A new model suggested below is based on international legal acts and the positive experience of the leading European countries. Belarus' new judicial system should comprise the Constitutional Court, general jurisdiction courts, commercial, administrative and other specialized courts.

Constitutional Court

The Constitutional Court, the top authority within the system of governance, has considerable influence on public authorities and plays a key role in the checks and balances system, and in guaranteeing people's rights and freedoms[31].

Constitutional Court powers

It is necessary to expand powers of the Constitutional Court of the Republic of Belarus. It should have powers to:

1) interpret the constitution. Constitutional authorities in most European countries such as Bulgaria, the Czech Republic, Germany, Hungary, Poland, Russia, Slovakia and Slovenia have such a function;
2) examine international treaties, as yet ineffective, for compliance with Belarus' constitution. This function should help to prevent the country from assuming international commitments that contravene its constitution. Bulgaria, Germany, Hungary, Lithuania, Moldova, Poland, Slovakia and other countries have a constitutional provision on examining international treaties prior to adoption;
3) decide on the constitutionality of platforms and activities of political parties. This function would be an additional guarantee of legality in the operation of political parties. Constitutional authorities in Armenia, Germany, Poland, Portugal and Turkey have a similar function;

[31] Н. В. Витрук, Конституционное правосудие. Судебное конституционное право и процесс. М., 1998; Конституционное правосудие в Республике Беларусь: пятилетний опыт, проблемы и перспективы. Мн., 1999; Конституции государств Европы. В 3 т. М., 2001; Правовое государство. Конституционный суд (Материалы международных семинаров). Мн., 2000.

4) assess the wording of questions subject to referenda for compliance with Belarus' constitution. Armenian, Georgian, Italian and Moldovan constitutional authorities have this function;
5) arbitrate disputes concerning powers of supreme governmental agencies (the Polish Constitutional Tribunal has this function);
6) examine individual complaints. This power is vested in constitutional authorities of most European countries such as Austria, Croatia, the Czech Republic, Germany, Hungary, Spain and Switzerland.
   Constitutional complaints are an effective means of safeguarding constitutional rights and freedoms to individuals. However, to prevent backlog, it is necessary to impose certain conditions on accepting complains from individuals, for instance, a) an individual must have used all other legal means of defense; b) the term for filing complaints should be limited (in Poland, complaints may be filed within two months after a court's final ruling on the case); c) complaints should be examined prior to Constitutional Court hearings to find out whether they are acceptable; d) it is also possible to introduce charges for unfounded appeals, like in Germany.
7) assess legal acts issued by central government for constitutionality.

The Constitutional Court's powers may be expanded by amending the current law 'On the Constitutional Court of the Republic of Belarus'.

Who can appeal to the Constitutional Court

The range of those allowed to file a complaint with the Constitutional Court should be expanded. It is necessary to confer this right to groups of parliamentary deputies (the threshold depending on the number of seats in Parliament), the human/civil rights ombudsperson, courts of all levels (in certain circumstances), and individuals (to exercising their right to appeal to the Constitutional Court).

The Constitutional Court should examine cases at plenary meetings and chamber meetings. All Constitutional Court judges take part in plenary meetings on key issues within the court's powers. Less important cases, primarily individual appeals, are examined at chamber meetings.

Courts of general jurisdiction

The system of courts of general jurisdiction should be built on the following principles: 1) ex-territoriality of the main components of the judiciary; 2) maximum proximity of courts to the population; 3) cases may be tried by a panel of judges or by a judge sitting alone; 4) citizens should participate in proceedings as jurors; 5) panels of judges should be formed to deal with specific cases; 6) a court of appeal should be established, with general courts retaining the appellate jurisdiction.

Belarus should have a three-tier system of general jurisdiction courts: the Supreme Court, regional (Minsk city) courts, and district courts.

Misdemeanor courts should be an independent element in the court system. They should hear relatively uncomplicated criminal and civil cases. Their rulings may be appealed against to the council of the justices of peace, the highest instance of the misdemeanor courts which should meet every month.

The establishment of such courts offers people better access to judicial defense and eases the caseload on district courts which try all cases within their jurisdiction except those under the jurisdiction of misdemeanor courts and the regional (plus Minsk city) courts.

In district courts, cases that entail a prison sentence of up to five years, or civil cases outside the jurisdiction of misdemeanor courts should be tried by a judge sitting alone. A panel of three professional judges should try cases that entail a punishment of five to ten years of imprisonment if the defendant does not demand a trial by jury, as well as complicated civil cases. A professional judge and a jury should hear cases that entail five to ten years of imprisonment if the defendant pleads not guilty and demands a jury trial.

The regional and Minsk city courts should have appellate jurisdiction over district courts. Hearings of defendant appeals should involve all participants in a district court session and result in a new ruling. When considering an appeal, a superior court rules on the basis of case-related evidence. Criminal cases that entail sentences of ten years-to-life imprisonment should be tried by regional (and Minsk city) courts acting as the courts of first instance.

The Supreme Court should have supervisory jurisdiction over all courts of general and appellate jurisdiction at the regional (and Minsk city) level.

The principle of specialization of judges should be widely applied in courts of general jurisdiction as increasing numbers of cases require expertise in specific legal areas.

Courts of general jurisdiction should administer justice in their respective jurisdictions which will not necessarily overlap with administrative districts. Each jurisdiction will cover an area of 350,000–400,000 population. The number of judges in a jurisdiction should depend on the caseload.

Jurisdictions should be divided into judicial precincts, each having a misdemeanor court. A jurisdiction should comprise five to seven precincts. Misdemeanor courts should have two to three judges depending on the caseload.

Public assessors (representatives of the public sitting to advice the judge), should be replaced with the jury, an instrument with a number of unquestionable advantages[32].

Given financial constraints, scarcity of resources and difficulties in enlisting jurors, the jury should be composed of seven to nine jurors in district courts and of nine to 12 jurors in regional (and Minsk city) courts.

Commercial courts

The system of specialized commercial courts should remain unchanged. It is necessary to clarify the jurisdiction and practice of commercial courts. Regional and Minsk city commercial courts may set up panels to arbitrate tax, land, customs and bankruptcy cases. The same panels may be set up in the Supreme Commercial Court, which has the appellate jurisdiction.

[32] И. Л. Петрухин, *Суд присяжных: проблемы и перспективы*, «Государство и право» 2001, № 3, стр. 15; И. И. Мартинович, *Введение суда присяжных в Республике Беларусь – требование времени*, «Российская юстиция» 2001, № 8, p. 54.

Administrative courts

Administrative courts should be established to deal with complaints by citizens, non-governmental organizations and companies against governmental agencies and officials. They should have jurisdiction over the following cases:

- appeals challenging legal acts of the president and the government if the plaintiff does not plead for these acts to be declared unconstitutional;
- appeals against decisions of the central and lower-level electoral commissions;
- appeals against decisions of other governmental agencies, or commission or omission on the part of officials that encroach on civic rights and, in cases stipulated by the law, rights of legal entities;
- cases aimed at suspending or closing a non-governmental organization or association in Belarus for breach of law;
- other public legal disputes resulting from legal and administrative relations.

Considering Belarus' current territorial and administrative structure, the administrative court system should consist of two elements: regional (and Minsk city) administrative courts and the Supreme Administrative Court. The structure of the new judiciary is illustrated below.

Formation of courts

The procedure for establishing courts should involve the legislature, the executive and the judiciary.

The parliament should elect the judges of the Constitutional, Supreme, Supreme Commercial and Supreme Administrative Courts. The president should appoint judges of general, commercial and administrative courts recommended, respectively, by the chairs of the Supreme, Supreme Commercial and Supreme Administrative Courts.

The chairs and deputy chairs of courts should be elected by judges in secret ballot for a four-year tenure. A judge may not serve more than two consecutive

tenures. The chairs of the supreme courts recommend nominees put forward by judicial self-governance bodies.

Justices of peace should be nominated by judicial self-governance bodies and appointed by the Ministry of Justice.

Guarantees of judicial independence

The new law should specifically emphasize guarantees of judicial independence, and do so via the following mechanisms:

1) procedure for appointing or electing judges;
2) ban on replacing judges;
3) procedure for dismissing or suspending judges;
4) procedure for bringing disciplinary action against judges;
5) high salaries;
6) ban on the transfer of judges without consent;
7) right to resignation;
8) immunity;
9) protection by judicial self-governance bodies.

Judicial self-governance

The role of judicial self-governance should increase in the new system. Judicial councils should address key issues of the judiciary, distribute funds, issue credentials, administer aptitude tests, make recommendations regarding appointment and dismissal of judges.

Prosecution

Radical changes need to be made in the way the work of prosecutors' offices is organized. Their main functions should be to institute and pursue criminal proceedings, substantiate charges in court, oversee investigations and enforce laws in detention centers, reformatory and penitentiary institutions.

Prosecutors should be deprived of the right to warrant arrest of suspects or investigative actions that infringe on individual privacy and property rights. Such warrants should be issued by investigative judges sitting in district courts.

In court proceedings, counsels for the prosecution should represent their office rather than the State. Counsels for the prosecution and defense should have equal rights.

The prosecutor general should be selected by the parliament from at least two candidates for five years.

Investigative agencies

The reform will substantially affect the police and other agencies involved in pre-trial investigation of offenses. The police should be responsible for maintaining law and order and for investigating most offenses.

The country should be divided into police districts (higher level) and precincts (lower level – transl.). Local government agencies should be empowered to form municipal police force.

Internal investigative units within departments (the Prosecutor General's Office, Ministry of Internal Affairs, Committee for State Security [KGB] and Financial Investigations Department) should be eradicated. An Investigative Committee should be established to replace these units and deal with most severe and complex crime cases, as ordered by the Prosecutor General's Office.

Secret services

The KGB should be renamed as the National Security Service (NSS). Its functions and powers should be clearly specified in the law and the agency should be accountable to the parliament.

Defense attorneys

The current ban on the practice of private lawyers should be lifted. Lawyers should be free to choose to join bar associations or set up private firms.

District courts should run an office offering legal services at modest fees and appoint public attorneys at the request of investigative agencies and courts.

Notaries

Belarus should do away with the current state system of notaries public and establish a Latin-type system where notaries are employed in the private sector, obliged to comply with effective laws and guided in their work by principles such as independence, impartiality, confidentiality of service-related information and full financial liability for results of their work.

The organization and practice of notaries should be governed by a dedicated piece of legislation[33].

Regional justice administration (*orhany yustytsyi*)

They should retain their administrative functions (office supplies to courts, assessing staffing needs, training judges, gathering statistics etc.) They should select justices of peace, organize court bailiff services, and run correctional and penitentiary institutions etc.

Reform mechanism

Belarus needs to adopt a detailed plan of reform of the judiciary. The plan was developed by independent lawyers and presented at a conference in November 2000[34]. It calls for revising current legislation regarding the judiciary and law enforcement agencies.

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[33] *Падрабязьней пра рэформу натарыяту ў Рэспубліцы Беларусі* гл.: А. К. Турмович, *Концепция нового закона о нотариате* [в:] *Материалы международных семинаров «Нотариат. Уполномоченный по правам человека»*, Мн.: Трансформ, 2000, p. 35–40.

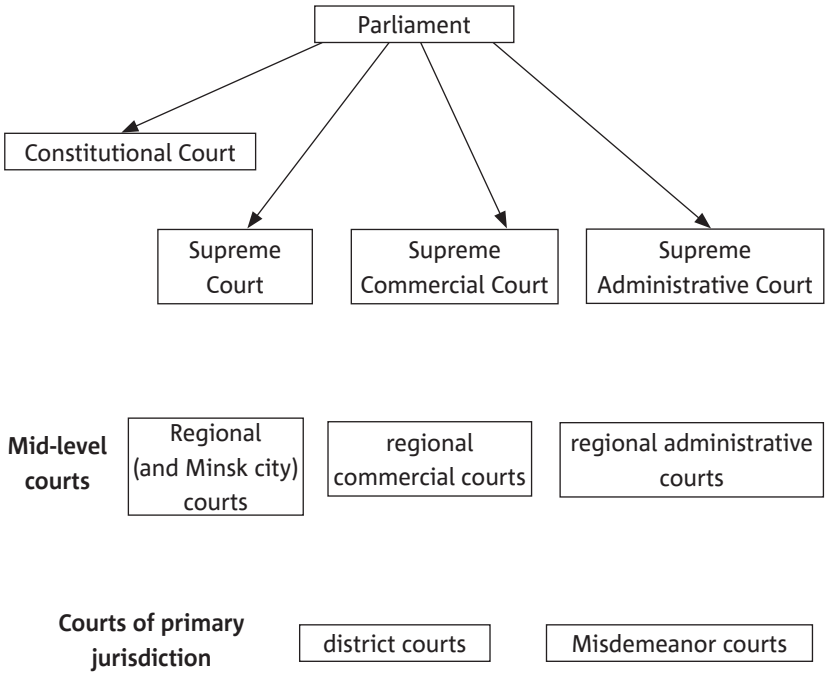
[34] М. И. Пастухов, *Каким быть новому суду в Беларуси. Обоснование новой редакции Концепции судебно-правовой реформы* [в:] *Материалы международных семинаров «Судебно-правовая реформа. Нотариат»*, Мн.: Трансформ, 2000, p. 5–11.

The ultimate goal of the reform is to create an environment for a powerful and independent judiciary, a key guarantor of the civil rights and freedoms, and an effective mechanism to safeguard principles of democratic rule of law.

The parliament should establish a Committee on Judicial and Legal Reform to oversee its progress and coordinate efforts of governmental agencies and non-governmental organizations to carry out the plan.

Appendix

Judiciary in Belarus after the reform



Notes:
1. Superior courts are formed by the parliament.
2. Judges are appointed to mid-level courts by the president from among candidates proposed by judicial self-governance bodies.
3. Justices of peace are appointed by the justice minister for three years from among candidates put forward by judicial self-governance bodies.

The Constitutional reform
by Mikhail Pastukhou

The planned reform of the legislative, executive and judiciary should be codified in the constitution. The question is what version of the constitution should be used as the basis of reform – the one adopted on March 15, 1994, or the amendment enacted on November 26, 1996.

The new edition cannot be regarded legitimate as it was adoptied with numerous violations of the law. It was enacted regardless of the Constitutional Court's ruling of November 4, 1996, that constitutional amendments subject to a referendum should not be binding.

The 1994 constitution is the only legitimate basis for a constitutional reform in Belarus. Restoration of that constitution will enable the rule of constitutional law in the country.

On the other hand, much time has elapsed since the 1994 constitution was replaced. Legislation has changed significantly, a new system of governmental agencies has been established and new legal relations have been formed. It is not advisable for laws to retroact. It would be better to use the 1994 constitution to prepare a Small Constitution for the transition period. The Small Constitution should outline principles of the constitutional and government system and map out prospects for drafting the constitution proper.

The preparatory stage of the constitutional reform would be spent drafting the Small Constitution for the transition period, with major political forces discussing its text.