# Creating Legal Unity in a Rapidly Changing World: Indonesia and the Netherlands Compared

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## Abstract

Confronted with rapid and complex changes in the digital era, both the Indonesian and Dutch Supreme Court have been granted the powers of providing legal solutions at an early stage of the legal process. The Dutch Parliament introduced the Law on Prejudicial Questions whereas the Indonesian Supreme Court reinstated the chamber system. Each year, pressing legal issues are discussed by the Supreme Court judges in the chambers and the legal solutions published in a circular (*Surat Edaran Mahkamah Agung*, SEMA) as guidelines to be followed by lower courts. In this paper we compare both 'legal shortcuts' and argue that, while the goal of legal unity is an urgent issue in Indonesia, to be able to properly function as legal guidelines for judges and lawyers SEMA require a more detailed description of the legal issue and legal reasoning behind the offered legal solutions.

## Keywords
Mahkamah Agung, SEMA, Prejudiciële Vragen, Hoge Raad, Case Law

## 1. Introduction

The digital age has brought significant changes to how people live, make contracts, conduct their business, buy their groceries, and work. Law and lawyers have the obligation to adapt to such new social and technological realities that have blurred the previously clear boundaries of legal concepts and legal categories (Brownsword 2022). A judge cannot refuse a case when it concerns an issue that is new for the legal system and is not yet clearly regulated. Therefore, the judge will make a legal construction and pass a judgment based on his own interpretation of how the law should be applied to the facts of the case. In a situation of disruption caused by new technologies, combined with the absence of clear legal sources, it is well possible that different judges interpret the same issue differently (Walker-Munro 2020). In such a situation of novel legal development, legal unity (*rechtseenheid, kesatuan hukum*) is at risk. This inconsistency in judgments affects the principles legal certainty, equality before the law and ultimately the Rule of Law (*rechtsstaat, negara hukum*).

In the new millennium, both in the Netherlands and in Indonesia the idea gained ground that the traditional law-making mechanism of case law (Nl: *Jurisprudentie,* IND: *yurisprudensi*) by the Supreme Court sometimes develops too slow to provide lower courts guidance on how best to interpret novel pressing legal issues. It can take years before a problematic case at the first-instance level reaches the Supreme Court (Bakels 2015, Franx 1994). Some cases do not reach the Supreme Court at all, as many litigants do not appeal a case they lost (Simanjuntak 2019). The court process can be a long and costly process, making litigants reluctant to appeal a case – especially when in the absence of clear regulations and in a situation of inconsistent judgments, there is no indication of the chances of success.

At the same time digitalization of society has made it easier for litigants to look up cases on the internet or to interact with persons who experience similar grievances. When in similar cases different verdicts are passed by judges the sense of injustice will spread through these online communities and eventually reach the press. The inconsistency of judgments is exposed and will harm the trust of citizens in the legal system (Haltom and McCann 2009).

In the year 2012 the Dutch Supreme Court (*Hoge Raad*) and in 2011 the Indonesian Supreme Court (*Mahkamah Agung*) acquired the competence to provide legal guidance to lower courts at an earlier stage of a novel legal development. In the Netherlands this was done through introduction of the Law on Prejudical Questions, by granting the Supreme Court the competence to answer questions of law by lower courts that are handling a novel legal issue (*prejudiciële vraag*), on an issue that potentially has a large impact on future legal practice. In Indonesia the Supreme Court issued an internal regulation (*Peraturan Mahkamah Agung*), assigning the chambers of the

Supreme Court the task of discussing and finding solutions to pressing legal issues in an annual plenary meeting of the chambers. The solutions agreed upon in the plenary meeting are subsequently published by means of a circular (*Surat Edaran Mahkamah Agung;* SEMA).

The *prejudiciële vraag* and SEMA both are new legal tools designed to enable the judicial system to respond faster to novel technological and social developments that require reinterpretation of legal rules. The idea is simple: at a much earlier stage the Supreme Court may provide clarity about how the rule should be interpreted in such new contexts. In this paper, however, I will show that on several aspects description of the legal question, legal reasoning and legal justification he Dutch and Indonesian approach is fundamentally different.

In this explorative paper I will attempt to formulate a brief answer the following questions:

1. What are the similarities and differences between the legal mechanisms of the *prejudiciële vraag* and SEMA?
2. What are the strengths and weaknesses of both legal solutions?

### 1.1 Objectives

1. Compare the legal foundations of prejudicial questions in the Netherlands and SEMA in Indonesia that grant the Supreme Courts of the Netherlands and Indonesia wider law-making powers.
2. Formulate recommendations regarding SEMA as how to improve the practical usefulness of SEMA for legal practitioners in Indonesia.

## 2. Literature Review

Traditionally, in the absence of regulations passed by the government, legal systems around the world, whether common law or civil law countries, rely on Supreme Court judgments for guidance. Once the Supreme Court had passed a judgment that is valued by the legal community as leading, first instance courts are expected, but not always compelled, to follow the new boundaries it has set through its law-making powers (Shapiro 2013).

Indonesia as a former colony of the Netherlands has inherited a civil law tradition in which judgments of the Supreme Court were not considered to constitute case law (Apeldoorn and Langemeijer 1948), however, as *jurisprudentie*, provided guidance to judges of lower courts (Simanjuntak 2019; Harahap 2002). Following Indonesia's Independence, the *jurisprudentie* in the Netherlands and *yurisprudensi* in Indonesia developed in different ways (Bedner 2013; Pompe 2005). In the Netherlands *jurisprudentie* increasingly turned into the direction of the case law of common law countries, meaning that *jurisprudentie* has to be followed by lower courts in the Netherlands, whereas at least until the late 2000s the *yurisprudensi* of the Supreme Court in Indonesia did not succeed to create consistency in decisions – the legal development initially moved into the other way: the Supreme Court increasingly struggled to maintain legal unity (IND: *kesatuan hukum*, NL: *rechtseenheid*).

In the Netherlands, Supreme Court case law has increased in significance since the 1960s. Technological and societal changes made interpretation of legal texts increasingly complex and required an active law-making (*rechtsvorming*) role of the Supreme Court. Today, no Dutch lawyer will any longer maintain that the judge only can play the role of the "mouthpiece of the law" (*bouche de la loi, corong undang-undang*). In the Netherlands, as in all countries of the European Union, *jurisprudentie* has turned into case law, and it is accepted by the legal community that judges ought to follow it. In fact, judges now more rely on jurisprudence than ever before (Feteris 2017).

Sebastiaan Pompe in his book "The Indonesian Supreme Court" (2005) has provided a credible explanation of why in Indonesia *yurisprudensi* did not develop as *jurisprudentie* did in the Netherlands. Upon independence there was a lack of judges to serve as Supreme Court judge, and as a measure the chamber system was abolished. Moreover, during the years of authoritarian rule under President Suharto, the function of the Supreme Court was increasingly focussed on resolving individual disputes, thereby neglecting its function of creating consistency in decisions and preserving legal unity. As a result, the judgments produced by the Supreme Court became inconsistent themselves, and as the legal reasoning in judgments of the Supreme Court is often incomplete, they no longer provide sufficient guidance to lower courts (Butt 2019). Moreover, the idea has set foot in Indonesia, that the functions of guiding legal development and creating legal unity of the Supreme Court impinges on the independence of judges to adjudicate cases brought before them (Gandasubrata 1998). As a result, first-instance courts no longer felt themselves bound to *yurisprudensi* and the Supreme Court looked for other means to create more legal consistency – among others through the issuance of circulars (SEMA) and by compiling technical guidelines (Petunjuk Teknis). By making use of its supervisory powers and by issuing internal policies, the Indonesian Supreme Court attempted to increase consistency and predictability of court judgments.

Although in Indonesia there is considerable support among lawyers for the idea Supreme Court judgments do not constitute law-making as they are not precedents (Asshiddiqie 2016) and judges therefore often set aside *yurisprudensi* (Simanjuntak 2019), in legal practice, one can find legal issues for which *yurisprudensi* is accepted, treated as case law and followed by the lower courts, for instance in the cases of the concepts "broken marriage" and "no-fault divorce" that were established by *yurisprudensi* of the Supreme Court (Huis 2015). The difference with *jurisprudentie* in the Netherlands is that in Indonesia one cannot predict which *yurisprudensi* will turn into case law. The label of *yurisprudensi* the Supreme Court attaches to a selection of its judgements in itself provides insufficient guarantees that lower courts, or even Supreme Court judges themselves, will abide by it.

In the first decade of the 21st century, in the Netherlands too the effectiveness of *jurisprudentie* to provide sufficient guidance to the courts was put into doubt. in the digital age, or "the age of disruption", societal changes take place too rapidly and legal issues become too complex to be left to the lower courts to decide without any guidance. The Hammerstein report of 2008 recommended a legal reform in which lower courts, could ask for guidance by the Supreme Court before the case was adjudicated – the so-called prejudicial questions. The idea is that lower courts no longer have to wait for pressing novel legal issues to go up the latter to the Supreme Court (Giesen and Overheul 2015).

Thus, through the 2012 Law on Prejudicial Questions the Dutch created a shortcut to be able to maintain legal unity in in the face of complex technological changes and the legal challenges these pose. A year before, with the same objectives, the Indonesian Supreme Court had issued a Regulation establishing the chamber system and regulating the issuance of SEMA on pressing legal issues and the solutions established by the Supreme Court's chambers in their annual plenary meetings. Thus, the Indonesian Supreme Court continued its policy to rely on its supervisory powers (bureaucratic control) by issuing general solutions for legal issues, while the Dutch Supreme Court continues to rely on its judicial function – judgments that are based on a single legal case.

## 3. Methods

This paper is the result of a collaborative research between legal researchers of Leiden University, Bina Nusantara University and Universitas Indonesia, as part of the *Penelitian International BINUS* (PIB) grant. The research conducted consists of a desk study and interviews. A large part of the study conducted was a desk study. In the framework of this research, we have analysed legal literature about the role of the Supreme Court in creating legal unity in the legal system, analysed the SEMAs issued from 2012- 2020, and analysed the Dutch Law on Prejudicial Questions.

The desk research conducted led to a number of questions about the procedure behind the SEMAs: how the legal questions to be answered in the plenary meeting of the Supreme Court's chambers are selected, how the SEMAs are circulated, and what the position of such SEMA is among other legal sources. In order to find an answer to those questions we interviewed Supreme Court judge I Gusti Agung Sumanatha, S.H., M.H., the Chair of the Civil Law Chamber of the *Mahkamah Agung*, and Supreme Court judge Amran Suadi, the Chair of The Religious Chamber of the *Mahkamah Agung*. These interviews provided valuable additional inside information needed to answer our main research questions of the research.

## 4. Results and Discussion

The first question we intend to answer in this paper is what the differences and similarities are between the Dutch prejudicial questions and the Indonesian SEMA. The results are captured in the following Table 1.

Table 1. Comparison of Prejudicial Questions and SEMA

| | Prejudicial questions | SEMA |
|---|---|---|
| Objectives | Consistency of judgments<br>Resolving pressing legal issues | Consistency of judgments<br>Resolving pressing legal issues |
| Means | Creating a legal shortcut | Creating a legal shortcut |
| Legal foundation | Statute | Supreme Court Regulation |
| Selection | Request by lower courts | Observations and consensus of Supreme Court judges in the annual plenary meeting |
| Origins | A concrete case | A general legal issue |
| Format | A detailed description of the case and the legal reasoning of the Supreme Court | General formulation of the legal solution (without a concrete context) |
| Legal status | Supreme Court Judgment (*jurisprudentie*) | A Supreme Court circular (SEMA) |

The similarities between the mechanisms of judicial questions and SEMA are in the objectives of creating consistency for pressing legal issues and the need for what we have called "a legal shortcut". It is a shortcut compared to the traditional law-making taking place at the Supreme Court level – through case law. The first main difference concerns the legal foundations of judicial questions and SEMA. Judicial questions are introduced by statute adopted by the Dutch Parliament, whereas SEMA are introduced through a Supreme Court Regulation. The latter is a continuation of the tendency observed by Sebastiaan Pompe (2005) of the Supreme Court to rely on its supervisory rather than judiciary powers. It also means that Parliament was not involved in this substantial reform, which can be interpreted as undemocratic.

The second and third differences concern the selection of legal issues and the origins of these issues. In the Netherlands prejudicial questions are posed by first-instance or appellate courts that are adjudicating a complex case that involves a pressing legal issue. The SEMA are the result of a plenary chamber meeting of Supreme Court judges where pressing legal issues are discussed. The judicial question mechanism is bottom-up whereas the SEMA is top-down. As mentioned by Sebastiaan Pompe (2005) the Indonesian Supreme Court increasingly relies on its supervisory powers as Supreme Court judgments are not automatically considered case law by lower courts. The top-down approach is considered a more reliable option in view of the more limited role that case law plays in Indonesia's legal system.

Fourth, with regard to the format in which the legal solutions are published, the Dutch Supreme Court subsequently treats a prejudicial question as a normal case, describing the context of the legal issue, the legal question that needs to be answered, and subsequently providing a complete legal justification for the legal solution. In contrast, the SEMA only publishes the new legal norm. The legal question and its context and the legal reasoning of the Supreme Court judges are not included in the standard format. This means that judges and lawyers will not have much clarity on how to apply the legal solution to concrete cases.

The fifth difference concerns the end product of the legal shortcut. In the Netherlands it has the status of a Supreme Court judgment, which means that it can be considered a new form of *jurisprudentie*. As mentioned, the end-product of the legal shortcut in Indonesia is a SEMA – as there is scepticism within the Supreme Court itself that *yurisprudensi* can attain the role and status of case law in other countries.

## 4. Conclusion

The comparison between the prejudicial questions in the Netherlands and the SEMA in Indonesia has made clear two similarities: (1) their objectives of creating legal consistency pertaining to pressing legal issues; and (2) the way this is done, namely by creating a shortcut for the Supreme Court to provide legal solutions at an early stage of the legal process. However, we have also found several significant differences between prejudicial questions and SEMA with regard to the legal foundations, selection procedure, origins, formats, legal status. The main problem we found regarding the legal solutions adopted in SEMA is that the published SEMA does not contain a legal background, a concrete legal question, or a legal reasoning behind the new legal norm. This makes the legal solutions offered vague and therefore subject to interpretations by lower courts – which may lead to inconsistency in judgments. I therefore would recommend that in the future a more detailed description of the legal problem and the legal reasoning behind this solution will be provided. In this age of rapid changes and digital disruption, judges and lawyers are looking for guidance – in the form of detailed legal solutions.

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