LEGAL ASPECTS OF BUSINESS LICENCES IN FINLAND

BY

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1. GENERAL REMARKS

Every society has its legal foundations which cover all important aspects of human life. In the economic sphere one encounters—at least in the countries where free enterprise prevails—an elaborate system of legal rules covering such areas as sale of goods, patents, trade marks, companies, etc. The basic principles of the law, as far as economic activities are concerned, are not always very clearly formulated. They are often understood as self-evident foundations of the life of the community.

The challenge of socialism has certainly given added weight to problems concerning legal aspects of various kinds of business. Within the capitalist countries themselves new needs continually arise to enlarge the public control of economic activities. I am referring especially to the problems created by water and air pollution. The impending shortage of fresh water, alone, will gradually lead to a degree of public control of industries that are heavy consumers of water. Traditionally, considerations of, e.g., public health, morals, or public order have justified public control of the manufacture and sale of drugs, firearms, alcohol, etc.

From a legal point of view the basic principles in a "capitalist" system are those of (1) private property and (2) freedom of business. To these should be added (3) freedom of contract, which is a prerequisite of (4) the credit system. It is by no means self-evident that property and the right of economic enterprise should be treated separately. Whether these rights should be so treated is a constitutional question of great importance, especially in a country like Finland, where the constitution guarantees the right to private property but has nothing to say about freedom of business.

As regards various kinds of economic activity, the various legal standpoints of society may be roughly classified as follows: (1) the activity is free to all who fulfil some very basic requirements (e.g., full age), (2) the activity requires a special licence or authorization from a public authority, (3) the activity is monopo-

lized in the sense that it is legally a *privilege* of a certain person or company or the state itself, and (4) the activity is totally forbidden.

From a legal point of view the socialist state might be characterized as a state where as a matter of principle the production and sale of goods is a monopoly of the state or of other public (collective) entities. The state has also a monopoly of ownership as far as the means of production are concerned. On the other hand, private ownership is by no means unknown in a socialist state, but its role is very much restricted in comparison with the role of private ownership in a capitalist state.

The purpose of this article is to give a general picture of the public control of business activities in Finland in so far as the control takes the form of a licence or authorization given by a public authority. There are, of course, many other forms of public control of economic activity, but they are outside the scope of this paper.

2. MAIN FEATURES OF THE FINNISH SYSTEM

The Freedom of Business Act, 1919, is based on the principle of freedom of commerce, which was introduced into Finland by an earlier Act of 1879. The guild system, which formerly prevailed in Finland as well as in other Northern countries, was abolished in 1868.

Regulated forms of economic activity are listed in the Freedom of Business Act, 1919, sec. 3. Among the most important kinds of regulated business activities in Finland are banking, insurance, hotels, restaurants, pharmacies, road transport, etc. Restrictions on specific branches of commerce have also been introduced by separate acts, e.g., the Foreign Currency Dealings Act, 1959.

If a business activity is listed in the Freedom of Business Act, 1919, sec. 3, it can be regulated by statutory order (decree). This regulation usually means that the right to carry on a restricted business activity is subject to a licence or permit issued by a public authority, usually by the provincial administrative board, but sometimes, as for instance in the case of commercial banks and insurance companies, by the Council of State (Cabinet). A regulated business is thus usually a licensed business.

If a type of business is free, as most are, the operator must fulfil two requirements: he or she must be fully responsible in law and must not have been convicted of certain (grave) crimes (Freedom of Business Act, 1919, sec. 6). Before the enterprise is started, a local authority must be notified (Freedom of Business Act, 1919, sec. 7). If the enterprise is on a very small scale, however, the operator need not have the qualifications mentioned above and the authorities do not have to be notified. Such a business is one where no other persons are employed than the spouse of the operator or his/her minor children and which has no shop or office premises intended for use by the public (Freedom of Business Act, 1919, sec. 5).

The Freedom of Business Act also applies to corporate bodies, such as partnerships, limited partnerships, companies limited by shares, and cooperative societies.

The position of *foreigners,* whether individuals or corporate bodies, is a subject which will be dealt with separately.[1] A foreigner who wants to establish a business in Finland must apply to the provincial administrative board for a licence. The applicant must be a person fully responsible in law and of known integrity. Moreover, he must produce a guarantee for payment of three years' taxes. If the enterprise requires a special licence or authorization, the foreigner must—in addition to the licence from the provincial administrative board—have a special licence for that type of business activity. Some kinds of regulated activity are, however, of such character that a licence can be obtained only by a Finnish citizen or a Finnish corporate body. Such activities are, e.g., banking and savings bank business and the manufacture of and trade in firearms.

There are some government monopolies in Finland. The manufacture, import and sale of spirituous liquors is the monopoly of a state-owned company (under the Liquor Act, 1932). Sound and television broadcasting is in practice the preserve of a state-owned broadcasting company. The postal, telegraph and long-distance telephone services are also a state monopoly.

[1] See Veikko Reinikainen, "Aspects of the Right of Establishment by Aliens in Finland", *Economic Review* (Helsinki), no. 3, 1964, pp. 119–39.

3. THE BUSINESS LICENCE FROM A LEGAL POINT OF VIEW

The concept of "business" or "means of livelihood" may be defined differently in different countries. In Finland, the historical background has to be taken into account. Thus, farming and forestry are not treated as business activities, probably because these occupations have been free to all citizens from the most ancient times. Mining, on the other hand, comes under the provisions of the Freedom of Business Act, 1919. Business activity within the meaning of the Freedom of Business Act, 1919, is defined as *any independent and continuous activity which is not contrary to the law or good morals and which is carried on for the purpose of making profit.* The *independence* of an activity is judged on the ground of legal criteria, thus being separate from the idea of economic independence as opposed to a status of dependence. In the legal sense an employee is never independent of his employer.

Professional activities, e.g., the work of doctors and dentists, are not business activities within the meaning of the Freedom of Business Act, 1919. There are some differences, which seem to be legally relevant. A doctor, for instance, can either do his work as an independent person or as a civil servant or as a private employee. The authorization that is given to members of a certain profession is also more strictly personal than is a business licence. There are further other minor differences.

The business licence belongs to a larger group of administrative permits. Logically, the giving of permission to do something must presuppose the existence of a general norm which forbids the same action. In this case the norm is not unconditional but conditional: the activity is forbidden *unless* a person gets a permit for it. There must also be found an organizational norm prescribing which organ is competent to issue the permission.

Administrative permits must be seen as means of social control, which may serve different purposes, e.g., public health (manufacture and sale of drugs), public safety and order (firearms), public morals, health and fire prevention (hotels and restaurants), prevention of economic exploitation (housing agencies), etc. The fact that a certain kind of economic activity requires a licence does not indicate that the activity should be considered unacceptable as a matter of principle. It only indicates that strong public

interests are connected with the activity and especially with the manner in which it is pursued. Thus a permit or licence differs from a *dispensation,* which is an exemption from a prohibition that is meant to be real.

4. FREEDOM OF BUSINESS AND THE FUNDAMENTAL RIGHTS OF CITIZENS

In Finland, the fundamental rights of citizens are guaranteed by the Constitution Act of 1919.[2] Art. 6 of the Act is the most important provision in this respect:

> Every Finnish citizen shall be protected according to law as to life, honour, personal liberty and property.
>
> The labour of the citizens shall be under the special protection of the State.
>
> Expropriation of property for the public benefit subject to full compensation shall be regulated by law.

Other fundamental rights guaranteed by the Constitution Act of 1919 are those of equality before the law (art. 5), right of sojourn, of choosing one's place of residence and of travelling within the realm (art. 7), freedom of religion (arts. 8 and 9), freedom of speech and the right to print and publish written or pictorial representations without interference, freedom of public meetings and the right to form associations (art. 10), inviolability of domicile (art. 11), and the secrecy of postal, telegraphic and telephonic communications (art. 12). Art. 14 contains provisions safeguarding the national languages—Finnish and Swedish.[3]

The Courts in Finland have no power to review the constitutionality of laws. Thus the observance of the rules concerning fundamental rights is mainly a responsibility incumbent upon Parliament itself. Doubtful cases are usually discussed at length in the Constitutional Committee of Parliament, where expert legal advice is often used. If this scrutiny reveals that a proposed measure would violate some fundamental right, the Bill is often

[2] See *Constitution Act and Parliament Act of Finland,* published by the Ministry for Foreign Affairs, Helsinki 1959.

[3] See Paavo Kastari, "The Fundamental Rights of Citizens", in Jaakko Uotila (editor), *The Finnish Legal System,* Helsinki 1966, pp. 41–53.

amended on this preparatory stage, before it becomes a law. More often than not, this revision means that the Bill can be passed as an ordinary Act—generally by simple majority. Finland has, however, a peculiar way of dealing with Bills that contain provisions contrary to fundamental rights. Such enactments are regarded as exceptions to the Constitution and as such they can be passed by resorting to the same procedure as in amending the Constitution itself, although the text of the Constitution is left unchanged.[4] In most cases such enactments interfere in some way or other with the property of the citizens (e.g. agrarian reforms).

Freedom of business is not among the fundamental rights guaranteed by the Constitution Act, 1919. The rule that *freedom* is guaranteed under the Constitution has not been understood to mean that restrictions upon certain kinds of economic activity would amount to violations of the Constitution. In the legislative work more attention has been given to the problem whether the right to carry on a business is in itself property in the meaning of art. 6 of the Constitution Act. Generally, it is understood that economic activity presupposes the use of property and that restricting or forbidding that activity may in practice come very close to compulsory acquisition of property. In this way the problems concerning freedom of business have been rather closely linked in Finland with the constitutional guarantee of property.

When discussing freedom of business from a constitutional point of view, it is useful to make a clear distinction between persons who are actually engaged in a business activity of some kind and those who are not. In the following text the term "right" refers to the legal status of the former group of persons. Where freedom of business prevails, any person who fulfils the basic legal qualifications may start some kind of business activity. Possible restrictions curtail only his potential rights. In this article the term "freedom" denotes this legal possibility of action even when it is not actually made use of.

In what follows, a brief description is given of the constitutional aspects of the most important legislative measures in Finland restricting the freedom of business. Part of the legislation still in force dates from the time before the Constitution of 1919, which was preceded by the Constitution of 1772.

By a Statutory Order of 1872 the manufacture and sale of matches containing white phosphorus was completely forbidden.

[4] See Kauko Sipponen, "Some Aspects of the Delegation of Legislative Power in Finland", *Scandinavian Studies in Law*, 1965, pp. 159–176.

No compensation was paid for the loss suffered by those hitherto engaged in such activities. Pawnbroking, after having been a free business, became restricted under an Act of 1898 and was practically made a monopoly of the urban municipalities. No compensation was paid to pawnbrokers active at the time when the act came into force, but by virtue of special provisions they were permitted to continue their activities for a period of 10 years.—The employment agency business used to be free until by an Act of 1917 it was made a restricted activity which could be carried on only by municipalities or—upon special authorization—by certain societies. No compensation was paid to those who were active in the field at that time.—Economically, the Prohibition Act of 1917 was the most important piece of legislation concerning business activities. This act, which forbade all manufacture and sale of alcoholic liquors, gave no compensation to distillers of and dealers in such liquors. When a more liberal Liquor Act was enacted in 1932, such problems, of course, no longer existed.

During the preparation of the Pharmacies Act, 1928, the legal nature of "privileged" pharmacies—some of which dated from the 17th century—was carefully considered. These privileges (numbering only 33 at the time) were both transferable and hereditary. The Constitutional Committee of Parliament was of the opinion that privileged pharmacies were property in the sense of the Constitution Act, 1919, sec. 6. As the proposed Bill would have deprived the owners of their privileges without compensation, the Committee stated that the Bill could be passed only by observing the procedural provisions for constitutional amendments. The owners of privileged pharmacies then declared that they would be satisfied if they could retain their privileges for a period of 40 years and thereafter have the status of ordinary pharmacies (which are not transferable and not hereditary). Subsequently, the Pharmacies Act was passed as an ordinary Act, by simple majority.

Privileged pharmacies are in Finland the only known case where business rights have been treated as property in the sense of the Constitution Act, 1919, sec. 6.

The State Granary Act, 1951, was passed in accordance with the procedure for constitutional amendments. It authorized the Cabinet to set up a monopoly for the State Granary in respect of grain imports. This was not in itself the reason why the constitutional procedure was applied. Rather, the argument was that the monopolization would render certain equipment useless and also

prevent the import of certain cargoes already bought. No compensation was paid for loss. In this connection, it was also agreed that legally the right or freedom to grain imports was not in itself "property".

The Foreign Currency Dealings Act, 1959, was passed as a simple statute. The act made dealing in foreign currency a restricted business which could be carried on only by the Bank of Finland or, subject to permission of the Ministry of Finance, by a restricted group of corporations or persons. A clear distinction has been made between this kind of regulation and the currency restrictions which are based on the Currency Restrictions Act, 1959. This latter act, like its predecessors, was passed in compliance with the rules concerning constitutional amendments.

5. THE GRANTING OF BUSINESS LICENCES

Usually certain requirements specified by law or statutory order must be fulfilled before a business licence can be obtained. These requirements may be concerned with the applicant's person (e.g. integrity, training, the legal structure of a corporation) or with the usefulness of the planned activity (e.g. road transport).

When an application for a business licence has been filed, the authority must, before rendering its decision, examine two separate questions: (1) Are all the legal requirements fulfilled? (2) If the answer to this is in the affirmative, shall the licence be granted or not? The keeping apart of these two "phases" of deliberation is of particular importance in Finland, where legal questions and questions of expediency are dealt with separately in the system of administrative appeals.[5] In the overwhelming majority of cases, the licence must be granted if the legal requirements are fulfilled. This is quite natural in a country where freedom of business is a matter of principle. But there are some cases where the authority has freedom of discretion even where all the requirements are met. Such cases are usually those involving important public interests (e.g. safety and public order) or where the wording of the law clearly indicates discretionary powers.

[5] Cf. V. Merikoski, *Le pouvoir discrétionnaire de l'administration*, Brussels 1959.

Very often the question arises whether the authority may attach to a business licence conditions or stipulations not clearly envisaged by the law. If the licence is one of those which the authority is free to grant or refuse at its discretion, it can also attach conditions and stipulations to it rather freely. On the other hand, if the licence is of a type which has to be granted if the requirements are fulfilled, there is little place for such conditions and stipulations. Only those necessary from the point of view of public control are allowed.

If the licence is not granted, the authority must state the reasons for its decision. This rule is not clearly stated anywhere in written laws, but it has been laid down in a number of decisions by the Supreme Administrative Court of Finland (KHO).[6]

In case of refusal, the applicant has the right of appeal. Even a favourable decision may be appealed against, e.g. for the reason that the appellant challenges the term of the licence or some of the conditions and stipulations attached to it. During the last few years the question has been discussed whether the applicant's *competitors,* too, are entitled to appeal if the licence is granted. The main rule is that competitors have no right to appeal. Lately exceptions have been made to this rule, especially in cases where the competitor—himself a licence-holder—not only has the right to pursue an activity but also is *obliged* to do so.[7] Such licences are given, *inter alia,* for road transport undertakings and pharmacies. It has been argued that in such cases the granting of a new licence may sometimes mean economic disaster for an existing licence-holder, and therefore the latter is in need of legal protection. In most cases, however, the business licence does not *oblige* the licence-holder to carry on his business. Therefore, such a licence-holder has never been allowed to appeal against a decision to grant a new licence to another person.

A brief description of the system of administrative appeals in Finland will be given at the end of this article (see section 8 *infra).*

[6] See KHO 1945 II 406; 1953 II 474; 1962 II 287.
[7] KHO 1963 A I 15; 1963 A II 238; KHO 5.4.1965 no. 1483.

6. THE CARRYING ON OF THE LICENSED BUSINESS

Before commencing his business activities, the licence-holder must, under the Freedom of Business Act, 1919, sec. 7, notify a local authority.

A business licence is of a personal character and is not transferable. This does not prevent the licence-holder from having in his service auxiliary persons and employees. From the point of view of public control it is, however, important to know who is responsible for the conduct of the business. In many cases the licence-holder is required to appoint a *responsible manager* who must be approved by the supervising authority.

The carrying on of a licensed business is usually connected with *supervision* authorized by law or delegated legislation. The supervising authority is not necessarily the authority that is competent to grant the licence. It is the duty of the supervising authority to ensure that the business is conducted according to the law and the special conditions attached to the licence.

Supervision does not mean that the licence-holder is generally subordinated to the supervising authority. Usually, the licence-holder has duties towards the supervising authority only in so far as these are based on statutory rules. The authority must, e.g., have a clear authorization to conduct inspections of any kind. Also, the licence-holder is obliged to provide the supervising authority with information only to the extent he is required to do so by law. On the basis of delegated legislative power (Freedom of Business Act, 1919, sec. 3), the duties of the licence-holder in this field may be defined in a statutory order.

The licence-holder has a strong interest in ensuring that the information he has given to the supervising authority should not be made public. It may contain business secrets. Here his interests are safeguarded by special clauses in the Publicity of Official Documents Act, 1951, and its Promulgation Order.

There are various kinds of sanctions that may be used by the supervising authority. The most common sanctions are warning and temporary withdrawal of the licence. In any case, only such sanctions may be used as are based on statutory rules. Before any kind of sanction is applied, the licence-holder must be heard. Ordinarily, the licence-holder may also appeal against a decision that a sanction is to be applied, though this is not always so in the case of a warning, which is considered the most lenient kind of sanction.

7. CESSATION OF THE LICENCE

A business licence may come to an end for various reasons. Some of these grounds, such as the death of the licence-holder or the expiration of the term, cause *ipso iure* the cessation of the licence. In most cases, however, the cessation of the licence requires a decision by a competent authority, usually an administrative authority but in exceptional instances an ordinary court of law. In practice, *revocation* by decision of an administrative authority is the most important situation.

The revoking of a business licence must be treated as a type of legal sanction. Whether there is sufficient reason for revocation is always a legal question, not one of expediency. Generally, laws and statutory orders concerning regulated business activities also contain norms on revocation of licences. These rules display great variety and cannot be described here in detail.

It is an accepted principle in Finnish administrative law that when using sanctions against individuals, the authorities must display a sense of proportion. When there are many kinds of sanctions available, the heaviest among them may not be used for minor faults. In this field, revocation of the licence is considered the ultimate sanction.

The most common reason for revoking the licence is the fact that the business has not been conducted according to law and the conditions and stipulations of the licence. Very often the question arises whether the standards of the activity are too low, a matter which cannot always be determined by legal rules; it must be judged with regard to the standards of the branch of activity in general.

It has been said before (see section 6 *supra*) that the business licence is personal, i.e. non-transferable. It is not uncommon that the licence, though it is *res extra commercium,* is transferred together with a business when it is sold with its assets and liabilities. Such a transaction is null and void as far as the licence is concerned. It usually leads to the withdrawal of the licence.[8] This does not, however, prevent the new owner of the business from applying for a licence. If he does not fulfil the legal requirements for obtaining a licence, the stage is set for litigation between the vendor and emptor. A lawyer would advise that the transaction be made *conditional,* i.e. to become effective only after the emptor has obtained a business licence.

[8] KHO 1960 II 71, 114; 1963 A II 277.

There are some provisions on the revocation of a licence based on the fact that the licence-holder has lost his integrity and reliability. In several cases the Supreme Administrative Court has found that such a decision of revocation must be based on deeds and facts which are relevant as disqualifying factors because of their close relation to the type of business activity in question. Thus, while a taxi owner's licence could not be revoked because of unpaid taxes,[9] it might well be withdrawn because of drunken driving.[1]

Bankruptcy is dealt with in different ways in various fields of regulated business. In most cases it leads *ipso iure* to the cessation of the business licence. In some cases, however, bankruptcy is treated as a valid reason for withdrawal of the licence.

The decision on revocation must be preceded by a formal *hearing* of the licence-holder. The reasons for the revocation must always be stated in the decision. In case of revocation, the licensee has, of course, a right to appeal against the decision.

8. LEGAL REMEDIES[2]

In Finland ordinary courts of law are not entitled to review administrative action. This power is given to administrative courts. The foremost among these is the Supreme Administrative Court which was established in 1918. By the Provincial Courts Act of 1955 provincial courts were set up within the provincial administrations. A provincial court is composed of three members and its main task is to deal with appeals falling within the jurisdiction of provincial administrations. The judgment of the provincial court is issued as a decision of the provincial administration. Generally an appeal can be made to the Supreme Administrative Court. The provincial courts might, in fact, be regarded as administrative courts of first instance.

Since the earliest times, it has been a rule of Finnish administra-

[9] KHO 1960 II 72, 498.

[1] KHO 1958 II 288.

[2] See Reino Kuuskoski, "The Administrative System and Legal Safeguards in Administration", *The Finnish Legal System*, Helsinki 1966, pp. 89–102; V. Merikoski, "Legality in Administrative Law", *Scandinavian Studies in Law*, 1960, pp. 125–49; Jaakko Uotila, "Improving Public Administration in Finland", *International Review of Administrative Sciences*, 1961, pp. 65–70.

tive law that appeals against the decisions of a lower authority can be lodged with a higher authority. This rule has been firmly established in the Administrative Appeals Act, 1950. The most important reform in this Act was the extension of the right of appeal so as to include the decisions made by the Cabinet and the ministries. In these cases, an appeal can be made, on legal grounds only, to the Supreme Administrative Court.

Appeals against the decisions of lower governmental authorities may be based either on legal grounds or on the ground that the authority did not use its discretion expediently. In both cases, appeals are channelled to the Supreme Administrative Court in the last instance. According to the Supreme Administrative Court Act, 1918, sec. 5, this court must examine whether the appellant attacks the decision of authority *primarily* on legal grounds or on grounds regarding the expediency of the decision. In the latter case, the appeal must be transferred to the Cabinet for decision. Before transferring a case, the Supreme Administrative Court has to decide upon the possible legal questions involved.

It has been pointed out earlier (see section 5 *supra*) that in most cases a business licence must be granted whenever the legal requirements are fulfilled. If a licence is refused in such a case the appeal remains completely in the jurisdiction of the Supreme Administrative Court. But there are some situations where the licensing authority has free discretion even if the legal requirements are at hand. If a licence of this kind is refused and the decision is appealed against, the jurisdiction of the Supreme Administrative Court is more limited. The Court has to examine only the legal side of the issue. If the Court is satisfied that the legal requirements are fulfilled, it will give a decision to that effect, and then transfer the case to the Cabinet. If, on the other hand, the Court finds that there are legal obstacles which prevent the granting of a licence, there is no need to trouble the Cabinet. The applicant has lost his case.

If follows from what has been said before that the revocation of a licence is always considered to be a question of law, in which there is no place for discretionary power.