Constitutional judgment 3-4-1-3-05

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-3-05
Date of decision	2 May 2005
Composition of court	Chairman Märt Rask, members Tõnu Anton, Lea Kivi, Ants Kull, Jüri Põld
Court case	Complaint of members of the Riigikogu P. Kreitzberg, S. Mikser and H. Õunapuu against the resolution of the Board of the Riigikogu of 14 December 2004, refusing the registration of the faction of the Estonian Social Liberals
Complainants	Peeter Kreitzberg, Sven Mikser, Harri Õunapuu
Court hearing	Written proceeding
Decision	**To dismiss the complaint of Peeter Kreitzberg, Sven Mikser and Harri Õunapuu**

FACTS AND COURSE OF PROCEEDING

1. Members of the Riigikogu Peeter Kreitzberg, Olev Laanjärv, Rober Lepikson, Jaanus Marrandi, Sven Mikser, Mark Soosaar, Liina Tõnisson and Harri Õunapuu, who had left the faction of the Estonia Centre Party, submitted an application to the Board of the Riigikogu for the registration of the faction of the Estonian Social Liberals.

2. By its resolution of 14 December 2004, on the basis of § 40(1) of Riigikogu Rules of Procedure Act (hereinafter “the RRPA”), the Board of the Riigikogu refused to register the faction of the Estonian Social Liberals.

3. On 23 December 2004, P. Kreitzberg, S. Mikser and H. Õunapuu filed a complaint against the resolution of the Board of the Riigikogu, applying for annulment of the resolution and declaration of § 40(1) and § 41(1) and (3) of the RRPA partly unconstitutional. By its ruling of 17 January 2005 the Constitutional Review Chamber of the Supreme Court resumed the proceedings for the review of constitutionality of relevant legislation of general application and involved the participants in the constitutional review proceeding in the hearing of the matter.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING

4. The complainants are of the opinion that § 40(1) and § 41(3) of the RRPA are unconstitutional to the extent that the provisions do not allow the members of the Riigikogu who are not members of a political

party, to form a faction. § 41(1) of the RRPA is unconstitutional to the extent that the right to submit applications for the registration of factions is limited to five days after the first sitting of the Riigikogu. Due to the unconstitutionality of these provisions the resolution of the Board of the Riigikogu of 14 December 2004, which is in formal conformity with the Riigikogu Rules of Procedure Act, is unconstitutional, too.

The contested provisions are in conflict with the principle of free mandate, established in § 62 of the Constitution, because the provisions do not enable all members of the Riigikogu to exercise their rights and duties pursuant to their conscience. The restrictions tie a member of the Riigikogu to the political party, in the list of which he or she was elected to the Riigikogu, to unjustifiably wide extent. If members of the Riigikogu wish to leave a faction, they can not form a new faction and they are deprived of the right to participate in the work of the Riigikogu to the extent guaranteed to factions. When leaving a faction a member of the Riigikogu is deprived of his or her office as well as of a secretary, thus his or her decision is made dependent on economic and practical considerations.

Secondly, the contested provisions are in conflict with the right of members of the Riigikogu to form factions, established in § 71(2) of the Constitution. Pursuant to § 71(3) of the Constitution only the procedure for the formation of factions can be established by law, and not the grounds for the formation of factions (number of members, membership in political parties, etc.), thus the referred provisions are unconstitutional even in the formal sense.

Thirdly, the contested provisions are in conflict with the principle of equal treatment, established in § 12 of the Constitution. Proceeding from the principle of free mandate and from the right to form factions the members of the Riigikogu are presumably equal. But as the right to form factions is not guaranteed to all members of the Riigikogu, the members of the Riigikogu are treated unequally without a ground. For example, the Social Liberals can not co-ordinate their activities in standing committees, they are appointed to committees by the Board of the Riigikogu, and neither can a common workroom be allocated to them. Thus, the members of the Riigikogu belonging to factions have unjustifiably better possibilities for exercising their mandates. The Social Liberals lack the rights proceeding from § 54, § 98(5) and (6), § 106(2), § 111, § 116(4), § 117(2), § 118(4), § 120(4), § 126, § 132(1), § 134, § 136, § 154 and § 155 of the RRPA. There are no reasonable and weighty grounds for such large-scale unequal treatment of members of the Riigikogu.

Furthermore, § 40(1) of the RRPA is in conflict with the principle of proportionality arising from § 11 of the Constitution. The aim of the restrictions established in § 40(1) of the RRPA is to create stability and prevent fragmentation within the Riigikogu as well as on the Estonian political landscape as a whole. The restrictions probably serve the aim of preventing disunion. The aim is achievable by other measures, just as effective but less infringing. For example, it would be possible to provide that at least five members of the Riigikogu may form a faction and that a faction must have at least five members, and that members of the same political party may form only one faction. As the members of a political party could form only one faction, the substantial distortion of the will of the constituents would be precluded. Neither are the contested restrictions proportional in the narrow sense. The restrictions undermine the right of the members of the Riigikogu to freely exercise the rights arising from their mandate to a greater extent than it is justifiable by the aim of creating a stable structure of political parties and political landscape.

5. In its explanations concerning the complaint, submitted to the Supreme Court, the Board of the Riigikogu is of the opinion that the complaint is unfounded.

Satisfaction of the application for the registration of the faction of the eight members of the Riigikogu would have been in conflict with the second sentence of § 40(1) of the RRPA, pursuant to which members of the Riigikogu who are elected from a list of candidates of the same political party may form only one faction.

Although § 71(3) of the Constitution does not expressis verbis provide for the establishment of the conditions of the formation of factions by the Riigikogu Rules of Procedure Act, it is unthinkable that the Riigikogu could not establish such conditions in the interests of organising its activities and ensuring its

efficiency. Due to the right of self-organisation the Riigikogu has wide discretion regarding its internal organisation of work.

The Riigikogu Election Act has been gradually amended towards party-centred elections, in order to organise the political landscape. Pursuant to the Riigikogu Rules of Procedure Act, passed on 5 November 1992, a faction could be formed by at least six members of the Riigikogu and each member of the Riigikogu could belong to only one faction. That procedure enabled to from new factions not based on the concrete lists of candidates. The Riigikogu Rules of Procedure Act passed on 15 November 1994 introduced an amendment concerning factions, the aim of which was to preclude the formation of new factions by members of the Riigikogu who had been elected from different lists of candidates. On 17 February 1999, § 30 of the RRPA was amended, decreasing the number of members of the Riigikogu necessary for the formation of factions to five and precluding the formation of more than one faction on the basis of one list of candidates that had participated in the elections. The connection between a political party and its faction was more clearly declared through the name of the faction. By the amendment to the Riigikogu Rules of Procedure Act, passed on 17 November 1998, the possibility of formation of election coalitions of political parties was eliminated. Imposition of comparatively rigid rules for the formation of factions has been a clear and unambiguous will of several compositions of the Riigikogu.

§ 60(1) of the Constitution requires elections based on the lists of candidates, elections where – according to the valid law – political parties are the central subjects, and favours multiparty system, wherein political decisions are taken as a result of discussions and agreements between political parties. In the elections based on the lists of candidates the voters express their support firstly to the ideology and platform of a political party, and only in the second order to a concrete person. A faction constitutes the representation of a political party in the Riigikogu, with the basic function of contributing to the fulfilment of the platform of the political party. The constituents can pass a judgment on a political party and its representatives primarily on the basis of the activities of the faction. Thus, conferral of greater rights to factions in comparison to individual members of the Riigikogu is justified in certain instances.

All members of the Riigikogu, irrespective of membership in a faction, have access to the services offered by the Chancellery of the Riigikogu. In the Riigikogu building every member of the Riigikogu has either an individual workroom or a workroom shared with another member, depending on the post in the Riigikogu.

6. The Riigikogu itself, having passed the contested legislation, did not submit a supplementary opinion to the Supreme Court, it only pointed out that it adhered to the opinions and arguments expressed in the explanations of the President of the Riigikogu.

7. The Chancellor of Justice is of the opinion that § 40(1) and § 41(1) and (3) of the RRPA are in conflict with § 71(2) and § 62 of the Constitution in their conjunction, because the restrictions imposed on the formation of factions prejudice the rights of members of the Riigikogu, provided by § 71(2) of the Constitution, more than is justifiable by the legitimate aims of the norms.

The Riigikogu is entitled to establish by law the grounds for the formation of factions, that is the conditions upon the fulfilment of which the members of the Riigikogu can exercise the right to form factions. The conformity of the grounds for the formation of factions, established in the Riigikogu Rules of Procedure Act, with the Constitution depends on the characteristics, arising from the Constitution, a faction must have.

The aim of the provisions of § 40(1) of the RRPA is to contribute to guaranteeing efficiency and stability of the work of the parliament and of its factions, to avoid political double-crossing and to increase political responsibility of members of the Riigikogu to political parties and constituents. There is also the will to avoid fictitious factions and to prevent the formation of factions with small number of members. The aim of the provisions of § 41(1) of the RRPA is to ensure the formation of the political structure of and commencement of substantial work of the parliament as soon as possible after the assuming of office of the new composition of the Riigikogu. The aim of the provisions of § 41(3) of the RRPA is to show clearly to everybody the relationship between the political party who has reached the parliament and the faction

formed on the basis thereof. These are the legitimate aims of restricting the right to form factions. The contested measures are suitable and necessary for the achievement of the referred aims.

Nevertheless, the restriction is not proportional in the narrow sense. The right of the Riigikogu to establish the grounds for forming factions is restricted by the principle of free mandate, arising from § 62 of the Constitution. This principle includes the principle of equality of mandates. The members of the Riigikogu have equal right to participate in the process of formation of the will of the parliament, including the equal right to form factions. Nevertheless, the principle of free mandate and the equal right of people's representatives to participate in the process of formation of the will of the parliament may be restricted. A restriction on the principle of free mandate, which arises from the Constitution, is the principle of proportional elections. Yet, this principle does not constitute a sufficient justification for restricting the principle of free mandate so that a political force created within a political party, having considerable support and consisting of people's representatives acting jointly and sharing a common ideology, can not form a faction. The Riigikogu Rules of Procedure Act ties a member of the Riigikogu rigidly to the political party in the list of which he or she was elected to the Riigikogu. Those people's representatives who wish to exercise their mandate contrary to the directives of the political party risk being excluded from the faction and deprived of the right guaranteed to factions in a situation where they can not form a new faction. As these people lack actual alternatives for the protection of their views, they are in fact forced to continue their activities in the faction, going counter to their principles and infringing the principle of free mandate.

Chapter V of the Riigikogu Rules of Procedure Act does not take into account the possibility, arising from the Political Parties Act, that the political landscape may change during the mandate of the composition of the Riigikogu, i.e. it does not take into account the possible merger, division, termination and compulsory dissolution of political parties. In all the referred cases § 40(1) and § 41(1) and (3) of the RRPA rather contribute to the confusion of the political landscape, parliamentary structure and party democracy than to the better organisation of the work of the parliament and stabilisation of the representation democracy.

8. The Minister of Justice is of the opinion that § 40(1) and § 41(1) and (3) of the Riigikogu Rules of Procedure Act are not in conflict with §§ 11, 12, 62 and 71 of the Constitution.

Estonia has made a constitutional choice in favour of proportional electoral system. On the basis of this choice factions have to be regarded as political associations implementing political platforms of the political parties represented in the Riigikogu. A political platform of a political party is prepared for the whole period of mandate of the composition of the Riigikogu. Those representatives who had not participated in the elections with a joint program on which the constituents have not passed their judgment, or those representatives who deviate from the political platform of a political party in the course of work in the Riigikogu, should not have a possibility to form a faction.

The contested provisions are not in conflict with the principle of proportionality. The restrictions in force are suitable, necessary and proportional in the narrow sense for ensuring stability and efficient work for the term of office of the Riigikogu. Elimination of the restrictions may result in fragmentation of the Riigikogu into changeable tiny factions, in the possibility to withdraw from taking unpopular decisions or to start solving inner conflicts of a political party in the Riigikogu. The five-day term for the submission of applications for the registration of factions is necessary for speedy actuation of the work of the new composition of the Riigikogu.

The contested provisions are not in conflict with the principle of equal treatment. Unequal treatment is constitutional if it has a legitimate aim and if applicable measures are proportional to the desired aim. Unequal treatment is justified by the necessity to guarantee efficient and stable work of the Riigikogu and by the choice of the constituents in favour of certain political choices and platforms. The additional rights conferred upon those members of the Riigikogu who belong to factions in comparison to those members of the Riigikogu who do not belong to factions, in the majority of cases consist in procedural rights. The rights of the members of the Riigikogu arising from Chapters IV and VII of the Constitution are not restricted by the Riigikogu Rules of Procedure Act. Furthermore, the principal work format of the Riigikogu is work in

committees, where it is possible to defend one's opinions during the preparation of drafts. The Riigikogu Rules of Procedure Act has created possibilities that all members of the Riigikogu are guaranteed sufficient working conditions irrespective of whether they belong to factions or not.

Neither are the contested provisions in conflict with the principle of free mandate, as these do not restrict the right of a member of the Riigikogu to vote and decide pursuant to one's conscience and principles.

It is impossible to concur with the grammatical interpretation of the complainants, that the Riigikogu is not competent to establish the conditions for the formation of factions. Formation of factions on the conditions referred to in § 40(1) of the RRPA is necessary for ensuring that the division of political principles chosen by the voters remains the same during the whole term of office of the Riigikogu and that the Riigikogu shall not become fragmented.

CONTESTED PROVISIONS

9. § 40(1) of the Riigikogu Rules of Procedure Act (RT I 2003, 24, 148; RT I 2004, 89, 607) provides as follows:

"(1) A faction may be formed by and shall comprise not less than five members of the Riigikogu who are elected from a list of candidates of the same political party. Members of the Riigikogu who are elected from a list of candidates of the same political party may form only one faction."

§ 41(1) of the RRPA provides as follows:

"(1) An application for the registration of a faction shall be submitted to the Board of the Riigikogu within five days after the first sitting of the Riigikogu."

§ 41(3) of the RRPA provides as follows:

"(3) The name of the faction shall be the name of the political party which submitted the list of candidates together with the word "*fraktsioon*" [faction]."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

10. First of all the Chamber shall examine the issue of constitutionality of the legal norms serving as the basis for the contested resolution of the Board of the Riigikogu, raised by the three members of the Riigikogu. For that purpose the Chamber shall ascertain which fundamental rights and/or principles are infringed by the restrictions imposed on the formation of factions, the Chamber shall examine the legitimate aims of these restrictions and shall from an opinion on whether the restrictions imposed on the formation of factions by the Riigikogu Rules of Procedure Act are constitutional (I). Next, the Chamber shall analyse the allegations of the complainants that the violation of the principle of free mandate consists in the failure to guarantee them sufficient conditions necessary for the work of a member of the Riigikogu (II). Finally, the Chamber shall reply to the application of the members of the Riigikogu for annulment of the resolution of the Board of the Riigikogu of 14 December 2004, refusing to register the faction of the Estonian Social Liberals (III).

I.

11. The complainants and other participants in the proceeding have referred to the following four constitutional values as the fundamental rights and other constitutional principles restricted by the contested provisions: the right of the members of the Riigikogu to form factions (§ 71(2) of the Constitution), principle of free mandate (§ 62 of the Constitution), principle of equal treatment (the first sentence of § 12(1) of the Constitution), and the principle of proportionality (§ 11 of the Constitution). As the principle of proportionality is the so called central clause concerning restrictions of fundamental rights, which has

meaning only in conjunction with a restricted fundamental right or principle, the Chamber does not consider it necessary to examine the principle of proportionality separately.

12. § 71(2) of the Constitution provides as follows: “Members of the Riigikogu have the right to form factions.” Pursuant to the third indent of the same Article the Riigikogu shall provide for the procedure for the formation of committees and factions, and their rights, by the Riigikogu Rules of Procedure Act. This is a right subject to simple reservation by law. This means that the legislator has comparatively wide discretion upon elaborating the rights of factions – the legislator may restrict the right of the members of the Riigikogu to form factions for the purposes that are not in conflict with the Constitution.

13. The Chamber does not concur with the allegation of the complainants that the contested regulation is in conflict with § 71 of the Constitution solely from the formal point of view, as the referred constitutional provision authorises the Riigikogu to regulate by law only the technical, procedural rules of the formation of factions, and does not allow to impose substantial conditions on the formation of factions. The opinion that only technical, procedural rules of the formation of factions can be regulated by law would not be in conformity with the essence of factions and could result in a situation wherein one member of the Riigikogu could be a member of several factions simultaneously. Bearing in mind the aim of effective functioning of the parliament the legislator has the right to provide, either in the Riigikogu Rules of Procedure Act or some other legal act regulating the work of the Riigikogu, for the grounds and conditions of the formation of factions.

14. Indeed, when elaborating the institute of faction the legislator must take into account the constitutional values that may be damaged by the restrictions imposed on the formation of and belonging to factions. Such values are potentially the principle of free mandate arising from § 62 of the Constitution and the requirement of equality before the law of the first sentence of § 12(1) of the Constitution. Thus, it proceeds from § 71(2) and (3), § 62 and the first sentence of § 12(1) of the Constitution that the legislator has the freedom to elaborate the bases for and conditions of the formation of factions and the rights of factions to the extent that it does not unconstitutionally interfere with the exercise of free mandate of a member of the Riigikogu and does not treat the members of the Riigikogu upon exercising their mandates unequally without basis.

15. Pursuant to the first sentence of § 62 of the Constitution a member of the Riigikogu shall not be bound by his or her mandate. The principle of free mandate means, first and foremost, that a member of the Riigikogu can not be removed either by the people who had elected him or her, or by the political party in the list of candidates of which he or she was elected to the parliament. According to this principle a member of the Riigikogu does not represent only the interests of his or her constituents, he or she exercises state authority as a representative of all the people. Secondly, it proceeds from the principle of free mandate that a member of parliament must be able to make political choices on the basis of his or her conscience. At that, the rights arising from free mandate of a person elected to the Riigikogu include the freedom to change his or her ideology and/or political party preferences without the danger of being removed from the representative body. Also, it derives from the principle of free mandate that a member of the Riigikogu is not bound by pre-election promises. On the basis of the extreme concept of free mandate recognition of any relationship with the political party in the list of which a person was elected to the parliament would not be permissible. Besides, the principle of free mandate is restricted when the exercise of the right to free political self-determination results in negative consequences to the volume of rights conferred upon a member of the Riigikogu.

16. The duties and competence, conferred upon the Riigikogu by the Constitution, can not be exercised independently from the members thereof. Consequently, every member of the Riigikogu is entitled to participate in all activities of the Riigikogu. Although the Riigikogu has wide discretion to elaborate the rules establishing its organisation and procedures (see paragraph 42 below), the constitutional principle of equal participation in the exercise of the functions of the Riigikogu has to be recognised as a constitutional restriction of this right of discretion. Thus, what becomes important besides the principle of free mandate is the requirement of equal opportunities for the exercise of mandate, i.e. the prohibition of unequal treatment of the members of the Riigikogu upon the exercise of their mandates.

17. The first sentence of § 12(1) of the Constitution establishes the principle of equality before the law. Members of the Riigikogu have equal mandates. At the same time the Riigikogu Rules of Procedure Act provides for a number of rights that are not applicable to the members individually or associations of members not forming a faction. Such rights are, for example, the right of a faction to appoint its members to serve on standing committees (§ 26(3) of the RRPA); the right to oppose to the agenda for the next working week (§ 54(3) of the RRPA); the right of representatives of the factions to present comments at the first reading of draft legislation (§ 98(5) of the RRPA); the right to move to reject the draft legislation at the first reading (§ 98(6) of the RRPA); the right to request that a motion to amend be put to a vote at the second reading of draft legislation (§ 106(2) of the RRPA); the right of representatives of the factions to present comments upon deliberations at the third reading (§ 111(1) of the RRPA); the right of representatives of the factions to present comments upon deliberations at legislative proceeding of draft Acts to approve or repeal decrees of the President of the Republic (§ 116(4) of the RRPA); the right to submit motions to amend draft resolutions of the Riigikogu on appointment to or release from office of officials, appointment of members of supervisory boards and formation of delegations of the Riigikogu (§ 117(2) of the RRPA); the right of representatives of the factions to present comments at legislative proceeding of draft resolutions of the Riigikogu on declaration of state of emergency, state of war, mobilisation or demobilisation (§ 118(4) of the RRPA); the right to submit motions to amend the draft state budget after the close of the second reading of the draft state budget and at the third reading of the draft state budget (§ 120(4) of the RRPA); the right of representatives of the factions to present comments upon deliberations at a reading of the draft Act to amend the Constitution upon amendment of Constitution by two successive compositions of Riigikogu (§ 126(4) of the RRPA); the right to nominate candidates for Prime Minister in Riigikogu (§ 132(1) of the RRPA); the right of representatives of the factions to present comments upon deliberation of an expression of no confidence in the Government of the Republic, the Prime Minister or a minister (§ 134(3) of the RRPA) and upon deliberations of draft legislation bound to the issue of confidence (§ 136(4) of the RRPA); the right of representatives of the factions to present comments upon deliberation of issues provided for in §§ 154 and 155 of the RRPA.

18. The contested norms of the Riigikogu Rules of Procedure Act make the extent to which a mandate can be exercised dependent upon belonging to a faction having the rights enumerated above, and thus the provisions constitute a restriction of the principle of equal exercise of the mandate of a member of the Riigikogu. Rendering it impossible for a member of the Riigikogu to belong to a faction deprives the person of the right to participate in the work of the Riigikogu through exercising the rights conferred upon factions by the Act, and thus restricts his or her possibilities to exercise the mandate in comparison to those members of the parliament who belong to factions and who have wider possibilities for the exercise of their mandates.

19. In summary, the contested provisions of the Riigikogu Rules of Procedure Act, establishing the minimum number of members of a faction, and the requirement that the members of a faction be elected to the parliament in the list of a political party, pursuant to the principle of "one political party, one faction", and allowing to register a new faction only within five days after the fist sitting of the Riigikogu, restrict the principle of free mandate in conjunction with the principle of equal treatment of members of the Riigikogu upon exercise of their mandate.

20. Restriction of the principle equality does not automatically amount to a violation of the principle. The principle of equality before the law has been violated when unequal treatment can not be constitutionally justified. If there is a reasonable and relevant justification for unequal treatment, the unequal treatment before the law is justified (*judgment of the Constitutional Review Chamber of the Supreme Court of 3 April 2002 in matter no. 4-3-1-2-02, paragraph 17*).

21. The principle of free mandate, just like any other principle expressed in the Constitution, is not absolute, either. Similarly with the principle of equal treatment a restriction of the principle of free mandate does not mean a violation of the Constitution. A fundamental right or principle is violated if a restriction is unconstitutional. A restriction is unconstitutional if it has no legitimate aim or if it is not suitable, necessary or proportional in the narrow sense to the desired aim. As the free exercise of a mandate is one of the most

important political rights in a democracy, the unequal treatment of members of the Riigikogu upon the exercise of their free mandates has to be subjected to strict constitutional review. The mere test of reasonableness is not sufficient for justifying the restriction of this principle. A restriction is constitutional if it has a legitimate aim and if it is suitable, necessary and proportional to the desired aim.

Next, the Chamber shall examine whether there exists a legitimate aim for the unequal treatment of the members of the Riigikogu upon the exercise of free mandate, and whether the restriction itself is proportional to the aim in the narrow sense. As the rights of the members of the Riigikogu are restricted through the concept of faction, substantiated in the Riigikogu Rules of Procedure Act, the Chamber shall first examine the nature of a faction.

22. The Constitution does not define the concept of faction. In the Riigikogu Rules of Procedure Act the legislator has defined a faction as a political association having at least five members, being tied to a list of candidates of a political party, implementing the political platform of a political party represented in the Riigikogu. The complaint submitted to the Supreme Court indicates that the complainants wish to define a faction as an association of members of the parliament, having the same political opinions, who wish to exercise the rights of factions deriving from the Riigikogu Rules of Procedure Act.

The Chamber points out that on the basis of the right of the parliament's self-organisation (see paragraph 42 below) the legislator is entitled to choose between different concepts of faction. But the legislator can not formulate the definition of faction in a manner that would render the right to form factions but a fictitious one, or so that the restrictions imposed would disproportionally confine the constitutional rights of the members of the Riigikogu or other Constitutional principles.

23. Next, the Chamber shall analyse whether the legislator has adhered to constitutional requirements upon formulating the concept of faction, i.e. the Chamber shall analyse the proportionality of the restrictions imposed by the Riigikogu Rules of Procedure Act in the broader sense. First of all, the Chamber shall ascertain the possible legitimate aims of restricting free mandate and the equal exercise thereof, i.e. the values that the imposition of restrictions on the formation of factions serves.

24. The Chamber is of the opinion that the regulation of factions in the Riigikogu Rules of Procedure Act serves aims of two different kinds. These are the guarantee of efficient functioning of the parliament, and support of the objectives of proportional electoral system. Firstly, the Chamber shall analyse the former.

25. A faction of the Riigikogu, just like a committee, is a form of collective parliamentary decision-making. Differently from the so called domain-oriented committees, intended for guaranteeing the efficient work of the parliament through division of labour and specialization, the factions are political associations of the members of the Riigikogu, not formed around a narrow domain but based on a political platform prompted by certain ideology. Usually, a faction is an association of members of parliament belonging to one political party, wherein they exchange opinions and form the opinion of the political actor concerning draft legislation, a national issue, election or appointment of a person or some other resolution within the sphere of activities of the parliament. Factions offer a possibility to prepare joint motions, to exchange information and to concentrate ideological opinions in other ways. For example, the fact that only factions are allowed to present comments at the first reading of a draft has been justified by the need to find out whether there is any sense in proceeding with the legislative proceeding of the draft. At that, the need for further legislative proceeding is ascertained within factions, which, presumably, consist of people having the same ideological views. Being the bearers of such function of concentration, the factions and the restrictions imposed on the formation of factions serve the objective of facilitating the work of the parliament. The efficient functioning of the parliament is a legitimate aim for restricting the rights of the members of the Riigikogu.

26. Within the context of the referred legitimate aim the unlimited freedom to form factions could lead, for example, to a situation wherein a political actor represented in the parliament could, at any time, in order to achieve procedural advantages, form several tiny factions with any number of members, or it could lead to uncontrollable movement from faction to faction, for example with the aim of solving conflicts within a

political party. Bearing in mind the referred dangers a failure to regulate the bases for and conditions of the formation of factions would jeopardise effective functioning of the parliament.

27. The Chamber is of the opinion that the restriction established in the second sentence of § 40(1) of the RRPA, pursuant to which members of the Riigikogu who are elected from a list of candidates of the same political party may form only one faction, in conjunction with the possibility to register a faction only within five days after the first sitting of the Riigikogu, arising from § 41(1) of the RRPA, and with the requirement that the name of the faction shall be the name of the political party which submitted the list of candidates together with the word "*fraktsioon*" [faction], established in § 41(3) of the RRPA, serves one more aim, in addition to ensuring effective functioning of the parliament.

The aim is to retain connection between election results and parliamentary factions, i.e. to guarantee the realisation of the political platforms, supported by the people at the elections, through the legislation and resolutions adopted by the Riigikogu, and to increase the political liability of the members of the Riigikogu in relation to their constituents.

28. The legislator, too, underlines the aim upon establishing the restrictions on factions. After the adoption of the Riigikogu Rules of Procedure Act in 1992 the will of the Riigikogu has clearly been to establish comparatively strict rules for the formation of factions. The Riigikogu Rules of Procedure Act, passed on 5 November 1992, enabled the members of the Riigikogu who left a faction formed on the basis of the list of candidates that had participated in the elections, to form new factions which did not have to have anything to do with a concrete list of candidates. By the Act to Amend § 30 of the Riigikogu Rules of Procedure Act, passed on 17 February 1999, § 30 of the RRPA was enacted in the following wording: "(1) A faction may be formed by and shall comprise not less than five members of the Riigikogu who are elected from the same list. Members of the Riigikogu who belong to one list may form only one faction. The name of the faction shall be the name of the political party which submitted the list together with the word "*fraktsioon*" [faction]."

29. The Constitutional Review Chamber of the Supreme Court is of the opinion that guaranteeing the realisation of the political platforms, supported by the people in the elections, through the legislation and resolutions adopted by the Riigikogu, and increasing the political liability of the members of the Riigikogu toward their constituents through belonging to a parliamentary faction on the basis of a political party list of candidates, is a legitimate aim for deviation from the principle of free mandate and the equal exercise thereof.

30. This aim is in conformity with the principle of proportional elections, referred to in § 60(1) of the Constitution, and with the principle of political party democracy, covered by the principle of democracy. In the case of elections of lists of candidates, in accordance with the principle of proportionality, the voters in fact give their support to the ideology of a political party and to that political party. That is why each change in the membership of a faction during the period between elections affects the power relations in the parliament, formed as a result of elections, and thus distorts the will of the constituents.

31. On the basis of the principle of political party democracy, the Political Parties Act defines a political party as a voluntary political association of Estonian citizens the objective of which is to express the political interests of its members and supporters and to exercise state and local government authority. A political party is a bridge between the society and the state, ensuring democracy, the function of a political party is to concentrate political views and mould these into a tangible whole, and to implement these upon exercising public authority, in the case it is a success at the elections. Only lists of candidates of political parties and independent candidates have been allowed to run as candidates at the recent elections of 1999 and 2003.

32. The Chamber points out that the restrictions imposed on the formation of factions in the Riigikogu that has just convened serve two aims simultaneously, namely the aim of efficient functioning of the parliament and the aim of adequately reflecting the election results. To enable the parliament to commence its work it is necessary to from the factions immediately after the parliament has convened; in order to ensure the functioning of proportional electoral system it is justified that the right to form factions is given only to those

persons who wish to realise in the parliament the political platforms in relation to which they were elected to the parliament. Ideally, these aims should be sought to be realised during the whole term of office of the composition of the Riigikogu. There is no doubt that pursuant to this approach the impermissibility to form factions later than five days after the first sitting of the Riigikogu would be constitutional.

33. The Chamber admits that in certain cases the formation of new factions during the term of office of a composition of the Riigikogu could be unavoidable and, thus, the regulation of the Riigikogu Rules of Procedure Act preventing this is unconstitutional. The Political Parties Act does not tie the creation of political parties and other changes in the political landscape to the election cycle, and a necessity to from a new faction in the Riigikogu could arise, for example, if a political party merges with another or splits up. The necessity may also rise in the situation where, as a result of leaving factions, the scope of fragmentation compromises the efficiency of the parliament. In such cases the only possibility for continuing normal functioning of the parliament would be to amend the rules concerning the formation of factions so that the link between the lists of candidates participating in the elections and the factions is loosened up. The Chamber is of the opinion that the situation under review is not of this kind.

34. The association of social liberal members of the parliament (the Social Liberals) has been formed of the members of the Riigikogu who have left the Estonian Centre Party faction of the Riigikogu, whereas the connection of the persons to a political platform which has earned the support of the voters or which has extensive support in the society can not be clearly defined. Provided that within the framework of a new faction the Social Liberals wish to represent the political platform of the Estonian Centre Party, i.e. they did not leave the Centre Party faction because of ideological differences, it is questionable why a political party platform, supported by the voters at the elections, should be represented in the Riigikogu through two factions having certain special rights. In such a case those parliamentary factions who are able to implement their platform in the Riigikogu through one single faction, would be treated unequally. But if the Social Liberals wish, in the form of a Riigikogu faction, to represent some other platform, different from that of the political party in the list of candidates of which they ran as candidates for the Riigikogu, it should be weighed whether the lack of such possibility is in conformity with the principle of equal exercise of the free mandate of a member of the Riigikogu.

35. The Chamber is of the opinion that the guarantee of efficient functioning of the parliament as a legitimate aim of restricting the rights of the members of the Riigikogu is not sufficient within the context of this complaint to justify the restriction of the rights of the members of the Riigikogu. It is not clear whether and how the formation of the faction of the Social Liberals would hinder the effective functioning of the parliament. If the complaint of the Social Liberals were satisfied, a faction with more than five members, sharing common opinions and ideology, would probably be formed. This is not a too small association of members of the parliament, without common aim and policy, the permission of which would result in excessive fragmentation of the parliament. The fact that as a rule the restrictions on the formation of factions contribute to the effective work of the Riigikogu is not sufficient for the adjudication of this dispute. That is why the Chamber shall analyse the restrictions on the formation of factions in the light of the second aim referred to above – the guarantee of the proportionality of elections and political party democracy.

36. The restrictions of the formation of factions must consist in measures suitable for the achievement of the aims of proportional elections and political party democracy. The restrictions imposed on the formation of factions do not prevent a member of the parliament from resigning the membership of a political party, and can not guarantee the preservation of political parties initially elected to the Riigikogu or the stability of their opinions. Nevertheless, the restrictions on the formation of factions constitute a measure supporting the survival of factions formed by political parties after the elections. These restrictions give certain advantage to factions formed by political parties immediately after the Riigikogu elections, which contributes to the realisation of the aims of proportional electoral system and political party democracy. Thus, this restriction is suitable. The restrictions is necessary, too, because it is impossible to suggest measures less restricting the rights of the members of the parliament, yet guaranteeing the achievement of the aims of proportional electoral system with the same efficiency.

37. Upon assessing the proportionality of a measure in the narrow sense the values to be weighed are the principle of free mandate and equal exercise thereof, and the principle of proportionality of elections and political party democracy, associated therewith. Thus, it should be asked whether the aim sought (the guarantee of proportionality – i.e. the reflection of the will of the voters – and political party democracy) is sufficiently weighty against the background of the weight of the measure chosen (enabling only members of the Riigikogu elected to the parliament from the list of candidates of the same political party, within 5 days after the first sitting of the new Riigikogu, to from factions). When deciding on proportionality it is first of all necessary to examine the differences of the rights of independent members of parliament to participate in the process of parliamentary decision-making, in comparison with those of factions.

38. The Riigikogu Rules of Procedure Act establishes a number of rights for the factions or the representatives thereof, that the independent members or associations of members of parliament that are not factions do not have. The conferment of such rights (see paragraph 17 above) to factions only serves the aim of making the work of the parliament more efficient. At the same time the independent members of the parliament have substantially bigger rights than people's representatives in several other European states. For example, besides the right to participate and vote in the sessions of the Riigikogu, the independent members have the right to introduce draft acts and to defend their motions at the first and second reading of the plenary assembly of the Riigikogu; to submit interpellations; to nominate candidates for President and Vice-Presidents of the Riigikogu; to serve on a standing committee; to pose two questions at the first reading of a draft; to submit motions to amend a draft, to explain the motions before a leading committee for the draft legislation and demand that the motions be voted by the plenary assembly; to pose two questions and submit comments at the second reading of a draft; initiate a referendum; to pose questions at Question Time; to submit questions in writing and have the floor during unscheduled statements. The Chamber points out that the primary work format of the Riigikogu is the work in committees, wherein the independent member who has prepared a draft can submit his or her justifications, answer the questions and refute counterarguments.

39. The complainants argue that it is impossible for them to serve on committees on equal footing with the members of the Riigikogu who belong to factions, and that they can not co-ordinate their activities in committees. Pursuant to § 13(2)2) of the RRPA the Board of the Riigikogu shall determine the number of positions in the standing committees for the factions. Pursuant to the same clause the Board of the Riigikogu shall appoint members of the Riigikogu who do not belong to factions to standing committees. Pursuant to § 27 of the RRPA the Board of the Riigikogu shall appoint members of the Riigikogu who do not belong to a faction to serve on a standing committee on the basis of the wishes of the member of the Riigikogu and in the interests of the organisation of work. To the knowledge of the Chamber the leaving of the Social Liberals of the Estonian Centre Party faction has not affected the participation of the former in the work of the standing committees of the Riigikogu.

40. A general aim of the proportional electoral system and of political party democracy is the realisation of the political platforms, which earned the support of the people in the elections, in the Riigikogu decision-making through the factions. Among other things, the aim of proportional electoral system is to reflect the political views of the constituents in the composition of the parliament, i.e. to form a representative body conforming to these views as closely as possible. Allowing the formation of new factions will make the achievement of this aim more difficult, as it would result in the creation of a new actor in the political landscape during the period between elections, an actor whose political space is created at the expense of the political space of other political actors.

41. It is clear that the changing of power relations of the time of elections can not be impermissible in principle. The principle of free mandate gives rise to the right of every member of parliament to changes his or her ideological opinions, to grow and develop in the sense of political self-determination. Pursuant to this principle every member of the Riigikogu has the right to diverge from the political party in the list of which he or she was elected to the parliament, and to commence exercising the rights of a member of the Riigikogu as an independent member, which in turn will inevitably result in a change of the balance of the time when

the composition of the Riigikogu was formed. Upon determining the extent of the principles of proportional electoral system and political party democracy the principle of free mandate must necessarily be taken into account. But if we affirm the constitutional requirement to guarantee the exercise of free mandate equally to the members of the Riigikogu belonging to factions and to those not belonging to factions, the legislator will not have sufficient measures for safeguarding the proportional electoral system and political party democracy. Pursuant to the Constitution the legislator must not deprive a member of the parliament of his or her freedom of political self-determination, but the legislator is entitled to formulate the rules that – at least to some extent – prevent the formation of factions during the period between elections and thus, also prevent the distortion of the will of the constituents.

42. The Chamber is of the opinion that the restriction of free mandate and of the equal exercise thereof by rules on the formation of factions is proportional to the aim of safeguarding proportionality of electoral system and political party democracy. This view is supported by principle of parliamentary self-organisation, i.e. the principle that the legislator has comparatively broad discretion in the issues concerning its own activities. The right of self-organisation arises from § 65(16) of the Constitution in conjunction with the principle of separation of powers. The right of self-organisation means that the branches of state power and constitutional institutions must have autonomy upon organising the exercise of the competencies expressly conferred to them by the Constitution, and that as a rule they are entitled to determine the internal organisation of and procedure for exercising their competencies (*see judgment of the Constitutional Review Chamber of 14 April 1998 in matter no. 3-4-1-3-98 – RT I 1998, 36/37, 558, IV*).

43. As it has been pointed out above (paragraph 33 of this judgment), the prohibition to form a new faction during the period between the Riigikogu elections may, under certain conditions, constitute a disproportional restriction of the principle of free mandate and the equal exercise thereof. The Chamber does not exclude the possibility that the contested restrictions may prove unconstitutional for example in a situation where, after splitting up of a political party, a new political party is created which has a clearly defined ideology, declared through a political platform. Even if allowing for the formation of such a faction would mean re-distribution of mandates received as a result of elections, it could be counterbalanced by the argument that a new political force has emerged, capable of taking political responsibility through the relationship between a parliamentary faction and the political party on the basis of which the faction is formed. From the aspect of efficiency of parliamentary work it is also important that groups of members of the Riigikogu having a clear understanding of the aims to be achieved and the ways how to achieve the aims could exercise the rights of factions. The relation of the Social Liberals with a platform manifesting the ideological views of a specific political party is unclear.

II.

44. The complainants argue that it is in conflict with the principle of free mandate that when leaving a faction a member of the Riigikogu is deprived of a workroom and a secretary, which gives rise to unfounded extra time cost and expenditure and inconveniences upon the exercise of mandate.

45. Pursuant to § 18 of the Riigikogu Internal Rules Act services to the Riigikogu and its bodies and members shall be provided by the Chancellery of the Riigikogu. Pursuant to § 19 of the same Act the duties of the Chancellery of the Riigikogu include, among other things, consultation of the Riigikogu and its bodies and members on legislative drafting and on issues concerning the performance of other functions of the Riigikogu, and creation of the necessary conditions for the Riigikogu to perform its functions. Pursuant to the provisions of the statutes of the Chancellery of the Riigikogu the legal department gives legal consultation to members of the Riigikogu in drafting legal acts; economic and social information department satisfies the orders of the members of the Riigikogu upon proceeding draft legislation and concerning other issues related to the activities of the Riigikogu; documentation department consults the members of the Riigikogu concerning language issues, etc. Besides these services, guaranteed to all members of the Riigikogu, the statutes of the Chancellery of the Riigikogu provides for employees of the Chancellery servicing only factions, with the main function to provide consultations and assistance to a faction and the

members thereof and to arrange the day-to-day business of factions. Pursuant to clause 19 of the statutes of the Chancellery of the Riigikogu factions are serviced by employees of the Chancellery, the total number and positions of who shall be determined by the chairmen of factions within the budgetary limits allocated to factions for salaries by the Board of the Riigikogu.

46. As the unequal treatment of members of the Riigikogu not belonging to factions through depriving them of certain rights is justified on the basis of the aforesaid, the allocation of supplementary resources to assist factions can not be considered unfounded. The allocation of additional funds to factions may be legitimate due to the special role of factions in the context of political party democracy and the additional duties arising from that. This does not mean that servicing some of the members of the Riigikogu upon the fulfilment of the duties imposed on them is allowed to be insufficient. The members of the Riigikogu should be serviced in a manner enabling them to fulfil their duties efficiently.

47. The arguments of the complainants that the lack of a common workroom restricts their ability to exercise their free mandate is not the object of this complaint. The provisions of the Riigikogu Rules of Procedure Act do not regulate the allocation of workrooms to factions and do not provide for the right of a faction to a common workroom. The Chamber is of the opinion that upon refusal to allocate a workroom it is possible to contest the resolution by which the Board of the Riigikogu refused to allocate a workroom to the association of the Social Liberals. The resolution of the Board of the Riigikogu of 14 December 2004, the invalidation of which is being applied for by the complainants, does not concern the refusal to allocate a common workroom to the association of the Social Liberals.

III.

48. On the basis of the aforesaid there is no ground in this matter to declare§ 40(1) and § 41(1) and (3) of the Riigikogu Rules of Procedure Act unconstitutional. Thus, the application of the members of the Riigikogu Peeter Kreitzberg, Sven Mikser and Harry Õunapuu for invalidation of the resolution of the Board of the Riigikogu of 14 December 2004, refusing to register the faction of Estonian Social Liberals, shall be dismissed, too.
