2010, February 26). *Collection of Legislation of the Russian Federation*, 10, Art. 1084. (In Russian).

requires that the period for the provision of each public service be determined.³² One of the many “*reglaments*” sets the maximum waiting time for foreign citizens who want to work in Russia and must submit documents to obtain a permit within fifteen minutes.³³ It is clear that the authorities have no discretion in this procedure. The first path is straightforward: if the aim is to constrain others, the law does so by prescribing a strict and highly detailed procedure.

Such detailed regulations can be found in every legal system and mirror the 19th and early 20th century debates on “free” administrative discretion. If a matter is not specifically regulated by a statute, it falls within administrative discretion domain, and courts do not have the power to review administrative acts adopted in this sphere. On the contrary, the laws reduce the free zone and the discretionary powers of the authorities. However, this path is based on the dichotomy of administrative discretion and powers bound by laws; these two parts of governance form two independent administrative worlds that compete with each other and require the creation of different regulatory systems. This approach is both justified and straightforward, but it has natural limits: it is impossible to eliminate all legislative gaps, rule-makers will never be able to regulate every situation, and new social spheres that are not covered in detail by legislation inevitably emerge over time. The second approach is more interesting: the legislature establishes general criteria for assessing how administrative authorities apply their discretionary powers. These criteria are, first of all, legal principles, legal purposes, and legal limits of administrative discretion. As a result, administrative discretion becomes a part of governance, and it is not opposed to powers bound by laws.

In the Russian legal system, the second approach is represented primarily by the law “On State Control,”³⁴ which may be called the “law of a new generation.” This law contains some elements of the laws on administrative procedures that are found in many civil law countries. Thus, the core of the theory of administrative procedures is legal principles, among which the principle of proportionality stands out (however, there are others, no less important). The principles set barriers to discretionary actions aimed at limiting human rights, and proportionality has played a very important role over recent decades.³⁵ Now, this principle, according to Jan Ziekow, has “evolved from

³² Federal Law No. 210-FZ “On the organization of the provision of state and municipal services.” (2010, July 27; amended 2023, December 25). *Collection of Legislation of the Russian Federation*, 31, Art. 4179. (In Russian).

³³ Ministry of Internal Affairs of the Russian Federation. (2020, October 5). *Administrative regulations of the Ministry of Internal Affairs of Russia for the provision of public services for registration and issuance of patents for foreign citizens and stateless persons to carry out labor activities on the territory of the Russian Federation* (Order No. 695, Article 49 of the Regulations). Official Internet Portal of Legal Information. <https://pravo.gov.ru>. (In Russian).

³⁴ Federal Law No. 248-FZ “On state control (supervision) and municipal control in the Russian Federation.” (2020, July 31; amended 2023, December 25). *Collection of Legislation of the Russian Federation*, 31(part I), Art. 5007. (In Russian).

³⁵ De Falco, 2018, p. 11.

a yardstick for limiting state interference in the rights of citizens to a more far-reaching yardstick for assessing the appropriate level of government action.³⁶ While the first laws on administrative procedure did not contain definitions of legal principles because they were created by judges, the modern laws were passed in this century and these principles were included in their texts. For instance, Article 10 of the Administrative Procedure and Process Code of the Republic of Kazakhstan establishes the principle of proportionality: an administrative body, when applying its discretionary powers, must ensure a fair balance between the interests of the participants in the administrative procedure and the public interest; an administrative act or administrative action must be suitable, necessary, and proportionate.³⁷ Similar rules can be found in the laws on administrative procedures adopted by Central Asian and Caucasian countries, including Uzbekistan,³⁸ Tajikistan,³⁹ Kyrgyzstan⁴⁰ and Azerbaijan.⁴¹

In fact, Kazakhstan's definition essentially reproduces the strict German proportionality test, with its four stages of review.⁴² The Russian approach, set out in Article 9 of the Law "On State Control," is noticeably simpler than the Kazakhstan's model. An official must weigh the measures to be taken against entrepreneurs and select only those that are necessary to prevent and/or eliminate violations of mandatory requirements; these measures must be proportionate to the actual or potential harm to legally protected values, and, among all possible options, the measures applied must minimize interference with rights while still achieving a legitimate aim. This model does not have a three-four stage test, but the stages of necessity, minimal impairment of rights, and balancing between individual and public interests are clearly discernible. It is important to note that this rule is the only one in Russian legislation where a relatively complete principle of proportionality is presented. Though some laws contain legal constructs, and if they are correctly

³⁶ Ziekow, J. (2022). Function and structure of the proportionality principle in German public law. In O. N. Sherstoboev, K. V. Davydov, & A. Cenerelli (Eds.), *Annual comparative administrative law review 2021* (pp. 17–26). NSUEM. (In Russian).

³⁷ *Administrative Procedure and Process Code of the Republic of Kazakhstan No. 350-VI*. (2020, June 29). Reference Control Bank of Regulatory Legal Acts of the Republic of Kazakhstan in Electronic Form. <https://adilet.zan.kz/rus/docs/K2000000350/info>

³⁸ *Law of the Republic of Uzbekistan No. ZRU-457 "On administrative procedures"* (Article 7). (2018, January 8). National Database of Legislation of the Republic of Uzbekistan. <https://lex.uz/docs/3492203>

³⁹ *Administrative Procedures Code of the Republic of Tajikistan* (Article 7). (2007, March 5). Unified State Electronic Portal of Legal Information of the Republic of Tajikistan. http://portali-huquqi.tj/publicadliya/view_qonunhoview.php?showdetail=&asosi_id=7818#A000000006

⁴⁰ *Law of the Kyrgyz Republic No. 210 "On the fundamentals of administrative activities and administrative procedures"* (2015, July 31). Centralized Data Bank of Legal Information of the Kyrgyz Republic. <https://cbd.minjust.gov.kg/111254/edition/1198322/ru>

⁴¹ *Law of the Azerbaijan Republic No. 1036-IIQ "On administrative procedures"* (Article 17). (2005, October 21). Constitutional Court of the Republic of Azerbaijan. <https://constcourt.gov.az/ru/legislation/25>

⁴² Ziekow, 2022.

interpreted, individual stages of proportionality will be revealed. The Tax Code is an example of this.⁴³ However, it should be recognized that proportionality and other principles limiting administrative discretion in Russian legislation are presented very fragmentarily.

Chinese administrative legislation, like its Russian counterpart, offers only a limited set of legislative techniques for constraining administrative discretion; however, the reasons for this differ in the two systems, as in China they are closely linked to “Chinese characteristics” grounded in deep historical and cultural traditions. The Chinese understanding of law does not coincide with the Russian one, when legislation is the main legal source. According to Troshchinsky, this idea can be found in the Chinese character for “law” (法); one of the meanings is to follow the decisions of impartial authorities; the former and original meaning of this term, in addition, is to follow fair decisions of courts; as a result, laws are not the only legal sources with the highest legal force, and China does not have many laws compared to civil law countries; the regulations and the acts of statutory interpretation are very important for understanding this legal system.⁴⁴ Therefore, the Chinese legislator can afford to take time in adopting the most important laws. The Civil Code is a case in point: although the People’s Republic of China was founded in 1949, its first civil code was only adopted in 2020, following a renewed codification effort launched in 2014.⁴⁵

Administrative legislation is in a similar position: in China there is still no single system-forming general law on administrative acts. However, the idea of the law on administrative procedures is known and discussed by public law scholars. Wang Zichen notes that there is broad academic consensus in favour of such a law, with some scholars even describing it as a “Chinese dream,” and several academic draft versions have already been prepared. Moreover, in 2021, the Chamber of Legislative Work of the Standing Committee of the National People’s Congress of the People’s Republic of China announced the procedure for creating a general administrative code.⁴⁶ However, such projects are the subject of administrative law doctrine, and the code is likely to be adopted, but it may take many years. In order to understand how administrative discretion is applied, it is necessary to study the regulations passed by authorities at different levels. The provincial governments, for instance, regulate the administrative actions of their bodies through regulations, which are general acts and cover all the specifics of administration. “Hunan Provincial Measures for the Standardization of Administrative Powers” is a good example of such government

⁴³ Yadrikhinskiy, S. A. (2021). The proportionality principle as a tool for achieving balance of interests in tax relations: Theory and law enforcement in Russia and abroad. *Law. Journal of the Higher School of Economics*, 3, 96–98. (In Russian).

⁴⁴ Troshchinsky, 2016, pp. 84–85.

⁴⁵ Alekseenko, A. P. (2021). Characteristic features of the Civil Code of the People’s Republic of China. *Actual Problems of Russian Law*, 16(12), 201–202. (In Russian).

⁴⁶ Wang, 2024, pp. 137–138.

documents.⁴⁷ The content of this document is very similar to the Chinese equivalent of European laws on administrative procedures. Provincial authorities also devote considerable attention to the use of administrative discretion.

Generally, this document contains two approaches to limiting administrative discretion similarly to the Russian model. However, the Chinese provincial government is trying to provide the local authorities and other subordinate bodies with guidance on how to exercise discretionary powers. They must adopt their regulations and reasonably limit discretion, but there are areas that should be free from the influence of power, including the matters that individuals and companies can decide on their own or through market competition and self-discipline. The subject of administrative discretion must be set out in legal rules, specified and clearly formulated. The conditions for applying discretionary powers must be legally formed, as well as their assessment and other factors relevant to the maximum reduction of discretionary space. Authorities are obliged to constantly improve their regulations and eliminate legal rules containing unreasonable discretion. The Hunan provincial government has understood that the administration cannot exercise its powers without discretion, which could be limited but never abolished. Therefore, the regulation contains some criteria delineating the discretionary scope and allowing for verification of the legality of their application.

For instance, the use of discretionary powers must be aimed at achieving a legal purpose; if there are several measures and each of them allows to achieve the desired result, the authorities must choose the measure that has the least impact on the rights and interests of participants in the administrative procedure. Acceptable damage to rights cannot significantly conflict with legitimate interests. The text of this regulation does not use the term “proportionality,” but in substance the principle is embodied in these formulations. There are four clearly founded classical stages of “whether the state is actually pursuing a legitimate purpose with the measure taken ...; whether the concrete measures that the state is taking to achieve the legitimate purpose are at all suitable ...”; whether the measure is “milder” among those existing; the “appropriateness test.”⁴⁸ However, the principle of proportionality in the Hunan Provincial Measures is not as clearly formulated as its classical doctrinal variant, and in this it resembles the Russian example given above. It should be noted that in Germany, the birthplace of proportionality, this principle exists only in legal doctrine and judgements, and it is absent in administrative legislation.

Guiding decisions (typical cases) are a very important means of assessing administrative discretion. All bodies must publish these decisions, and the authorities must follow them when they are faced with similar cases. These decisions have to be

⁴⁷ People's Government of Hunan Province. (2009, November 12). *Hunan provincial measures for the standardization of administrative powers* (Regulation No. 244). Portal of Hunan Provincial People's Government. https://www.hunan.gov.cn/hnszf/xxgk/zfgz/202110/t20211009_20738961.html. (In Chinese).

⁴⁸ Ziekow, 2022.

published at least once a year, and this procedure is subject to rules on mandatory disclosure of public information. As a result, discretionary powers are covered by the principle of unification of administrative actions. The recipients of the administrative procedure can also evaluate the behaviour of the authorities and compare it with the guiding decisions. If a discretionary act does not correspond to a similar typical case, this act can be declared invalid by the court or the higher authorities. The Hunan Provincial Measures are not the only example: similar rules exist in other provinces, and the Chinese authorities sometimes also adopt their own regulations that focus solely on administrative discretion. However, a general approach to administrative discretion exists in all similar legal sources.

Finally, legislators in both China and Russia have generally refrained from enacting clear legal rules that define administrative discretion and embed it in a comprehensive framework of administrative legislation. Although a number of relevant legal instruments have been adopted, particularly over the last decade, they have not coalesced into a system-forming general law binding on all administrative authorities. In these circumstances, it is judicial practice that must play the decisive role in articulating a formal view of how discretionary powers are to be exercised.

3. Administrative Discretion and Judicial Practices

Neither the Russian nor the Chinese legal system formally recognizes case law as a primary source of law, and the authority of judicial decisions is not comparable to that of precedents in common law jurisdictions; legislation remains the main source of law, although the actual role of judicial practice is more complex. Where the legislature leaves a matter unregulated, it falls to the courts to determine how individuals should conduct themselves in the absence of explicit statutory regulation. It follows not only from reasoning, but also from the principle of the separation of powers, which is enshrined in most contemporary constitutions. In Russia, the discussion about case law has been an important part of legal doctrine since the middle of the last century.⁴⁹ The legal nature of higher courts' judgments has become a distinct object of scholarly inquiry, and two main academic approaches can be identified: case law and acts of legal interpretation. Moreover, legal doctrine recognizes judicial decisions given by the Supreme Court, especially by its Plenum, and the Constitutional Court.⁵⁰ It is generally accepted that lower courts must take into account the legal positions of higher courts, but if judicial interpretations are formulated in very broad terms, the line between case law and legal interpretation becomes indistinct.

⁴⁹ Tolstoy, Y. K. (2004). Teacher, scientist, citizen (to the 100th anniversary of M. D. Shargorodsky). In B. V. Volzhenkin (Ed.), *M. D. Shargorodsky, Selected works* (pp. 25–26). Law Center Press. (In Russian).

⁵⁰ Gitsu, M. A. (2017). Judicial precedent judicial as a source of law in the light of modern trends in Russia. *State and Law*, 6, 5–16. (In Russian).

Guidance on administrative discretion in Russia is provided by Resolution No. 21 of the Supreme Court of the Russian Federation (2022).⁵¹ The Court states that all discretionary acts and actions are subject to judicial review based on such criteria as legitimate purpose, legitimate limitation on discretionary powers, and proportionality of the impact on the rights of individuals or organizations. In addition, the prohibition of excessive formalism (or bureaucracy) was proclaimed as a legal principle, and violation of the formal procedure cannot be grounds for declaring an administrative act invalid without other circumstances. This rule is based on two principles: protection of legitimate expectations and proportionality. As a result, breaches of procedure that are merely formal in nature cannot, as a rule, serve as a sufficient ground for declaring a decision or action unlawful. The Supreme Court of the Russian Federation also requires courts to assess the consequences of administrative acts for the rights and legally protected interests of individuals and organizations. In fact, the Russian Supreme Court for the first time recognized the theory of “favourable and unfavourable” administrative acts.

After the Supreme Court of the Russian Federation formulated its approach to administrative actions, including discretionary ones, this position became binding on other courts and administrative authorities, which must evaluate judicial opinions to guide their actions. Instead of formal purposes, judges often identify substantive ones and then measure discretionary acts based on those goals. For example, one of the courts, in order to discover the obligatory purpose for the body that made the controversial decision, used not only the text of the law, but also the explanatory note to it. As a result, the administrative authority could not follow the procedural rules; officials had to achieve the substantive purpose; since the law was adopted to protect the interests of entrepreneurs, to “reduce financial risks and costs,” therefore this phrase is the main goal for decision-making bodies in relation to entrepreneurs.⁵² Another example: the court noted that the formal signs were not enough to make a fair judgement. This line of reasoning led to several conclusions. First, the administrative authority (the ministry) was vested with discretionary powers to pursue a legitimate aim, but the officials failed to do so. Instead, they exercised their discretion solely on formal grounds, without considering the substantive reasons. Secondly, the ministry did not seek additional information and did not request clarifications concerning ambiguities or typographical errors. Thirdly, the authorities thereby undermined trust in the state and frustrated the legitimate expectations of those concerned. Yet the officials were obliged to assess the legitimate aim, to

⁵¹ Supreme Court of the Russian Federation. (2022, June 28). *On some issues of application by courts of the provisions of Chapter 22 of the Code of Administrative Procedure of the Russian Federation and Chapter 24 of the Arbitration Procedure Code of the Russian Federation* (Resolution of the Plenum No. 21). <https://www.vsrfr.ru/documents/own/31334/>. (In Russian).

⁵² Arbitration Court of the Trans-Baikal Region. (2023, December 28). *Judgement No. A78-12036/2023*. Database of Arbitration Cases of the Russian Federation. <https://arbitr.ru>. (In Russian).

identify appropriate means of pursuing it, and to choose the action that best served both individual and public interests. After the court explored the legitimate aim, and issues of trust in the state, the conclusion was formulated that in order to pass an unfavourable act, the authorities must state the objective, and not procedural, impossibility of a favourable act.⁵³

When the Supreme Court of the Russian Federation takes new legal positions, paying attention to legal principles, this does not imply that other courts will fully share this view. Judicial practice may sometimes be fragmentary or formulaic, regardless of the factual meaning of the Supreme Court's opinion. At times, judges merely reproduce passages from Resolution No. 21 (2022), yet such references are largely formal, as the actual substance of that instrument does not, in fact, inform their reasoning or affect the outcome in the individual cases. For instance, the court referred to the opinion on administrative discretion and stated that it is necessary to assess the legitimate purpose, the limit of the discretionary power, and the proportionality of the administrative act. In fact, the judicial decision was based only on the purpose, and the remaining criteria were not the subject of judicial reasoning.⁵⁴ The Russian doctrine of administrative discretion is just being formed, and judges do not have a clear set of tests to verify administrative discretion. However, this situation has recently begun to evolve from relative uncertainty towards greater clarity, and Resolution No. 21 (2022) is an important, though not the only, indication of this trend. Consequently, the emergence of a coherent system of such tests appears to be only a matter of time, potentially in the near future.

The Chinese situation is similar though with some specifics represented by the guiding judicial decisions; since they are binding on other courts and, possibly, executive authorities, they look like case law. These decisions were introduced in 2011, and were the result of judicial reform. According to Liu Qiucen, their purpose is threefold: (1) they are aimed at solving complex law enforcement issues; (2) guiding decisions form the general standard of judicial practice; (3) they limit judicial discretion. In fact, there are two points of view: (1) the tradition of civil law does not allow court decisions to be recognized as sources of law; they are a kind of acts of judicial interpretation of legal norms; (2) the guiding decisions of the Supreme People's Court are regarded as a specifically Chinese model of case law; however, this is not the main point of view. Liu Qiucen wrote about the tendency to implement some common law constructs into civil law systems, which becoming a trend in Chinese jurisprudence.⁵⁵ The system of guiding judicial decisions is based on the

⁵³ Arbitration Court of the Republic of Ingushetia. (2023, December 18). *Judgement No. A18-1979/2023*. Database of Arbitration Cases of the Russian Federation. <https://arbitr.ru>. (In Russian).

⁵⁴ *Judgement No. A18-1979/2023*, 2023.

⁵⁵ Liu, Q. (2020). Status and the role of judicial guidelines in People's Republic of China as precedent law. *Legal Bulletin of the Kuban State University*, 1, 2–7. (In Russian).

Regulation of the Supreme People's Court of the People's Republic of China No. 51 (2010), the document contains general rules about what cases should be included in the lists of guiding judicial decisions. For example, they should reflect issues of concern to the whole society and reveal new or sophisticated problems.⁵⁶

These lists are similar to the Russian reviews of judicial practice that have been adopted by the Supreme Court of the Russian Federation, but with distinct Chinese characteristics. Thus, they contain general conclusions that resemble a moral imperative rather than a legal opinion. For instance, the Supreme People's Court of the People's Republic of China summed up one of these cases, noting that the outcome of the judgment is that the judge and prosecutor acted together to protect the environment in the Yellow River basin; they have increasingly demonstrated "active oversight," "transparency of the judicial system," and "fairness."⁵⁷ In addition to the specific purpose of the administrative case in which discretionary powers have been exercised, more general objectives may also be taken into account. They are often reflected in typical phrases that signify the values of China's political and legal system. In such cases, courts do more than simply resolve individual disputes between a private party and an administrative authority; they also act in the public interest, contribute to the welfare of society, and help to safeguard the overall legitimacy of the system of governance. This reflects socialist legal ideas, strengthened by Chinese traditions, including Confucianism. Within this perspective, the notion of a subjective public right is not central; what becomes decisive for the authorities is the public, or common, interest. However, there is nothing to prevent the protection of the rights of individuals in their relations with administrative authorities. Instead of the separation of powers, there is the distribution of power functions. As a result, the court and the prosecutor in the administrative case can be considered one party formed to achieve a general purpose.

Chinese specifics can be illustrated by the example of one guiding judgement to preserve a school building of cultural and historical value. The prosecutor filed a lawsuit and demanded that the administrative body preserve this building. The defendant objected that this was impossible due to the lack of the necessary powers. This public authority was able to inspect the conditions of the building and its real state was identified, but the authority declared that they could not fix it. The authority had previously sent a notice to the provincial government about this situation, though they reported that nothing could be done. As a result, everyone knew that the building was collapsing, and did not do anything. The court's position was articulated in three distinct statements: (1) the prosecutor is right, but the administrative authorities

⁵⁶ Supreme People's Court of the People's Republic of China. (2010, November 26). *Provisions of the Supreme People's Court on case guidance work*. <https://court.gov.cn>. (In Chinese).

⁵⁷ "Two leaders" perform duties in one court to protect the safety of the Yellow River. (2024, March). *Chinacourt.org*. <https://www.chinacourt.org/article/detail/2024/03/id/7853541.shtml>. (In Chinese).

are also right; (2) however, the building is collapsing every day and the situation becomes irreversible; (3) the preservation of the building is important for the entire nation because it has historical significance. Finally, the authorities must find an opportunity to solve the problem.⁵⁸ In fact, the public interest requires the exercise of administrative discretion to ensure the safety of the building. The higher-level purpose has superseded current tasks related to a specific situation and a conflict of competence.

Recently, Chinese courts have begun to apply legal principles that are widely accepted in many legal systems, mostly the principle of proportionality. After the case of *Huifeng Industrial Development Co., Ltd v Harbin Municipal Planning Bureau*, much more courts across the country have applied this principle, and administrative discretion is the main area in which proportionality plays a role.⁵⁹ This case is very interesting because the Chinese judges were able to reproduce an almost classical version, once invented in German legal theory. A company constructed the building that was taller than permitted by the building rules; the historical skyline of the city centre was disrupted; the administrative authorities demanded to demolish the building; the company did not agree, considering the demand too strict. The court ruled that the administration must evaluate the impact of its decision on the company's rights; the authority must not only ensure the achievement of the legitimate purpose, but also protect the rights and interests of the company. In this case, the part of the building to be demolished is clearly disproportionate to the task of restoring the historical appearance of the city centre; the company was saddled with disproportionately high costs.⁶⁰

The judicial views have played a leading role in shaping approaches to administrative discretion in both Russia and China. However, this trend has been common in many major legal systems around the world. Georges Vedel (France) wrote that if administrative legislation had disappeared completely, administrative law would have continued to exist, since fundamental norms of this branch of law have been created by judicial practice without reference to written laws. On the contrary, civil law without a corresponding code would be impossible.⁶¹ According to Eberhard Schmidt-Assmann (Germany), courts have determined the basis of the doctrine

⁵⁸ Failure to urge rectification in time led to increased damage to cultural relics protection units: Administrative units were ordered to continue performing supervisory and management duties. (2024, March 14). *Chinacourt.org*. <https://www.chinacourt.org/article/detail/2024/03/id/7846741.shtml>. (In Chinese).

⁵⁹ Su, 2020.

⁶⁰ Supreme People's Court of the People's Republic of China. (2000, April 28). *Judgement on the administrative dispute appeal between Harbin Planning Bureau of Heilongjiang Province and Heilongjiang Huifeng Industrial Development Co., Ltd*. *Chinacourt.org*. <https://www.chinacourt.org/article/detail/2002/04/id/4396.shtml>. (In Chinese).

⁶¹ Vedel, G. (1973). *Administrative law* (p. 59). Presses Universitaires de France. (In French).

that has shaped the governance system and guided the executive authorities to adhere to the principles of reasonableness, legality, neutrality, efficiency, and others.⁶² Horst Dreier (Germany) stated that modern administrative law has been a joint product of the legal doctrine and the judicial positions on governance issues, and the role of the legislator has never been as important as the role of the courts.⁶³ The principle of proportionality is a clear example due to the fact that it was first specified by the Higher Administrative Court of Prussia in the *Kreuzberg case* in 1880 and 1882,⁶⁴ and then “under the jurisdiction of the Federal Constitutional Court it has been developed into a central constitutional legal principle.”⁶⁵ Many other countries have their own examples of how their judges influence official approaches to administrative discretion. In fact, this shows that Russian and Chinese approaches are part of a general path inherent in civil law system, but there are characteristics that determine the specificity of administrative discretion in Russia and China.

Conclusion

The doctrine of administrative discretion in both Russia and China is developing within the civil law tradition. While the Russian view of discretion has fairly deep historical roots, the Chinese approach has emerged relatively recently. Despite this, scholars in both countries have paid attention to similar issues, including the legal limitation of discretionary powers, but criteria for judicial review of discretionary acts and actions are often lacking in general legislation, especially criteria relating to legitimate purposes and limits of powers. The judicial tests to review administrative discretion have attracted academic interest over the past several years. However, Russian scholars prefer to discuss the rules of the Administrative Judicial Code, and sometimes their views are directed towards certain general principles that are intended to limit discretion. Proportionality is well-known to Russian legal science, but it is often introduced in a constitutional context, without discussing the problems of limiting discretionary powers. It should be noted that academic works have tried to describe the phenomenon of administrative discretion from the perspective of its control function, used both by the court and by the administrative bodies. Chinese administrative doctrine has been focused on the country’s specifics, where civil law constructions are adapted to the political and legal system. Chinese legal doctrine provides wide

⁶² Schmidt-Aßmann, E. (2007). Administrative procedures and administrative culture. *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*, 26(1), 40–47. (In German).

⁶³ Dreier, H. (1990). Merkl’s doctrine of administrative law and contemporary German administrative law dogmatics. In R. Walter (Ed.), *Adolf J. Merkl. Work and impact: Proceedings of an international symposium in Vienna (March 22–23, 1990)* (pp. 63–88). Manz. (In German).

⁶⁴ Peters, A. (2018). The principle of proportionality as a global constitutional principle. *Public Law Digest*, 7, 104.

⁶⁵ Ziekow, 2022.

opportunities, for example, to implement common law theories. In Chinese model, discretionary powers must be exercised in accordance with guiding decisions; public interests are the preference, but the rights and interests of the individual must be taken into account; administrative authorities must be open to society.

The legislative approaches to administrative discretion are correlated in both countries. Although the idea of a general law on administrative procedures is well established in legal doctrine, both Russian and Chinese legislators have so far refrained from adopting such a framework statute. Two bills introduced in the Russian Parliament were rejected, China also has introduced several semi-official drafts. As a result, there is only special legislation in certain areas, which contains some of the structures inherent in the theory of administrative procedures that can limit discretionary powers. Russian officials may eventually accept the idea of such a law. This is evidenced by the general path of the development of the theory of administrative discretion, similar to civil law countries. Chinese specifics lie in the cautious attitude toward new laws, and therefore the prospect of adoption of this law is very unlikely. This approach to the hierarchy of legal sources does not permit administrative action to be comprehensively defined at the level of statutes. Detailed rules governing such action are elaborated in a dense body of subordinate regulations rather than in primary legislation, with the result that administrative discretion is not regulated in Chinese statutory law as systematically as it is in Russia.

Judicial practice is the main path for implementing the criteria by which discretionary acts and actions must be reviewed. Supreme courts, Russian and Chinese, have created guidelines to test how administrative discretion is exercised. For instance, general principles—proportionality, protection of legitimate expectations and others—were first recognized by these courts. The Supreme Court of the Russian Federation formulates its legal views in the frameworks of civil law, whereas the Supreme People's Court of the People's Republic of China acts through guiding decisions that reflect Chinese specifics. The specific attitude to the system of the separation of powers and to the idea of subjective public rights opens up the possibility of cooperation between authorities to protect the public interest. For example, the Supreme Court may stress that judges and prosecutors must work together to protect the public interest and to pursue objectives of broader social importance. In addition, administrative authorities may receive judicial directions that, while formally binding, are framed in the language of moral exhortation. In sum, while the Supreme People's Court of the People's Republic of China urges officials not only to comply with legal rules but also to act as morally responsible actors devoted to society and the public good, Chinese judicial practice at the same time incorporates civil-law inspired doctrines such as proportionality and related constructions.

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