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Policy Regulations in the Indonesian Legislative System: Position and Testing

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ABSTRACT

Policy regulations (*beleidsregel*) are important instruments in Indonesia's legal system of government. The absence of regulation of this policy in legislation makes its position unclear in the legal system of government in Indonesia and also constrains its material testing. This study aims to explain why the position of *beleidsregel* is vague or ambiguous in the legal system of government describe what testing mechanisms are applied to *beleidsregel* and explore the challenges or obstacles faced in testing these policy regulations in Indonesia. The research method used is normative legal research. The results of the research on policy regulations are part of an administrative legal product based on the principle of freedom or discretion. The position of policy regulations is not regulated in the legal system in Indonesia. The absence of regulation of this policy makes its position of material testing a matter of debate, but in current practice, testing is carried out at the State Administrative Court.

KEYWORDS

Policy Regulations;
Legislative System;
Position; Testing



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INTRODUCTION

Policy regulations or *beleidsregel* is a policy issued by government officials who have the authority, policy regulations are the result of the freedom of government officials in making decisions or can be called discretion. This policy rule acts to provide technical direction or guidance to implement higher laws, especially those relating to state administration or government management.¹ Policy rules in state administrative law are provisions determined by administrative officials to provide direction in carrying out their administrative tasks, which are more flexible than laws or more formal government regulations.²

Not only that policy regulations be considered more flexible than statutory regulations, but policy regulations themselves are not included in statutory regulations. This is due to Article 7 of Law No. 12/2011 on the Establishment of Laws and Regulations (amended several times, most recently by Law No. 13/2022 on the Second Amendment to Law No. 12/2011 on the Establishment of Laws and Regulations) which confirms that policy regulations (*beleidsregel*) are not part of the hierarchy of laws and regulations.³ Because it is not listed in the laws and regulations, there are no provisions that regulate the policy and this causes the policy to not have any position in the legislative system.

It should be recalled that policy regulations are the result of the freedom of action possessed by government officials, and this freedom of action has been regulated in Article 1 point 9 of Law Number 30 of 2014 concerning Government Administration. Although discretion has clear provisions that refer to it, it is different with *beleidsregel* because until this research is conducted, there are no specific norms that discuss or regulate this policy (*beleidsregel*). The legal vacuum that arises, in the end, becomes an obstacle in examining the policy regulations issued by government officials. Policies are not included in the system of legal regulations, so the Supreme Court, Constitutional Court, and even the courts are not authorized to test these policies.⁴

Although policy regulations are not clear on how to be tested, in some cases, policy regulations have been tested many times in the state administrative court, even up to the Supreme Court. This is inappropriate because the regulations that can be tested are laws and regulations that are under the law, while policy regulations themselves do not have a statutory basis.

This research was made to show that the position of policy regulations in the legislative system does not have strong clarity, so in fact, this has led to a legal vacuum against these policy regulations. Another thing that becomes an obstacle or problem is that there is no clarity on the government organ that can test this policy regulation method because, in essence, policy regulations have no basis in existing laws and regulations.

¹ Muhammad Ali Hasan & Anna Erliana, "The existence of policy regulations and the court's authority to review policy regulations (*beleidsregel*)" (2023) 11:2 Int J Polit Sociol Res 405–411, online: <<https://www.ijopsor.pelnu.ac.id/index.php/ijopsor/article/view/158>>.

² Mhd Lutfi AR et al, "Policy regulation test according to government administration regulations" (2022) 6:1 Int J Health Sci (Qassim) 2368–2380.

³ Murlinus, "Perlindungan Hukum Atas Terhadap Peraturan Kebijakan (*Beleidsregel*)" (2023) 1:2 J Stud Huk dan Adm Publik 77–91.

⁴ Victor Imanuel Nalle, "Kedudukan Peraturan Kebijakan dalam Undang-Undang Administrasi Pemerintahan" (2016) 10:1 Refleks Huk J Ilmu Huk 1–16.



METHOD

The normative legal research method was chosen in discussing the position and mechanism of testing policy regulations in the Indonesian legislative system because this method focuses on analyzing existing legal norms, both those written in laws and regulations and relevant legal doctrines. In this context, normative research allows researchers to explore and analyze legal provisions governing the mechanism of testing policy regulations, as well as their position in the hierarchy of Indonesian legislation. The approaches used in this research are statutory, conceptual, and case approaches.

RESULT & DISCUSSION

I. The Position of Policy Regulations in the Indonesian Legislative System

Policy regulations (*beleidsregel*) are legal instruments stipulated by state administrative officials to carry out government functions. This regulation is not included in the order of laws and regulations stipulated in Article 7 of Law Number 12/2011 on the Making of Laws and Regulations.⁵ In Indonesia's legislative order, policy regulations are not included in this arrangement. The hierarchy of statutory regulation in Indonesia consists of:

- a. The 1945 Constitution of the Republic of Indonesia
- b. Decree of the People's Consultative Assembly
- c. Law / Government Regulation instead of Law
- d. Government Regulation
- e. Presidential Regulation
- f. Provincial Regional Regulation
- g. Regency/City Regional Regulations

By the law, policy regulations (*beleidsregel*) are not part of the hierarchy of laws and regulations above. Because they are not included in the laws and regulations and there are no rules that explicitly regulate these policy regulations, the position of policy regulations is unclear. This can lead to overlapping authority and different interpretations.⁶

The definition of "policy regulations" itself is often unclear and diverse, making it difficult to determine its exact boundaries and scope, the meaning of the policy itself must meet signs or guidelines such as Policies must be distinguished from decisions, and many more. Because of this vagueness of meaning, it may also have an impact on the legal certainty of this policy regulation. However, despite its unclear position, this policy regulation is very important in the practice of government administration because it serves to provide guidelines in the application of higher regulations or may not be regulated by higher regulations. In the Indonesian legal system, policy regulations are used to elaborate on higher provisions, such as laws or other laws and regulations, which sometimes require further explanation for implementation, because usually laws and regulations only regulate in outline or general terms.

The existence of these policy regulations is important so that higher regulations can be implemented effectively and follow the context of the field. Although policy regulations are very important in the implementation of government duties, they do not

⁵ Ilham Dwi Rafiqi, "Criticisms Toward the Job Creation Bill and Ethical Reconstruction of Legislators Based on Prophetic Values" (2021) 29:1 Leg J Ilm Huk 144–160.

⁶ Sadhu Bagas Suratno, "Pembentukan Peraturan Kebijakan Berdasarkan Asas-Asas Umum Pemerintahan yang Baik" (2017) 4:3 Lentera Huk 164–174.



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have a direct binding force for the community. For example, a policy regulation issued by a minister or ministerial-level official is more instructive in terms of policy implementation. Policy regulations have several forms, including:

- a. Circular Letter: Used by officials such as ministers or directors-general to inform their subordinates about policies that must be implemented about public services.
- b. Operational or Technical Guidelines: Contains administrative and operational technical methods regarding a specific task.
- c. Instruction: Issued by the leader as an order to carry out a specific task.
- d. Announcement: Contains information necessary for the public regarding public services provided by government agencies.

Policy regulations (*beleidsregel*) have several characteristics that distinguish them from other laws and regulations, ranging from the Constitution to District/City Regulations. Although not explicitly regulated in laws and regulations, policy regulations play an important role in public administration.⁷ One of its main characteristics is that policy regulations serve as guidelines or technical instructions in the implementation of higher laws and regulations, such as Laws or Government Regulations. If a law establishes a broad principle, then policy regulations provide more specific guidelines regarding the application of that principle in state administrative practice. In addition, policy regulations are more flexible than other laws and regulations because they can be issued to respond to certain situations that are not covered by higher regulations, thus allowing the government or authorized officials to adjust policies to the needs of the field without having to change higher regulations (laws and regulations).

Another characteristic is its instructive nature which does not directly regulate the substance of the law. Policy regulations provide instructions or procedures for implementing higher regulations without changing the fundamental legal substance, such as operational procedure policies in granting licenses. Policy regulations are also issued by public officials or government agencies that have authority in certain fields, such as ministries or administrative bodies. In addition, policy regulations have the flexibility to change or be updated according to the needs and development of the situation in the field, because these policy regulations are the result of discretion. For example, in the face of technological developments or social changes, policy regulations can be adjusted to the latest conditions without going through a more complex procedure of changing laws and regulations. With these characteristics, policy regulations are an important instrument in supporting adaptive and responsive state administration.

While policies do not fall under the legislation, they do have some significant similarities. First, both generally have a binding nature. An example given is the Circular Letter of the COVID-19 Handling Task Force Number 1 of 2023 regarding Health Protocols During the Transition Period of the 2019 Coronavirus Disease Endemic (COVID-19), in which the public is obliged to comply with the provisions set out in the circular letter. Although policy regulations do not fall under the class of legislation, they are called "regulations" due to their mandatory character like a legal norm. Second, the structure and format of policy regulations almost resemble laws and regulations, including the preamble, legal basis, main body, and final section. Third, both laws and policies have a

⁷ Surya Mukti Pratama & Hario Danang Pambudhi, "Kedudukan, Fungsi, dan Pengawasan Peraturan Kebijakan Kepala Daerah dalam Kerangka Sistem Otonomi Daerah" (2021) 4:1 J Anal Huk 120–130, online: <<https://journal.undiknas.ac.id/index.php/JAH/article/view/2951>>.



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dynamic character. As long as a country exists, regulations will always exist, develop, be created, modified, improved, deleted, and replaced with new regulations according to the needs of the progress of society and the state. This illustrates that despite fundamental differences, regulatory policies and laws have features that support each other in the context of the legal system.

Statutory regulations and policy regulations (*beleidsregel*) both have an important role in the Indonesian legal system, although they differ in terms of their position, legal force, source, nature, purpose, and formation process. Position in the legal system, laws, and regulations have higher legal force and apply generally to all Indonesian people.⁸ According to Law No. 12/2011, every lower regulation must comply with higher regulations, such as the Law which must not contradict the Basic Law. In contrast, policy regulations (*beleidsregel*) are issued by public officials or government agencies as technical implementation guidelines of higher regulations. Policy regulations are not included in the formal statutory hierarchy but rather are administrative with a focus on technical procedures.

Furthermore, statutory regulations originate from higher written rules, such as the Law or the Constitution. In contrast, policy regulations stem from the discretionary authority (*freies ermesen*) possessed by government officials. Despite using discretion, officials must not violate or contradict higher laws and regulations.

Then the nature and purpose of legislation is normative and fundamental, regulating matters such as human rights, legal obligations, and the division of power between state institutions. Its main purpose is to create justice, legal certainty, and order in society. Policy regulations, on the other hand, are instructive and administrative, providing practical guidance to implement higher regulations. Policy regulations are also designed to deal with or implement higher policies and deal with concrete situations in state administration.

Furthermore, the process of forming laws and regulations involves a long and complicated formal mechanism, involving executive and legislative institutions, such as the President and the DPR. This process requires joint discussion and approval. In contrast, policy regulations are usually set by administrative officials or certain bodies that have discretionary authority, without the need for a formal legislative process. Therefore, the establishment of policy regulations is faster and more flexible compared to laws and regulations. With this difference, statutory regulations and policy regulations complement each other within the framework of the Indonesian legal system, where one provides legal certainty and fundamental norms, while the other offers flexibility and technical guidance for implementation.

Legal position has a very important role in the process of forming and implementing policy regulations. In this context, legal position is not only the basis for policymaking but also ensures that the resulting policy regulations are by applicable legal principles. The legal position provides legitimacy to the resulting policy regulations. Every policy regulation issued by the government or public institutions must be based on clear legal norms so that it can be considered valid and accepted by the community. Without a strong legal basis, policy regulations can be considered invalid and risk being challenged, even overturned by authorized legal bodies, such as the Constitutional Court or the State Administrative Court.

⁸ Ilham Dwi Rafiqi, "Legal Ideals Pancasila in the Development of a National Environmental Legal System" (2023) 4:3 Audit Comp Law J 134–146.



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The legal position of policy regulations has very important implications in terms of accountability, transparency, and prevention of abuse of power. With a clear legal basis, policy regulations can be monitored, accounted for more effectively, and ensure adequate oversight mechanisms. The government is expected to be transparent in making decisions and implementing policies that affect the community.

A clear legal position also ensures that every policy can be monitored by supervisory bodies or institutions that have the authority and can be accounted for by the public. This process serves to ensure that the policies implemented are truly in favor of the public interest and do not violate existing legal norms. In addition, the legal position in policy regulations aims to prevent abuse of power. The law regulates the limits of authority possessed by policymakers so that no party exceeds their authority in making decisions that have an impact on society. This also ensures that the policy regulations taken are not discriminatory and can be accepted by all groups in society.⁹

The legal position in policy regulations has broad implications, especially in the aspect of protecting human rights. Policy regulations that are based on strong legal standing tend to pay more attention to and protect human rights because the policies are made with due regard to the principles of justice and equality. This is important to prevent human rights violations that may occur in the implementation of the policy.

The position of law has a crucial role in ensuring that policy rules do not conflict with human rights. Every policy must take into account the principles of human rights enshrined in the constitution or international treaties to which the state has acceded. This includes protection for the civil, political, economic, social, and cultural rights of the people. Therefore, policies that are based on strict and clear laws not only ensure transparency and accountability but also protect the rights of individuals and ensure that the policies implemented support justice and equality.

In essence, the legal position of the policy is crucial to ensure that the regulation is legal, fair, and accepted by the community. The legal position provides a solid foundation for policy development that is not only efficient in dealing with problems, but also prioritizes the principles of justice, legal certainty, and accountability. However, the opposite will happen, without a firm legal position, policy regulations can cause legal problems, injustice, and uncertainty that are detrimental to society and the state, contrary to legal principles.

II. How Policy Regulations are Approved in the Indonesian Legislative System

Reminding us that policy regulations (*beleidsregel*) are legal instruments issued by public or government officials to provide guidelines or directions to facilitate the implementation of higher laws and regulations. Although not stated in the hierarchy of official laws and regulations or can be called not part of the law, regulatory policies have binding power and can affect the rights of citizens. Therefore, it is crucial to have a testing system that ensures that policy regulations do not conflict with higher legal rules and basic principles of good governance.¹⁰

The testing of policy regulations in Indonesia experiences various obstacles that result in uncertainty, such as the absence of a firm legal basis and the non-concrete

⁹ Cholida Hanum, "Analisis Yuridis Kedudukan Surat Edaran dalam Sistem Hukum Indonesia" (2020) 10:2 Humani (Hukum dan Masy Madani) 138–153.

¹⁰ Eduard Awang Maha Putra, "Konsep Ideal Pengujian Peraturan Kebijakan (Beleidsregel) di Indonesia" (2024) 3:1 Wijaya Putra Law Rev 1–20.



characteristics of policy regulations. Regulatory policies are not included in the hierarchical arrangement of formal legislation, so the method of testing is not regulated in the legal system in Indonesia. This creates uncertainty regarding the procedures and institutions that have the authority to carry out the review. There is also discussion about which judicial institution has the right to test policy regulations. Various opinions suggest that the State Administrative Court has this authority, while others suggest that the Supreme Court or even the District Court can play a role in this review, but the debate has not resulted in a clear view of who is authorized to review a policy.¹¹

a. Institutions Authorized to Examine Policy Regulations

Policy regulations are issued by public officials or government agencies that have authority in a particular field. These regulations are usually issued by ministries, state agencies, or bodies authorized by law. In the Indonesian legal system, there is much discussion about the power of courts to evaluate policy regulations. Policy regulations are not included in the classification of state administrative decisions (KTUN) that can be considered in the State Administrative Court. However, in practice, the Supreme Court has granted review of policy regulations as objects of judicial review. This shows that there is an ambiguity or legal vacuum regarding the way policy regulations are tested in Indonesia, which raises the question of which institution has the authority to test policy regulations if they adversely affect the affected community. As policies are not at the level of laws and regulations, the review of these policies is not expressly regulated by Law Number 12 Year 2011. However, several institutions have the potential to carry out testing.

The first is PTUN because PTUN has jurisdiction to test government administrative actions that result in harm to certain parties. If the policy regulation is considered a state administrative decision, then the PTUN can test the validity and reliability of the policy regulation being tested. The second is the Supreme Court, based on Article 24A of the 1945 Constitution and Law No. 3 of 2009 concerning the Supreme Court, the Supreme Court is authorized to test laws and regulations under the law against the law. However, since policy regulations are not included in the category of laws and regulations, this test is more often considered administrative supervision. Why the Supreme Court is still considered as a potential institution in testing policy regulations is the practical aspect, policy regulations are often tested in the Supreme Court through the mechanism of judicial review.

Although policy regulations are not included in the hierarchy of laws and regulations, the Supreme Court can still decide the validity of administrative policies if the policy has a broad impact on society or is deemed to violate higher laws and regulations. Although the main focus of the Supreme Court is laws and regulations, the Supreme Court is a potential institution to examine policy regulations because the scope of the test includes administrative policies that have general binding characteristics.

Several other reasons why the Supreme Constitutional Court has the potential to review policy regulations, There is no specialized institution for Policy Regulations Since policy regulations are not explicitly regulated in the legal hierarchy, testing these policies requires a flexible approach. PTUN and the Supreme Court, with their respective scope of testing authority, are the main options due to the absence of other institutions that specifically oversee or test administrative policies. Then

¹¹ Firdaus Arifin, "Pengujian Peraturan Kebijakan dalam Sistem Peradilan di Indonesia" (2021) 22:1 J Litigasi 133–156, online: <10.23969/litigasi.v22i1.3751>.



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because of the Principle of Balance and Supervision, in the context of the principle of the rule of law, the Supreme Court is considered to have an important role in ensuring that policy regulations always follow the general principles of good governance (AUPB), and do not conflict with the basic rights of citizens or higher legal norms.¹²

b. Mechanism for Testing Policy Regulations

The mechanism of testing policy regulations differs depending on the institutions involved. The first one, PTUN, has the authority to test administrative policies issued by government officials or institutions. Although it does not explicitly test *beleidsregel*, PTUN can handle cases related to administrative decisions, including those taken under policy regulations. A review mechanism through PTUN is often conducted in the form of a lawsuit by an individual or entity that feels aggrieved by an administrative decision outlined in a policy regulation. With the Case Initiation process, Testing begins when individuals or entities who feel aggrieved by an administrative policy file a lawsuit with the PTUN. Next is to examine the Authority of the Court, PTUN will assess whether administrative decisions or policy regulations issued by government agencies or officials are by the provisions of higher laws and regulations and whether the policy violates basic rights or principles of justice. And next is the Decision, If the PTUN finds that the policy under review is invalid or contrary to higher laws and regulations, the PTUN can cancel the administrative decision or order changes to it.

Supreme Court review. The Supreme Court has the authority to test policy regulations through judicial review of administrative decisions or policies that are generally binding. Although the Supreme Court does not explicitly have the authority to test policy regulations, regulations that conflict with laws or higher regulations can be tested through a lawsuit at the Supreme Court level. Petition for Review, the process of testing policy regulations at the Supreme Court is usually carried out through a petition for review by a party who feels aggrieved by the administrative policy. Legal Consideration, the Supreme Court will assess whether the policy regulation is contrary to the law or higher regulations and whether the policy is by applicable legal principles, including the principles of justice and non-discrimination. Supreme Court Decision, if the Supreme Court decides that the policy regulation violates higher regulations or contradicts applicable legal principles, it may invalidate the policy or order changes to it.

III. Cases Involving Policy Regulation Testing, and its Impact on Legal and Administrative Practice

An example of a case of testing policy regulations that had become a hot issue in its time was when the Supreme Court tested policy regulations in the form of circular letters related to Circular Letter of the Director General of Coal and Geothermal Minerals No. 03/31/DJB/2009. Through the Supreme Court's decision with case number No.23/HUM/2009, it was stated that SE No. 03/31/DJB/2009 was contrary to Law No. 4/2009 concerning Mineral and Coal mining, so the circular letter was declared invalid and did not apply to the wider community. With the issuance of decision No.23/HUM/2009 by the Supreme Court, this shows an interpretation that

¹² Febriansyah Ramadhan, Sunarto Efendi & Ilham Dwi Rafiqi, "Penentuan Jenis Produk Hukum dalam Pelaksanaan Putusan Mahkamah Agung tentang Hak Uji Materil (Kajian terhadap Tindak Lanjut Putusan Mahkamah Agung 28 P/HUM/2018)" (2022) 11:1 J Rechts Vinding Media Pembina Huk Nas 55–76.



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expands the scope of the type of legislation and at the same time blurs the boundaries of the concept of a policy regulation itself.¹³

The substance of Circular No. 03/31/DJB/2009 was issued to clarify government regulations on energy and mineral resources that were not regulated in detail in Law No. 4 of 2009. The petitioner in the material test of the circular was Isran Noor acting for and on behalf of East Kutai Regency, and argued that the objection in the circular was about asking Governors and Regents/Mayors throughout Indonesia to temporarily stop issuing Business Licenses.

Mining (IUP) until the issuance of government regulations as the implementation of Law No. 4 of 2009, because according to the applicant, it is contrary to Law No. 4 of 2009 itself. Not only that, the applicant also argued that the circular letter was not included in the system of applicable laws and regulations. The arguments put forward by the applicant, in the author's view, contradict one another, because if the applicant has argued that SE No. 03/31/DJB/2009 is a form that is not included in the system of legislation, then it should also be SE No. 03/31/DJB/2009 is not at all contrary to the legislation. The non-inclusion of SE No. 03/31/DJB/2009 in the legislation, actually also shows that SE No. 03/31/DJB/2009 itself is not recognized for its existence and is also not binding since the circular was formed because it was not ordered by legislation.¹⁴

The contradiction did not end there, the Supreme Court, which at that time was the institution examining SE No. 03/31/DJB/2009, ruled that the circular letter was a legal regulation with the legal basis referring to Article 7 paragraph (4) of Law No. 10 of 2004, even though the law only regulates other recognized forms of regulation, not explicitly indicating that the circular letter issued by the Director General can be considered as a form of statutory regulation system.

According to the author's view, why the Supreme Court can still examine the circular letter and categorize it as included in statutory regulations because the Supreme Court still refers to Law No.12 of 2011 which provides limitations on statutory regulations. If this is used, then the material test of policy regulations by the Supreme Court can only be carried out on policy regulations in the form of laws and regulations, namely laws and regulations formed based on discretion. Because it is born from discretion, the basis for testing cannot be limited to the laws and regulations above it. Testing also needs to be based on principles or principles in government or the formation of regulations.

Maintaining the original concept that a policy regulation is not included in statutory regulations and therefore the Supreme Court cannot review it, does not mean closing legal remedies for legal subjects who feel aggrieved. Maintaining the original concept of a circular letter also strengthens and restores its character as a guidance or direction or guideline from superior officials addressed to subordinates, and if the circular letter is intended for the general public, then its nature is not binding and the government also cannot impose the implementation of the circular letter on the general public.

¹³ Victor Imanuel W Nalle, "Kewenangan Yudikatif Dalam Pengujian Peraturan Kebijakan (Kajian Putusan Mahkamah Agung Nomor 23 P/HUM/2009)" (2013) 6:1 J Yudisial 33–47.

¹⁴ *Ibid.*



CONCLUSION

Policy regulations are a form of actualization of the freedom (discretion) owned by government officials in taking action in administering the government in which there is a legal vacuum and is not regulated in legislation so that it does not have a clear position and therefore, making a material test is not very easy. Policy regulations are more like guidance or direction or guidelines from superior officials addressed to subordinates, and if the circular is addressed to the general public, it is non-binding and the government also cannot impose the implementation of the circular on the general public. Although policy regulations are free, they are not necessarily interpreted without limits. There are limitations such as using laws and regulations as a reference to see whether the policy regulation is good or not, beneficial to the whole, or even damaging, it becomes a coaching and supervision effort that can be constructed as internal supervision both preventively and repressively.

Suggestions for improvement in policy regulations to be more effective are to conduct or hold internal supervision, it is also necessary to have more structured arrangements related to policy regulations in the legislative framework. By creating and ratifying standard rules that explicitly regulate policy regulations, it will be easier for relevant parties to control their application and understand their position in the national legal system. These rules can include a clear definition of the scope of discretion, procedures for the formation of policy regulations, and mechanisms for testing and evaluating these policies. This step will also provide a stronger guarantee of legal protection for legal subjects who feel their rights have been violated or harmed due to the enactment of a policy regulation. In this case, judicial institutions such as the State Administrative Court and the Supreme Court will have a clearer legal basis for conducting material testing and resolving disputes related to policy regulations.

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