163/11/A/2009

JUDGMENT
of 2 December 2009
Ref. No. U 10/07*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Bohdan Zdziennicki – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Mirosław Granat
Marian Grzybowski
Wojciech Hermeliński
Adam Jamróz – Judge Rapporteur
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Marek Mazurkiewicz
Janusz Niemcewicz
Andrzej Rzepliński,

Grażyna Szałygo – Recording Clerk

having considered, at the hearings on 1 July and 2 December 2009, in the presence of the applicant, the Polish Minister of National Education and the Public Prosecutor-General, an application by a group of Sejm Deputies to determine the conformity of:

1) the Regulation of the Minister of National Education of 13 July 2007 amending the Regulation concerning the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in state schools (Journal of Laws – Dz. U. No. 130, item 906) to Article 25(1) and (2), Article 32(1) and (2), Article 53(3) in conjunction with Article 48(1) and to Article 92(1) of the Constitution of the Republic of Poland,
2) the Regulation referred to in point 1 above to Article 6(2), Article 10(1), Article 20(2) and (3) of the Act of 17 May 1989 on the Guarantees of

* The operative part of the judgment was published on 11 December 2009 in the Journal of Laws - Dz. U. No. 210, item 1629.

Freedom of Conscience and Religion (Journal of Laws – Dz. U. of 2005, No. 231, item 1965),

adjudicates as follows:

The Regulation of the Minister of National Education of 13 July 2007 amending the Regulation concerning the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in state schools (Journal of Laws - Dz. U. No. 130, item 906)**:**

a) is consistent with Article 25(1) and (2), Article 32 and Article 53(3) in conjunction with Article 48(1) the Constitution of the Republic of Poland,

b) is not inconsistent with Article 6(2), Article 10(1) and Article 20(2) of the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Religion (Journal of Laws - Dz. U. of 2005, No. 231, item 1965 and of 2009 No. 98, item 817)**.**

Moreover, the Tribunal decides as follows:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, Dz. U. of 2000 No. 48, item 552 and No. 53, item 638, Dz. U. of 2001 No. 98, item 1070, Dz. U. of 2005 No. 169, item 1417 and Dz. U. of 2009 No. 56, item 459**), to discontinue the proceedings on the grounds that the pronouncement of a judgment is inadmissible.**

STATEMENT OF REASONS

I

1. In a letter of 9 November 2007, a group of Deputies of the 6th term of office of the Sejm, referred to the Tribunal for it to determine that the Regulation of the Minister of National Education of 13 July 2007 amending the Regulation concerning the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in state schools (Journal of Laws – Dz. U. No. 130, item 906; hereinafter: the Regulation or the challenged Regulation) was inconsistent with Article 25(2), Article 32(1) and (2), Article 53(3) in conjunction with Article 48(1) of the Constitution and was inconsistent with Article 6(2), Article 10(1), Article 20(2) and (3) of the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Religion (Journal of Laws – Dz. U. of 2005, No. 231, item 1965; hereinafter: the Act on Guarantees).

Alleging that the Regulation did not conform to the principle enshrined in Article 25(2) of the Constitution, the applicant argued that - despite the obligation of public authorities to remain neutral in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life – the public authorities support religious education, motivating pupils to make more effort in this regard. According to the applicant, the said supporting of religious education consists in including the grades for the school

subject of religion or ethics in the calculation of a grade point average (GPA), which is to encourage pupils to choose, *inter alia*, to attend religion classes. Therefore, the decision about attending such classes is not entirely a free choice, but it is made "under the pressure of expectations of obtaining a good grade in ethics or religion". In the opinion of the applicant, the adopted measures constitute a way of exerting pressure on children and adolescents to make them participate in religion classes. The grade for religion is to motivate pupils to be religiously active also outside school, *inter alia*, to take part in religious practices.

The applicant also indicated that, by including religion in the calculation of grade point average, public authorities additionally support a theistic worldview and place this school subject on par with other school subjects which pass on objective academic knowledge.

The applicant sees the infringement of Article 32 of the Constitution in the introduction of different methods and criteria for calculating a grade point average in the case of pupils who attend religion or ethics classes and for those who do not participate in such classes.

In the case of pupils attending religion classes, the object of evaluation is "the degree of internalisation of a certain worldview – articles of faith, as well as the involvement in religious practices, i.e. the degree of piety". By contrast, the pupils who do not attend catechesis are evaluated on the basis of how much academic knowledge they have gained and in respect of related skills they have acquired.

In the applicant's view, the amending Regulation is inconsistent with the parents' right, enshrined in the Constitution, to ensure their children a moral and religious upbringing and teaching in accordance with their convictions, and such upbringing should respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions (Article 53(3) in conjunction with Article 48(1) of the Constitution). The applicant argued that, by including a grade for religion in the calculation of grade point average, the challenged Regulation introduced an instrument of pressure on pupils who attended catechesis due to their parents' wishes, and not out of their own will. Hence, the Regulation disturbs the "balance between parents' rights and the freedom of conscience and belief and also the convictions of the pupil". Moreover, the applicant asserted that, in the light of the opinion of the Episcopal Commission on Education, the grading system for religion classes is to encourage pupils to be religiously active outside school, "be active in their parishes, attend services and religious retreats, manifest their religious beliefs or join in religious groups". In the applicant's opinion, such a grading system may infringe on the freedom of conscience and belief of children, as well as affect their parents' choice with regard to upbringing.

Claiming that the challenged Regulation is inconsistent with the Act on Guarantees, the applicant indicated Article 6(2), as the first higher-level norm for review. It prohibits compelling citizens to participate or compelling them not to participate in religious activities or rituals. In the applicant's opinion, by including religion in the calculation of grade point average, the challenged Regulation introduces an instrument of pressure, aimed at guaranteeing high turnout at religion classes and pupils' participation in the practices

carried out outside school. Indeed, the object of evaluation is not only pupils' knowledge, but also their attitude and participation in prayer during catechesis. The applicant believes that catechesis as such is a religious activity. However, in the light of Article 6(2) of the Act on Guarantees, the state "should not legitimise pressure in matters of religion".

For the same reasons, the applicant petitions for determining the non-conformity of the challenged Regulation to Article 10(1) of the Act on Guarantees, which stipulates that the Republic of Poland is a secular state, and as such is neutral in matters of religion or conviction. Indeed, due to introducing "criteria which are religious in character (...) into the realm of activities of public authorities", the state ceases to be secular and neutral in matters of worldview, and acquires the qualities of a religious state.

In turn, the applicant argues for the non-conformity of the Regulation to the principle enshrined in Article 20(2) of the Act on Guarantees, mentioning that the state interferes in the evaluation of pupils' participation in catechesis. This way religion ceases to be merely a matter of religious organisations and enters the public education system.

Justifying the non-conformity of the challenged Regulation to Article 20(3) of the Act on Guarantees, in the light of which "a separate act sets forth the rules for teaching religion in state schools and kindergartens for the pupils of those institutions", the applicant indicated that evaluating pupils during such classes, and also including – or not - a grade for religion classes in the calculation of annual grade point average or a grade point average for end-of-school classification, is subject to the rules for teaching religion in schools. Therefore, they should be regulated in a legal act equivalent to a statute.

2. In a letter of 6 February 2008, the Minister of National Education held the view that the challenged Regulation conformed to Article 25(2), Article 32(1) and (2) and Article 53(3) in conjunction with Article 48(1) of the Constitution and to Article 6(2), Article 10(1), Article 20(2) and (3) of the Act on Guarantees.

Taking a stance on the allegation that the amending Regulation did not conform to Article 25(2) of the Constitution, the Minister of National Education pointed out that the calculation of grade point average included not only a grade obtained in religion classes, but also a grade for ethics classes. Consequently, public authorities provide pupils with a choice, not favouring any kind of worldview.

According to the Minister of National Education, the applicant's opinion that the easiness of obtaining a good grade in religion classes "makes" pupils choose that particular subject is merely a subjective view of the applicant, and hence it does not deserve being taken into consideration. Taking up religion classes is an act of free choice, as pupils may choose ethics classes instead. Moreover, the Minister of National Education indicated that "the preamble to the Education System Act declares that universal principles of ethics shall be taken into account with regard to education and upbringing (with the reservation that Christian value system will be respected). Including grades for school subjects such as ethics and religion (the latter of which also contains an ethical message) in the calculation of grade point average reflects the position which ethics occupies in the education system".

Also, the Minister of National Education disagreed with the allegation of the breach of Article 32(1) and (2) of the Constitution. Quoting the stance of the Roman Catholic Church presented in the document entitled *Dyrektorium katechetyczne kościoła katolickiego w Polsce (Directory for Catechesis of the Roman Catholic Church in Poland*),

the Minister stated that "grades for religion classes are awarded on the basis of pupils' knowledge, their skills, as well their activity, diligence and conscientiousness. They should not be based, however, on pupils' involvement in religious practices". This means that the criteria for evaluating pupils who attend religion do not necessarily have to be different from the evaluation criteria for the other subjects.

However, as regards the allegation of non-conformity of the challenged Regulation to Article 53(3) in conjunction with Article 48(1) of the Constitution, the Minister of National Education stated that the Regulation did not disturb the balance between parents' right, as regards ensuring their children a moral and religious upbringing and teaching, and parents' obligation to respect the freedom of conscience and belief as well as the convictions of their children. Providing for the possibility of choosing ethics classes and the possibility of not choosing either religion or ethics classes – the Regulation respects the guarantees arising from Article 53(3) in conjunction with Article 48(1) of the Constitution.

Taking a stance with regard to the claim that the Regulation was inconsistent with the Act on Guarantees, the Minister of National Education stated that the Regulation infringed on Article 6(2) of the Act, as it provided pupils with a choice to select other extracurricular subjects such ethics classes. In the Minister's view the challenged Regulation also conforms to Article 20(2) of the Act on Guarantees. The provision ensures the autonomy of teaching that is carried out in places of religious instruction which are in churches, prayer houses and at other locations, made available for those purposes by an authorised person, by allowing for a curriculum to be devised by the authorities of a church or religious organisation. However, that curriculum does not apply to the teaching of religion in state schools, as set out in Article 20(3) of the Act on Guarantees. Thus, these provisions do not contradict one another.

In the opinion of the Minister of National Education, the challenged Regulation is also consistent with Article 20(3) of the said Act. The issues pertaining to grading should not be considered tantamount to the rules for teaching. The Minister of National Education pointed out that the "rules for teaching" were set out in Article 12 of the Education System Act. By contrast, the issue of including a grade for religion in the calculation of grade point average is specified in the regulation concerning grading, issued pursuant to Article 22(2)(4) of the Education System Act.

3. Taking a stance in a letter of 12 March 2008, the Public Prosecutor-General stated that the challenged Regulation was consistent with Article 25(2) and Article 32(1) and (2) of the Constitution and with Article 20(3) of the Act on Guarantees, and also that it was inconsistent with Article 53(3) in conjunction with Article 48(1) of the Constitution and Article 6(2), Article 10(1) and Article 20(2) of the Act on Guarantees.

As regards the allegation of non-conformity of the amending Regulation to Article 25(2) of the Constitution, the Public Prosecutor-General indicated that, according to the substantiation of the draft regulation, its purpose was to "make a grade point average a source of information on the overall work and progress of pupils, and motivate them to make more effort, as well as to appreciate the work done in extracurricular classes", and not to favour any of the extracurricular subjects. In the opinion of the Public Prosecutor-General, the Regulation is not aimed at assigning to religion classes, as an extracurricular

subject, the attributes of compulsory subjects. In fact, the provision requires that all extracurricular subjects be included in the calculation of annual grade point average. The Public Prosecutor-General stated that it was doubtful that the inclusion of a grade for religion classes in the calculation of grade point average would change the character of that subject.

Also, the Public Prosecutor-General disagreed with the applicant's argument that the way of grading pupils in religion classes motivated them to be religiously active outside school. He pointed out that "in *Dyrektorium katechetyczne Kościoła katolickiego w Polsce* (*Directory for Catechesis of the Roman Catholic Church in Poland*), which was adopted on 20 June 2001 by the Polish Episcopal Conference, it was stated that «grades for religion classes are awarded on the basis of pupils' knowledge, their skills, as well their activity, diligence and conscientiousness. They should not be based, however, on pupils' involvement in religious practices. For it should be recognised (...) that religious life is subject to the judgment of conscience made before God»".

The Public Prosecutor-General did not view the arguments of the applicant as justified with regard to the non-conformity of the challenged Regulation to Article 32(1) and (2) of the Constitution. Indeed, the Regulation concerns all grades for extracurricular classes that pupils attend. However, if they do not attend any extracurricular classes, their grade point average should be calculated on the basis of a smaller number of grades. The Public Prosecutor-General also indicated that such differentiation, with regard to a set of subjects from which grades are taken into account when calculating a grade point average, exists "e.g. among pupils from different forms, which vary as regards prescribed curricula (cf. the Regulation of the Minister of National Education specifying different curricula for comprehensive as well as mixed comprehensive and vocational education)". In the light of the above, it cannot be concluded that the subject of religion is privileged in that respect, at the same time leading to discrimination against pupils who do not attend catechesis.

Taking a stance with regard to the alleged non-conformity of the Regulation to Article 53(3) in conjunction with Article 48(1) of the Constitution, the Public Prosecutor-General noted that the rules for teaching religion in state schools are regulated by the Education System Act and by the Regulation of the Minister of National Education of 14 April 1992 on the terms and ways of organising religion classes in state schools and kindergartens (Journal of Laws – Dz. U. No. 36 item 155, as amended), and not by the challenged Regulation. It is the above-mentioned normative acts that regulate the issues related to making a choice whether to attend religion classes or not. Therefore, the Public Prosecutor-General concluded that there was no adequate relation between the challenged Regulation and the indicated higher-level norm for constitutional review.

The Public Prosecutor-General took the same stance on the allegation of non-conformity of the Regulation to Article 6(2) of the Act on Guarantees, for it changes neither "the rules for organising religion classes, nor the terms of attending them; in particular, it does not impose an obligation to attend those classes". Analysing a dictionary definition of the term "religion class", the Prosecutor also disagreed with the applicant's claim that catechesis was a religious activity, and that a prayer at the beginning and at the end of such classes did not have a compulsory character.

For the same reasons, the Public Prosecutor-General stated that there was no adequate relation between the amending Regulation and Article 10(1) of the Act on Guarantees.

The Public Prosecutor-General stated that the allegation of non-conformity of the challenged Regulation to Article 20(2) of the Act on Guarantees was misguided. He underlined that "it follows from the content of the Act on the Guarantees of Freedom of Conscience and Religion that Article 20(2) concerns the teaching of religion by religious organisations in places of religious instruction which are in churches, prayer houses, etc. (see the second sentence of that provision). It does not concern the teaching of religion in schools". Thus, also in this case, Article 20(2) of the Act on Guarantees is not an adequate higher-level norm for constitutional review.

However, referring to the issue of non-conformity to Article 20(3) of the Act on Guarantees, the Public Prosecutor-General pointed out that a separate statute, within the meaning of the indicated higher-level norm for constitutional review, containing the rules for teaching religion in state schools and kindergartens, is the Education System Act of 7 September 1991. Moreover, he noted that "since the Constitutional Tribunal recognised that the issue of placing grades for religion classes in school reports is not a separate issue, but is part of a statutory rules for organising religion classes by state schools, and hence it does not require special regulation at the statutory level (cf. […] the judgment of 5 May 1998, Ref. No. K 35/97) – the adopted solution should not raise constitutional questions. Consequently, the Public Prosecutor-General stated that the amending Regulation was consistent with Article 20(3) of the Act on Guarantees.

4. In a letter of 3 March 2009, the President of the Constitutional Tribunal requested the Minister of National Education to provide replies, within the period of 30 days from the date of service of the letter, to the following questions:

What is the percentage structure of the extracurricular subjects selected by pupils in state primary, lower secondary and upper secondary schools, i.e. what percentage of pupils choose religion, and what percentage of them opt for ethics, and what percentage of pupils select neither of the extracurricular subjects?

What is the way of calculating an annual grade point average of pupils who did not choose any of the extracurricular subjects, i.e. does the grade point average of the pupil who did not attend any of the extracurricular classes (religion or ethics) constitute the sum of the grades obtained by the pupil divided by the number of compulsory subjects that the pupil took up, or is it that the grade point average of the pupil constitutes the sum of the grades obtained divided by the number of compulsory subjects including extracurricular ones?

Does the Minister of National Education receive any complaints concerning the inclusion of grades for extracurricular subjects or/and religion or ethics in the calculation of grade point average for annual classification of pupils, or does the Minister of National Education have information about such complaints received by other institutions?

5. With reference to the above questions from the President of the Constitutional Tribunal, the Minister of National Education replied in a letter of 3 June 2009.

With regard to the first question, the Minister of National Education informed that he had no data illustrating the choices made by pupils (namely, the choice of religion, ethics or neither of the subjects). This information had also not been collected by the Central Statistical Office. Likewise, such data were not included in the database of information on the education system. However, the Minister of National Education provided information on the number of schools where ethics classes were conducted. According to the information from 30 September 2008, ethics classes were conducted in 89 primary schools, 137 lower secondary schools, 33 vocational schools, 186 comprehensive upper secondary schools, 23 specialist upper secondary schools and 91 technical secondary schools.

The Minister of National Education pointed put that the number of pupils attending extracurricular classes changed throughout the school year. The pupils who are dissatisfied with "the grade for religion the teacher announces, (...) file a statement about their resignation from participation in religion classes before the date of annual or end-of-school classification of pupils, thus avoiding obtaining a grade in that subject, and the impact it would have on their grade point average".

As regards the second question, the Minister of National Education stated that "a pupil's grade point average constitutes the sum of the grades obtained by him/her (from the compulsory and extracurricular subjects) divided by the total number of subjects. This means that if a pupil attended, for instance, religion classes and classes of a second foreign language, which is regarded as an extracurricular subject at a given school, his/her grade point average will be the sum of grades for the compulsory subjects the pupil has taken up and grades for religion and the second foreign language, divided by the number of the said subjects, including religion and the second foreign language.

The pupil who has not chosen an extracurricular subject (religion or ethics), and has not attended other extracurricular classes which are taken into account when calculating a grade point average, obtains a grade point average which is calculated by dividing the sum of all his/her grades from compulsory subjects divided by the total number of these subjects".

Moreover, the Minister of National Education pointed out that in the forms 4-6 of primary school or in the forms of lower secondary school, apart from the second foreign language, a grade point average includes also the grades for extracurricular subjects, "for which no curriculum outline has been devised, but for which – in accordance with separate provisions – a course syllabus has been devised that has been included in the school's set of curricula. In the case where pupils learn a language of a national or ethnic minority, or a regional language (Kashubian), as part of efforts aimed at preserving their national, ethnic or linguistic identity, the said language classes are also taken into account when calculating a grade point average of the pupils, according to the rule set forth above".

With regard to the third question, the Minister of National Education replied that in the years 2007-2009, he did not receive any complaints concerning the inclusion of grades for religion or ethics classes in the calculation of grade point average.

6. In a pleading of 24 June 2009, the applicant requested that the applicant's letter of 9 November 2007 be supplemented with an additional motion to determine the

conformity of the challenged Regulation to Article 25(1) and Article 92(1) of the Constitution, as well as to adjudicate the non-conformity of Article 22(2)(4) of the Education System Act of 7 September 1991 (Journal of laws - Dz. U. of 2004 No. 256, item 2572, as amended; hereinafter: the Education System Act) to Article 92(1) of the Constitution. In case the non-conformity to the Constitution should be adjudicated, the applicant also petitioned for granting a 12-month's respite with regard to Article 22(2)(4) of the Education System Act becoming null and void.

In the applicant's view, the challenged Regulation is inconsistent with the principle of equal rights of churches and other religious organisations, which is enshrined in Article 25(1) of the Constitution, and, furthermore, it was issued pursuant to statutory provisions which infringe on the requirements provided for in the so-called statutory authorisation, and therefore it remains contrary to Article 92(1) of the Constitution.

Substantiating the claim about the infringement on the principle of equal rights of churches and other religious organisations by the Regulation providing for the inclusion of grades for religion and ethics in the calculation of grade point average, the applicant presented the following arguments:

" – religion classes (...) are classes the content of which falls within the scope of competence of particular churches and religious organisations – the classes of Catholic religion organised in almost all state schools in Poland, whereas classes devoted to other religions are conducted in only few schools, - in the case when single pupils attending a given school would like to participate in classes of a religion other than the Catholic religion, they virtually have no chance for that, as the education system is structured in such a way that it promotes "majority" religions. This way, pupils who are Catholic have an opportunity to attend religion classes, whereas, in a majority of cases, the pupils who are followers of other religions have no such possibility. [Consequently, this affects their grades for religion and is of significance when these grades are to be included in the calculation of grade point average]; - the above problem is not resolved (...) – by the possibility of attending ethics classes. Such classes are conducted in very few schools. Therefore, the pupils who do not want to attend classes of (Catholic) religion – have no possibility of including a grade from ethics in their grade point average".

Moreover, the applicant indicated serious problems concerning the organisation of ethics classes and classes of religions other than the Catholic religion in Polish schools. The applicant recalled the cases pending before the European Court of Human Rights against Poland, which concern the lack of real possibilities for teaching ethics in Polish schools and the discrimination against pupils on the grounds of not attending religion classes. Referring to the opinion of the Helsinki Foundation for Human Rights, presented in the case concerning the limited possibilities of organising ethics classes, the applicant underlined that ethics classes are organised in merely 1% of Polish schools.

In the applicant's view, the provided figures should be taken into consideration by the Constitutional Tribunal when examining this application, also in the context of equal rights of churches and other religious organisations (and of their followers).

Claiming that the amending Regulation was inconsistent with Article 92(1) of the Constitution, the applicant indicated that it had been issued on the basis of statutory

authorisation which had been recognised as being contrary to the Constitution even by the Constitutional Tribunal.
Indeed, the basis for the Regulation was Article 22(2)(4) of the Education System Act, in which case the conformity to the Constitution had been challenged in the signalling decision (Ref. No. S 1/07) – as the applicant wrote elsewhere.
Nevertheless, as the applicant emphasises, state authorities, instead of restoring conformity to the Constitution and amending Article 22(2)(4) of the Education System Act, issued another executive act, namely the challenged Regulation.

II

At the hearing on 1 July 2009, the Presiding Judge informed that on 29 June 2009 the Constitutional Tribunal received a pleading from a group of Sejm Deputies, in which they requested that the scope of this constitutional review be extended, i.e. to determine the non-conformity of the amending Regulation to Article 25(1) and Article 92(1) of the Constitution and to determine the non-conformity of Article 22(2)(4) of the Education System Act to Article 92(1) of the Constitution in relation to – as it was stated in the pleading – the signalling decision of the Constitutional Tribunal of 31 January 2007, Ref. No.S 1/07, which has not had any impact until today, and to specify in a judgment that the challenged provision shall become null and void after the lapse of 12 months from the date of adjudication.

The representative of the Minister of National Education and the representative of the Public Prosecutor-General requested the hearing to be adjourned, due to the fact that the copies of the pleading, which extended the scope of the application, had been provided for the parties to the proceedings shortly before the hearing, and thus the parties had no time to take a position on the allegations contained therein.

At the hearing, answering the question from the Judge Rapporteur as to whether the pleading extending the scope of the application is appropriate to be supplemented to the application of 9 November 2007 – the representative of the applicant stated: “lodging «Application Supplement» with the Constitutional Tribunal indicates that this is an additional circumstance, which has not been included in that application earlier. However, indicating the provision which is to be reviewed by the Constitutional Tribunal which has not been included in the original application suggests that one cannot speak of the application supplement to be fully equivalent to the original application, for the matter that was challenged was to be the object of review by the Constitutional Tribunal, and also an additional higher-level norm for constitutional review was indicated but in relation to a different issue. Therefore, one cannot regard these two applications, referred to the Constitutional Tribunal, as being equivalent”.

The representative of the applicant also explained that given the lack of such equivalency, it had been considered whether to refer a new application to the Constitutional Tribunal, which would include the allegations presented in the pleading extending the scope of the said application. However, due to the anticipation of the applicant’s representative that different directions might be taken in adjudication by the

Constitutional Tribunal, in case of separate adjudication on the application of 9 November 2007 and the application based on the allegations included in the pleading extending the scope of the application, the applicant decided to extend the scope of the original application. Indeed, the applicant recognised that challenging the formal basis for issuing the Regulation would result in the lack of necessity, on the part of the Tribunal, to examine the matters pertaining to the content.

In the decision issued at the hearing, the Constitutional Tribunal adjourned the hearing indefinitely and granted the parties to the proceedings a 30-day period to take an additional position on the part of the applicant's pleading which concerns supplementing the application of 9 November 2007 by extending the scope of the constitutional review, i.e. by determining non-conformity of the Regulation of the Minister of National Education of 13 July 2007 amending the Regulation concerning the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in state schools to Article 25(1) and Article 92(1) of the Constitution.

Moreover, "the Tribunal has decided that it will refuse to proceed with the application contained in the pleading of 24 June 2009, which was received by the Constitutional Tribunal on 25 June 2009, to the extent it requests the Constitutional Tribunal's examination of conformity of Article 22(2)(4) of the Education System Act to Article 92(1) of the Constitution. The said application does not meet the procedural criteria, ensuing from Article 191(1)(1) of the Constitution, as it was not supported by a group of at least 50 Deputies and also it was signed by persons who had not been authorised to do so by a group of at least 50 Deputies, i.e. a requirement that arise from Article 29(1) and (2) of the Constitutional Tribunal Act". Moreover, the Tribunal indicated that "the application contains the allegations which are primarily based on the argumentation presented in the signalling decision of 31 January 2007, S 1/07, which was issued earlier by the Constitutional Tribunal; however, it does not contain further argumentation and other additional proof to support the raised allegations, which does not fall within the meaning of Article 32(1) and (2) of the Constitutional Tribunal Act.

III

1. In a letter of 27 July 2009, referring to the allegation presented by the applicant in the pleading of 24 June 2009 on supplementing the application, the Public Prosecutor-General stated that the challenged Regulation was not inconsistent with Article 25(1) of the Constitution and was consistent with Article 92(1) of the Constitution.

Referring to the allegation that the challenged Regulation was inconsistent to Article 25(1) of the Constitution, the Public Prosecutor-General noted that the arguments presented by the applicant in that regard concerned the application of law, which did not fall within the scope of constitutional review of the said Regulation. Moreover, the Public Prosecutor-General pointed out that the provisions of the Regulation did not infringe on the equal rights of churches or other religious organisations carrying out their activities in Poland. Thus, they could not be a possible source of differences in their actual situation. The provisions of the Regulation did not rule out "the possibility of including grades for

classes of religions other than the Roman Catholic religion," the Public Prosecutor-General stated.

However, as regards the allegation that the Regulation was inconsistent with Article 92(1) of the Constitution, the Public Prosecutor-General argued that "the review of compliance of the provisions of the challenged Regulation with Article 92(1) of the Constitution may not consist in indirect adjudication that the authorisation set forth in Article 22(2)(4) of the Education System Act is unconstitutional". The Public Prosecutor-General stated that the mere fact of issuing the Regulation pursuant to the provision whose conformity to Article 92(1) of the Constitution might raise doubts, did not result in the said Regulation being inconsistent with the second sentence of Article 92(1) of the Constitution. Therefore, as long as the provision constituting the authorisation to issue the Regulation has not been derogated from the legal system, the executive act should be subject to review, as regards its conformity to the first sentence of Article 92(1) of the Constitution. In that respect, however, it may not be determined that the amending Regulation does not conform to the indicated higher-level norm of review. The Public Prosecutor-General emphasised that the applicant had not presented any arguments proving that the statutory authorisation to issue an executive act had been exceeded.

Analysing the scope of authorisation specified in Article 22(2)(4) of the Education System Act, which stipulates that a regulation shall regulate "the terms and methods of grading, classifying and promoting pupils and conducting tests and examinations", the Public Prosecutor-General noted that the said provision set out the subject matter to be regulated by regulation, in a way which was too general and insufficiently specific. However, it may not be argued that the scope of the challenged Regulation goes beyond the subject matter referred for regulation in the authorising provision. Therefore, the Regulation is consistent with Article 92(1) of the Constitution.

2. In a letter of 14 August 2009, the Minister of National Education requested that the challenged Regulation be adjudicated as consistent with Article 25(1) and Article 92(1) of the Constitution.

The Minister of National Education regarded the arguments of the applicant as misguided. "The circumstance that churches and other religious organisations are responsible for the content of religion classes does not clash with Article 25(1) of the Constitution". The Regulation does not regulate the issues of the right to devise a curriculum for religion classes by churches and other religious organisations, thus it may not be concluded that it introduces differentiation in that respect depending on a given religious organisation.

According to the Minister of National Education, the fact that religion classes are organised in virtually all state schools reflects the religious structure of Polish society, in which the majority is Roman Catholic, and that has nothing to do with unequal treatment of religious organisations by state authorities. Moreover, the Minister of National Education pointed out that "the obligations of schools with regard to teaching religion are specifically governed by the Regulation of the Minister of National Education of 14 April 1992 on the terms and ways of organising religion classes in state schools and

kindergartens. And, therefore, the provisions of the latter Regulation should be confronted with Article 25(1)".

The Minister of National Education also disagreed with the statement that the Polish education system favoured religious organisations with a large number of followers. He illustrated this by mentioning that the Regulation of 14 April 1992 provided for religion classes to be organised in kindergartens and schools for a group of fewer than 7 pupils in a group comprised of pupils from different forms or schools (different kindergartens) (§ 2(2)). However, if "in a kindergarten or school fewer than 7 pupils are interested in religion classes of a particular religion or religions, the authority supervising the kindergarten or school, in agreement with the relevant church or religious organisation, shall organise religion classes in a group comprised of pupils from different schools (different kindergartens) or outside school (kindergarten) in a place of religious instruction (§ 2(3))". The Minister of National Education emphasised that the above examples "did not mention all the institutions specified in the Regulation, which aimed at facilitating access to religious instruction for persons of minority religions".

Also, he disagreed with the applicant's statement that pupils had limited possibilities of attending ethics classes due to the fact that such classes were organised in very few schools. The Minister of National Education pointed out that, although the difficulties pertaining to organisation of ethics classes could not be ruled out, they were incidental. In the light of legal provisions, a school has no grounds to refuse the organisation of ethics classes. A possible occurrence of such a situation is related to the application of law and is not subject to constitutional review. However, he stressed that the provisions of the challenged Regulation did not concern that issue at all.

With reference to the allegation about the non-conformity of the challenged Regulation to Article 92(1) of the Constitution, the Minister of National Education stated that this higher-level norm for review "might only be confronted with the provision containing authorisation to issue the Regulation", for it sets out the requirements for formulating statutory authorisation. However, the defectiveness of Article 22(2)(4) of the Education System Act, which includes such authorisation, may not be the object of review in these proceedings.

IV

On 2 December 2009, at the hearing reopened after its adjournment on 1 July 2009, the Presiding Judge informed that on the preceding day, i.e. on 1 December, at about 3 p.m., the Constitutional Tribunal received an application from a group of Sejm Deputies requesting the Tribunal to determine the non-conformity of Article 22(2)(1) and (4) of the Education System Act of 7 September 1991 to the Constitution. The application was accompanied by a pleading from the representatives of the applicant, in which they requested that the present case with the reference number U 10/07 be heard and determined together with the case concerning the new application from the group of Deputies. The Presiding Judge stated that, for obvious reason, the pleading had been presented to the other parties to the proceedings on that day, right before the hearing.

He also pointed out that the hearing scheduled for 1 July 2009 had been adjourned because the representatives of the group of Sejm Deputies, by pleading of 24 June 2009, petitioned for the extension of the scope of the constitutional review, and namely for determining the non-conformity of the Regulation of the Minister of National Education of 13 July 2007, which was challenged in the application, to Article 25(1) and Article 92(1) of the Constitution; they also petitioned for determining the non-conformity of Article 22(2)(4) of the Education System Act of 7 September 1991 to Article 92(1) of the Constitution. The Tribunal decided then to adjourn the hearing without setting a new date, and at the same time set a 30-day period for the parties to the proceedings to take an additional stance with regard to the extension of the scope of the review of the challenged Regulation. With regard to the said application concerning the non-conformity of Article 22(2)(4) of the Education System Act of 7 September 1991 to the Constitution, the Tribunal decided that the application did not meet the procedural criteria, arising, *inter alia*, from Article 191(1)(1) of the Constitution, as it had not been supported by a group of at least 50 Deputies, and had been signed by persons who were unauthorised to do so. In addition, the Tribunal explained that the Tribunal's decision, with regard to the application for determining the non-conformity of Article 22(2)(4) of the Education System Act to the Constitution, which did not commence the constitutional review of Article 22(2)(4), due to the fact that the requirements concerning support and appropriate signatures of a group of Deputies had not been met, does not rule out the possibility of resubmission of an application in that case, in the form required by the provisions of law.

Having heard the argumentation of the Sejm and the Public Prosecutor-General with regard to the application for the examination of constitutionality of Article 22(2)(1) and (4) of the said Act and for the examination of that Article together with the case under examination, Ref. No. U 10/07, the Tribunal held a brief meeting to confer together. Afterwards, the Presiding Judge announced that the Tribunal had decided not to admit the application. The Presiding Judge explained that the period that had been granted at the hearing on 1 July 2009, in the case with the reference number U 10/07, in order to supplement all the elements related to the extension of the scope of the constitutional review was sufficiently long. At the same time, it had been explained then, that with regard to challenging Article 22(2)(4) of the Education System Act, all the procedural criteria should be met, which had not been fulfilled then. The Tribunal adjourned the hearing, allowing the applicant to repair the defects in accordance with the requirements of the procedure. However, the applicant submitted the application right before the hearing. The case concerning the examination of constitutionality of Article 22(2)(4) of the Education System Act, is a new case in the substantive and procedural sense; it must be assigned a new reference number, must be subject to preliminary consideration, also as regards procedural requirements. The Presiding Judge explained that if the application satisfied the requirements of the preliminary consideration, then the parties to the proceedings had to take a position with regard to the new application. The Presiding Judge stated that it was a new case, though in a substantive sense it was related to the present case under examination, but for the obvious procedural reasons it might not be examined at that moment.

V

The Constitutional Tribunal has considered the following:

1. The object of allegations.

In a letter of November 2007, a group of Deputies (hereinafter: the applicant) referred to the Tribunal for it to determine that the Regulation of the Minister of National Education of 13 July 2007 amending the Regulation concerning the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in state schools (Journal of Laws – Dz. U. No. 130, item 906, hereinafter: the amending Regulation or the challenged Regulation). Pursuant to Article 22(2)(4) of the Education System Act of 7 September 1991 (Journal of Laws - Dz. U. of 2004, No. 256, item 2572, as amended; hereinafter: the Education System Act), the challenged Regulation introduces amendments to § 20 and § 22 of the Regulation of the Minister of National Education of 30 April 2007 concerning the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in state schools (Journal of Laws - Dz. U. No. 83, item 562, as amended; hereinafter: the amended Regulation).

§ 1 of the challenged Regulation introduces the following amendments to the amended Regulation:

"1) in § 20, after paragraph 4, paragraph 4a shall be added with the following wording:

«4a. In the case of a pupil who attended extracurricular classes and/or religion classes or ethics classes, the grade point average, as referred to in paragraph 4, shall also include annual grades for those classes»;

2) in § 22, after paragraph 2, paragraph 2a shall be added with the following wording:

«2a. In the case of a pupil who attended extracurricular classes and/or religion classes or ethics classes, the grade point average, as referred to in paragraph 2, shall also include annual grades for those classes».

§ 2 of the amending Regulation (final provision) stipulates that the said Regulation shall enter into force as of 1 September 2007.

As higher-level norms for "vertical review" of the challenged provisions of the amending Regulation, the applicant indicated the following provisions of the Constitution: Article 25(2), Article 32(1) and (2) and Article 53(3) in conjunction with Article 48(1), as well as the following provisions of the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Religion (Journal of Laws – Dz. U. of 2005, No. 231, item 1965, as amended; hereinafter: the Act on Guarantees): Article 6(2), Article 10(1) and Article 20(2) and (3).

The scope of allegations, arising from the subject matter of the amending Regulation, is very narrow, and concerns: the inclusion of grades for religion classes in the

calculation of grade point average, for the purpose of annual classification of pupils, which encompasses compulsory subjects and which entitles pupils to complete their school year with honours, pursuant to § 20(4a) of the amended Regulation, challenged as § 1(1) of the challenged Regulation, in conjunction with § 20(4) of the amended Regulation. The inclusion of grades for religion classes in the calculation of grade point average, for the purpose of end-of-school classification of pupils, which encompasses compulsory subjects, and which entitles pupils to finish their primary school, lower secondary school or upper secondary school, or a post-primary school, with honours in accordance with Article 22(2a) of the amended Regulation, challenged as § 1(2) of the challenged Regulation, in conjunction with § 22(2) of the amended Regulation. Thus, the allegations concern a particular issue related to the field of teaching religion. However, it is not possible to carry out a constitutional assessment of the challenged Regulation without presenting the scope of allegations in a broader context.

As it has been mentioned above, in the pleading on supplementing the application of 24 June 2009, the applicant petitioned for the extension of the scope of the constitutional review of the challenged Regulation by including the higher-level norms arising from Article 25(1) and Article 92(1) of the Constitution. Moreover, the applicant requested that the non-conformity of Article 22(2)(4) of the Education System Act to Article 92(1) of the Constitution be determined. The Tribunal refused to commence the constitutional review proceedings as regards the examination of conformity to Article 22(2)(4) of the Education System Act to Article 92(1) of the Constitution, for this scope of review does not fall within a procedural and substantive aspect of the application of 9 November 2007. Consequently, the constitutional review of Article 22(2)(4) of the Education System Act would require, in the course of proceedings specified at the hearing of 1 July 2009, filing a separate application.

Having acknowledged the admissibility of the extension of the scope the application of 9 November 2007, where Article 92(1) of the Constitution has been added as the basis for review of the challenged Regulation, the Tribunal, in the first place, focused on the constitutional review within that very scope, beginning with the applicant's argumentation presented in the pleading of 24 June 2009, commencing with the review of the fulfilment of formal requirements, arising from the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act).

2. The discontinuation of the proceedings with regard to the review of the challenged Regulation in the light of Article 92(1) of the Constitution.

Indicated by the applicant as a higher-level norm for constitutional review of the challenged Regulation, Article 92(1) of the Constitution stipules that: "Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act".

The Constitutional Tribunal wishes to point out that the above constitutional provision sets out the constitutional requirements concerning the provisions which authorise the issue of a regulation, namely that the said provisions should clearly indicate the organs authorised to

issue a regulation, specify the scope of the matters to be regulated and the guidelines regarding the provisions of the act issued with authorisation.
Pursuant to Article 92(1) of the Constitution, the authorisation should be "specific" and the legal regulation issued on its basis should carry out the aim arising from the authorising provisions.

Specifying the normative content of Article 92(1) of the Constitution, the Constitutional Tribunal, on a number of occasions, indicated that the legislator, granting authorisation to issue a regulation, should "construct statutory authorisation in such a way that it would provide answers to three questions: «who?» (has the right to issue an act), «what?» (is to be regulated in this act) and «how?» (are the given matters to be regulated?). The issue of constructing statutory authorisation has been addressed by the Constitutional Tribunal many times (see, e.g. the Constitutional Tribunal's judgments of: 12 March 2002, Ref. No P 9/01, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 2/A/2002, item 14; 10 July 2000, Ref. No. K 12/99, OTK ZU No. 5/A/2000, item 143; 9 November 1999, Ref. No. K 28/98, OTK ZU No. 7/1999, item 156), and hence it is redundant to discuss it in detail once again. Article 92(1) of the Constitution allows for (...) issuing regulations only on the basis of specific authorisation contained in an act so as to implement the act. The authorisation must be specific in character in respect of its subject (it must specify the organ which is competent to issue it), object (it must specify the scope of matters to be regulated) as well as content (it must set out the guidelines concerning the content of an act)" (the judgment of 12 September 2006, Ref. No. K 55/05, OTK ZU No. 8/A/2006, item 104).

On numerous occasions, the Tribunal has explained that the guidelines referred to in Article 92(1) of the Constitution, must "always be set out in the form a statute, though they do not need to be contained in the authorising provision. «The principle of unification of a statute as a normative act also allows for tolerating the situation where the guidelines are included in other provisions of a statute than the authorising provision» (K 10/99, as above, p. 861). This is permissible provided that «this allows to precisely reconstruct the content of these guidelines» (K 12/99, as above, p. 684)" (the judgment of 13 March 2001 Ref. No. K 21/00, OTK ZU No. 3/2001, item 49). Also, the Tribunal has emphasised that it follows from Article 92(1) of the Constitution that blank authorisation, which does not specify guidelines precisely, is not permissible. The regulation may not regulate the matter independently without statutory authorisation, without precise guidelines that would be adequate to the matter under regulation; neither may it regulate the matter reserved for statutes which concern the rights and freedoms of the individual (cf. e.g. the judgments of: 13 November 2001, Ref. No. K 16/01, OTK ZU No. 8/2001, item 250; 6 November 2007 Ref. No. U 8/05, OTK ZU No. 10/A/2007, item 121; 26 April 2004 Ref. No. K 50/02, OTK ZU No. 4/A/2004, item 32).

The analysis of the normative content of Article 92(1) of the Constitution reveals that, although this provision sets out the constitutional requirements concerning the statutory authorisation to issue a regulation, it refers not only to the statutory authorising provisions, but also to the regulations issued pursuant to statutes. In fact, Article 92(1) of the Constitution concerns not only the authorising provisions of a statute, but also the relations between the provisions of an authorising statute and the provisions of an

"authorised" regulation. In the case of constitutional review of a challenged regulation, it is also necessary, even where the statutory provisions which authorise the issue of a regulation have not been challenged, to analyse the statutory provisions. However, the assessment of constitutionality of the statutory provisions, since they have not been challenged, is not possible.

The Tribunal stresses that the constitutional review of a challenged regulation, from the point of view of its conformity to Article 92(1), is also possible when the statutory provisions which authorise the issue of a regulation have not been challenged in order to examine their compliance with the requirements of Article 92(1) of the Constitution. The Tribunal recalls here the judgment of 16 January 2007, Ref. No. U 5/06 (OTK ZU No. 1/A/2007, item 3), the operative part of which was promulgated on 22 January 2007.
In the said judgment, the Tribunal decided that there were no grounds for the Public Prosecutor-General's argument that "the fact that authorisation has not been challenged in the application requesting a constitutional review of the act issued on the basis of such authorisation which has not been challenged, it forces to recognise the constitutionality of the act issued on the basis of authorisation, in the review proceedings concerning the constitutionality of this executive act. Indeed, in both cases something else is the object of assessment and adjudication of the Tribunal. The Tribunal may not adjudicate about the unconstitutionality of an act which has not been challenged, which does not, however, preclude the assessment of the challenged act by means of the arguments arising from the statutory authorisation that has not been challenged". As regards the present case, the Tribunal maintains its above-mentioned conclusions. In the present case, it is possible to carry out the review of the challenged Regulation in respect of its conformity to Article 92(1) of the Constitution, despite the fact that such review will not be carried out with regard to the provisions of Article 22(2)(4) of the Education System Act, which constitutes the formal basis for issuing the challenged Regulation. Therefore, the Tribunal has analysed the applicant's pleading of 24 June 2009 in which he requests that it be determined that the challenged Regulation does not conform to Article 92(1) of the Constitution. As it has already been mentioned, within the scope concerning the higher-level norms for review arising from Article 92(1) of the Constitution, the Tribunal allowed for the pleading of 24 June 2009 on the application to be supplemented, for substantive examination, at the same time refusing to proceed with, in the present case, the application for examination of conformity of Article 22(2)(4) of the Education System Act to Article 92(1) of the Constitution.

Analysing the applicant's pleading of 24 June 2009, the Tribunal has determined that none of the arguments cited in that pleading refers to the application for examination of the conformity of the challenged Regulation to Article 92(1) of the Constitution. To justify the application in the above regard, the applicant only refers to the above-mentioned Tribunal's judgment, in the case with the reference number U 5/06, from which it follows, according to the applicant, that the Regulation challenged in the present case is inconsistent with the Constitution, as the Constitutional Tribunal itself has regarded the statutory authorisation in Article 22(2)(4) of the Education System Act as "contrary to the Constitution". The applicant also refers to the signalling decision of 31 January 2007 with the reference number S 1/07 (OTK ZU No. 1/A/2007, item 8), which was issued by the

Tribunal in relation to the case with reference number U 5/06; in the applicant's opinion, in the said decision, the Tribunal clearly and explicitly questioned the conformity of the provisions constituting the statutory authorisation to issue the above-mentioned Regulations. On these grounds, without providing any other arguments, the applicant asserts that the challenged Regulation is inconsistent with the Constitution. Additionally, the applicant quotes an excerpt from the signalling decision of 31 January 2007 which refers to the legislative deficiencies concerning Article 22(2)(4) of the Education System Act, in which the Tribunal stated as follows: "Defectiveness of an authorising norm, which is the basis legitimising the issue of an executive act, inevitably leads to the situation where any cases of its application will have to be qualified as non-compliant with constitutional standards".

The Tribunal points out that in the judgment in the case with the reference number U 5/06, it did not adjudicate about the conformity of Article 22(2)(4) of the Education System Act to the Constitution. In the said judgment, the Tribunal adjudicated, *inter alia*, that: "§ 2 of the Regulation of the Minister of National Education of 8 September 2006 amending the Regulation concerning the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in state schools (Journal of Laws – Dz. U. No. 164, item 1154) and the annex to that Regulation are inconsistent with Article 22(2)(4) of the Education System Act of 7 September 1991 (...) and with Article 92(1) of the Constitution of the Republic of Poland".

However, the Tribunal points out that, in relation to the judgment of 16 January 2007 (Ref. No. U 5/06), it suggested to the Sejm of the Republic of Poland, in its decision of 31 January 2007 (ref. No. S 1/07) that there was a need for legislative initiative with regard to amending Article 22(2)(4) of the Education System Act, in a way that would comply with the constitutional requirements concerning the statutory authorisation and the principle of exclusiveness of statutory regulation in the realm of rights and freedoms.

In the above-mentioned decision, the Tribunal stated, *inter alia*, that:

"In the light of the presented assumptions, Article 22(2)(4) of the Education System Act does not fulfil the requirements specified in Article 92(1) of the Constitution. It is hard to regard the guidance from Article 22(2)(4)(a)-(g) as imperative guidelines. They are formulated as a set of certain rules which should be respected, regardless of the specific provisions of a regulation, but they definitely do not specify the wording: «terms and methods of grading and classifying».

The Tribunal also pointed out that Article 22(2)(4) of the Education System Act transferred the legislative functions to an executive authority, as a result of which the provisions of a regulation became an independent source of law in the realm of constitutional individual rights – the right to education. The Tribunal stated, *inter alia*, that: "the analysed situation pertains to the exclusiveness of statutory regulation from the realm of rights and freedoms. In the legal order proclaiming the principle of separation of powers, based on the primacy of a statute as a basic source of internal law, the parliament may not at a random moment «transfer» legislative functions to executive authorities. A fundamental regulation of a given matter may not be a domain of executive provisions, issued by authorities not belonging to the legislative power. Indeed, it is not admissible to

leave the shaping the fundamental elements of a legal regulation to the legislative decisions of an executive authority. Yet, this is so in the case of Article 22(2)(4) of the Education System Act. Also, Article 31(3) of the Constitution requires statutory regulation with regard to all provisions concerning the limitation of constitutional rights and freedoms of the individual. In such a case the scope of matter to be regulated in a regulation needs to be narrower than the scope of the matter generally permitted in the light of Article 92(1) of the Constitution. Indeed, Article 31(3) of the Constitution more strongly stresses the necessity for a broader regulation of statutory rank and narrows down the regulatory scope remaining for the regulation.

Article 22(2)(4) of the Education System Act concerns the exercise of constitutional right to education (Article 70(1) of the Constitution), which is an individual's right. Thus, in the case of this matter, all the aforementioned restrictions concerning the formulation of authorisation to issue executive acts are relevant.

The analysis of the content of the Education System Act, the Regulation concerning the terms and methods of grading and the amending Regulation – and in particular the provisions under review in the case with the reference number U 5/06 – clearly indicates that, in this case, the executive act has become the basic source of law as regards the end of secondary school examinations, functioning as an independent act. This situation, which leads to an undesirable destabilisation of the relation between an act and an executive act, and hence being constitutionally inadmissible, stems from the authorisation which has been incorrectly formulated in respect of legislative aspects and which is contained in Article 22(2)(4) of the Education System Act".

With regard to the judgment in the present case, the Constitutional Tribunal maintains the above conclusions. The Tribunal emphasises that the analysis of the present case confirms the need for a prompt legislative initiative concerning an amendment to Article 22(2)(4) of the Education System Act, in a way which is consistent with the constitutional requirements.

However, the signalling decision with the reference number S 1/07 and the Constitutional Tribunal's conclusions from the judgment in the case with the reference number U 5/07, which have been referred to by the applicant, do not justify the assertion that the Tribunal adjudicated on the non-conformity of Article 22(2)(4) of the Education System Act, which constituted the formal basis for the issue of the challenged Regulation. Despite the Tribunal's suggestions contained in the decision with the reference number S 1/07, Article 22(2)(4) of the Education System Act remains an element of the current legal system.

As it has already been mentioned, it is permissible, in the light of the normative content of Article 92(1) of the Constitution and the Tribunal's jurisprudence, to carry out a review of a regulation in accordance with the requirements of constitutional review, arising from Article 92(1) of the Constitution, despite the lack of a formal motion for a review of the statutory provision which authorises the issue of that regulation. Therefore, such a review is admissible, provided the constitutional and statutory requirements have been met, in the present case, in which the challenged Regulation is subject to examination in respect of its conformity to Article 92(1) of the Constitution, despite the fact that the provision in Article 22(2)(4) of the Education System Act, constituting the basis for the issue of the

Regulation, is not subject to the said review, for the reasons mentioned above. However, it is obvious that the application for the examination of conformity of the challenged Regulation to Article 92(1) of the Constitution must meet the statutory formal requirements, ensuing from Article 32(1) of the Constitutional Tribunal Act.

The Tribunal points out that the applicant requested the review of the challenged Regulation in the light of Article 92(1) of the Constitution, however, he did not meet the formal requirement arising from Article 32(1)(4) of the Constitutional Tribunal Act. He did not substantiate his allegations by citing relevant evidence. It may not be assumed that such substantiation is the assessment of Article 22(2)(4) of the Education System Act, arising from the judgment in the case with the reference number U 5/07, and in particular from the signalling decision with the reference number S 1/07 related thereto, since the above provision of the Act was not the object of review in the case U 5/07, is still generally binding and is an element of the current legal system.

Also, the Tribunal wishes to stress that it may not accept, as the substantiation of the allegation that the challenged Regulation does not conform to Article 92(1) of the Constitution, the arguments that the applicant included in point 7 in the application of 9 November 2007. These arguments, aiming to prove the non-conformity of the challenged Regulation to Article 20(3) of the Act on Guarantees, refer to "the rules for teaching religion" in schools, including "the evaluation of pupils in respect of their participation in such classes". According to the Tribunal, the arguments formulated in such a way, being the object of detailed analysis in the subsequent part of this Statement of Reasons, refer to the rules for teaching religion, specified in particular in the provisions of the Regulation of the Minister of National Education of 14 April 1992 on the terms and ways of organising religion classes in state schools and kindergartens (Journal of Laws – Dz. U. No. 36 item 155, as amended; hereinafter: the Regulation of 14 April 1992) as well as to the method of evaluation of pupils, regulated by the provisions of the amended Regulation of 30 April 2007.

Therefore, the Tribunal has decided to discontinue the proceedings concerning the examination of conformity of the challenged Regulation to Article 92(1) of the Constitution.

3. The genesis and contemporary content of the principle of freedom of religion (freedom of belief).

3.1. In the light of the standards of a contemporary state ruled by law, the teaching of religion is one of the elements of the freedom of religion, at times referred to as freedom of belief, which constitutes one of the vital manifestations of the idea of the individual's freedom in a democratic society, which in turn is a fundamental principle of a democratic society. Therefore, the Tribunal first analysed the genesis and contemporary normative content of the principle of freedom of religion (freedom of belief) in a democratic society, in particular in the context of a more broadly construed principle of the individual's freedom and the role of the state (public authority) in ensuring the exercise of the freedom of religion (freedom of belief) as well as in the context of equal rights of religions. This is a fundamental issue, as despite the fact that the above ideas have the specificity of legal

regulation, which is characteristic of the Constitution, the Constitution assumes a doctrinal character of the individual's freedom, also in the realm of freedom of religion (freedom of belief).

The freedom of religion, which has emerged in the European civilisation as one of the fundamental manifestations of the individual's freedom, has evolved in the course of a long historical process, marked by wars and social riots, inspired by the works of the renowned representatives of social and philosophical thought. In the contemporary catalogue of the fundamental rights and freedoms of the individual in a democratic society, the freedom of religion usually appears together with the freedom of conscience. This way, by combining freedom of conscience and religion, it is emphasised that the two components of the human consciousness in matters of religion are to be considered, namely: the internal – related to the shaping of the individual's thoughts and beliefs with regard to religious matters, and the external – which consists in revealing those thoughts and beliefs and acting in accordance with the teachings" (M. Pietrzak, *Prawo wyznaniowe*, Warszawa 2005, p. 19). Such a dual rendering of the concept of the freedom of conscience and religion can often be encountered in the contemporary international documents, containing the standards, fundamental rights and freedoms which should be guaranteed by a democratic state. However, developed historically, the freedom of conscience and religion still appears under different terms, in most cases reflecting the traditions of a given state in the course of evolution of the said freedom of the individual. In particular, this regards the following terms: "freedom of belief", "freedom of worship" or "freedom of religious beliefs". The term "freedom of religion" appears in Article 53(1) of the Constitution, together with the freedom of conscience as the "freedom of conscience and religion". Moreover, it should be added that in the literature on the subject, the two above-mentioned aspects of freedom of conscience and freedom of religion are sometimes rendered as one term "freedom of religion".

The Declaration of the Rights of Man and of the Citizen of 26 August 1789, inspired by the ideas of the Enlightenment, arising from the doctrine of natural law, specifying the first catalogue of the individual's rights and freedoms, included - among the "natural, unalienable, and sacred rights of man" - also the right to freedom of religion, construed as the right to religious views. Article 10 of the Declaration states that: "No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law".

The ideas of freedom of religion were further propagated as a result of the development of liberal ideology in the 19th century, which proclaimed the individual's freedom as the natural right to freedom of activity in various realms. "The concept of that freedom relied on the assumption that religion is the individual's private matter, and should not be of any interest to state authorities. The individual's right to freedom of conscience and religion was assigned a character of a public individual right, which was equivalent to private individual rights. This right comprised a wide range of the individual's positive entitlements which the state could limit only by way of exception and for serious reasons. To secure that freedom, the theoreticians of liberalism called for giving the state a secular character and recognising its neutrality in matters of religion. This neutral character of the state was to be best secured by the separation of church and state. The liberal doctrine

indicated the need for legal regulation of the right to freedom of conscience and religion. It called for recognising that right as a constitutional right and for guaranteeing the relevant specific entitlements of the individual in the positive law" (M. Pietrzak, *op. cit*., pp. 29-30).

The state was to be a guarantor of the individual's freedoms, arising from the freedom of religion; both with regard to the freedoms of choice and worship of a given religion, as well as the guarantor of the functioning of institutions allowing for the collective worship of religion: churches and religious organisations. The state was to be a neutral and impartial guarantor, not favouring any particular religion, which was a postulate arising in an obvious way from an ideological basis of liberalism that proclaimed the protection of the individual's freedom from the interference of the state (public authority), but also the praise of a competitive system, not only in the realm of economy and politics, but also in the realm of opinions, views and ideas.

Fully developed after the World War II, universally recognised in contemporary European democracy, the normative content of the idea of freedom of religion has emerged from mature liberalism which aimed for creating liberal-democratic systems. But its contemporary form, visible in the post-war international documents which reflected generally accepted democratic standards, has been affected by egalitarian doctrines (equality of religion and neutrality of the state) and concepts of a legal state which in the current legal system, embedded in the Constitution as the highest legal act (in particular continental legal systems) extensively regulated the freedom of religion together with the freedom of conscience as a public individual right, enshrined in the Constitution, guaranteed by statute in the form of specific entitlements of persons and institutions.

At this point, the significance of the experience of World War II should be stressed, and in particular the totalitarian doctrines which proved disastrous to human dignity, as regards the post-war revival of natural law doctrines and the realisation of the relevant proposal to devise a catalogue of fundamental rights and freedoms of the individual. The fundamental freedoms included the freedom of conscience and religion, rendered together. It can be found in major post-war international legal acts, containing the catalogue of fundamental rights and freedoms of the individual. Such a catalogue is treated as a prerequisite element of a contemporary democratic state ruled by law; it is incoporated into today's constitutions of European states, including the Constitution of the Republic of Poland of 1997.

3.2. The first of these legal acts, the Universal Declaration of Human Rights of 10 December 1948, which was adopted and proclaimed by the United Nations, presents a catalogue of fundamental rights and freedoms of the individual, pointing out that it arises from the ideological framework adopted earlier in the Charter of the United Nations: "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women", and the need to support social progress and to create better living standards in greater freedom. Article 18 of the Declaration defines the freedom of religion, by indicating its main elements and its relations to the freedom of thought and conscience. As the Declaration states, everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his

religion or belief in teaching, practice, worship and observance. The Declaration did not have direct legal effects; still, it was an expression of political and moral commitment of the Member States of the United Nations.

The International Covenant on Civil and Political Rights - submitted for signing on 19 December 1966 (Journal of Laws - Dz. U. of 1977 No. 38, item 167; hereinafter: the Covenant on Civil Rights), presenting a universal catalogue of fundamental rights and freedoms of the individual, which was later ratified by many states (Poland ratified the Covenant on 3 March 1977) – propagated the fundamental rights and freedoms of the individual on a world scale. Drawing from the ideological inspirations which arise from the Charter of the United Nations and the Universal Declaration of Human Rights, recognising that the fundamental rights of the individual derive from the "inherent dignity of the human person", Article 18(1) of the Covenant on Civil Rights sets out the essence of the concept of "freedom (...) of conscience and religion" In paragraph 2 of that Article, a restriction has been clearly set forth with regard to these states where the freedom of religion is not sufficiently protected. Indeed, Article 18(2) stipulates that: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice".

As regards devising a standard catalogue of fundamental rights and freedoms in a democratic state, what is of significance is the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention), supplemented with several additional Protocols. The Convention and its supplementary Protocols were signed and ratified by the countries being the Member States of the Council of Europe (Poland ratified the Convention by the Act of 2 October 1992 on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, Journal of Laws - Dz. U. No. 85, item 427).

This special significance of the Convention stems from the fact that the states – being the parties to the Convention – committed themselves not only to observing the catalogue of the rights and fundamental freedoms set out in the Convention, but also to submit to the judgments of the European Court of Human Rights (hereinafter: the European Court), which adjudicates in accordance with the Convention and its supplementary Protocols. The Tribunal, in its jurisprudence, establishes the normative content of the rights and fundamental freedoms, rendered in a succinct form, which is understandable, in the Convention and its Protocols. The jurisprudence of the European Court of Human Rights determines the common normative content of the rights and fundamental freedoms, the legal (also constitutional) regulation of which varies in different states, sometimes quite considerably. This also pertains to the freedom of conscience and religion, which is one of the fundamental freedoms included in the Convention. Although the legal regulation of the freedom of conscience and religion varies in different European states, the European Court has established the normative content of the principle of freedom of conscience and religion which is common to democratic European states, and thus determining, in relation to the cases heard, the interpretation of the Convention's provisions, and in particular of Article 9 thereof, which specifies the freedom of conscience and religion.

Article 9 of the Convention, comprising two provisions, reads as follows:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".

"2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others".

The Constitutional Tribunal draws attention to the fact that Article 9 of the Convention, outlining the direction for determining the normative content of the freedom of religion in contemporary democratic societies (rendered here in paragraph 1 together with the freedom of thought and freedom of conscience), indicates the areas of freedom to manifest, alone or in community with others, in public or private, one's religion or belief. These areas, apart from worship, practice and observance, also include teaching (of religion and belief). In the context of Article 9(2) of the Convention, this means that the freedom to teach religion (belief), by analogy to other areas of freedom to manifest one's religion (belief), may be subject to statutory restrictions only for the reasons set out in this provision. The freedom to teach religion relies, like any fundamental freedom in a democratic society, on the presumption of freedom of the individual, except for the admissible statutory restrictions, and at the same time in particular situations, which are necessary in a democratic society. This observation is vital for the case under examination and its constitutional assessment, since the applicant indicates, as the higher-level norms for constitutional review of the challenged Regulation, the constitutional provisions on the freedom of conscience and religion.

3.3 In its jurisprudence, the European Court has emphasised that "freedom of thought, conscience and religion", specified in Article 9 of the Convention, is one of the foundations of a pluralist democratic society. In the judgment of 25 May 1993 (the case of Kokkinakis v. Greece, Application No. 14307/88), the Court stated that: "As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a «democratic society» within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to «manifest [one's] religion». Bearing witness in words and deeds is bound up with the existence of religious convictions".

The European Court has also emphasised that the role of the state should be that of an impartial and neutral organiser of the practices of various religions, beliefs and convictions. The state should not assess the legitimacy of religious convictions and the ways of manifesting them. The role of the state is to guarantee tolerance and pluralism; it is to maintain a fair balance, where there will be no abuse of a dominant position of a religious group, and where religious minorities will be protected.

In the judgment of 10 November 2005 (the case of Leyla Şahin v. Turkey, Application No. 44774/98), the Court established, *inter alia*, that what should be emphasised is: "the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. (...) the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed. (...) it requires the State to ensure mutual tolerance between opposing groups (...). Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (...).

Pluralism, tolerance and broadmindedness are hallmarks of a «democratic society». Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (...). Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society (...). Where these «rights and freedoms» are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a «democratic society»".

In the context of the above case, the European Court stated that, despite common democratic standards, also related to the freedom of conscience and religion, it is not possible to arrive at one unified European position with regard to the significance of religion in society. In the judgment quoted above, the European Court stated: "It is not possible to discern throughout Europe a uniform conception of the significance of religion in society (...), and the meaning or impact of the public expression of a religious belief will differ according to time and context (...). Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order (...). Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context (...).

This margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate (...). In delimiting the extent of the margin of appreciation in the present case, the Court must have regard to what is at stake, namely the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society".

As it has already been mentioned, Article 9(1) of the Convention indicates that one of the elements of freedom to manifest one's religion or belief (in public or private, either alone or in community with others), apart from worship, practice and observance, is the teaching of religion. The basis for adjudication, for the European Court, with regard to the

teaching of religion has not only been Article 9 of the Convention, but also Article 2 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Paris on 20 March 1952 (Journal of Laws - Dz. U. of 1995 No. 36, item 175; hereinafter: Protocol No. 1). This provision stipulates that: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions".

The European Court has drawn attention to the fact that Article 2 of Protocol No. 1 should be interpreted in a systemic way, in particular in the light of Article 8 (respect for private life), Article 9, Article 10 (freedom of expression), but also taking into consideration Article 11 of the Convention (freedom of assembly and association). Stating that the scope of the fundamental right to education includes the parents' right for respect for their religions and philosophical convictions, the European Court emphasised that, from that point of view, making a distinction between state and private education does not matter. The European Court stressed that in both cases the point is to protect the fulfilment of a crucial goal, namely the protection of pluralism in education, which is of vital significance for the preservation of a democratic society. Therefore, respecting parents' religions and philosophical convictions, in the whole national curriculum, does not relieve the state, which is obliged to refrain from interference, from a positive obligation, i.e. the obligation to take positive action aimed at ensuring respect for parents' convictions.

In the judgment of 29 June 2007 (the case of Folgerø and Others v. Norway, Application No. 15472/02), the Court stated, *inter alia*, that: "Article 2 of Protocol No. 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme (...). That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the «functions» assumed by the State. The verb «respect» means more than «acknowledge» or «take into account». In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The term «conviction», taken on its own, is not synonymous with the words «opinions» and «ideas». It denotes views that attain a certain level of cogency, seriousness, cohesion and importance".

Nevertheless, in the above judgment, the European Court also emphasised that the respect for the aforementioned parents' rights might not mean that the state would be deprived of its competence to devise and plan a curriculum, at the same time noting that the solutions in this regard may vary depending on the country or a given point in time. Also, the state needs to refrain from indoctrination. "However, the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era (...). In particular, the second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable" (the judgment of 29 June 2007, No. 15472/02). According to

the European Court, in a pluralist society, the state should play a role of an impartial arbiter. "(...) the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded," the Court stated in the judgment of 29 June 2007.

Aware of the fact that frequently the infringements on democratic standards with regard to the freedom of conscience and religion arise from the infringements during the application of law, the Justices of the European Court also stated in the said judgment that: "In order to examine the disputed legislation under Article 2 of Protocol No. 1, interpreted as above, one must, while avoiding any evaluation of the legislation's expediency, have regard to the material situation that it sought and still seeks to meet. Certainly, abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism".

What is also of significance, as regards the application under examination by the Constitutional Tribunal, is the decision of the European Court of Human Rights in the case of Saniewski v. Poland of 26 June 2001 (Application No. 40319/98). Recalling that, in the light of the Convention, the freedom of thought, conscience and religion is one of the foundations of a democratic society, emphasising that the freedom construed in such a way is a prerequisite for pluralism inextricably linked with a democratic society, and being its precious acquisition, the European Court stated, *inter alia*, that: "Article 9 of the Convention affords protection against religious indoctrination by the State. Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*. (...) there was no interference with the rights safeguarded by Article 9 of the Convention where voluntary religious education had been organised in State schools, or exemptions were possible from compulsory religious education, or when marks for attendance at such courses or alternative ethics courses were foreseen in school reports".

4. The legal regulation of the freedom of conscience and religion prior to the enactment of the Constitution of 1997.

4.1. The analysis of the normative content of the freedom of conscience and religion, in the light of the Constitution of 1997, should be preceded by some information on the legal situation pertaining to this matter prior to the enactment of the Constitution. Such information is needed in order to better understand Polish traditions and determinants, their impact on statutory regulations and the constitutional regulation in the provisions of the Constitution of 1997, as well as on the interpretation of the constitutional provisions which regulate the freedom of conscience and religion, indicated by the applicant as higher-level norms for constitutional review of the challenged provisions.

Polish constitutional traditions concerning institutional relations between the state and churches can be traced back to the Constitution of 3 May 1791. These deliberations

were more conservative than those of that time – radically lay French constitutional statutes" (cf. L. Garlicki, commentary to Article 25, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 5, Warszawa 2007). The text of the Constitution of 3 May 1791 stipulated, *inter alia*, that "the dominant national religion is and shall be the sacred Roman Catholic faith with all its laws. Passage from the dominant religion to any other confession is forbidden under penalties of apostasy". The manner of rendering the matter of religion was the object of fierce controversy between the state and churches in the course of the work on the Act of 17 March 1921 – the Constitution of the Republic of Poland (Journal of Laws - Dz. U. No. 44, item 267; hereinafter: the March Constitution). "In the end, the adopted approach was a compromise, largely eclectic in character, as it strongly emphasised the position of Roman Catholic religion and Church, but at the same time referring to the principle of equal rights of religions" (cf. J. Szymanek, "Regulacja stosunków państwo-kościół w polskich aktach konstytucyjnych XX wieku", *Przegląd Sejmowy* No. 3/2002). Article 111 of the March Constitution stipulated, *inter alia*, that: "All citizens shall enjoy the freedom of conscience and religion. No citizen may be deprived of the rights enjoyed by other citizens, on the grounds of his religion or religious beliefs". However, Article 114 stipulated that "the Roman Catholic religion, being a religion of a major part of the nation, shall occupy a primary position among other religions which have equal rights in the State. The Roman Catholic Church is autonomous. The relations between the State and Church shall be specified on the basis of an agreement with the Holy See, which shall be subject to ratification by the Sejm".

The constitutional regulation of 1921, reinforced by the concordat of 1925, created a certain balance "which was so fragile that there was no will to interfere with it during the work on the Constitution of 1935" (cf. L. Garlicki, *op.cit*.).

After the World War II - until the adoption of the Constitution of the People's Republic of Poland, which was enacted by the Sejm on 22 July 1952 (Journal of Laws - Dz. U. of 1976 No. 7, item 36, as amended; hereinafter: the Constitution of 1952 or the Constitution of the People's Republic of Poland) – the Constitutional Act of 19 February 1947 on the system and scope of operation of the supreme organs of the Republic of Poland (Journal of Laws - Dz. U. No. 18, item 71, as amended) was in force, which did not include any regulations of the rights and freedoms of the individual. On 22 February 1947, the Declaration of the Sejm concerning the exercise of the civil rights and freedoms was enacted. It stipulated that the Sejm "shall continue the exercise of the fundamental civil rights and freedoms". Among the enumerated rights and freedoms, there were also "the freedom of conscience and the freedom of religion". The Declaration was not a legal act; it did not even specify the essence of the rights and freedoms – it merely listed them. Such a state of affairs, namely the complete lack of legal guarantees of the rights and freedoms of the individual, including the freedom of conscience and religion, facilitated even more the political changes that were taking place at that time, in an undemocratic way, also with the use of force.

The Constitution of the People's Republic of Poland, enacted on 22 July 1952 (entered into force the same day), regulated, in a very general way, the relations between the state and the church, the position of the churches and religious organisations as well as the freedom of conscience and religion in Article 70, and later in Article 82. What is

characteristic is that, although in a declarative way, the Constitution of 1952 was bound to include the religious realities of the Polish society. Article 82(1) of the Constitution of 1952 read as follows: "The People's Republic of Poland shall ensure its citizens the freedom of conscience and religion. The church and other religious organisations may freely fulfil their religious roles. Citizens may not be prevented from participating in religious activities or rituals. Likewise, no-one may be compelled to participate in religious activities or rituals," and Article 82(2) stipulated that: "the church shall be separated from the state. The relations between the state and the church as well as the legal and financial situation of religious organisations shall be regulated by statutes".

It is rightly pointed out that the considerable degree of generalisation rendered Article 82 devoid of actual legal content. Above all, it should be stressed that the Constitution of 1952, despite its name, was not regarded as the highest normative act, but as an ideological declaration, which - in conjunction with the fact that the Sejm ceased to be the real centre of political power, since this was the competence of the leaders of the Communist Party in power – entailed that the interpretation of the Constitution was subordinate to the requirements of the political strategy, which was changeable depending on the determinants of the time. Hence, within the framework of that Constitution, the model of "hostile separation" was carried out (1952-1956) with regard to the relations between the state and churches, later there was the practice of *modus vivendi* (1956-1989) in various forms; also, there was the model of "coordinated separation", which was developed on the basis of the so-called "religious statutes" (especially in the 1990s), until the enactment of the Constitution of 1997, when the provisions of Article 82 of the Constitution of 1952 were regarded as "natural" due to certain *desuetudo* (cf. J. Brożyniak, *Konstytucyjne dylematy regulacji stosunków wyznaniowych we współczesnej Polsce*, Warszawa 1996, p. 48, *passim*).

The general formulation of the legal principles concerning religious matters in the constitutional provisions, the lack of statutory regulation of competence arising from the freedom of conscience and religion, in conjunction with the mechanisms of the government of the People's Republic of Poland – all this led to the situation where there were no legal and actual guarantees of the freedom of conscience and religion during the period of the People's Republic of Poland. Dominant in the regulations of religious matters in the Constitution of the People's Republic of Poland, the principle of the separation of church and state was considered to be the principle of advancing secularisation of the state, in such a way that the state would acquire an atheistic character, which undoubtedly constituted a model contrary to Polish traditions and social determinants. Secularisation, which was advancing in this way in the public life and the education system, thus leading to discrimination against believers (cf. M. Pietrzak, *op. cit*., pp. 161-168), was no doubt contrary to worldview pluralism, democratic standards of freedom of religion and the principle of the neutrality and impartiality of the state – which constitute the essence of the freedom of conscience and religion in a democratic society.

4.2. The fundamental amendment to the Constitution of 1952, made by the Act of 29 December 1989 (Journal of Laws - Dz. U. No. 75, item 444, as amended), related to the introduction of thorough changes in the political system, kept in force in particular

Article 82(2), which specified the principle of separation of church and state . Also, the entry into force of the Constitutional Act of 17 October 1992 on the mutual relations between the legislative and executive branch in the Republic of Poland and on the local self-government (Journal of Laws- Dz. U. No. 84, item 426, as amended), often called the "Small Constitution", did not change the legal regulation of the freedom of conscience and religion, referred to in Chapter 8 of the Constitution of 1952, which was still legally binding at that time (despite the numerous fundamental changes in the political system), although it functioned within the framework of the principles of a new democratic system.
However, the said regulation, and in particular the principle of separation of church and state, functioned in the conditions of a new political system. The amendments made to the Constitution of 1952, deprived the still binding legal regulation of the previous axiological basis, which had a significant impact on the interpretation and application of the provisions of the aforementioned Article 82 of the Constitution of 1952. Until the entry into force of the Constitution of 1997, the interpretation concerning the application of these provisions was, to a large extent, determined by the legal acts adopted at that time with regard to the freedom of conscience and religion, and in particular with regard to the teaching of religion. As far as statutes are concerned, those particularly worth noting are the so-called religious statutes passed on 17 May 1989, concerning: the relationship between the State and the Roman Catholic Church; social insurance for the clergy; and above all, the Act on Guarantees. These statutes - drawn up in cooperation with the Roman Catholic Church and other churches - constituted, as it is rightly indicated, a breakthrough in the religious policy of a socialist state. "They gave new interpretation to the principles concerning religion in the Constitution of 1952. They created a new normative model of a secular state which corresponded to the standards adopted by European democratic-liberal states" (M. Pietrzak, *op. cit*., pp. 201-202), even though at the time of the enactment of those statutes, there were no predictions of significant political changes which led to the emergence of a democratic system.

The Act on Guarantees, relating to the international acts setting out democratic standards such as the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights, stipulates, in Article 1(1) of Section I entitled "Freedom of Conscience and Religion", that: "The freedom of conscience and religion shall be ensured to every citizen in the Republic of Poland" and, in Article 1(2), that: "The freedom of conscience and religion shall include the freedom to choose a religion or convictions as well as to manifest such religion or convictions, either individually or collectively, publicly or privately". Paragraph 3 of the quoted Article 1 specifies that: "Citizens being believers of any religion, or being non-believers, shall enjoy equal rights in state, political, economic, social and cultural life". Article 10(1) of the said Act stipulates that the Republic of Poland is a secular state, and as such is neutral in matters of religion and conviction. The statement that the Republic of Poland is a secular state, and as such is neutral in matters of religion, acquires its full meaning due to a systemic interpretation which takes into account other provisions of the Act. Thus, the above statement primarily means that "churches and other religious organisations are separate from the state as regards the fulfilment of their religious roles" (Article 11(1)), and that "the guarantees of freedom of conscience and religion in the relations between the state and churches as well as other religious

organisations shall be: 1) separation of churches and other religious organisations from the state; 2) freedom of churches and other religious organisations to fulfil their religious roles; 3) equal rights of all churches and other religious organisations, regardless of the form of regulation of their legal status" (Article 9(2)). The neutral character of the state is to be ensured by, *inter alia*, Article 6, which stipulates that "no-one may be discriminated against or favoured on the grounds of religion or convictions in religious matters" (paragraph 1), and also that "citizens may neither be compelled to participate nor compelled not to participate in religious activities or rituals" (paragraph 2).

The Act on Guarantees specifies what the freedom of conscience and religion means for a citizen, and what it means for churches and religious organisations, by enumerating specific citizens' rights and the specific rights of churches and religious organisations, which fall within the scope of the freedom of conscience and religion, which - in the light of this Act - becomes a complex principle of the political system, going beyond the status of a fundamental freedom of the individual.

It should also be added that both the rights of the individual (citizens) and the rights of churches and religious organisations do not constitute a closed catalogue, which is in accordance with the understanding of the presumption of "freedom" in a democratic society. But, at the same time, the Act underlines that "churches and other religious organisations as well as their activities are subject to legal protection, to the extent specified by statute" (Article 11(2)).

Therefore, Article 2 of the Act on Guarantees stipulates that "enjoying the freedom of conscience and religion, citizens shall, in particular, be able to:

1) establish religious communities, hereinafter referred to as «churches and other religious organisations», which shall be set up with the aim to worship and propagate religious faith, and which shall have their own structure, doctrine and rituals;

2) in accordance with the principles of their religion, participate in religious activities and rituals, as well as fulfil religious duties and observe religious holidays;

2a) belong or not to belong to churches and other religious organisations;

3) manifest their religion or convictions;

4) raise their children in accordance with their convictions in matters of religion;

5) remain silent in matters of their religion or convictions;

6) maintain relations with other believers of the same religion, including participation in the work of religious organisations of an international character;

7) access information sources on religion;

8) produce and acquire objects necessary for worship and religious practices, as well as use those objects;

9) produce, acquire and possess items necessary for the observance of religious rules;

10) choose a clerical or monastic way of life;

11) assemble in secular organisations in order to carry out the tasks arising from their religion or their convictions in matters of religion;

12) have a funeral conducted in a manner consistent with their religious practices or their convictions in matters of religion".

Article 19 of the Act on Guarantees, by stipulating that "churches and other religious organisations shall have equal rights as regards the freedom to fulfil their religious functions" (paragraph 1), specifies in paragraph 2 that "when fulfilling their religious functions, churches and other religious organisations shall, in particular, be able to:

1) specify the religious doctrine, dogmas and principles of faith as well as liturgy;

2) organise and publicly carry out worship;

3) provide religious services, also to the persons referred to in Article 4, as well as organise religious rituals and gatherings;

4) apply their own regulations within the scope of their matters, freely exercise clerical authority and manage their matters;

5) appoint, educate and employ members of the clergy

6) carry out investment in church property and other church-related investment;

7) acquire, possess and sell movable and immovable property, as well as manage that property

8) collect contributions and receive donations, inheritance and other benefits from individuals and legal entities;

9) produce and acquire objects and items necessary for the purposes of religious worship and practices, as well as use them;

10) teach religion and propagate it, by means of, *inter alia*, the press, books and other publications as well as films and multimedia resources;

11) make use of the mass media;

12) conduct educational activities;

13) set up and maintain orders and diaconates

14) set up organisations whose activities are aimed at supporting religious groups and public worship, as well as at counteracting social pathologies and their consequences;

15) conduct charity and social care activities;

16) (deleted);

17) establish national organisations associating a number of churches;

18) belong to international one-denominational and interdenominational organisations, as well as maintain international relations with regard to the matters concerning the fulfilment of their own functions".

Moreover, Article 21(1) of the Act on Guarantees states that "churches and other religious organisations shall have the right to establish and run schools and kindergartens and other educational and care institutions in accordance with the rules specified by statutes". The above educational institutions "shall be subsidised by the state and local self-government authorities, in the cases and according to the rules specified in separate statutes" (Article 21(2) of the Act on Guarantees).

Article 20(1) of the Act stipulates that "churches and other religious organisations may teach religion and provide a religious upbringing to children and adolescents, in accordance with the choice made by their parents or legal guardians", signalling that the content of the model of a secular state, as set forth in the Act on Guarantees, is much different from the interpretation of the concept of a secular state that existed in the People's Republic of Poland.

The provisions of Article 20(2) and (3) of the Act on Guarantees set out the rules for teaching religion, stipulating in paragraph 2 that "teaching children and adolescents religion is an internal matter of churches and other religious organisations. It is organised in accordance with a curriculum specified by the authorities of a church or another religious organisation, in places of religious instruction which are in churches, prayer houses and at other locations made available for those purposes by a person authorised to do so", and in paragraph 3 that "the teaching of religion to pupils of state schools and kindergartens may also be carried out in schools and kindergartens, according to the rules specified in a separate statute".

The Act on Guarantees, containing a number of elements of democratic standards concerning the freedom of conscience and religion, outstripped the process of democratisation of the Polish legal system, commenced in a fundamental way by the amendment to the Constitution dated 29 December 1989; this amendment, apart from the change of the country's name to the "Republic of Poland", stipulated in Article 1 that the country is "a democratic state ruled by law", which, as mentioned before, significantly changed the axiological basis of the Constitution of 1952, which was later strengthened by the "Small Constitution" of 1992.

It is worth noting that Article 11(1) of the Act on Guarantees specifies that "churches and other religious organisations are independent from the state as to fulfilling their religious functions". This is different from Article 82(2) of the Constitution of 1952, which stipulates that: "The church shall be separated from the state. The relations between the state and the church as well as the legal and financial situation of religious organisations shall be regulated by statutes". The Act on Guarantees may be regarded as one of the acts referred to in Article 82(2), although there is no doubt, even more so in the light of the whole Act on Guarantees, that Article 11(1) of that Act falls within the general scope of the freedom of religion, whereas Article 82(2) of the Constitution of 1952 refers to a broader institutional relationship between church and state. The Act on Guarantees definitely departs from the previous model of separation of church and state, stipulating in Article 16(1) that "the state cooperates with churches and other religious organisations to preserve peace, facilitate the development of the country and counteract social pathologies". Paragraph 2 of the Article provides for a possibility of various forms of cooperation aimed at resolving problems between the state and churches.

Article 20 of the Act on Guarantee, cited above, sets out the rules for teaching religion, also in state schools. This way it clearly solves the problem which, in the period of the People's Republic of Poland, was the object of conflicts between the state and churches, and believers, on a number of occasions. It solves it in the light of the principles of a democratic state, alluding to Article 19 of the Act, pursuant to which (Article 19 paragraph 1 in conjunction with paragraph 2 point 10) teaching and propagating religion, by means of the press, books and other publications as well as films and multimedia resources, arise from the freedom to fulfil religious functions, which churches and religious organisations enjoy on equal terms.

In these conditions of emergence of a new model of relations between the state and churches (religious organisations) and the situation where the legal protection of the freedom of conscience and religion has got closer to meeting the democratic standards, and

at the same time in the context of a legal system which hindered unequivocal interpretation – in such circumstances the teaching of religion was introduced into primary schools, on the instruction of the Minister of National Education of 3 August 1990, concerning the return of religious instruction to schools. It should be noted that Article 2 of the Act of 15 July 1961 on the Development of the Education System (Journal of Laws - Dz. U. No. 32, item 160, as amended), which was still binding at that time, stipulated that "schools and other educational institutions shall be secular institutions. The entirety of teaching and upbringing provided by these institutions shall be secular in character".

The Education System Act of 7 September 1991, enacted in a democratic state, already mentioned the teaching of religion in state schools and kindergartens. Article 12(1) of the Education System Act stipulates that: "State kindergartens, primary schools and lower secondary schools shall organise religion classes upon parents' request, whereas state upper secondary schools – upon the request of parents or pupils themselves; having attained the age of 18, pupils themselves decide about their participation in religion classes". And Article 12(2) stipulates that: "The minister who is competent in matters of education and upbringing, in agreement with the authorities of the Roman Catholic Church, the Polish Autocephalous Orthodox Church as well as the authorities of other churches and religious organisations, shall determine, by regulation, the terms and methods for carrying out the tasks, referred to in paragraph 1, which are assigned to schools".

On the basis of the quoted above Article 12(2) of the Education System Act, the Minister of National Education issued the Regulation of 14 April 1992. Pursuant to this Regulation, as part of preschool education, state kindergartens organise, upon the request of parents (legal guardians), religion classes. In state primary and lower secondary schools, as well as in post-primary and upper secondary schools, religion and ethics classes are provided within the school timetable.

In primary schools and lower secondary schools, they are organised upon the request of parents (legal guardians); in post-primary and upper secondary schools – upon the request of parents (legal guardians) or pupils themselves; upon the attainment of the age of 18, pupils themselves decide about their participation in religion and ethics classes.

During the period from the enactment of the statutes of 17 May 1989, and in particular the Act on Guarantees, until the enactment of the new Constitution of 2 April 1997, the previous model of relations between the state and churches as well as religious organisations, was undergoing transformation. The transformation, taking place then, involved shift from an extreme model of a secular state, which is set apart from any churches and is heading towards full secularisation, to a broadly conceived model of a secular state which guarantees the democratic standards of the freedom of conscience and religion, in the context of pluralism, neutrality and impartiality of the state in matters of religion, where the teaching of religion in state schools is also guaranteed. The emerging new type of relations between the state and churches, which was still fitting within the broad contemporary model of a secular state, in which, however, the term "secular state" was losing its original clarity and unequivocalness, as well as the content of the broadly construed freedom of conscience and religion, have in particular been shaped in this period by: the so-called religious statutes of 17 May 1989, constitutional changes to the political system, and especially by the constitutional principle of a democratic state ruled by law,

which entered into force on 1 January 1990, the structure of social religious relations and the position of the Roman Catholic Church. In the realm of politics, the significant change taking place was the realignment of political forces (in the parliament and government).
These factors determined the shape of the constitutional regulation of freedom of conscience and religion in the Constitution of 1997, within the above-mentioned general, comprehensive idea of freedom of conscience and religion, arising from the contemporary standards of a democratic and pluralist society – the standards indicated above, in the light of the most important international legal acts and the jurisprudence of the European Court of Human Rights.

What was of significance with regard to the new model of relations between the state and churches which was emerging in the Republic of Poland – due to the dominant position of the Roman Catholic Church in the religious structure of Polish society and long-established traditions – was the signing of the Concordat between the Holy See and the Republic of Poland on 28 July 1993 (Journal of Laws - Dz. U. of 1998 No. 51, item 318; hereinafter: the Concordat). The President of Poland ratified the Concordat on 28 February 1998, after several years of discussions and political disputes.

The ratification of the Concordat marks the end of the period when a new model of relations between the state and the Roman Catholic Church, both respecting the democratic standards and stemming from historical traditions, was being formed. The special position of the Roman Catholic Church, ensuing from the conclusion of the agreement, was confirmed in the Constitution of the Republic of Poland (Article 25(4)). Specifying the model of relations between the state and churches as well as other religious organisations (Article 25(3)), the Constitution contains the same, as to the essence, rendering as that in Article 1 of the Concordat, emphasising respect for mutual independence and autonomy of church and state, each in its own regard and cooperation for the benefit of the individual and common good.

With the ratification of the Concordat, the normative meaning of the term "secular state" evolved; the term as referred to in Article 10(1) of the Act on Guarantees, which stipulates that "the Republic of Poland is a secular state, and as such is neutral in matters of religion or conviction". Since then the evolving model of a secular state in the Republic of Poland has ensued not only from the Act on Guarantees, but also has had to reflect the relevant normative content of the provisions of the Concordat, which after the ratification has become a legal act of the legal order of the Republic of Poland which takes precedence over the Act on Guarantees.

What is worth noting, as well as significant for the case being examined by the Tribunal, is the wording of the provisions of Article 12(2)-(4) of the Concordat, indicating several important aspects of the freedom to teach the Catholic religion, and in particular the problem of curricula for the classes of Catholic religion and the content of religious instruction and upbringing. The above-mentioned provisions of the Concordat read as follows: in paragraph 2, "the curriculum for the teaching of Catholic religion and the relevant textbooks are prepared by church authorities, and presented to competent state authorities"; in paragraph 3, "teachers of religion need to be given authorisation (*missio canonica*) by a diocesan bishop. Withdrawal of such authorisation means the loss of the right to teach religion. The criteria for pedagogical qualifications as well as the way and

terms of acquiring necessary qualifications shall be subject to arrangements between of the competent state authorities and the Polish Episcopal Conference; in paragraph 4, "as regards the content of religious instruction and upbringing, teachers of religion shall be subject to church provisions and regulations, whereas in other regard – subject to state provisions".

5. The normative content of the indicated higher-level norms for constitutional review.

The applicant requested the Tribunal to examine the conformity of the challenged Regulation to the above-mentioned provisions of the Constitution. Moving on to the assessment of the constitutionality of the challenged Regulation, from the point of view of the indicated higher-level norms for constitutional review, required a prior analysis of the normative content arising from the constitutional provisions indicated by the applicant. The Tribunal points out that the way of rendering the matter of freedom of conscience and religion in the Constitution of 1997 follows from respecting European democratic standards, but also from Polish traditions and social determinants and from the evolutionary transformations of the political system that took place until the enactment of the Constitution (hence the significance of point 3 of this Statement of Reasons). According to the Tribunal, the normative content of the constitutional provisions, specifying the freedom of conscience and religion, ought to be analysed in the light of the standards of a democratic state ruled by law. Therefore, as the Tribunal stresses once again, it was necessary to present these standards (point 2 of the Statement of Reasons). The interpretation of the said constitutional provisions should also take into account the context of the aforementioned Polish traditions and social determinants which were taken into account in the Concordat. That is why, the Tribunal regarded it appropriate, for the sake of this case, to discuss some of the Concordat's provisions earlier, although they had not been indicated as the higher-level norms for review of the challenged provisions.

The constitutional matter concerning the freedom of conscience and religion comprises two parts: an institutional one – regarding, in particular, the relations between the state and churches a well as other religious organisations – regulated primarily in Article 25 of the Constitution, and the part pertaining to individual guarantees of freedom of conscience and religion, arising from Article 53 of the Constitution. The above-mentioned articles of the Constitution regulate the issue of freedom of conscience and religion, broadly understood, as the method (technique) applied in the Constitution is that of dispersion of "the matters of religion", which entails that the matter is regulated in a few legal provisions, placed in different chapters of the Constitution. In the case of the Constitution of 1997, the method used was not that of condensation, which consists in rendering the matters of religion in a clustered way, grouping legal norms which regulate the issues related to religion in one extensive article or in a sequence of subsequent articles placed in the same section of the Constitution, often under one common title. Contemporary democratic states take different approaches in this regard, which most frequently arise from the tradition or socio-political realities, existing at the time of the enactment of a constitution (see J. Szymanek, "Konstytucyjna regulacja stosunków państwo-kościół" (comparative approach), *Państwo i Prawo,* Vol. 4/2000, pp. 24-29). Different techniques or methods for constitutional regulation also depend on the model of

relations between the state and churches as well as other religious organisations, which has been adopted in a given country.

The adopted dispersion method, which consists in dispersing constitutional provisions that regulate the matter of freedom of conscience and religion, does not affect the hierarchy of constitutional provisions. In particular, placing Article 25 of the Constitution, which primarily regulates the institutional aspects of freedom of conscience and religion, in Chapter I ("The Republic") among the principles of the political system does not entail that, in the course of interpreting the Constitution, Article 25 takes priority and overrides Article 53 of the Constitution. Articles 25 and 53 are complementary and should be taken as a whole. The adopted regulatory method also leads to an increased significance of the systemic interpretation; the above articles of the Constitution ought to be interpreted in a broader constitutional context, and in particular in the context of: general provisions concerning the political system; the provisions of the Preamble of the Constitution (reference to God, Polish traditions and the principle of subsidiarity); Article 2 which sets out the principle of a democratic state ruled by law; Article 30 (the principle of human dignity); Article 32, specifying the right to equal treatment by public authorities and prohibiting "discrimination on any grounds"; Article 31(3) concerning general (common) rules for limiting rights and freedoms – this provision is more specifically rendered in Article 53(5) (which constitutes a *lex specialis* in relation to Article 31(3)).

Article 53(3) of the Constitution, indicated by the applicant as a higher-level norm for review, stipulating that parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions, ought to be interpreted especially in relation to Article 48(1). This relation is so significant that the Constitution prescribes in Article 53(3) that Article 48(1) should be applied as appropriate.

It is aptly stated in the doctrine that, since the regulation of institutional position of churches and religious organisations, as set out in Article 25 of the Constitution, has been assigned the status of a principle of the political system, then the interpretation of all the other constitutional provisions must be carried out in a "friendly" way with regard to these principles, and thus in a way that ensures the maximum exercise of these principles. Indeed, this is an advantage of adopting the dispersion method and of assigning the status of a principle of the political system to Article 25 of the Constitution (see L. Garlicki, *op. cit*., p. 6). In addition, the Tribunal wishes to emphasise that the object of discrepancies or disputes, concerning the regulation of matters pertaining to religion in contemporary (democratic) constitutions, which is also visible in Poland, is not constituted by democratic standards regarding individual guarantees of freedom of conscience and religion. Indeed, these are rendered everywhere in a relatively unified way. However, there are considerable differences among democratic states in respect of the choice of an institutional model which results from the adoption of a certain model of relations between the state and churches as well as other religious organisations.

Indicated by the applicant as higher-level norms for constitutional review of the challenged Regulation, the provisions of Article 25(1) and (2) of the Constitution should be interpreted in the context of other constitutional provisions, in particular paragraphs 3 and 4 of that Article. Article 25(1) stipulates that "churches and other religious organisations shall have equal rights". The Tribunal wishes to stress that the axiological

basis of the institutional equality specified here is the same individual dignity of followers of any religions in a democratic pluralist society, which constitutes the basic religious prerequisite for equal constitutional protection of the rights of the followers of different religions which arise from the freedom of religion. This results in the equal institutional rights of churches. At the level of political system, the principle of equal rights of churches and other religious organisations excludes the possibility of establishing a state religion, and turning a country into a religious state. In the light of the Constitution, the essence of the principle of equal rights of churches and religious organisations, as the Constitutional Tribunal pointed out in one of its judgments, is the adoption of the rule which says that "all churches and religious organisations which share a significant quality should be treated equally. At the same time this rule assumes different treatment of churches and religious organisations which do not share a quality that is significant from the point of view of a given regulation" (the judgment of the Constitutional Tribunal of 2 April 2003 Ref. No. K 13/02, OTK ZU No. 4/A/2003, item 28). Such rendering implies the prohibition on discrimination against and unequal treatment of churches to the extent they meet the requirements prescribed by law. Nevertheless, this does not mean that certain differentiation in the status of particular religions is not admissible constitutionally (cf. S. Bożyk, "Konstytucyjna zasada równouprawnienia Kościołów i innych związków wyznaniowych", [in:] *Zasada równości w prawie*, (eds.) H. Zięba-Załucka, M. Kijowski, Rzeszów 2004, p. 95). This differentiation follows from, for example, Article 25(4) which stipulates that the relations between the Republic of Poland and the Roman Catholic Church shall be determined not only by statutes but also by an international treaty concluded with the Holy See. In this context, the Tribunal wishes to underline, which is also indicated in the doctrine, that the principle of institutional equality may not be construed as the principle creating expectations of actual equality (cf. L. Garlicki, *op. cit*., p. 12 and the literature on the subject, cited therein).

Other provisions of Article 25 of the Constitution, namely paragraphs 2 and 3, even more clearly indicate that out of the two general models that are known today, as regards the relations between the state and churches as well as other religious organisations – i.e. the system of ties or the system of separation between the state and churches as well as other religious organisations – the Constitution of 1997 presents a solution falling within the scope of the latter model.

Indicated as a higher-level norm for constitutional review, addressed to all public authorities of the Republic of Poland, Article 25(2) of the Constitution stipulates that "public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life".

By contrast, a characteristic feature of the so-called system of ties between the state and churches as well as religious organisations is the religious character of a state. In such a model, the state favours a specific religion which acquires a privileged position in relation to other religions. Citizens' religion is a public matter, and the state's activities are influenced by religious teachings. The elements of the system of ties may also be observed in some democratic European states where a constitution has introduced, for instance, a state religion (Norway), a dominant religion (the Greek Orthodox Church in Greece) or a

national religion (the Evangelical Lutheran Church is a national church in Denmark), as well as in such states in which holding certain important state offices is reserved for the followers of a state religion (monarchs in Great Britain, Norway or Denmark). In such a system, religion is usually a compulsory subject in all state schools (see M. Pietrzak, *op.cit*., pp. 61-69).

The Tribunal wishes to point out that the constitutional solutions falling within the scope of the model of separation between the state and churches as well as other religious organisations vary in different countries. Any legal solutions which fall within the scope of such a broadly construed model may still be qualified as solutions functioning within the framework of a broadly construed secular state. However, in the second half of the 20th century, "anti-religious" character of a secular state is no longer emphasised, which was the original feature of that state, but what is stressed is the neutrality of the secular state in matters of religion and worldviews. Nowadays, in very few constitutions the term 'secular state' is used to denote the relations between the state and churches (religious organisations); it is present in the French constitution of 1958, as well as in the constitutions of Russia and Albania. By contrast, other constitutions contain terms underlining the prohibition on the existence of a state church or state religion (Germany, Spain and Lithuania). In literature one can come across both the term 'secularisation of state', construed in a broad sense (see M. Pietrzak, *op. cit*., pp. 86-94), as well as the term 'secular state', construed in a narrow sense, being a qualified form of the system of separation between the state and churches, with the simultaneous constitutionalisation of the secular state (J. Szymanek, *op. cit*., p. 37).

According to the Contitutional Tribunal, using the term 'secular state' to denote a legal solution or legal solutions, with regard to democratic states, is not indispensible today, and at times it may be misleading. What is important is the fact whether the normative content of the terms introduced into the Constitution, specifying the relation between the state and churches as well as other religious organisations, safeguard the independence of churches and religious organisations, their mutual autonomy, to a degree sufficient to respect the standards of the freedom of conscience and religion of the individual and the free functioning of religious institutions, which allow for individual manifestation of the freedom of conscience and religion, as well as the public manifestation of that freedom in various areas, *inter alia*, the teaching of religion, but, at the same time, in a way that does not limit the freedom of conscience and religion of followers of another religion, and a way that take into account non-believers. A constitutional regulation (and a legal regulation in general), concerning the relations between the state and churches as well as other organisations, will be consistent with democratic standards if, first of all, it is consistent with the fundamental principle of pluralism of ideas, convictions and activities in a democratic society.

The solution adopted in Article 25(2) of the Constitution (also indicated by the applicant as a higher-level norm for constitutional review) – in accordance with which public authorities in the Republic of Poland remain impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, in the context of the above-analysed paragraph 1 of that Article, and in the context of paragraph 3 of that Article which stipulates that the relationship between the State and churches and other

religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere – falls within the framework of a broadly construed model of separation between the state and churches as well as other religious organisations. This solution is compliant with the concept that the state is neutral in matters of worldviews, and friendly and cooperative towards churches, guaranteeing the freedom of conscience and religion, which, however, may not entail that state activities should aim at ensuring actual institutional equality of churches, religious organisations and all religions. If this were the case, then, in the situation where churches and religions vary in popularity in society (in particular with regard to the number of followers), this would lead to an inevitable interference of the state (public authorities), aimed at achieving actual equality among churches and religions, which, as a result, would contradict the principle of a neutral character of the state and of respect for the autonomy and mutual independence of the state, churches and other religious organisations.

According to the Tribunal, the impartiality of public authorities in the Republic of Poland – as referred to in Article 25(2), in the context of autonomy and mutual independence, as referred to in Article 25(3), and in the context of equal rights of churches and other religious organisations (Article 25(1)) – may not imply actual institutional equality between the Roman Catholic Church, which is dominant in Polish society in respect of the numbers of followers, and other churches and religious organisations. At the same time, it may mean such activities of the state (public authorities) which would approve of the dominant position of one church with the existence of discrimination against other churches or religions. Therefore, the state's acceptance of the current *status quo* as regards the religious structure of society may not lead to the strengthening of the dominant position of the church, as a result of the activities of the state (public authorities). The impartiality of public authorities in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, as referred to in Article 25(2) of the Constitution, entails, however, that a change in the current *status quo*, with regard to the religious structure of society, is permissible but without any interference of the state, in a "natural" way, as a result of the evolution of the structure of social awareness, with the existing freedom of religious beliefs and other convictions, as well as the freedom of choice enjoyed by every individual. In the light of Article 25(2) of the Constitution, it is the obligation of public authorities to ensure every individual the freedom of convictions and the freedom to manifest them in public life, as well as the related freedom to make decisions in this regard. The Tribunal stresses that the impartiality of public authorities and the respect for the equal rights of churches and religious organisations on the part of public authorities are strictly connected with the respect for religious beliefs and other convictions and the freedom to manifest them in public life.

The interpretation of the normative content of Article 25(1) and (2) of the Constitution should be carried out in close conjunction with Article 53(1) of the Constitution, which stipulates that the freedom of conscience and religion shall be ensured to everyone (by public authorities), and in conjunction with Article 53(2) of the Constitution. The latter provision of the Constitution specifies that: "Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by

worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services".

Article 53(2) of the Constitution sets out the areas of the freedom of religion: professing a religion, accepting it by personal choice and manifesting it, possessing sanctuaries and other places of worship, and benefiting from religious services; as well as it specified the rights arising from the freedom of religion: worshipping, praying, participating in ceremonies, performing of rites and teaching. The above-mentioned rights of every individual, arising from the freedom of religion, may be manifested either individually or collectively, publicly or privately, and the public authorities of the Republic of Poland, pursuant to Article 25(2) in conjunction with Article 53(1) of the Constitution, should guarantee these rights to everyone on a voluntary basis. This also refers to the right to teach religion and the right to learn about – which are significant to the present case.

In the light of the above analysis, the Tribunal wishes to emphasise that, in the context of the Constitution, and in particular Article 25(2) and Article 53(1) and (2), the impartial activities of the state in matters of religious beliefs, above all, consist in guaranteeing everyone the exercise of all the rights arising from the freedom of religion, and also in guaranteeing churches and religious organisation the possession of sanctuaries and other places of worship. The above premises are at the same time prerequisites for the equal rights of churches and other religious organisations.

According to the Constitutional Tribunal, Article 53(2) of the Constitution specifies not only the areas of the freedom of religion, and the human rights and the entitlements of churches and religious organisations that arise from that freedom, but also the functions and activities of churches and religious organisations.

In the light of Article 25(1) and (2) of the Constitution as well as Article 53(1) and (2) of the Constitution, public authorities act in an impartial way and churches and religious organisations have equal rights, if everyone can exercise the rights arising from the freedom of religion, and churches and religious organisations can fulfil their functions arising from the freedom of religion as well as exercise the rights which are prerequisite for the fulfilment of these functions, with the proviso that they fulfil these functions guaranteeing equal rights, which ensue from the freedom of religion as referred to in Article 53(2) and (3) of the Constitution, to each of the followers of various religions and beliefs.

The Tribunal also points out that the equal rights of churches and religious organisations, as referred to Article 25(1) of the Constitution, should be interpreted in the context of the provisions of paragraphs 4 and 5 of that Article.

Sharing equal rights with other churches and religious organisations, the legal and constitutional status of the Roman Catholic Church ought to be interpreted in the light of the provision of Article 25(4) of the Constitution, which constitutes a peculiar *lex specialis* in relation to the other provisions of Article 25 of the Constitution, and in particular in relation to Article 25(1) of the Constitution; since Article 25(4) of the Constitution also refers to an international treaty (a concordat) concluded by the Republic of Poland with the Holy See, which shall determine the relations between the Republic of Poland and the

Roman Catholic Church. Hence, the ratified provisions of the Concordat have become part of the legal system of the Republic of Poland, overriding statutory provisions, and were actually included in the constitutional matter, pursuant to Article 25(4) of the Constitution.

There is no doubt that Article 25(4) of the Constitution and the concordat specify the special institutional position of the Roman Catholic Church in the legal system of the Republic of Poland, reflecting its dominant position the religious structure in Poland. However, the Tribunal wishes to stress that the special institutional position may not in any way affect the equal rights of individuals, arising from the freedom of all religions and beliefs.

In the light of Article 25(1) and (2) in conjunction with Article 53(2) and (3), and, consequently, also in conjunction with Article 48(1), to which Article 53(3) of the Constitution refers – with regard to ensuring the rights arising from the freedom of religion, as set out in Article 53(2) and (3) of the Constitution - churches and religious organisations have equal rights, whereas public authorities should remain impartial, as stipulated in Article 25(2) of the Constitution. The special institutional position of the Roman Catholic Church, ensuing from Article 25(4) of the Constitution and the Concordat, has its limits, in the light of Article 25(1) and (2) in conjunction with Article 53(2) and (3) of the Constitution; the limits are the consequence of the equal rights of every individual, arising from the freedom of religion, including the equal rights arising from the freedom to teach every religion. Thus, Article 25(4) of the Constitution, in the light of other provisions, constitutes a *lex specialis* of a limited scope, since the specific regulation of institutional position of the Roman Catholic Church is limited by the principle of equal rights of followers of all religions and beliefs, with regard to the rights arising from Article 53 of the Constitution, and in particular from paragraphs 2 and 3 of that Article.

6. The review of the challenged Regulation of the Minister of National Education of 13 July 2007, in the light of the following constitutional higher-level norms: Article 25(1) and (2), Article 32(1) and (2) as well as Article 53(3) in conjunction with Article 48(1) of the Constitution.

It should be recalled that the challenged Regulation under constitutional review supplements, with two additional provisions, the previously enacted Regulation of 30 April 2007. This observation is important as the provisions of § 20(4a) and § 22(2a) which were added to the amended Regulation of 30 April 2007 should be considered in the context of the whole Regulation of 30 April 2007, which is of significance for the analysis of the applicant's allegations.

The applicant argues that the challenged Regulation infringes on Article 25(2) of the Constitution due to the lack of impartiality, and thus the lack of neutrality, of public authorities in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life. The applicant notices the infringement of the above provision in the fact that the challenged Regulation supports religion at the expense of other worldviews, and exerts pressure on pupils and parents (legal guardians) to choose religion classes.

The applicant sees the promotion of religion in the fact that one of the aims of the enacted Regulation is to motivate pupils to make more effort, and to appreciate their work done, in religion or ethics classes, and also in the fact that the inclusion of the grades obtained in the

subjects of religion or ethics in the calculation of grade point average, for annual or end-of-school classification of pupils, is to encourage pupils to choose, *inter alia*, to attend religion classes and, in the case of those who have already chosen such classes, to be more dedicated to studying religion; as a matter of fact, in the applicant's view, this is to also meant to prevent pupils from giving up these classes. This way, according to the applicant, the choice made by pupils is not completely voluntary, but is made under the pressure of expectations of obtaining a good grade in religion.

First of all, the Tribunal wishes to point out that, as it has already been mentioned in point 3 of this Statement of Reasons, Article 12(1) of the Education System Act has created the legal basis, which is still binding, for the teaching of religion upon parents' request (after attaining the age of 18, pupils decide themselves), in state kindergartens, primary schools, lower secondary schools and upper secondary schools. The above-mentioned educational institutions organise the teaching of religion. Article 12(2) of the above Act has authorised the minister who is competent in matters of education and upbringing, in agreement with the Roman Catholic Church, the Polish Autocephalous Church as well as other churches and religious organisations, to determine, by regulation, the terms and methods for carrying out the tasks, specified in Article 12(1), which are assigned to schools. This constituted the basis for issuing the Regulation of 14 April 1992. The applicant himself mentions that Regulation, pointing out that, pursuant to the Education System Act, "pupils – upon consent of their parents (legal guardians) or by their own decision may attend religion classes, ethics classes, or attend none of the said classes".

Citing the above-mentioned legal acts is vital, for some of the applicant's arguments, presented in the substantiation of the application, refer not only to the challenged Regulation, introducing the inclusion of annual grades for, inter alia, religion in the calculation of annual and end-of-school grade point average, but also generally refer to a broader problem; namely, the issue of teaching religion is state schools. Therefore, the Tribunal stresses that a number of provisions of the aforementioned Regulation of 14 April 1992, concerning the teaching of religion in state schools and kindergartens, has already been the object of review by the Constitutional Tribunal, in the case of the application of the Polish Ombudsman of 19 August 1992. As higher-level norms for review, the Ombudsman indicated the provisions of the Constitution which were in force at that time, as well as the provisions of a few statutes. Some of the conclusions of the Tribunal, in relation to the said Ombudsman's application, presented in the decision of 20 April 1993 (Ref. No. U 12/92, OTK of 1993, Part I, item 9), remain relevant to the present case under examination by the Tribunal. In particular, the Tribunal wishes to recall the following fragment of the reasoning of the decision: "Including the grades for religion in school reports is a consequence of organising religion classes in state schools. Article 22(2)(4) and (5) of the Education System Act obliges the Minister of National Education to, inter alia, set forth «the manner of maintaining documentation on the course of education provided by schools and educational institutions». There is no mention of any exceptions here. A school report includes all school subjects – both compulsory and extracurricular ones, and hence there are no reasons for mandatory exclusion of religion. Obviously, the Minister of National Education could decide otherwise, and abolish the requirement of including the grades in school reports".

The Tribunal emphasises that the teaching of religion is one of the elements of freedom of religion, as set out in Article 53(2) of the Constitution, apart from, *inter alia*, worshipping, praying, participating in ceremonies, performing of rites, and possessing sanctuaries and other places of worship, as well as the right to benefit from religious services. The freedom of religion always implies the freedom to profess or to accept a religion by personal choice, as well as to manifest such religion, either individually or collectively, publicly or privately. The freedom to manifest religion also refers to the freedom to teach religion. This should occur upon a voluntary decision of the persons concerned, with full respect for their will. The Tribunal stresses that, pursuant to Article 53 of the Constitution, which respects the contemporary standards regarding the rights and freedoms of the individual in a democratic society, and, in particular, pursuant to Article 53(1) to (3) of the Constitution, public authorities do not decide about the right to teach religion, nor do they decide about the right to freedom of religion in general. Public authorities specify and implement the guarantees of the freedom of religion, including also the guarantees of freedom to teach religion as one of the elements of the freedom of religion.

The introduction, by the challenged Regulation, of the inclusion of an annual grade for religion, apart from annual grades for ethics and for compulsory subjects, in the calculation of an annual grade point average (§ 20(4a) of the amended Regulation) and a grade point average for end-of-school classification (§ 22(2a) of the amended Regulation), is – according to the Tribunal – a consequence of introducing religion classes into curricula, and a consequence of including grades for religion in school reports in state schools, which, as already mentioned, the Tribunal reviewed in the decision of 20 April 1993 (Ref. No. U 12/92).

The Tribunal draws attention to the fact that the Regulation of the Minister of National Education of 13 July 2007, including final grades for religion, ethics and other extracurricular classes in the calculation of annual or end-of-school grade point average, is challenged at the moment when including grades for religion in school reports in state schools and the teaching of religion, in general, are no longer issues which arouse constitutional controversy. Therefore, the burden of proof as to why the inclusion of grades for religion in the calculation of annual or end-of-school grade point average, which constitutes an element of the evaluation system being a component of the teaching of religion, is inconsistent with the indicated higher-level norms for constitutional review – lies with the applicant. At this point the Tribunal points out that it does not matter whether the subject is compulsory or extracurricular, provided that the extracurricular subject is freely and voluntarily chosen. It is of importance in the case of religion classes that the subject is not inconsistent with parents' (pupils') worldviews or religious beliefs; for in the latter case, the freedom of choice would be fictitious (Article 53(3) in conjunction with Article 48(1) of the Constitution). It is also necessary to meet another basic requirement, arising from Article 53(4) of the Constitution, which generally refers to the possibility of teaching religion in schools, namely that the teaching of religion of a church or another religious organisation may not infringe on other peoples' freedom of conscience and religion.

In this context, the Tribunal wishes to stress again that the applicant's allegations presented in the *petitum* of the application are very narrow in scope, in the light of the constitutional assessment of the legal regulation of the teaching of religion. The applicant does not formally question the teaching of religion in schools as such; neither does he question the inclusion of grades for religion in school reports in state schools, but he merely challenges the inclusion of grades for religion in the calculation of annual and end-of-school grade point average. Since the applicant's arguments presented in the substantiation, as it has already been mentioned, do not solely concern the exclusion of grades for religion from the calculation of annual and end-of-school grade point average, but, contrary to the applicant's declaration at the hearing, they also refer to including grades for religion in school reports in state school, and at times they refer to the teaching of religion in state schools; the Tribunal recalls that, in the judgment of 5 May 1998 (Ref. No. K 35/97, OTK ZU No. 3/1998, item 32), it arrived at conclusions which are significant for the present case. The Tribunal adjudicated in the said judgment, *inter alia*, that: "it follows from the norm of Article 12(1) of the Education System Act that the issue of including grades for religion in school reports in state schools is not treated by the legislator as a separate issue, but is to constitute an element of the schools' obligation to organise religion classes upon the request of parents or the request of parents and pupils.
The Act entrusts the Minister of National Education merely with specifying the terms and methods for carrying out that task assigned to state schools, authorising him to issue a relevant regulation in agreement with the authorities of churches and religious organisations whose relations with the state are regulated by statutes. The scope of the statutory concept of terms for carrying out the task of organising religion classes upon the request of parents or the request of parents and pupils also includes the issue of including grades for religion in school reports".

The applicant is critical of the current legal situation where "public schools may only teach religion (religious worldview) which is represented by a religious organisation with a regulated legal status", and the Polish law does not provide for disseminating any other worldviews at school, such as an atheistic, pantheistic or deistic worldview. By providing for the inclusion of a grade for religion in the calculation of grade point average, public authorities additionally support the theistic worldview, by acting in its favour.

According to the Tribunal, it is understandable that public schools may only teach the religion of a church or religious organisation with a regulated legal status, as this explicitly arises from Article 53(4) of the Constitution. The teaching of a given religion, just as disseminating a given worldview, is not a separate fundamental right of the individual. The teaching of religion, as the Tribunal points out, is a right which ensues from the freedom of religion, from the freedom to manifest one's religion in this way; this right is guaranteed in Article 53, in particular in paragraphs 2 and 3. The Tribunal again stresses that the inclusion of grades for religion in annual and end-of-school grade point average results from introducing religion into curriculum and from including grades for religion in school reports in state schools. This, in turn, ensues from the constitutional guarantees of the freedom of religion, and not from favouring a theistic worldview. In the light of the binding provisions, pupils (their parents and legal guardians) have a choice between classes of a particular religion or classes in ethics, the latter being a subject for

those who do not share a religious worldview. The Constitution does not provide separate guarantees for the teaching of the worldviews enumerated by the applicant: atheistic, pantheistic or deistic. Considering organisational aspects, it would even be difficult to imagine how such a differentiation could be made among extracurricular subjects. The persons concerned may acquire the knowledge necessary at this level from ethics classes or another subject from the category of "extracurricular classes", as specified in the challenged Regulation.

Substantiating the above allegations, the applicant links them to the fact that "the teaching of religion in schools in Poland implies, in an overwhelming majority of cases, the teaching of Roman Catholic religion". The Constitutional Tribunal wishes to point out that the freedom of religion (freedom or belief) does not lead to actual equality.
Since this is indeed the freedom of religion, also in the realm of education, guaranteed by the freedom of choice, and public authorities, pursuant to Article 25(2) of the Constitution, are to remain impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, ensuring the freedom to manifest those convictions in public life, and in accordance with Article 25(1) of the Constitution they are to respect the equal rights of churches and religious organisations – then the structure of social awareness in matters of religious and other convictions is undoubtedly reflected in the structure of the teaching of religion and ethics. Therefore, the majority position of Roman Catholics usually is reflected (depending on the structure of a given community) in the fact that a majority of pupils choose to learn about the Roman Catholic religion.

The Tribunal draws attention to the fact how the equal rights of churches, and religious organisations as well as the impartiality of public authorities in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, should be understood in the light of the Constitution. The normative meaning of the term "equal rights", as referred to in Article 25(1) of the Constitution, and the term "impartiality", as referred to in Article 25(2) of the Constitution, has been determined, in the light of the Constitution, in point 5 of the statement of reasons of this judgment.

In a pleading of 24 June 2009, the applicant repeated, formulating in a slightly different way, in the context of the indicated infringement on Article 25(1) of the Constitution, the allegations about the challenged Regulation, as regards the consequences of the "domination" of the Roman Catholic religion, arguing that Catholic religion classes are organised virtually in all state schools in Poland, whereas classes of other religions are held in very few schools, that the system of religious education "promotes" "majority" religions, and that the pupils who do not want to attend Catholic religion classes have no opportunity to attend ethics classes.

According to the Tribunal, it follows from the wording of the allegations in the above pleading that they refer to the application of the provisions and that they concern not only the scope of the allegations, but also the organisation of classes of "minority" religions and ethics classes. This is also confirmed by the cases pending before the European Court, which were initiated by complaints against Poland, with regard to the organisation of ethics classes and classes of religions other than Catholic religion.

The Tribunal is aware of the fact that it may be the happen in the situation where the Roman Catholic religion is a dominant religion in the religious structure of Polish

society that the choice of an extracurricular subject made by parents or pupils may not be truly free, for it may be made under the pressure of the preferences of the "local" community. Indeed, the free choice of an extracurricular subject is to a large extent contingent upon the fact whether local communities respect the principles of social pluralism and tolerance for different convictions and religions. In particular cases where external pressure, infringing on the freedom of choice, would occur – it would stem from the declining standards of democratic culture. However, this important issue noticed by the Tribunal falls outside the Tribunal's jurisdiction. Indeed, the Tribunal is a court of law; it does not assess the application of law. For the same reasons, i.e. the lack of jurisdiction to examine the allegations concerning the actual state of affairs, the Constitutional Tribunal does not analyse the allegation put forward by the applicant that the principle of the impartiality of public authorities has been infringed upon, also because the challenged legal act was issued due to the demands of the leaders of the Roman Catholic Church leaders, presented at the meeting of the Joint Commission of the Government and Episcopate of Poland. However, the Tribunal wishes to note that Article 25 of the Constitution, apart from the principle of equal rights of churches and other religious organisations and the principle of the state's impartiality in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life (paragraph 2), it also expresses the need for cooperation between the state as well as churches and other religious organisations (paragraph 3).

The applicant also argues that the inclusion of grades for religion and ethics in the calculation of annual or end-of-school grade point average is to encourage pupils to choose a given religion and to prevent them from giving up attending those classes, under the pressure of expectations of obtaining a good grade in religion or ethics, as a result of which the choice made by parents or pupils is not truly free; particularly that a grade for a given subject may weigh in favour of a special appraisal of a pupil, such as being awarded a school certificate with honours. On the other hand, the situation where a grade for religion or ethics would not be taken into account, when calculating a grade point average, would result in narrowing down the scope of grade point average (the pupil does not have extracurricular classes of ethics or religion).

According to the Constitutional Tribunal, the applicant has not presented any evidence that the aforementioned situations arise from the challenged Regulation. It may not be taken for granted that the inclusion of a grade for religion or ethics in the calculation of grade point average will lead to obtaining a higher grade point average. This may depend on various factors in specific cases. Moreover, it should be noted that the challenged Regulation stipulates that the final grade to be included in the calculation of annual grade point average and grade point average for end-of-school classification are not only grades for religion, but also for ethics as well as for "extracurricular subjects", which give more opportunities to increase one's grade point average. This is pointed out by the Public Prosecutor-General.

As regards the allegation raised by the applicant that the adopted solutions exert pressure on children and adolescents "in order to make them attend religion classes in accordance with the choice made by parents or legal guardians", the Constitutional Tribunal considers this to be related to the aforementioned declining standards of

democratic culture in a given community. By contrast, the allegation that a grade for religion is meant to motivate pupils to be religiously active outside school, would be relevant if, in a particular situation, this would take place under pressure, depriving pupils (their parents) of free choice. However, if such a choice is free, religious activity outside school should be treated as an element of freedom of religion. With regard to this allegation, which also raises the issue of pressure exerted on children and adolescents, the above conclusions may also apply, namely that the allegation concerns the application of the challenged provisions and a possibly negative impact of local culture and customs on the attitude of respect for religious beliefs, worldviews an philosophical convictions and worldviews other than those followed by a majority.

Also, the applicant argues that religion classes do not have the character of religious studies, but that they are catechesis. "The catechetical aims of catechesis in forms 4-6 of the primary school include primarily, *inter alia*, awakening an interest in God's message, enabling pupils to find God' vocation for their lives in Biblical teachings, preparing pupils to be independent recipients of Biblical texts", as the applicant points out, citing *Podstawa programowa katechezy Kościoła katolickiego w Polsce* (*Curriculum Outline for Catechesis of the Roman Catholic Church in Poland*); the document was approved by the Polish Episcopal Conference (published in Kraków, 2002 edition). In the pleading of 24 June 2009, the applicant also added to the above allegations that the "content" of religion classes is "the responsibility of particular churches and religious organisations".

The Constitutional Tribunal draws attention to the fact that the above allegations fall outside the scope of the allegations indicated in the application. Indeed, the object of allegations is the Regulation of the Minister of National Education of 13 July 2007. However, the above allegations by the applicant concern the content of the curriculum outline for catechesis of the Roman Catholic Church and the organisation of the teaching of religion in state schools. Due to their nature, the allegations – in the light of Article 188 of the Constitution and Article 2 of the Constitutional Tribunal Act – may not be subject to constitutional assessment by the Tribunal.

In this context, however, the Tribunal recalls that, in accordance with § 4 of the Regulation of 14 April 1992, "the teaching of religion is based on curricula devised and approved by the competent authorities of churches and other religious organisations, and then presented to the Minister of National Education. The same rules shall apply to the textbooks for religion classes". The applicant does not challenge the above provision. At this point, the Tribunal also wishes to recall the content of Article 12 of the Concordat, quoted above, and in particular paragraphs 2 and 4 of that Article, which regulate the issues regarding the curriculum for the teaching of the Catholic religion and the content of that curriculum. Pursuant to Article 12(2) of the Concordat, "the curriculum for the teaching of Catholic religion and the relevant textbooks are prepared by church authorities, and presented to competent state authorities". However, as stipulated in Article 12(4) of the Concordat, "as regards the content of religious instruction and upbringing, teachers of religion shall be subject to church provisions and regulations, whereas in other regard – subject to state provisions".

In the light of the earlier conclusions of the Tribunal, assessment should also be carried out with regard to the applicant's allegations that the provisions of the challenged

Regulation infringe on the constitutional principle of equality before the law, the right to equal treatment and the principle of non-discrimination, enshrined in Article 32 of the Constitution. Moreover, the applicant asserts that there is also a difference in the criteria for evaluation in the case of those pupils who attend religion classes and those who do not attend them. As regards the pupils who attend religion classes, "the degree of internalisation of a certain worldview – articles of faith, as well as the involvement in religious practices, i.e. the degree of piety"; whereas, in the case of pupils who do not attend catechesis, the criterion for evaluation is the level of acquired academic knowledge and the related skills", the applicant argues.

First of all, the Tribunal wishes to point out that the above allegations raised by the applicant fall outside the scope of allegations which is related to the Regulation of the Minister of National Education of 13 July 2007. However, it should be noted that the difference in criteria, indicated by the applicant, is inevitable, since the object of teaching is religion, and not religious studies. It should be recalled once more that the teaching of religion is one of the elements of the freedom of religion, in the light of the contemporary standards of a pluralist, democratic society. It is not the state's role to impose a curriculum for the teaching of religion, changing it into a curriculum for religious studies. The Tribunal has already mentioned that issue. Such a situation would be an infringement on Article 53, in particular paragraphs 1 to 5, but also on Article 25(2) of the Constitution, as the state, by such interference, would not remain impartial in matters of religious beliefs and as regards the freedom to manifest those beliefs in public life. Therefore, the Tribunal has concluded that the applicant has not proved the infringement of Article 32 of the Constitution.

However, the Tribunal wishes to emphasise at this point that the neutral and impartial role of the state in ensuring the freedom of religion in the realm of the teaching of religion may not be regarded as tantamount to a passive role, since the goal of the state is to guarantee pluralism in education, which would reflect the diversified structure of social awareness and religious beliefs. Specifically in those communities where one of the religions definitely holds a dominant position, ensuring non-discrimination, tolerance and protection of the convictions of minority groups becomes - in accordance with the previously discussed standards of a democratic society – a particularly important obligation of the state. The state (public authorities) is the organiser of education in state schools, and that regards the teaching of religion as well. Thus, it may not neglect its obligation to stay vigil and ensure true pluralism in education. The state should posses all information, also with regard to the content of the teaching of religion; it should react, in cooperation with appropriate church authorities, in the cases of intolerance or inadmissible pressure ensuing from the dominant position of one of religions.

The Constitutional Tribunal draws attention to the fact that the neutral and impartial role of the state may not consist in introducing actual equality of all religions and convictions, *inter alia*, in the realm of education, but should consist in guaranteeing every individual the freedom to believe in any religion or hold any convictions, as well as in ensuring the protection of the rights arising from the freedom of religion and conviction, also with regard to education. The Tribunal also stresses what it has established earlier that freedom of conscience and religion, which in the light of the Constitution should be

guaranteed to “everyone”, also in the field of teaching religion (Article 53(1) and (2) of the Constitution), constitutes a basic reason for limiting the existing institutional inequality among churches and religious organisations as well as restoring the special position of the Roman Catholic Church in the Republic of Poland, legally regulated in Article 25(4) of the Constitution, and also in the international treaty (Concordat) concluded between the Republic of Poland and the Holy See, which the said constitutional provision refers to.
The actual inequality among churches and religious organisations, consequently resulting in institutional inequality, may not limit the rights of every individual, arising from the freedom of religion, which is one of the fundamental freedoms of the individual in a democratic society. At this point, the Tribunal stresses that institutional inequality may not also restrain “minority” churches and religious organisations as to the fulfilment of their roles and the exercise of their rights, ensuing from the freedom of religion. The Tribunal draws attention here to the established jurisprudence of the European Court of Human Rights, presented in point 2.3 in the statement of reasons of this judgment.

The applicant also asserts that the challenged Regulation, by providing for the inclusion of grades for religion in the calculation of grade point average, exerts pressure on pupils who attend catechesis; it disturbs the balance between parents’ right and their children’s freedom of conscience, belief and convictions, and thus “a certain balance, arising from Article 53(3) in conjunction with Article 48(1), between parents’ right, as regards ensuring their children a moral and religious upbringing and teaching, and parents’ obligation to respect the freedom of conscience and belief as well as the convictions of their children”. The applicant holds the view that the Regulation disturbs the said balance, as it introduces an instrument of pressure on pupils who attend catechesis. Moreover, as the applicant asserts, the evaluation system for religion classes, in the light of the presented stance of the Episcopate, goes beyond pupils’ activity at school, as it induces them to be religiously active outside school, and this may not be consistent with the pupils’ freedom of conscience and belief, nor with their parents’ choices as regards upbringing.

The Tribunal again points out that the applicant raises an allegation which does not concern the challenged Regulation alone (the inclusion of grades for religion in the calculation of annual and end-of-school grade point average), but generally refers to the teaching of religion. Indeed, the applicant indicates an infringement of the above-mentioned balance, as a result of children’s attendance of religion classes, referred to as “catechesis” by the applicant.

Article 53(3) of the Constitution stipulates that: “Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate”. And Article 48(1) of the Constitution specifies that: “Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions”. Therefore, one should note the obvious relation between Article 53(3) and Article 48(1), and in particular that Article 53(3) is linked to the second sentence of Article 48(1). Namely, although parents enjoy the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions, they should also take into consideration, in this regard, the maturity of their children as well as their

children's freedom of conscience and belief and also their convictions. "This is, indeed, a provision of a praxeological character, expressing a well-established rule for an upbringing process". The parents who do not consider those aspects "would cease to bring up their children in a creative and positive way". Parents' right (obligation) to provide upbringing "remains intact, although it naturally should include certain reactions to new situations" (see P. Sarnecki, commentary to Article 48, [in:] *Konstytucja Rzeczypospolitej Polskiej*. *Komentarz*, Vol. 5).

The Constitutional Tribunal recalls that the aforementioned pressure exerted on pupils attending religion classes, which has been pointed out by the applicant, has already been the object of the Tribunal's analyses. According to the Tribunal, such pressure may result from local determinants, declining standards of democratic culture, which the Tribunal has explained before. The applicant has not proved that the pressure ensues from the challenged provisions. Thus, it may not be stated that the disturbance of the above-mentioned balance, which may occur in certain cases, stems from the entry into force of the challenged Regulation. The applicant has not proved that the challenged Regulation infringe on Article 53(3) in conjunction with Article 48(1) of the Constitution.

7. Review of the challenged Regulation in the light of the provisions of the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Religion, indicated by the applicant.

7.1. In the applicant's opinion, the challenged Regulation infringes on Article 6(2) of the Act on Guarantees, which stipulates that "citizens may neither be compelled to participate nor compelled not to participate in religious activities or rituals." Claiming that "catechesis as such may be regarded as a religious activity", and maintaining the stance, expressed earlier, that participating in religious instruction is tantamount to attending catechesis, the applicant states that, by including the grade for religion in the calculation of grade point average, pressure is exerted on pupils in order to "induce them to get more involved in religious practices outside school". As a result, in the applicant's opinion, we deal with the situation where pupils are forced to participate in religious activities and rituals.

According to the Tribunal, the applicant's allegations do not concern the normative content of Article 6(2) of the Act on Guarantees. This conclusion is drawn from the analyses carried out by the Tribunal, in relation to the constitutional review of the challenged Regulation conducted above. The applicant's above allegations pertain to the curriculum and the content of religion classes. By contrast, the challenged Regulation regards the inclusion of grades for religion and ethics classes, and from other "extracurricular classes", in the calculation of annual and end-of-school grade point average. According to the Tribunal, the applicant has not proved that it follows from the provisions of the challenged Regulation as such that pressure is exerted on pupils in order to induce them to get more involved in religious practices. The Tribunal also wishes to emphasise that it follows from the wording of Article 53(2) of the Constitution that the teaching of religion should not be regarded as tantamount to religious activities or rituals.

7.2. In the applicant's opinion, the challenged Regulation also infringes on Article 10(1) of the Act on Guarantees, which stipulates that the Republic of Poland is a secular state, and as such is neutral in matters of religion or conviction. The applicant stresses that "a secular state, being neutral in matters of worldview, is not interested in its citizens' religion. It does not subject its citizens to indoctrination; it does not show - directly or indirectly - any preference for any worldviews, religions or philosophies. The state refrains from restraining the freedom of choice as regards religion or worldview. It neither encourages nor discourages citizens' decisions in this regard. It does not reinforce specific religious or philosophical doctrines". The applicant states that the challenged Regulation infringes on Article 10(1) of the Act, as it demands that the grade obtained in catechesis is to be included in the official system of pupils' evaluation. The applicant stresses that the criteria which are religious in character are introduced into the realm of activities of public authorities. What is evaluated is not only the knowledge but also piety. This way, the state, at least partly, assumes the responsibility for the effectiveness of learning the articles of faith and religious moral principles in the case of the pupils who attend catechesis at school; it contributes to the consolidation of religious doctrine, becomes religiously involved, acquires the attributes of a religious state, and ceases to be a secular state which is neutral in matters of worldview.

The Tribunal shares the view of the Public Prosecutor-General that the above allegations, related to the indicated Article 10(1) of the Act on Guarantees, do not refer to the challenged Regulation, which concerns neither the teaching of religion nor the criteria for the evaluation of pupils with regard to that subject. The applicant's allegations are related to the subject matter of the Regulation of 14 April 1992. However, in particular due to the applicant's allegation of the infringement on the principles of a secular state, the Tribunal wishes to explain how the model of a secular state should be construed in the light of the Constitution of 1997.

To begin with, the Tribunal again points out that it does not follow from the principle of the impartiality of the state, from its neutrality in matters of worldview, that there is a need to introduce actual equality of all kinds of worldviews, Stressing that all the provisions of the Constitution should to be interpreted in a systemic way, the Tribunal points out again that the freedom of religion encompasses, *inter alia*, the teaching thereof (Article 53(2)). Therefore, the state should guarantee the teaching of religion, also in state educational institutions, on a voluntary basis. The consequence of including religion in curricula is the need to place it on par with other school subjects, also with regard to evaluation and promotion; but, as the Tribunal stresses, at the same time meeting the basic requirement that attendance at religion classes is voluntary. This requirement is crucial to ensure the neutrality of the state, and of public authorities in general, in matters of worldview. At this point, the Tribunal points out that it has already explained, in point 5 of this Statement of Reasons, the issue of equal rights of churches and religious organisations, and the issue of the impartiality of public authorities in matters of religious beliefs, in the light of the Constitution. The impartiality and neutrality of the state (public authorities) in matters of worldview also entails that there is no state, official or national religion in the light of the Constitution (and the legal system in general). Although, as it has already been mentioned, such a state of affairs is the case in some democratic states (also in Europe).

The state's impartiality and neutrality in matters of worldview is guaranteed, *inter alia*, by the freedom to profess and teach religion. These are, as mentioned before, the democratic standards of comprehensively understood freedom of conscience and religion in a pluralist democratic society.

The applicant argues that the challenged Regulation infringes on the principles of a secular state. The Tribunal wishes to point out that the term "secular state" used in Article 10(1) of the Act on Guarantees should be interpreted in the context of the axiological basis of the Constitution. As mentioned before, the term "secular state" occurs in very few constitutions (e.g. in France), which stems from the tradition of a particular country. Currently there is no single formula for a secular state, although it is possible to identify its basic characteristics. At present a secular state should not be associated only with its extreme version of complete separation of state from churches and religious organisations, also with regard to the teaching of religion in state schools. The tradition of a secular state understood in an extreme way has never been a tradition in Poland. As mentioned earlier, for political and economic reasons, religion was also taught in state schools during the period of the People's Republic of Poland.

From 1989 until the enactment of the Constitution of 1997, the Polish legal system underwent changes, also so as it could be adjusted, with regard to freedom of conscience and religion, to the requirements of a contemporary pluralist democratic society. The approach adopted in the Constitution of 1997 constitutes a certain compromise between various proposals; this is reflected, in particular, in Article 25 of the Constitution, which mentions the impartiality of public authorities as well as autonomy and mutual independence. The new concepts contained in the Constitution of 1997 often lead to interpretation problems, especially when juxtaposed with some statutes preceding the Constitution; indeed, for instance, the Act on Guarantees was enacted on 17 May 1989, but it is the Constitution of 1997 that constitutes an axiological basis of the interpretation of statutes, also in the case of provisions of the Act of Guarantees.

According to the Tribunal, it follows from the Constitution, in particular from Articles 25 and 53, that the character of the state is neutral, in matters of worldview, and secular, yet consistent with the above-mentioned traditions and contemporary Polish social determinants, and at the same time meets the requirements of a contemporary democratic state, presented in point 3 of this Statement of Reasons by the Tribunal. It is aptly stated in the doctrine that "when devising a normative model of relations between the state and religious organisations, one should take into account the established interpretation of such constitutional terms as: the impartiality of public authorities, the scope of the state's autonomy, its own scope of activity, the principles of respect for autonomy and the mutual independence, the equal rights of religious organisations. The interpretation accepting the neutrality of the state and the friendly separation, enhanced by cooperation, is fully supported by the provisions of the Constitution and the act on the Guarantees of Freedom of Conscience and Religion" (M. Pietrzak, *op.cit.*, p. 232). However, at this point, the Tribunal draws attention to that fact that the interpretation and application of statutes, concerning the issues related to the realm of freedom of conscience and religion, which shaped the actual impartiality of public authorities, fall outside the jurisdiction of the Tribunal.

The Constitutional Tribunal underlines that the question whether including the grades for religion classes in school reports is consistent with Article 10(1) of the Act on Guarantees, which stipulates that "the Republic of Poland is a secular state, and as such is neutral in matters of religion or conviction" – was already the object of the Tribunal's adjudication in the aforementioned decision of 20 April 1993, in the case with the reference number U 12/92. The object of review (also in the light of Article 82(2) of the formerly binding Constitution) was § 9 of the Regulation of 14 April 1992. The provisions of § 9 read as follows: "1. The grade for religion or ethics is placed on the school certificate directly after the grade for behaviour. In order to eliminate any possible manifestations of intolerance the school certificate shall not contain any data that would indicate which religion (or ethics) course was followed by a pupil."; "2. The grade for religion (ethics) has no influence on whether a pupil moves up to the next form."; "3. The grade for religion (ethics) is awarded according to the grade scale adopted in a given form"; "4. The pupils who attend religion or ethics classes organised by the school authorities, in accordance with the rules set out in § 2(2)-(4), the grade they obtain in religion/ethics is included in a school certificate issued by the school they attend, upon confirmation from a teacher of religion or ethics".

Adjudicating in the above-mentioned case, *inter alia*, that § 9(1), (2) and (3) of the Regulation of 14 April 1992 is consistent with Article 10(1) (and that Article 82(2) of the former Constitution), the Tribunal stated that "placing grades for religion on school reports is a consequence of organising religion classes in state schools. (...) A school report includes all school subjects – compulsory and extracurricular, and hence there are no reasons for mandatory exclusion of religion. Obviously, the Minister of National Education could decide otherwise and abolish the requirement to include the grades in school reports. The substantiation of that point reveals the Polish Ombudsman's fears about intolerance. To disperse possible reservations in this respect, in point 7 of the operative part of the judgment, the Constitutional Tribunal stressed that a grade on a school report may regard not only religion or ethics but, in the case when a pupil attends both types of classes, she/he may obtain a joint grade for both subjects".

Maintaining the above stance, the Tribunal wishes to emphasise, in relation to the case under examination, that including grades for religion in the calculation of annual or end-of-school grade point average is a result of placing grades for religion in school reports in state schools. The Tribunal also stresses that the legislator may eliminate that solution. The solution adopted in the challenged Regulation, as well as the elimination of it, falls within the freedom of the legislator. The solution adopted in the challenged Regulation, by the Minister of National Education, does not infringe on the model of a secular state that has evolved in the Republic of Poland, which reflects Polish traditions, and has been established on the basis of the Constitution of 1997, and also, what the Tribunal wishes to underline, which falls within the framework of the contemporary European democratic standards.

The Tribunal emphasises at this point that the above-mentioned, in point 3 of this Statement of Reasons, democratic standards concerning the teaching of religion, in the light of the European Convention and its Protocol No. 1, in accordance with which the teaching of religion and other subjects are subject to the same rules and consequences

ensuing from the inclusion in a curriculum, provided the voluntary character of religion classes and religious and worldview pluralism are respected. This entails that a consequence of the teaching of religion, as part of respect for freedom of religion, may be placing grades for religion on school reports, and a consequence of grades being placed on school reports may be, on equal terms with other subjects, the possibility of including grades for religion (and ethics) in the calculation of annual or end-of-school grade average.

Referring to the allegation of infringement on the challenged provisions § 9(1) to (3) of the Regulation of 14 April 1992, i.e. on the principle of a secular and neutral character of the state, in relation to the present case, the Tribunal points out that it explained in the above-mentioned decision that:

"As regards the allegation of infringement on the principles of separation of Church and State (Article 82(2) of the former Constitution) and the secularity and neutrality of the State (Article 10(1) of the Act on the Guarantees of Freedom of Conscience and Religion), as it has been mentioned above, it should be analysed in the context of the introduction of religion to state schools, as the problem of grades in school reports is merely a consequence of the teaching of religion. The principles referred to above require that both the State and the Church remain autonomous in their activities. However, this does not mean isolation, or definitely not competition, but on the contrary – it should mean an opportunity for cooperation in the areas that serve the common good and the development of the individual. These areas undoubtedly include the realm of ethical education of the youth. Thus, the aforementioned secular and neural character of the State may not mean a ban on teaching religion in state school, particularly that the said teaching, according to the Education System Act, may only take place upon parents' request or – in some cases – upon pupils' request.

The interpretation adopted by the Constitutional Tribunal is in line with the understanding of secularism, neutrality and the separation of Church and State in those European democratic states where religion is taught in state schools, sometimes even on a compulsory basis. Moreover, this is compliant with international conventions of human rights (...)".

With regard to the present case, the Constitutional Tribunal maintains the above conclusions. The Tribunal wishes to add that the allegation of the infringement on the principle of a secular and neutral character of the state, due to the inclusion of grades for religion in the calculation of annual or end-of-school grade point average, ought to be discussed in the context of the grades for religion in school reports, which, in turn, is a consequence of the introduction of religion into state schools. Citing extensively the above decision, the Constitutional Tribunal wishes to recall the already established fact that the applicant raises not only allegations which are related to the challenged Regulation , but also broader issues pertaining to the freedom to teach religion, in the context of the normative content of Article 10(1) of the Act on Guarantees, which have already been analysed by the Tribunal. Also, the fact that adjudication in the case with the reference number U 12/92 was issued before the enactment of the Constitution of 1997 induced the Tribunal to take a position with regard to the applicant's allegations concerning the infringement of Article 10(1) of the Act on Guarantees by the challenged Regulation.

7.3. The applicant asserts that the challenged Regulation is inconsistent with Article 20(2) of the Act on Guarantees, with the principle expressed therein that the teaching of religion is an internal matter of religious organisations. "Grades for religion and the consequences of these grades for pupils, as an integral element of the teaching of religion is also an internal matter of religious organisations," the legislator emphasises. Meanwhile, as the applicant explains, a grade for religion will affect an overall evaluation of a pupil, within the framework of school education, by having impact on his/her grade point average, and thus, as the applicant concludes, "will have external impact – not only in church, but also in the education system".

The Tribunal shares the view of the Public Prosecutor-General that this allegation is inadequate to the content of Article 20(2) of the Act on Guarantees, which does not concern the teaching of religion in schools, which becomes obvious in the context of Article 20(3) of the Act on Guarantees, also indicated, by the applicant, as a higher-level norm for constitutional review of the challenged Regulation.

7.4. In the applicant's opinion, the challenged Regulation is inconsistent with Article 20(3) of the Act on Guarantees, which stipulates that a separate statute shall set out the rules for teaching religion to pupils of state schools and kindergartens. Also, as the applicant argues, the issues of evaluating pupils and including the grades for religion in the calculation of annual or end-of-school grade point average in school reports and certificates should be regulated by statute, and not by regulation, since these matters fall within the scope of teaching of religion in schools. The Tribunal shares the view of the Public Prosecutor-General that it follows from the wording of Article 20(3) that it should be a statute which would be separate from the Act on Guarantees, yet not necessarily a statute that would be solely devoted to the rules for teaching religion. According to the Tribunal, such rules have been set forth in the Education System Act, Article 12 of which specifies the rules for organising religion classes upon parents' request. Article 22(2)(4) of the Act authorised the minister who is competent in matters of education and upbringing to issue a regulation setting out the terms and methods of grading, classifying and promoting pupils and conducting tests and examinations, which was done by the amended regulation of 30 April 2007, subsequently supplemented by the Regulation of 13 July 2007.

The Constitutional Tribunal has decided to discontinue the proceedings with regard to the examination of the conformity of the challenged Regulation to Article 20(3) of the Act on Guarantees. Indeed, the core of the applicant's allegations concerns the relation between Article 20(3) of the Act on Guarantees and Article 12 of the Education System Act, and thus concerns the relation between the statutes, which is outside the jurisdiction of the Tribunal. The other allegations also do not pertain to the relation between the challenged Regulation and Article 20(3) of the Act on Guarantees, but between Article 12 of the Education System Act and the aforementioned Regulation of 14 April 1992. This area of relations was not subject to challenge neither in the *petitum* of the application, nor in the substantiation. Therefore, it does not fall within the jurisdiction of the Tribunal.

8. As it has been mentioned before, the Tribunal, in relation to the judgment of 16 January 2007 (Ref. No. U 5/06), suggested to the Sejm of the Republic of Poland, in the

decision of 31 January 2007 (Ref. No. S 1/07), the need for legislative initiative with regard to amending Article 22(2)(4) of the Education System Act, in a manner which would be compliant with constitutional requirements pertaining to statutory authorisation as well as the principle of exclusiveness of statutory regulation in the realm of rights and freedoms. The Tribunal has cited above extensive excerpts from the aforementioned decision of 31 January 2007.

With regard to the present case, the Constitutional Tribunal maintains the conclusions it drew in that signalling decision. According to the Tribunal, this case confirms the need for a prompt legislative initiative with regard to amending Article 22(2)(4) of the Education System Act, in a manner which would be compliant with constitutional requirements.

The Constitutional Tribunal wishes to stress that the present case also suggests other premises for the sake of undertaking a possible comprehensive legislative initiative, going beyond the amendments to Article 22(2)(4) of the Education System Act, which would concern the teaching of religion in state schools and kindergartens. In the Tribunal's opinion, the current legal regulation of the teaching of religion, arising from the statutes and regulations issued within the time span of 20 years, in the period prior to the enactment of the Constitution of 2 April 1997 as well as after its enactment, exhibits inconsistencies. Therefore, in the light of the above, the Tribunal will consider the need to issue a relevant signalling decision to the Sejm of the Republic of Poland.

However, the Constitutional Tribunal has not stated that the challenged Regulation is inconsistent with the indicated higher-level norms for review. It would be desirable, according to the Tribunal, if the legislator considered whether the current regulation is apt, since it creates a risk of difficulties in ensuring the proper application of the challenged provisions and the risk of local social conflicts or cases of intolerance.

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.