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THE USAHA DAGANG: A COMMERCIAL VENTURE WITHIN INDONESIAN STATE LAW¹

A. Introduction

Publications on Indonesian law generally deal either with state law or with norms that govern life in practice, recently termed by D.S. Lev (1988:708) the 'formal-legal' and the 'pathological' approach respectively. These approaches rarely mix. Studies on state law tend as much as possible to ignore the norms that apply in practice. It is an often heard complaint, in fact, that publications on Indonesian state law may be theoretically and dogmatically sound but are practically of limited use. Pathological studies, on the other hand, may be eminently practical but, because of their great factual differentiation, are of little use to the legislator in Jakarta.

I do not propose to engage in a discussion of the merits of the two approaches, which assuredly are manifold. It is important to point out, however, that each in its own way supports the idea of the existence of a gap between state law and the practice which it purports to govern. 'Formal-legalists' appear to reason things out analytically, without much regard to what happens around them. 'Pathologists', on the other hand, never cease in their eminently practical studies to point out how out of

¹ This article is based on data gathered on research visits to Indonesia in 1986 and 1989. Another, closely connected, paper was presented at a congress organized by the Erasmus University in Rotterdam; it will hopefully be published soon. I am indebted to the Royal Institute of Linguistics and Anthropology at Leiden (KITLV) for its financial support for these visits. The staff of the Van Vollenhoven Institute, in particular Dr. J.M. Otto, and Professor J.Th. de Smidt helped me greatly with their valuable comments on an earlier draft of the article. I wish to express my gratitude also to the staff of the Universitas Airlangga in Surabaya, in particular Dr. R. Prasetya, for being most gracious and helpful hosts during my visits to their city. Most of all I want to thank Oom Maisir and Tante Mis and their delightful family for their kindness, hospitality, tolerance and trust, which have contributed so much to my work and towards making my visits to Indonesia a very pleasant experience. I was given permission to use the research data for the article on the condition that the identity of the respondents not be disclosed. Personal names and place names have hence been fictionalized.

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touch with reality state law really is and to cast doubt upon the role of state law as an instrument of social engineering.

1. Studies of Indonesian company law

The existing studies of Indonesian company law can serve as an illustration of the two different approaches. There is a large number of publications here dealing exclusively with (formal) state law, such as Soekardono (1967), C. Himawan and M. Kusumaatmadja (1973), A. Ichsan (1981), M. Natzir Said (1983), and the doctoral dissertations of N. Makarim (1978) and R. Prasetya (1983). These publications are analytical studies of what the state law is supposed to be. None of them look at the norms that actually apply in practice.

There are very few pathological legal studies of Indonesian company law, on the other hand. There are quite a number of publications on commercial ventures in Indonesia that examine the way in which these work in practice, such as the large body of literature on small-scale enterprises.² These are usually oriented more towards the economic and social than towards the regulatory or normative aspects, however, and hence do not fall within the scope of this essay. Of the few publications of this category in the field of law, two can be mentioned here. One is that by K. von Benda-Beckmann (1987), which nicely illustrates my point, I feel. This interesting and informative article examines the state cooperative venture KUD. The text mentions few state law regulations³, which is understandable, of course, if one bears in mind that the article sets out to look at the norms that apply in practice. Considering these norms, the author finds that the daily workings of the KUD apparently differ considerably from what the state law intended the cooperative to be and do. This publication thus reinforces the idea of the existence of a gap between what state law purports to be and the norms that govern life in reality. The same can be said of the other publication, which is a Leiden dissertation on Indonesian company law by C.B. Kaehlig (1986). In this study, the author comes to the conclusion that companies ostensibly set up in accordance with the legislation in fact are very much influenced by autochthonous

² As an example among many may be mentioned D.K. Forbes (1981). It is interesting to note in this context that Burger's early criticisms of Boeke's concept of east-west economic dualism were based on a categorization of commercial ventures according to a floating scale. This scale runs from large-scale, capital-based commercial ventures regulated by state law at one end to small-scale, family-based commercial ventures regulated by practical norms at the other, with commercial ventures including both elements in varying degrees coming in between (Burger 1953/4:177; 1975:189).

³ There were a number of legislative developments in this field between 1981 (the year of the last state law regulation to be referred to in this article) and 1987, the year in which the article was published, such as Presidential Instruction 4/1984; Decrees of the Minister of Agriculture nos.558/Kpts/Org/6/1981 and OT.210/706/Kpts/9/1983; Instruction of the Minister of Agriculture no. 4/Inst/DL.350/7/1984; Decrees of the Minister of Cooperatives nos. 07/M/KPTS/VI/1983 and 84/M/KPTS/VI/1984; Instruction of the Minister of Cooperatives no. 05/M/Inst/VI/1984.

forms of economic cooperation. He argues that these companies as a result have nothing whatsoever to do with the state law (for instance, Kaehlig 1986:272). This then brings the author to the conclusion that, in these cases at least, state law is too abstract to work in the Indonesian situation.⁴

2. *The Prasetya report*

Since the present discussion is restricted to commercial ventures⁵, special attention must also be given to an unpublished Indonesian government report on Indonesian forms of commercial venture, edited by R. Prasetya (1979), which will be dealt with in greater detail below. This report examines commercial ventures in the Indonesian commercial cities of Jakarta, Medan and Surabaya on the basis of a survey of the registers of the Department of Trade over the years 1971-1977, as well as interviews with a number of notaries. Little is said explicitly about either state law or practical norms. However, only data from sources of state law are collected together here. As a result, the report obviously bestows a good deal of attention on kinds of commercial venture that are explicitly mentioned in the Indonesian Civil and Commercial Codes. More interestingly for the purposes of the present article, it also mentions types of commercial venture that are not referred to anywhere in the law books at all. These ventures, as it turns out, are listed in the sources of state law which constitute the basis of the study.⁶

This rather startling finding makes one wonder about the gap existing between state law and practice, and notably about whether at least in this particular field state law is, in fact, as remote from practice as the aforementioned publications suggest. Consequently the question arises what the legal position is of commercial ventures that are not specified in state law but which exist in practice. It is to this question that I shall address myself next.

3. *A state law perspective of a commercial venture not specified in the legislation*

It is far from self-evident that the absence of references to practical norms in the legislation should signify that such norms then by definition do not form part of the state law or that there are no relevant provisions in the

⁴ For a more comprehensive review of the facts, the argument and the specific view of state law put forward in this book, see Pompe and Winter 1988:10.

⁵ The term 'commercial venture' as used in this article designates an organizational structure aimed at long-term (i.e., not incidental) participation in commerce. In this I follow the definition of the Dutch term '*onderneming*' as given by Van Schilfgaarde (1984:4). I have also followed the latter's reasoning in this connection inasmuch as it is relevant for this article, for which I refer to his book (Van Schilfgaarde 1984:8-10).

⁶ I have found two other books containing references to this type of business, namely Purwosutjipto (1986) and M. Natzir Said (1987). In both, these references are very brief and incidental. Nothing is said about the practical aspects of this eminently practical phenomenon.

legislation. Legislation in general, and legislation in the field of private law in particular, is not always mandatory or exclusive, but can be supplemented by normative systems applying in practice or even be displaced by such systems. When this happens, does this mean that practical norms become state law, or perhaps that the relevant so-called practical norms have been state law all along? The dividing line between state law and norms applying in practice obviously is not easy to draw. Further, the fact that a particular case that is regulated by practical norms has no references to it in the official legislation does not mean that this legislation cannot apply to it.

As regards commercial ventures, it was remarked by several Indonesian experts with whom I talked on the subject that the relevant Indonesian legislation, i.e. the Indonesian Civil and Commercial Codes, does not set out to regulate such ventures exhaustively. A person may set up a business in any form he likes – the resultant contractual relationship will in principle always be recognized in law. The Civil and Commercial Codes only attach certain legal consequences to particular commercial ventures specified therein.⁷

The structure of the codes supports this view. For instance, the second chapter of the Commercial Code (art. 6-12) obliges anyone 'carrying on a business' (in the original Dutch: *'een bedrijf uitoefenen'*) to keep a record of his finances (commonly referred to as 'keeping accounts'). It is precisely the wording of this chapter and its position in the Code, before the passages regulating commercial ventures, that indicate, according to the above-mentioned experts, that the legislator did not intend to regulate commercial ventures exhaustively here. Rather, scope was left for people to set up a business in any way they liked, provided pertinent accounts were kept.

In this view, the setting up of commercial ventures of any of the kinds that are not specified in the legislation but that are listed in the Prasetya report need not in itself be in contradiction with the state law. Rather, the state law prescribes that if a commercial venture of the type that is

⁷ This point is beyond dispute in both Dutch and Indonesian law, so that there is no need to substantiate it here. In this connection it is interesting to note the following, however. The Dutch authority on national conflicts of laws in Indonesia, R.D. Kollwijn, has pointed out that the provisions for the limited liability company in the Commercial Code were not declared applicable to the Indonesian population group. Members of this group could, however, voluntarily submit to them pursuant to the regulation on voluntary submission to Western law (S. 1917-12). According to Kollwijn (1955:235), the reason for not explicitly declaring this type of commercial venture applicable for Indonesians was that, under the submission rules, this would have done away with other types of commercial venture, comparable to the limited liability company, that existed exclusively for Indonesians, for instance the *Inlandse Maatschappij op Aandelen* (S.1939-596). Nevertheless, if the Civil and Commercial Codes had never been intended to regulate commercial ventures exclusively, it would have been possible to explicitly declare the articles on limited liability companies applicable to Indonesians and at the same time safeguard other types of venture, be it that these types would have been safeguarded not by the regulation on voluntary submission (S.1917-12) but by the open-ended formulation of the Commercial Code.

recognized in law is set up, accounts must be kept. From this perspective, the state law is fairly flexible and does allow of the recognition of norms that operate in practice but are not referred to explicitly in the state legislation. As a result, the gap between state law and actual practice is perhaps not as deep as most of the above-mentioned publications would have us believe. I propose to investigate this idea by looking at the place of types of commercial venture that are not referred to in the Indonesian state law (including commercial ventures that are regulated by the legislation). I shall then consider the actual practical working relationship between forms of commercial enterprise that are explicitly indicated in Indonesian legislation and those that are not. But first I shall describe the case that served as research basis for this article.

B. A case in practice

Zafrullah is a Minangkabau who first came to Surabaya together with his wife Laila in 1962. Initially he studied construction engineering, but after a short while Zafrullah quit his studies and started work as an employee with a construction firm. Then he had a job in the civil service for a little over a year, after which he entered upon his hitherto successful career as an independent entrepreneur. For convenience sake, one may divide this career into three stages. Each new stage marks the commencement of important new activities, rather than the abandonment of previous ones; these stages may therefore overlap.

1. Stage one: Establishing clothes shops

The first stage commenced in 1965, when Zafrullah and Laila struck out on their own with the opening of a small clothes shop in a *pasar* complex. He rented a small room in the huge *pasar* building from, in his own words, 'a good Muslim'. In time this proved to be a singularly lucky investment. Business flourished from the start and, indeed, has continued to do so to the present day. In fact, Zafrullah rented a second shop in the same complex, near his first shop, in 1983.⁸ The agreement accordingly was concluded by means of a notarial deed. I happened to be in Jakarta at the time and, to my pleasant surprise, was invited to witness the passing of this deed. This procedure was in all respects similar to that in the Netherlands, including the reading out loud of the contract. The only exception was perhaps that we had all taken off our shoes and left them near the front door.

One of the things that became apparent while I was talking with Zafrullah about this step was that he had given the form he would give his

⁸ A year later, Zafrullah even purchased a third clothes shop, but this he resold shortly afterwards.

business a lot of thought. It was evident that he definitely thought it a bad thing to have the shop named after its proprietor. In fact, when on a recent visit I made him a present of a plate with the name of his business engraved on it and his own name as director underneath, he tactfully gave me to understand that he would appreciate it if next time I would bring him such a plate without his name indicated so explicitly. Finding a form and a name for his business therefore was a matter of some importance to him. He decided at first to call the shop 'Toko M-tex'⁹, but, to his surprise, a formal looking fellow arrived not long afterwards, informing him that for the *toko* form a licence was required, to which costs were attached.¹⁰ So he chose a different form, that of the *usaha dagang*, for the establishment of which no such licence was required. Upon my enquiring why he had opted for the *usaha dagang* form, he replied that his neighbours in the *pasar* had inspired him to do so: virtually all the shops in the *pasar* had this form. The shop therefore was named 'Usaha Dagang (abbreviated as UD) M-tex'.

When I visited Zafrullah in the late 1970s, he actually worked in the shop himself together with his wife Laila and one or two cousins. During my visits in the early 1980s, it became apparent that Zafrullah was frequenting his clothes shops less and less. The day-to-day management came to rest more and more with Laila and a cousin, Aris, and later on with someone outside the family who had been working for them for ten years, Dako. Similarly, the purchase of stock for the shops, which initially was taken care of mostly by Zafrullah and Aris, by the 1980s had clearly passed to Laila and Dako. While in the early stages these purchases were made largely from Chinese dealers, who used to come to Zafrullah's house with large bundles of ready-made clothes late in the evenings, later these doorstep purchases appeared to have been replaced by purchases from wholesale dealers at a large *pasar* in the northern part of the city. These purchases were made on credit and usually took up a full day.

In fact, Zafrullah's only link with the clothes shops in the late 1980s seemed to be through his payment of bills his wife had not taken care of. He also sometimes inspected the books in the evenings, Laila generally not concerning herself with the paperwork. Zafrullah once showed me the payments he had made for one day by letting me see his cheque-book. These payments were for over thirty, varied items. These records appeared to be the only kind of accounts kept for these shops. There was no other paperwork to speak of. More importantly, to my mind, there were no

⁹ Interestingly enough, in the light of the anecdote related above, he eventually named the shop after one of his daughters. But, because he gave it only her first name, the personal link with the family presumably was less clearly indicated. Another interesting point in this connection was that, upon my later asking him why he had named this shop, as well as his other firms, as will appear below, after his two daughters, while his son had not been similarly honoured, he and his wife answered that in Minangkabau society there was no other way.

¹⁰ This was said by Zafrullah to be based on regulations of the *Hinder-Ordonnantie*, see Colonial State Gazette 1926-226, presumably art. 1, section XX.

records kept of current stock. Goods were purchased as the need arose, going mainly by intuition and shrewd guesses. That the administration was a weak spot in the conduct of the business became clear during my visit of 1989. By that time cousin Aris had established himself as an independent trader running a small clothes shop of his own. Zafrullah had actually helped set him up with a large gift of money – which was Aris' due after helping Zafrullah for almost sixteen years. It seemed to me as an outside observer that the two parties might profit by joining forces. When I suggested this to Aris, he agreed, but added that Zafrullah would have none of it, the main obstacle from a business perspective being that there was no administration to speak of. This lack would make it exceedingly difficult to coordinate purchases, which in effect made more intensive mutual cooperation, and to a certain extent also growth, impossible.

2. Stage two: Consolidation through investment in land

The second stage began around 1973. The success of his first clothes shop induced Zafrullah to start looking around for ventures in which to reinvest his profits. He bought a block of land in another part of town in that year, on which he built a small grocery store and a house in 1977.¹¹ The grocery store is favourably situated in a residential area. Zafrullah referred to it, too, as an *usaha dagang*. In the beginning, the proceeds from it were peanuts compared to those from the clothes shop, the land on which it is located being more valuable than the business transacted in it. But by 1989 the profits from it equalled those from the clothes shops.¹² Again, Zafrullah's wife Laila appeared to be in charge of the daily running of the store, together with another cousin, Eddy, with Zafrullah sometimes, but not very often, checking the books in the evening. In 1985 Laila told me that she had big plans for having a shopping complex constructed on the site of the grocery store and for renting out a number of small shops in this complex. She thought there would be a lot of interest in these shops. So far, however, these plans have not materialized, even though the plans for the building have already been drawn. In 1986, one of the reasons for this was that Zafrullah refused to make available the necessary large sum of money for the initial deposit as he apparently needed it himself. By 1989, the children

¹¹ The construction of the large house took only a few months – an exceptionally short time by Western standards. According to Zafrullah himself, the quality of the building is not very good. In this connection there is a joke current among Indonesians about an owner instructing an architect to build him a strong house of, say, one part cement to two parts sand and/or gravel. The architect tells the building contractor to use one part cement to three parts sand/gravel, pocketing the difference in cost himself. The contractor does the same, telling his foreman to observe a ratio of one to four. And so it goes on down the line, until the apprentice learns from his superior that a ratio of one part cement to seven sand/gravel makes for a good, strong mixture.

¹² This was in spite of a poisoned biscuit scare that year, as a result of which the number of supervisors in the shop was increased considerably and Zafrullah himself went to serve behind the counter.

had entered university, which constituted a large drain on the couple's finances, making large investments impossible.¹³

3. *Stage three: New projects in the construction sector*

The third stage began in about 1981. Zafrullah and Laila were working very hard and evidently doing well. In the early 1980s Zafrullah started itching for new projects again. The truth of the matter was, as he told me, that he had been dreaming of having his own construction company ever since giving up his engineering studies. In 1981, he thought he had a sufficiently large capital to give it a go. He set up a small construction company, for which he again chose the *usaha dagang* form, as for his earlier commercial ventures. With this company, he went exclusively for government contracts, feeling that private clients were too unreliable as debtors. So he built a series of schools for the governmental SD-Inpres programme as a sub-contractor.

In 1983 and 1984, the *usaha dagang* form for this company was abandoned and it was replaced by two *perseroan terbatas* (limited company), as provided for by the Indonesian Commercial Code. He had the articles of incorporation duly published in the Government Gazette, as prescribed by this Code.¹⁴

In 1986, Zafrullah was trying to make his mark in the tough construction world. It was very hard work, though – one day he collapsed, bleeding from the nose, on his return home. Laila had her doubts about whether he would succeed.

C. The *usaha dagang* and state law¹⁵

1. *Antecedents of the usaha dagang*

The interesting point to note in the above case of Zafrullah is that he invariably opted for the *usaha dagang* whenever he started a new business. The question then is what an *usaha dagang* is.

The origins of this business form are extremely hard to trace. Although the obvious way of finding the answer would be to check through the records of the Ministry of Trade, these appear to go no further back than the year 1982 for the type of small commercial ventures under consider-

¹³ Laila absolutely refuses to borrow money for the project from a bank, feeling this is too risky. She is considering going ahead with the plans by letting part of the site to a Kentucky Fried Chicken fast food restaurant, which will then finance the further development of the site.

¹⁴ This type of company will be analysed more closely in the second part of this article.

¹⁵ Besides the above-mentioned two rather sketchy published non-pathological studies, there exist two unpublished studies of this kind of enterprise, to my knowledge. They are the Prasetya report (Prasetya 1979) and the Gadjah Mada University MA thesis by Mulyanto (Mulyanto 1984).

ation here. However, the experts¹⁶ I consulted on the subject all gave the same explanation of these origins, which on careful consideration seems quite plausible. According to this explanation, the first *usaha dagang* were set up in the early nineteen-sixties. In this period the Indonesian government was pursuing a policy that disadvantaged the Chinese commercially. This induced a number of Chinese to look for a business form that would not reveal the name or other ethnic characteristics of the owner, and the establishment of which did not require government permission. The limited liability company (*perseroan terbatas*, or *PT*) was ruled out – even though this form is ‘nameless’ by definition, the Indonesian Commercial Code forbidding the use of the name of the owner as name for the company – because for the establishment of a company of this type government permission is required (Commercial Code art. 37). Such permission was not easy to get for a Chinese-owned limited company at the time. Further, as the connection between the form of a commercial venture and the ethnic origins of its owner should not be apparent in any other ways, the *kongsi* and *toko* forms were also out of the question, as these were commonly associated with Chinese ethnicity. Hence a totally new type of commercial venture was devised and given the name *usaha dagang*, meaning precisely ‘commercial venture’.

No one really knows exactly what an *usaha dagang* is in legal terms, and one may doubt that it has any characteristics that distinguish it from other types of venture apart from the name. Most of the people I talked to on the subject appeared to think that the *usaha dagang* generally is a one-man business, although more than one person could participate in it in one way or another. The few publications with a bearing on the matter support this view (Purwosutjipto 1986:2; Natzir Said 1987:53). If this definition is correct, then this form closely approximates the partnership as specified in the Indonesian Civil Code, as indeed Prasetya (1979) has suggested. The fact remains, however, that there is no reference to this form of commercial venture in the Indonesian Civil or Commercial Codes, or in any other formal code of law, for that matter. Hence the *usaha dagang* evidently is a type of commercial venture that was called into being and is governed by practical norms.

2. The *usaha dagang* in the legislation

As I pointed out above, it does not follow logically from the fact that this form of commercial venture is not referred to in the legislation that it then by definition does not form part of the state law or that the legislation does not provide for it. There are in fact a number of features besides the requirement to keep accounts that indicate that the legislation does pro-

¹⁶ I conducted extensive interviews among a number of notaries and lawyers in Jakarta, Bandung, Semarang, Yogyakarta and Surabaya.

vide for this type of commercial venture, be it to a limited extent. I shall look at these features immediately below.

a. Establishment by notarial deed

It became apparent to me during my stay in Indonesia that most of the notaries I talked to had standard deed forms for the establishment of *usaha dagang*.¹⁷ This seems to indicate that notaries in Indonesia derive regular business from the establishment of ventures of this type. It also suggests that some sort of official sanction for and evidence of the proprietary relationship between a particular kind of business and the owner is required. In fact, as the above-mentioned experts asserted, the relevant notarial deed is essentially intended to serve as evidence in any business dealings with the government. The latter generally requires some form of proof of ownership in its dealings with *usaha dagang*, and a person purporting to be the owner may prove this by producing the notarial deed of establishment.

The rather complex government tendering system may serve as an example (see Verrier 1988; Pompe 1989). The foundation for this in the state law is provided by a series of regulations introduced in 1984 (mainly Presidential Decrees nos. 29 and 30 of 1984). According to appendix one of Presidential Decree no. 29, government contracts may only be awarded to commercial ventures possessing a notarial deed of their establishment, a trading licence, sufficient working capital, and so on (Presidential Decree 29/1984, Appendix 1, I.3, section a). The reference to a deed of establishment in these regulations indicates that the applicant must be a commercial venture, and not an individual. At the same time, the wording of these regulations is so general that not only commercial ventures that are specified in the Civil and Commercial Codes appear to qualify for tenders. The logical conclusion thus is that the regulations for tendering procedures apply to *usaha dagang* as well, provided such ventures possess a notarial deed of establishment. Some of the legal aspects of tendering procedures will be considered later on in this paper.

b. The registration of commercial ventures (*Surat Izin Usaha Perdagangan*, or *SIUP*)

One interesting thing about the notarial deed whereby an *usaha dagang* is established is that its formalization requires a prior trading licence (*SIUP*). In the wording of the standard deed form in my possession, a company may be formed 'on the basis of a trading licence granted by the Ministry of Trade'. In 1982 the Indonesian government re-introduced the obligation for businesses to register with a local office of the Ministry of

¹⁷ A blank copy of this form is in the possession of the author of this article.

Trade.¹⁸ This represents a continuation and extension of the colonial regulations in this respect, notably the *Indische Bedrijvenwet* (*Staatsblad* 1927-419) and the *Bedrijfsregelementeringsordonnantie* (*Staatsblad* 1938-86). The Indonesian law on business registration requires a commercial venture to register with the Department of Trade (art. 5(1)). Failure to do so is liable to a fine. The definition of 'commercial venture' does not appear at first glance to be very broad. Article 6(1) exempts only the following category from the obligation to register: 'any small family enterprise which is run exclusively by the owner with or without the cooperation of close kin'. The following article, specifying that further regulations on the subject will be issued by the Minister of Trade, uses such a broad definition as to allow one to regard many limited companies as being exempted from the obligation to register, the majority of these companies being family businesses, as was pointed out by Kaehlig. However, the intention of the Indonesian legislator was otherwise, as is apparent from the decree of the Indonesian Minister of Trade of 1984¹⁹, which specifies that only ventures run by one family for the purpose of providing their daily livelihood are exempted from registration.²⁰ Interviews I conducted with officials of the Department of Trade indicated, in fact, that only street vendors are exempted from registration. Whenever a commercial venture appears to have some sort of continuity, according to them, the duty to register arises. Thus it is apparent that the obligation to register covers a much wider range than the kinds of commercial venture referred to in the Civil and Commercial Codes. This may hence include the *usaha dagang*, which in principle has the continuity which this legislation regarded as prerequisite.

¹⁸ The relevant law is the Law on Business Registration (*Wajib Daftar Perusahaan*), no. 3/1983. It should be noted in this connection that the central registration of businesses is being carried out step by step, with enterprises being registered in categories by kind of activity. The responsibility for registration is to be gradually transferred to the various departments responsible for the relevant branches of activity. Thus, as from 1988, construction businesses will no longer require a trading licence on the basis of registration with the Ministry of Trade, but one on the basis of registration with the Ministry of Public Works. See Joint Decrees of the Ministers of Trade and Public Works re Construction Enterprise Licence, no. 65/KPB/III/1987, of 18 March 1987, and 109/KPTS/1987.

¹⁹ Decree no. 1458/Kp/XII/1984 of 19 December 1984. See also Decree of the Minister of Trade no. 323/Kp/II/84 of 24 February 1984, articles nos. 21 and 22.

²⁰ The relevant articles are:

art. 11, section c: [exempted from registration are] small personal enterprises;

art. 12: By 'small personal enterprises' in art. 11, section c, are meant enterprises which:

- are not limited companies or partnerships;
- are managed, run or controlled by the owner, with or without the cooperation of close kin;
- are intended solely to provide the owner's daily livelihood;
- are made up by hawkers, pedlars or street vendors.

It is not clear to me whether or not these stipulations are meant to be interpreted cumulatively.

c. Taxation

One of the reasons for choosing the *usaha dagang* form no doubt is provided by the fiscal advantages attached to this form. The new Indonesian Income Tax Law (Law no. 7/1983) defines the taxpayer in very general terms. Under this law, the *usaha dagang* can without any problem be regarded as an independent taxpayer.²¹ As a consequence, the income of the owner/entrepreneur and that of the *usaha dagang* are taxed separately, in agreement with art. 17(1) of this law.²² This law does not distinguish between company tax and other forms of income tax. For example, if the income of an individual is 18 million Rupiah, he will come within the second category of taxpayers according to art. 17 and pay tax at a rate of 25%, which in his case comes to approximately 4.5 million Rupiah. If half of this income of 18 million Rupiah were income from his *usaha dagang* and the other half private income, the enterprise and the owner would each be taxed on an income of 9 million, which falls within the first bracket (a rate of 15%). In this case, only approximately 2.6 million Rupiah would have to be paid in taxes in total. The advantages of this are obvious. In addition, the number of deductions for company tax is large; so wages are tax-deductible here, including the wages of the owner/entrepreneur.

Of particular interest in this connection is the fact that, while small commercial ventures of the *usaha dagang* type may be regarded as independent taxpayers under state law, this is not necessarily the case with respect to sales tax. Enterprises with sales worth under 60 million Rupiah and capital under 10 million Rupiah are exempted from taxation on sales.²³ Thus an *usaha dagang* may be advantageous from an income tax as well as a sales tax point of view, provided its capital does not exceed the prescribed ceiling.

It is interesting to note in this connection that the Indonesian tax laws require the taxpayer to keep accounts.²⁴ Thus, the tax legislation fits in neatly with the relevant articles of the Commercial Code discussed above.

²¹ See art. 2, section 1, par. b: a tax subject is any organization, whether in the form of a corporation, limited partnership, state enterprise or regional government enterprise of whatever kind, partnership, firm, *kongsi*, cooperative, foundation, institution, or other permanent body.

²² The article in question runs: 'The tax rates to be applied to taxable income aside from income of the type specified in article 26 of this law are as follows:

Taxable Income	Tax Rate
up to 10,000,000	15%
from 10,000,000 to 50,000,000	25%
over 50,000,000	35%.

²³ Law on Sales Tax no. 8/1983, and Decree of the Minister of Finance no. 430/KMK.04/1984, art. 1, 2, of 1 May 1984.

²⁴ Law no. 7/1983, art. 13(1), which stipulates that 'A resident taxpayer who derives or accumulates income from a business venture and/or the exercise of a profession must keep written records of all transactions in Indonesia, in such a way that the amount of income that is subject to taxation under this law may be calculated on the basis of such records'.

The above are probably the most marked examples of legislation providing for kinds of commercial venture which it itself does not specify. They are not the only examples, however. Legislation for the protection of the environment²⁵, for instance, is formulated in such general terms that it may also extend to the *usaha dagang*.²⁶ In line with Indonesian administrative practice, however, this law has only been carried into effect in a limited number of fields.²⁷ Unlike in the above cases, therefore, the requirement of an environmental permit does not extend to all types of commercial venture, regardless of the activities in which they are engaged.

If the state law is applicable to commercial ventures that are not specified in that law, then the question arises whether the regulations concerned are obeyed in practice. In order to be able to answer this question, it will be necessary to reconsider the above case.

3. Zafrullah's Usaha Dagang and the law

Here I shall take a look first at the way in which the accounts are kept for Zafrullah's various businesses. My observation of the facts confirmed that records were, in effect, kept. Such records were kept for all of his enterprises, but only for the construction business did regular accounts appear to be kept, with a number of people being regularly engaged in keeping these up to date.

The paperwork for the other ventures was done by Zafrullah in the kitchen or living room in the evenings. He would sit here for several hours on end with the cousin in charge of one of the clothes shops, writing up books and ledgers and checking through what seemed to be accounts. The cousin in charge of the grocery store would drop in from time to time with a bunch of paperwork and a wad of banknotes. I hardly ever observed the administrative business of the construction firm being done at home, except perhaps on one occasion. But then it was not clear whether it was really administrative work that was being done or rather some sort of punitive educational exercise that was being carried out. The fact of the matter was that in 1986 a cousin who had worked in Malaysia for some time came to live with Laila and Zafrullah, who employed him in their various enterprises, usually the construction business. He had to do some paperwork for this business in the evenings, which he obviously did not enjoy, judging from his groans and sighs. It soon transpired that Zafrullah made him do paperwork in the evenings precisely when he was dissatisfied with the work of this cousin. Zafrullah would scold the fellow for being

²⁵ *Hinderordnantie*, *Staatsblad* 1926-226, Law 4/1982. See also Natzir Said 1987:54-55.

²⁶ Law 4/1982, art. 7, stipulates that 'Anyone carrying on a business has the duty to consider the environment . . . '.

²⁷ See Decree of the Minister of Industry no. 12/M/SK/1/78 of 26 June 1978 and Decree of the Minister of Mineral Resources and Energy no. 04/8/M/Pertamb./1977 of 28 September 1977.

lacking in the most basic skills of writing and arithmetic, strengthening the impression that it was some form of reformatory punishment being meted out.

With regard to the notarial deed, Zafrullah confirmed that he did possess a deed of establishment of an *usaha dagang* for his construction business. Unfortunately I could not get to see this, but it seems most likely that there was such a document. As I mentioned above, Zafrullah's construction business only accepts orders for the government's SD-Inpres programme for the construction of primary school buildings. For this programme, a tendering system, in accordance with the above-described regulations, applies. It is unlikely that Zafrullah would have launched into this field with an *usaha dagang* if he had not been in a position to secure contracts. It seems a logical conclusion, therefore, that his assertion that his *usaha dagang* were in fact incorporated by notarial deed is correct.

There is another factor that supports this conclusion. The standard notarial deed form that I have in my possession says that the deed is passed and the *usaha dagang* in question incorporated on the basis of a valid trading licence. Therefore, if his *usaha dagang* are registered, the logical next step of signing notarial deeds of establishment must also have been taken.

An inspection of the registers at the local office of the Department of Trade for the period from 29 July 1985 to 17 January 1986, for which I was given special permission, revealed the following.²⁸ The above-mentioned Decree of the Minister of Trade distinguishes between three types of commercial venture²⁹, whereby the size of the capital of a commercial venture is decisive, the three categories being ventures with a capital of up to 25 million Rupiah, those between 25 and 100 million Rupiah, and those with a capital of over 100 million Rupiah. The criteria for determining the size of this capital are not clear to me, but I assume that effective working capital is meant. For the period in question, 656 enterprises were listed in the first category. For 334 of these, no form was specified at all, these ventures being registered simply under their name; 217 were regis-

²⁸ Copies of this particular section of the registers are in my possession.

²⁹ Art. 4. See also the Circular Letter of the Director General of Domestic Trade of 19 July 1986, no. 183/DAGRI/VII/86, giving directions for the implementation of the decree of the Minister of Trade, no. 1458/Kp/XII/84, regarding trading licences (*SIUP*). This letter sets forth a number of formal criteria for the issue, suspension or withdrawal of licences. Thus section II, paragraph 1, specifies that a licence should be issued subject to the submission of 'A copy of the letter/notarial deed of incorporation of the company and confirmation by the Department of Justice or an authorized agency thereof in the case of a corporate body'. I interpret this article to mean that 'confirmation' is necessary only in the case of a 'corporate body', in line with art. 36 of the Commercial Code. This interpretation is supported by section II, paragraph 8, which states that 'In the case of enterprises owned by private individuals, attachment of the documents specified in paragraphs 3, 4, 5 and 6 will suffice in the event where [the owner] does not possess a notarial deed'. The paragraphs referred to here regulate subjects such as passport photographs, identity cards, etc., which are not relevant to the present subject.

tered as *toko* (shop), and the remaining 105 as *usaha dagang*. Not one entry for this category mentioned a commercial venture of the types that are enumerated in the Civil or Commercial Codes. For the other two categories the opposite was true, the enterprises in these which were recorded in these registers being only of the types mentioned in these codes, with the reservation that of those belonging to the second category 13 were *usaha dagang*, and of those in the highest category only 5. The representation of *usaha dagang* in all three categories, even that of firms with the largest capital, is quite surprising. One would expect entrepreneurs in the highest category to restrict their liability by opting for the limited liability company form. One reason why this is not always the case may be that in Indonesia social pressures may make it impossible for the owner/director of a limited company to restrict his liability even where legally this is possible, as Kaehlig has pointed out. Obviously in practice the tax argument plays a role in this. According to notaries in Semarang whom I interviewed, the local tax office in that town actually advises entrepreneurs who are just setting up to adopt the *usaha dagang* form because of the fiscal advantages this offers, in combination with the low starting capital needed.³⁰ However that may be, the above findings indicate that there are *usaha dagang* registered with the Department of Trade. When I asked Zafrullah about his trading ventures, he confirmed that he had all his *usaha dagang* registered.

Zafrullah was not too informative about the fiscal aspects of his commercial ventures. It is obvious, however that his reluctance to have his person associated with his commercial ventures, as became evident from the above-recounted incident of the name plate for his *usaha dagang*, had something to do with taxation, notwithstanding his protestations that it looked too conceited to have one's name mentioned so explicitly as **director** of an enterprise. An interesting point to note in this connection is that the exact opposite is true in Indonesian commercial practice in the case of private contractual relationships. As Kaehlig has pointed out, here the contracting parties know exactly who are the persons behind the unnamed commercial venture with which they conclude a contract. The reason for this difference may be that the latter type of commercial relationships are relationships between private individuals and the former between a private individual (the taxpayer) and the state. In any case, this point requires further investigation.

D. Conclusion

An interesting conclusion prompted by the above is that in the case of

³⁰ Some of these notaries added, however, that this was only true where the form of an enterprise was changed from *commanditaire vennootschap* to *usaha dagang*.

commercial ventures, Indonesian state law appears to be much more adaptable to norms applying in practice than is often assumed. Ventures of the *usaha dagang* type can serve as an example. They are among the most common type found in present-day Indonesia, and yet are mentioned nowhere in the state law. A close scrutiny of this law reveals that these ventures may in effect be governed by it, while the results of field research show that entrepreneurs in fact subject themselves to the regulations set forth in that law. This is notably the case where they stand to benefit by this, for instance where it enables them to secure government contracts. The way in which these ventures adapt themselves to and become integrated in the sector that is regulated by state law must remain a subject for further research.

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