true. Advertising would be objected to, however, if it involved unsolicited calls on prospective clients, if its character was sensational or quasi-commercial, or if it was misleading. According to the Court, these boundaries were embedded in the rules of fair advertising, which in the case of attorneys had to be slightly modified to take account of the special role of attorneys within the judicial system.

In another case a firm of tax lawyers had placed an advertisement in a local paper to search for a new secretary. The advertisement stated that the firm "was expanding rapidly." The Nürnberg court of appeals[32] held that this constituted factual and informative advertising, which was permissible under the standards developed by the courts.

Factual and informative advertising will most likely be legalized by statute when the Federal Attorneys' Act is amended to take account of the developments in the profession during the last five years. The amendment is expected to be adopted prior to the next federal elections scheduled for the fall of 1994.

Poland*

I. The New Polish Basic Law

The Basic Law on Mutual Relations Between the Legislative and Executive Powers of the Republic of Poland and on Local Government[1] passed by the Sejm (Lower House) on October 17, 1992, was the culmination of long-lasting efforts to introduce a new act of constitutional rank to Polish law. Demands to pass a new constitution surfaced as early as 1989 in order to change the outdated constitutional system's declaratory character of principles, low level of juridic precision, and lack of guarantees for human rights. Several amendments to the Constitution of 1952, imposing new legal principles and institutions on the outdated concepts of the former political system, resulted in inconsistencies and a constitution that was ineffective as a regulator of political and social changes.[2]

The adoption of a new basic law is a controversial achievement. Given the political divisions within the Polish parliament, passage of the new law required far-reaching compromises between parliamentary members with sharply diverging opinions on the desired system of government in Poland and the methods

32. Judgment of Dec. 1, 1992, OLG Nürnberg, 1993 BRAK-Mitteilungen 111.

*Prepared by Cezary Banasiński, LL.D., Warsaw University.

1. DZIENNIK USTAW [JOURNAL OF LAWS] [DZ.U.] No. 84, item 4265.

2. *See also* M. KRUK, MALA KONSTYTUCJA [SMALL CONSTITUTION] 5 (1993).

required to implement it. Nevertheless the parliament's inability to pass a new comprehensive constitution, despite much work and the preparation of two drafts, may testify to the shortcomings of Polish parliamentarianism in the past three years.[3]

Consequently, the new Basic Law is temporary in character. It regulates the fundamental principles and institutions of the political system for a period of transition, but fails to comprehensively cover matters considered as constitutional[4] in terms of doctrine and custom. As a result the Basic Law of 1992 does not fully replace the provisions of the old Constitution of 1952. The law leaves in force some of the chapters and provisions of the old Constitution, giving them new wording to reflect the conditions of a new political system. Those chapters and provisions constitute an integral part of the new constitutional and legal order and cover varied issues including: fundamental principles of the political system such as the principles of a democratic state of law and sovereignty of the nation; a clause on social justice; the principle of political pluralism and the freedom to found political parties; guarantees of economic freedom, property rights, and the right of succession; and the position of the armed forces in the system. The provisions concerning the Constitutional Tribunal, Tribunal of State, Supreme Board of Control, Ombudsman, Court and Public Prosecutor's Office, and the principles of parliamentary and presidential elections, preserved from the 1952 Constitution, have also been reworded. Paradoxically, the provisions of the old Constitution that regulate the basic rights and duties of citizens were only slightly changed because, in practice, citizen's rights are guaranteed effective protection. If, however, political rights and freedoms have become consolidated, social rights have clearly become restricted. Additionally, the Basic Law has also preserved the old procedure of amending the constitution.[5]

II. Concept of the Separation of Powers in the Basic Law of 1992

A. General Principles

In accordance with the preamble of the Basic Law, the authors of the law declare its foremost value to be to "improve the operation of the supreme state authorities until the time a new Constitution is passed." This objective is of a clearly pragmatic character; it is imperative to secure the relative stability of

3. This conclusion was fully confirmed by the dissolution of parliament by the President in June 1993.

4. The tradition of basic acts of this kind dates back to the resolution of the legislative Sejm of February 19, 1919, that regulated mutual relations between the head of state, parliament, and government until the time of passing the March Constitution of 1921. A similar role was played by the Basic Law of February 19, 1947, On the System and Scope of Activity of the Highest Bodies of the Republic of Poland, which was binding until the Constitution of 1952 was passed, see T. Szymczak, Materialy do Nauki Prawa Konstytucyjnego [Materials for the Teaching of Constitutional Law] (1990).

5. Dz.U. No. 84, item 4265, art. 106.

government and eliminate conflicts between the organs of authority. This foundation is particularly significant given the conditions of transformation of the economic and political system in Poland.

The Basic Law bases the structure and powers of the supreme organs of the state on the fundamental principle of separation of powers. Article 1 of the law puts it in a straightforwardly classical way: the legislative power is exercised by the Sejm and Senate (parliament), the executive power by the President and the Council of Ministers (government), and the judiciary power by independent courts.

The Basic Law, however, does not make an unequivocal selection of a specific option of the political and legal system. In historical terms, Poland remains within the tradition of a parliamentary model, rooted in the period of noblemen's democracy, followed by the Constitution of May 3, 1791, the first European constitution. The 1921 Constitution, patterned on the concept of the system of government of the Third French Republic, introduced a model of the parliamentary system to which the Basic Law of 1947 referred. Notwithstanding, much stress has been put on options favoring the consolidation of the executive power in Poland.

Finally, the Basic Law provides for legal institutions characteristic of both parliamentary and presidential systems in a manner not always consistent. A perfect example of this problem can be provided by the government-forming procedure.[6] The authors of the new system of government wanted to reconcile sometimes inconsistent interests and options that would guarantee the President's influence in four areas: (1) appointing the government and its members; (2) the Sejm's control over the formation and the dismissal of the government in accordance with the principle of parliamentary responsibility; (3) independence of the government from the changing alignment of political forces in the Sejm; and (4) the strengthening of the legal position of the prime minister within the cabinet.[7]

The fundamental method of appointing a government is as follows: the President designates the chair of the Council of Ministers, and the entire membership of the Council of Ministers is appointed on the motion of the prime minister. Next, within fourteen days, the chair of the Council of Ministers presents the Sejm with the program of the government along with a motion for a vote of confidence. A refusal to give a vote of confidence means a lack of approval for the government and, consequently, authorization for the Sejm to elect the chair of the Council of Ministers and members of the government proposed by that prime minister.

If this attempt to form a government also fails, the entire procedure is repeated again, but in this second round, for the Sejm's decision to be effective only a simple majority vote is required. If the second round turns out to be unsuccessful, the President dissolves the Sejm and appoints the prime minister and the Council

6. *Id.* arts. 57-62.

7. *See also* P. WINCZOREK, WARTOŚCI NACZELNE "MALEJ KONSTYTUCJI" [SUPERIOR VALUES OF THE "SMALL CONSTITUTION"] 10 (1992).

of Ministers for a period not longer than six months. If the Sejm fails to pass a vote of confidence for the government before the end of the period of time for which that government has been appointed, the President dissolves the Sejm. Also, the prime minister or the government are recalled by the President if the prime minister or the government resign. The President can also make changes in the Council of Ministers on the request of the prime minister. The Sejm may cause the dismissal of the prime minister or another cabinet member only by refusing to give a vote of acceptance of account or through passing a vote of no confidence. The passing of the no confidence vote for the government, however, depends on numerous procedural conditions, the so-called constructive vote being the only one that is legally effective.[8]

The option of a presidential legislative veto is an institution of great significance in the determination of the relations between the legislative and executive powers. It consists of the possibility of the President refusing to sign a bill passed by the Sejm and Senate and returning it for reexamination. The Sejm can either take the veto into consideration or uphold its decision by passing the bill again with a two-thirds majority vote.

The President is not politically responsible to the parliament. Therefore, presidential acts are subject—as in traditional parliamentary systems—to countersignature by the prime minister or a competent minister. Articles 46 and 47 of the basic law have introduced a negative clause by listing such official presidential acts that are not required to be countersigned.

Under the Basic Law the government is responsible to the Sejm. This principle is the source of the Sejm's controlling power over the government. On the other hand, the Basic Law has introduced the concept of nonparliamentary legislation in the form of government decrees.[9] The authority of the government in this respect is not total, however, because the parliament specifies the subject matter of a regulation to be passed in this mode and the time of authorization. The Basic Law also excludes certain categories of matters that can be the subject of nonparliamentary legislation such as amendments to the constitution, changes of the state budget, and the rights and duties of citizens. Control over the execution of special legislative powers by the government has been vested only with the President, who can refuse to sign such an act or appeal against it to the Constitutional Tribunal.

B. Parliament

The Basic Law preserves two chambers of parliament. The Sejm and the Senate, while holding a joint meeting, constitute the National Assembly[10] which is obliged

8. Dz.U. No. 84, item 4265, art. 66.
9. *Id.* art. 23.
10. *Id.* art. 27.

to examine and pass the Constitution. The National Assembly takes an oath from the President[11] and only the National Assembly can accuse the President before the Tribunal of State.[12] The Basic Law does not create a model of parliament with both chambers having equal rights. The fundamental functions of parliament, that is passing bills and control over the government, basically belong to the Sejm. The Senate's share in legislation consists of control functions over bills passed by the Sejm (the concept of the so-called reflective chamber). The Senate can pass the Sejm's bill, propose amendments to it, or reject it. The Senate's resolution is not final, however, as the Sejm can overrule it with an absolute majority rather than a two-thirds majority vote, which was the case before. This arrangement makes it possible to avoid the legislative stalemates that occurred in the past and the threat of which restricted the freedom of decision in the Sejm, frequently wasting all the efforts put into the preparation of a law. The new arrangement weakens the position of the second chamber in the system of government, thus taking the first step towards its transformation or even elimination. The doctrine rightly claims that the Senate, after its reinstitution in 1989, has failed to prove that its existence is necessary.[13]

C. President

The President is elected by the nation in a general election.[14] This solution, characteristic for the presidential model, is not sufficiently correlated with guarantees of the exercise of executive power by the President. The Basic Law only creates opportunities for cooperation between the President and the government. The President can call cabinet meetings and chair them; the prime minister is obliged to keep the President informed about the work of the cabinet.[15] The President's influence on governmental decisions has also been secured in the areas in which the President exercises general leadership, that is in the area of foreign relations, national defense, and internal security. In these areas the President may give opinions on candidates for ministers competent in those matters. The President ratifies international agreements, but if such agreements require changes in the legislation or concern changes of borders, defense alliances, or financial commitments, authorization by law is necessary. Powers to declare a state of war, martial law, or a state of emergency are also divided between the President and parliament.[16]

11. *Id.* art. 30, sec. 1.
12. *Id.* art 50, sec. 2.
13. P. Winczorek, *supra* note 7, 10.
14. This principle was introduced by the Law of September 27, 1990, On Amendments to the Constitution of 1952, Dz.U. No. 67, item 397, replacing the previous election by the National Assembly.
15. Dz.U. No. 84, item 4265, art. 38.
16. *Id.* arts. 32-37.

In general, the Basic Law does not introduce an unequivocal concept of the position of the President. The present solutions are far from the concept of president as a representative and at the same time arbitrator, and far from the model enacting a strong center of presidential executive power. Overcautiousness in providing the President with executive powers and the assumption of balancing the influence of individual bodies of the state resulted in the position of the President not being clear. Additionally, the Basic Law contains a number of accidental and inconsistent provisions.

D. GOVERNMENT

The Basic Law strengthens the previous position of the government. The Council of Ministers has become the main center of executive power; it pursues foreign and domestic policies, manages governmental administration, and makes decisions on all the matters of the policy of the state not reserved for the President, other state administration bodies, or local government.[17] The legal basis for the office of minister has also changed. The office is no longer created by a law; rather the law only provides for the scope of the minister's activity. Thus, the structure of ministries may be changed without recourse to the statutory path. The Basic Law is also marked by a trend towards an internal integration of the state administration, from the prime minister to local governors being the bodies of governmental administration and local representatives of the government.

III. Conclusions

The new Basic Law tries to fulfill the need to reform the state, but fails to fully meet all the expectations connected with it. In spite of the establishment of the general principle of triple separation of powers in the state, the law leaves an impression that the roles of individual "powers" are confused. The Basic Law lacks precision in arriving at a consistent and final classification of bodies that would correspond to such tripartite separation. While recognizing, for instance, an active part of the President in the formation of government, the authors of the law simultaneously refuse the President the right to move for the dismissal of government. This problem is also visible in the position and responsibilities of minister, since this post has not been unequivocally delineated in legal terms. Ministers are not classified as part of the executive power because executive power is exercised by the President and the Council of Ministers acting jointly. As a consequence, the minister plays the old role of a one-person body of administration sustaining the ministerial system of administration. The result emphasizes the clash existing in practice between

17. *Id.* arts. 51-52.

the new constitutional principle and the existing structure of administration based on the old principle of the "unity of power" characteristic of the former system of government. The reform of the Senate has also been left aside even though the recent period was not free from discussions on either the abolition of that chamber of parliament or its transformation into a chamber representing local government. Finally, the Basic Law needs significant amendment to regulate the relations between the authorities and the individual in a comprehensive way corresponding to the new role of the state.