Serhii Holovaty was educated at the Taras Shevchenko National University in Kyiv obtaining his PhD. in International Law. Dr. Holovaty's public positions began in 1989 as a member of the Central Leadership of the People's Movement of Ukraine (Rukh). From 1990-96, he was President of the Association of Ukrainian Lawyers, President of the World Congress of Ukrainian Lawyers, and a member of the Working Group of the Constitutional Commission on the drafting of the new constitution (until 1994). A former Minister of Justice (1995-97) who was part of the group drafting a new Civil Code of Ukraine, he was first elected in 1990. Dr. Holovaty is an author of numerous books and publications devoted to international and constitutional law. The lecture was delivered in 1994.

REFORMING UKRAINIAN SOCIETY: LAW AND POLITICS
(A condensed version of the lecture)

The speaker described the process of creating a new constitution and establishing the rule of law in Ukraine. He began by emphasizing that Ukrainians are trying to build a nation on the basis of law by means of legal reform. They are facing problems in a number of areas, such as codifying the constitutional process, determining the status of human rights, and developing a legal foundation for market reforms. The establishment of institutions, which are involved in legal reform is crucial.

Development of Ukraine

Ukraine is one of the last countries in Europe to undertake the process of building its nation state and it is being done in minimal time. Ukraine is sometimes called a country of paradox.

It is also the only country in Central and Eastern Europe, which does not have a new democratic constitution. The Kyivan-Rus State in 1016 had a written statute Ruska Pravda in the reign of Yaroslav the Wise, and Ukraine, in 1710 obtained a
Constitution written by Pylyp Orlyk, long before the advent of revolutions in Europe and America that ended in the adoptions of constitutions. At the end of the twentieth century Ukraine achieved independence, and the only type of nation state it should be, is a democratic nation state. It should achieve prosperity and freedom if this state is governed by the principle of the rule of law.

In March, 1990, the Gorbachev reforms started, and it was possible for anti-Communist forces to contest elections to parliament. The result was that nearly 25 per cent of the seats were held by anti-Communist forces, generally members of Narodnyi Rukh Ukrainy za Perebudovu ta Nezalezhnist (National Movement of Ukraine for Perestroika and Independence). The Verhovna Rada of the Parliament of Ukraine in which 360 of 450 deputies were members of the Communist Party of the Soviet Union adopted the Declaration of State Sovereignty of Ukraine.

The preamble to the Declaration underlined the necessity of creating a nation ruled by law with the aim of establishing sovereignty and self-government for the Ukrainian nation.

Russia, from 1917 onward, was thrown by the Bolsheviks onto the path of legal nihilism. The Bolsheviks' one-party state governed by a dictatorship of the proletariat was introduced into Ukraine as a result of aggression from Bolshevik Russia. It declared that law was superfluous and unnecessary. Power was the revolutionary idea of the dictatorship of the proletariat - power that was not limited by law. The history of the Ukrainian social state is the period of the creation of the authoritarian nation based on the principle of the dictatorship of the proletariat.

Ukraine does not have a future in its Soviet form. The future of Ukraine lies in the establishment of an independent democratic republic. The National Movement of Ukraine adopted the aim of building Ukraine as a nation ruled by law in order to end absolutism. The events of August, 1991, in Moscow, culminated in the separation of Ukraine from the Soviet Union.

On December 1, 1991, during a national referendum the Ukrainian people voted overwhelmingly in favor of independence and the state of Ukraine was born.

Creating A Mechanism of Democratic Government

A new epoch in the development of Ukraine has started. Ukraine faced and faces an extremely difficult task: to create within the shortest possible period of time the complete mechanism of democratic government with all necessary attributes, to dismantle the administrative command system, to begin the development of democratic principles for a nation ruled by law, and to establish the favorable conditions for the creation and development of civil society.

In three years much has been accomplished to dismantle the administrative command system and to establish democracy. A board of legislation has been adopted to de-nationalize, to privatize, and to de-monopolize ownership and production. A multi-party system is being created. Today, in essence, the system is a conglomeration, containing aspects of a parliamentary republic, a presidential government, and Soviet power.
Contradictions in the Constitution

The current Constitution of Ukraine is an uneven collection of articles with many that do not agree with one another, and even some which contradict others in a fundamental way. For example, the existence of Article 2 from 1978 contradicts not only the principle, but contradicts the entire idea of the separation of powers into legislative, executive, and judicial branches. The existence of such articles in the active Constitution often de-stabilizes the higher levels of the state mechanism and provokes legal collisions.

The contradictory nature of the Constitution hinders the acceptance of the principle of the rule of law by citizens, and inhibits their feeling of obligation to act according to law.

During these years in the sphere of state power we have noted the following: disagreements and conflicts among various branches of power and their internal organization, the absence of a clearly defined and effective hierarchy of executive power, the usurpation of excessive power by one branch, the intrusion of the legislative branch of power into the authority of the executive branch and vice versa, conflicts between city councils and executive power on the municipal level, disagreements between the central authorities in Kyiv and governments on the regional and local levels, an increase in corruption on all levels and in all branches of power, and the absence of an effective and independent branch of judicial power.

As a result, the priority today is to create an effective and authoritative system of state power, one that could be successfully used to reform all aspects of Ukrainian society. This can only be achieved within the framework of the new constitutional process.

Conception of a New Constitution

The movement towards adopting of a new Constitution of Ukraine began after the passage of the Declaration of State Sovereignty, which is the foundation for the new Constitution of Ukraine. On October 24, 1990, the Verhovna Rada of the Ukrainian SSR adopted the resolution to appoint a Commission to draft a new Constitution. Then on June 19, 1991, the conception of a new constitution was agreed upon. The conception contained the following methodological principles:

1. The Constitution of Ukraine is the fundamental law of the sovereign state. The entire document must reflect the ideals of a democratic system of power based on law.
2. The Constitution might establish the individual as the center for the organization and the function of the state. The highest social value is accorded to the individual human being, individual liberty, rights and dignity, the health, material and moral values. The Constitution is called upon to confirm the priority of general human values above class values, and to demonstrate the acceptance of international principles of human rights in Ukraine.
3. The Constitution must be a stable and binding legal document and an independently functioning statute.
These general methodological principles were expanded and made concrete in the special section of the conception dedicated to the axioms of constitutional power in Ukraine which establishes Ukraine as a nation state, her people as citizens of Ukraine who have equal rights before the law with respect to their origin, social and property status, race or ethnic origin, sex, education, language, attitude to political parties and movements, religion, birth, nature of occupation, place of residence, and other circumstances.

**State Power**

The basic underlying principle for the functioning of state power is the separation of powers between the legislative, executive, and judicial branches with the indispensable mechanism of checks and balances. The accepted model of state power was that of a presidential republic. The territorial form of national government was that of the unitary state that includes the Autonomous Republic of Crimea as an autonomous part of Ukraine. The conception foresees economic, political, and ideological pluralism, the multiparty system, the development of self-government on the basis of social and state order.

**Rights of Individuals and Citizens**

Human rights are not given by a state. They are based in nature and accordingly, are inalienable and untouchable. The list of rights and liberties of individual and citizens, their meaning, and the mechanism for their realization must accord with international standards established in the General Declaration of the United Nations, international treaties, and other documents outlining the rights of individuals and citizens. All rights and liberties of the individual and citizens declared in the Constitution are under the protection of the courts.

To strengthen the guarantee of rights and liberties of the individual and citizens, the conception foresees the creation of an official position whose holder has the authority to protect individual rights - ombudsmen. The power of appointment of this person is vested in the Verhovna Rada.

In the conception the greatest priority is given to the definition of civil society and the delineation of its relations to the state. The conception states that the Constitution should declare the priority of civil society over the state. The rule of the state is to ensure the conditions for the normal functioning of civil society. The conception contains guarantees of economic freedom in civil society, the protection of many forms of ownership, establishes their equal status and inviolability, and gives them the right to equal protection from the state.

**Organization and Realization of State Power**

The conception contains many provisions that have not been traditionally accepted in our constitutional practice in regards to the organization and realization of state power in Ukraine.

1. The Verhovna Rada of Ukraine is the continually functioning professional body of the legislative power. According to the model of a republic, it may not delegate any of its functions to other branches of power or to assume the functions of other branches, or to determine issues that are to be determined by a national
referendum.
2. Executive power is realized by the president, the vice president, the cabinet of ministers, and the state administration. The president is the chief of state, and the head of the executive branch of power. He signs laws and has the right to veto, but the veto may be overridden. The Constitution must forbid any form of presidential pressure on parliament. If the president contravenes the Constitution or the laws, he is responsible to the Verhovna Rada and electorate via the process of impeachment, a vote of non-confidence and the right to shorten the term of office through the process of the referendum.
3. All administrative entities are organized in accordance with a system of state power and self-government. The highest official in the oblast, city, raion, or village is the head of the appropriate council who simultaneously is the head of the Executive Committee and the plenipotentiary authorized representative of the president. The head, the chair of the council, is elected. The president approves the elected candidates, and thus gives the head the status of the president’s representative at the local level.

The conception defines the judicial power and the powers of the bodies of Procuracy in the traditional manner. The only new element in the conception regarding the court system is that the status of judges, as well as the organization and duties of the bodies of the Procuracy, is regulated by constitutional law.

Constitutional laws can be passed by a majority vote of the Verhovna Rada. The conception reflects the theory and practice of modern constitutional law, and represents a major step on the road to the new constitutional regime in Ukraine, the creation of nation state and the development of a legal system. However, a number of articles in the conception represent compromises between various political forces in the parliament. That is why the concepts of economic pluralism and private property, as well as socialist choice are to be found in the conception.

The presence of these, as well as other contradictory articles in the conception, reflect the existence of various drafts of the Constitution. Based on two and a half years of work, the Constitutional Commission prepared three drafts, which were discussed in parliament and amended.

**Structure of the Constitution and Main Institutions**

All persons are free and equal in their dignity and rights, Article 10. Human rights and freedoms are guaranteed by the Constitution and cannot be abolished by the State. The draft establishes that human rights and liberties will be protected by independent, just, and unconstrained courts. The rights listed in the Constitution reflect international treaties regarding political, social, economic, cultural rights. The draft establishes the principle of the presumption of innocence and foresees the personal liability of state officials if their actions infringe upon the rights or liberties of individual or citizens.

The special chapter in the draft is devoted to the civil society. Civil society is defined as an association of free and equal individuals who protect their many varied interests on the basis of a self-government. The society determines the necessity of the existence of a democratic and legal state, i.e. the state is subordinated to civil society. The state does not interfere in the affairs of an individual or society. It only
acts in accordance with the authority delegated to it by people to regulate social relations and to secure social order.

**Property Forms and Territorial Division**

There are two forms of property: public and private. Public property is defined as state and communal municipal property. All other property is private property. Ukraine is a unitary state with administrative territorial divisions and one autonomous entity - the Autonomous Republic of Crimea.

**State Power**

State power is separated into legislative, executive, and judicial branches. Legislative power is exercised by the national assembly, the Ukrainian parliament, that has two houses: the Council of Deputies and the Council of Ambassadors. Executive power is exercised by the President of Ukraine, who is the head of the state and executive, the Cabinet of Ministers, the government, which is subordinated to the president and responsible to him, the ministers, and oblast and region councils within the limits of their authority. The draft establishes checks and balances between the legislative and executive branches of power.

According to the draft, the procuracy is a part of the judicial branch. The draft states that judges are either elected or appointed for life with exception of judges who are serving their first term after they have been approved by the qualification commissions. First term judges are appointed for five years. The draft was analyzed at a 1992 International Symposium held in Kyiv, organized by the Association of Ukrainian Lawyers and the Ukrainian Legal Foundation.

After national consultations the Constitutional Commission prepared a new version of the draft, which was presented to the Verhovna Rada in September 1993. One month later the debates on this draft were completed, and it was published in the press.

The Verhovna Rada, which was in power from 1990 to 1994, was unable to adopt a new Constitution for Ukraine. After the election of a new Verhovna Rada and a new president, the question of renewing the constitutional process was raised again. During the speech delivered on August 26, 1994, at an official ceremony marking the third anniversary of Ukraine's independence, Olexander Moroz, the speaker of the parliament, stated: "At the present time the laws and the Constitution contradict each other. Drafting the Constitution must be a priority among the many issues that currently face the Verhovna Rada. Otherwise we will undermine the idea of the rule of law, we will show legal nihilism and distrust toward the Constitution".

The President of Ukraine, Leonid Kuchma supported the renewal of the constitutional process, and presented the new principles that would govern the formation of a new Constitutional Commission. These principles were approved by the Verhovna Rada: the new Constitutional Commission was formed from representatives of the three branches of power. In particular, the parliament would nominate 15 persons to represent the legislative branch; the president would nominate 15 persons to represent the executive branch, and 10 places would be reserved for representatives of the judicial branch. In his speech to the Verhovna Rada, on October 12, president
Kuchma expressed his reservations about speeding up the constitutional process. He stated that it would be a mistake to adopt a new constitution during the transitional period. In his opinion, it was best to draft and to adopt a constitutional law for this transitional period borrowed from the Polish experience. It would affect the division of power among the branches of government, and provide the conditions for radical reform.

In November, 1994, president Kuchma presented for consideration by Verhovna Rada the draft of a constitutional law that would resolve all conflicting issues between the current law and Constitution, and would establish a civilized method of resolving the contradictions between the parliament and the president. The same recommendation was made by the first World Congress of Ukrainian Lawyers, that met in 1992. President Kuchma was also supported in this issue by the Second World Congress of Ukrainian Lawyers held in 1994.

Reform of a Court System

One consequence of the conditions created by seventy-five years of the Communist regime in Ukraine is that the judges are not independent. The judicial branch of power is the weakest compared to the executive and legislative branches. There is a lack of understanding about the need to establish the judiciary as an independent branch of power among the population as a whole, among the vast majority of lawyers, and even among judges themselves. The organization of the court system in Ukraine retains characteristics of the Soviet system. A complete decentralization exists among the top courts in Ukraine. The Supreme Court and the Highest Court of Arbitration exist independently of one another. Each is at the top of a hierarchically structured independent court system.

The process of creating a Constitutional Court is still incomplete. At the present time only the Chief Justice and the four judges of the Constitutional Court have been appointed. Legal nihilism installed by the Soviet system is the most serious obstacle on the road to reform.

The majority of the population does not understand fundamental legal principles enough to accept that the courts are the most effective form for the protection of rights. Court decisions have the force of law and are subject to enforcement by state apparatus. The Court system is the only effective method for resolving disputes among legal subjects, and appeals to the legislative or judicial branches of power to influence court decisions are inadmissible. It is illegal and immoral to pressure the courts through the other branches of power, or through the mass media. The review of court decisions initiated by either party to inaction is possible only through another level of the court, and cannot be instigated through the bodies of legislative or executive power.

A significant number of professional lawyers also lack an understanding of fundamental legal principles sufficient to accept that the courts are a branch of power whose decisions are binding and indisputable. This stands as testimony to the lack of a psychological understanding by judges of their leading role in the establishment of a court system.

The initiative to reform the court system began when the Verhovna Rada of Ukraine adopted the Conception on Judicial and Legal Reform in April 1992. The laws on the
status of judges, on the Constitutional Court, on the Court of Arbitration, on the establishment of judicial qualification commissions, on advocates, and on notaries were adopted. Nevertheless, the effective reform of the court system has not yet occurred. The Minister of Justice stated that truly independent courts have not been created, the status of judges is not properly protected, many of the articles in the conception merely have declarative character, and no decision has been made in regard to their implementation. Now is the time to recognize errors in certain articles in the conception.

The movement toward the implementation of court reform may benefit from the accomplishments of the Second All-Ukrainian Congress of Judges in October 1994. In preparation for the Congress four conceptions of court reform were produced, and three were presented at the Congress.

The conception of the Supreme Court foresees the establishment of single Supreme Court at the top of the court hierarchy, a structural system of Courts of Appeal and Cassation, the introduction of the jury, and also proposes new provisions, like the introduction of the system of a president into Ukrainian law, which is absent from the conception of the Ministry of Justice. However, this conception also argues for establishment of Courts of Appeal, the jury system, an Economic Court, and an expanded Court of Arbitration.

The conception of the Ministry of Justice foresees one Supreme Court at the top of the court hierarchy. The main difference in the conception of the Highest Court of Arbitration is that the court argues for the maintenance of separate and independent court systems.

The first conception of Court Reform was proposed by Viktor Shyshkin, the Procurator-General of Ukraine from 1991 to 1993, and the Chairman of the Parliamentary Sub-Committee on Judicial Reform, that is part of the Permanent Commission on Legal Policy and Judicial Legal Reform of the Verhovna Rada of Ukraine. This version was discussed at a round-table on judicial reform organized by the Ukrainian Legal Foundation in September, 1994. It argues that the first stage in judicial reform must be the reorganization of the existing court system with the exception of the Constitutional Court.

The conception suggests the establishment of new court structure that would have the following goals:
1. to create a complete court system which unites the principle of the division of courts into various levels with the principle of the establishment of a single Supreme Court that crowns the court structure pyramid;
2. to establish regional courts that differ from the existing administrative divisions of Ukraine;
3. to create a structured court hierarchy with specialization in individual sectors of law: criminal, civil, commercial, economic, administrative-financial, and military courts;
4. to protect the rights of citizens to have their cases heard by the courts and to create conditions for greater professionalism and less bureaucracy and trials, and the decisions to be made by courts of first instance;
5. to establish the Supreme Court of Ukraine which stands at the top of the court hierarchy and consists of a Chief Justice, his deputy, three judges from the Military Court, and five judges from each sector: criminal, civil, economic, and
To bar the Supreme Court from the power to sit as a court of first instance as it is now, to secure the principle of the independence of courts from influence by the executive branch, and, finally, to create the Council for Judicial Administration at the Supreme Court.

The functions of the Council for Judicial Administration include control over monies allocated to the judiciary from the national budget, securing adequate material and technical conditions for the courts, the selection of judges and the establishment of a system of education to improve the professional qualifications of judges, and the introduction of a special service to enforce court decisions.

Through these initiatives, a specialized multi-branch, but hierarchically structured, court system can be established. The Constitutional Court falls outside this system.

The first step in reaching agreement among the various proposals was taken after the round-table discussion on judicial reform, and an agreement was reached between the conception of the Supreme Court and conception of the procurator-general. After the conclusion of the 1994 Congress, further steps were taken to find grounds for agreement among the different conceptions with the goal of drafting a single conception of Court Reform in Ukraine that could serve as the basis of changes for the foreseeable future.

**Concluding Remarks**

It is impossible to establish a democratic nation without the rule of law. Accordingly, the Ukrainian Legal Foundation (ULF) was established in the spring of 1992, and Dr. Serhii Holovaty was appointed its president. The Foundation was formed to implement a broad program of legal reforms, and ULF is one of the key organizations working to establish the rule of law in Ukraine. The program of the foundation is comprehensive and touches all aspects of the legal system. It is intended both to change the understanding of legal professionals and lay persons about law and its role in society, and to create the institutions that are necessary for a modern legal system institutions which are planned to last decades and, possibly, centuries. The programs of ULF are:

1. The establishment of a new law school in Ukraine to introduce changes to the form and content of legal education.
2. The establishment of National Legal Library of Ukraine, the first specialized legal library. The Library was opened in 1993, and it is available to legal professionals, parliamentarians, and to the public.
3. The creation of legal publisher that now has commenced a major publishing program. The Legal Dictionary, the first issue of theoretical legal journal *Ukrainske Pravo* (Ukrainian Law) and other works have been published, and many more are in progress.
4. Assistance to the process of law creation in Ukraine.
5. The Foundation of a Ukrainian Centre on Human Rights to monitor the human rights situation, to conduct research and education in relation to human rights.
6. The organization of legal conferences and symposia to address urgent legal issues.
7. The selection of individuals for scholarship and internships in Western countries.
8. The establishment of a professional lawyers organization.
9. The support of the judiciary in their attempts to become independent.
10. The creation of an organizational structure which brings together key persons from all sectors of the Ukrainian community.

The highly influential and representative nature of the Ukrainian Legal Foundation's Board makes it possible to plan common strategy for legal reform in Ukraine, and to ensure institutional support for its realization, and to fulfill our main mission - to build a nation based on the rule of law.