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# Civil Procedure as a Way of Thinking

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The article explores the critical role of the judicial mindset in applying Lithuania's Civil Procedure Code (CPC). It addresses why, nearly 30 years after the CPC's adoption, specific procedural innovations from Western legal traditions remain underutilised. A key factor is that judges' perspectives on procedural law have not fully evolved, with some still influenced by Soviet-era civil procedure paradigms. The article also outlines strategies to accelerate shifts in judicial thinking for more effective implementation of the CPC.

**Keywords:** civil procedure law, judicial mindset, judicial behaviour

## INTRODUCTION

Thomas Paine argued that in a state governed by the rule of law, the monarch is the law. This idea can be traced back to Ancient Greece. Aristotle, for example, also pointed out that 'Rightly constituted laws should be the final sovereign [...]' (Scalia 1989: 1176). In other words, law, not individuals, is the ultimate source determining our rights and obligations. Nevertheless, the mere emergence of law is not sufficient to guarantee the rule of law. Equally important, but very often overlooked, are the way of thinking and attitudes of those who apply the law.

This article examines judges' attitudes toward innovations introduced by Lithuania's Civil Procedure Code (CPC; Civil Procedure Code of the Republic of Lithuania 2002), enacted in 2002. The CPC brought a number of procedural innovations originating from the Western legal tradition. However, in 2024, we conducted an empirical study which found that judges often failed to apply and understand those innovations (see Nekrošius, Bartkus 2024). To date, legal scholarship has not explained the reasons behind such a phenomenon. This article aims to uncover why certain CPC innovations have not been fully implemented in Lithuanian civil proceedings.

We hypothesise that judges' unchanged mindsets and attitudes to the civil procedure hinder the application of new procedural tools. To test this hypothesis, the article (1) examines the role of judicial attitudes in applying civil procedure law; (2) analyses judges' perspectives on three CPC innovations – limitations on new evidence in appeals, balancing roles between the court and parties, and default judgments; and (3) explores the reasons behind these attitudes and suggests ways to shift judicial thinking toward better implementation of the CPC.

In the article, we use several legal and philosophical methods: (1) conceptual analysis: we analysed key concepts like 'judicial mindset', and the distinction between formal legal rules

and their practical application; (2) empirical-philosophical integration: we combine empirical data about judicial behaviour with philosophical reflection on why this occurs, bridging the is/ought gap that often separates descriptive and normative analysis; (3) historical-comparative method: the article also uses historical comparison extensively, contrasting the Soviet-era legal thinking with the Western legal tradition, and tracing the evolution of judicial attitudes from 1990 to the present; (4) hermeneutic approach: the article interprets not just legal texts but the deeper meanings and assumptions underlying judicial behaviour, seeking to understand the 'horizon' of judicial understanding shaped by historical experience.

In Lithuanian legal scholarship, research on judges' thinking and attitudes as barriers to applying procedural law remains limited and underexplored. Nevertheless, this topic has been analysed abroad from both a philosophical, psychological and legal perspective (for example, see Quintanilla 2012; Hubbard, Henderson 2014). Addressing this issue is crucial, as it highlights challenges affecting the effectiveness of legislation and its alignment with the rule of law in Lithuania and abroad.

## LITHUANIAN CIVIL PROCEDURE AND JUDICIAL THINKING

Franz Klein, a pioneer of social theory in the civil procedure, argued that the reform is only effective if it changes both the legal rules and the attitudes of those who apply them: '[…] civil procedure reform will only be effective if, in addition to changing the rules of law, it is possible to change the attitudes of the users of those rules. If attitudes do not change, the reform is doomed to failure' (Klein 1891: 6–7). Similarly, Justice Oliver Wendell Holmes believed that law and judicial attitudes are essentially the same: '[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law' (Holmes 1897: 457, 461).

The interplay between legal reforms and judicial thinking is especially significant in the civil procedure, which governs the interactions and conduct of the court, parties, and other participants (Mikelėnas 1996: 25). In virtually all civil proceedings, judges act in relation to other persons, usually the parties' lawyers. The effectiveness of the relationship between judges and lawyers is significantly influenced not only by procedural law but also, to a large extent, by various subjective factors, i.e. judges' and lawyers' way of thinking, attitudes, mindset, convictions, customs, habits, and tactical considerations. Thus, changing the procedural law will ensure its practical application only if the subjective factors determining the thinking of the participants in the proceedings also change.

What kind of judicial thinking and attitude does the Western legal tradition aim for? Marek Kuryłowicz, the famous Polish Romanist, has argued that the mindset should find its basis in the ethical elements of the legal profession, which were shaped by Western philosophy, Christian values and Roman law. Plato's Republic established *dikaiosyne* (justice) as the cardinal virtue that harmonises all others (see Keyt 2006). Other elements that are no less important include *bonum et aequum* (goodness and fairness), *humanitas* (respect for human beings), *aequitas* (equality), *fides* (trust) and honesty (Kuryłowicz 2003: 108).

Unfortunately, during the 50 years of the Soviet occupation of Lithuania, those standards were replaced by the moral standard of the 'Soviet man', which emphasised the fear of the paternalistic state and the distrust of any other human being. Hence, following the restoration of independence on 11 March 1990, Lithuania's legal system reform aimed not only to replace the Soviet framework but also to realign the society and individual behaviour with the values of Western legal culture.

Those changes significantly impacted the Lithuanian civil procedure law. The Seimas adopted a new Civil Procedure Code (CPC) on 28 February 2002, introducing a comprehensive systemic reform. This reform established a social model of the civil procedure rooted in the Western legal traditions, aiming to ensure the effective resolution of civil disputes in a democratic state. While amending the procedural law, the simpler aspect of the reform was achieved, the more challenging task remained: transforming the mindset and attitudes of participants, especially judges, in civil proceedings.

## JUDGES' MINDSET WHEN APPLYING CPC

This part analyses whether the reform of CPC has succeeded in changing the way judges think. It examines in detail the judges' mindset towards three CPC innovations: (1) the limitation of new evidence on appeal, (2) the balance between judges and parties, and (3) the default judgment.

### The Limitation of New Evidence on Appeal

Article 314 of the CPC states the following: 'The Court of Appeal shall refuse to accept new evidence which could have been submitted at first instance, unless the court of first instance unreasonably refused to accept it or unless the necessity of submitting such evidence arose subsequently'. This provision emphasises that the responsibility for ensuring a proper hearing lies not only with the court but also with the parties, who must actively manage the progress of the proceedings and submit the relevant evidence promptly (Nekrošius 2002: 82).

Article 314 also implements one of the ideas of the Western legal tradition – the main proceedings should not take place on appeal, not before the Supreme Court, but before a court of first instance. Accordingly, all evidence should be presented and examined at first instance, and new evidence can only be presented on appeal in exceptional cases. Not surprisingly, similar rules can be found in Austria or Germany (see Nunner-Kautgasser, Anzenberger 2015: 19–20; Wolf, Zeibig 2015: 53).

On the other hand, the Soviet civil procedure law generally did not contain any restrictions on submitting new evidence in appeal. Evidence could be adduced at any judicial instance, whether on appeal or at first instance. The responsibility for the proper handling of the case rested exclusively with the court (Žeruolis et al. 1983: 200). The rationale for such provisions stems from the differing objectives of the Soviet and Western civil procedure. While Western legal traditions prioritise conciliation, efficiency and speed, the Soviet system focused on uncovering the objective truth (Žeruolis et al. 1980: 16). In the Soviet model, judges who refused to admit evidence on appeal risked failing to establish the objective truth, which was considered the primary goal of the proceedings.

With the restoration of independence, the abandonment of the Soviet approach required not only the introduction of Article 314 but also a change in the way judges thought about the procedure. Unfortunately, even today, we cannot say with confidence that the judicial mindset has changed completely.

Until the end of 2020, the Supreme Court of Lithuania placed an excessive emphasis on the goal of establishing the truth, rendering Article 314 of the CPC largely ineffective. In its ruling of 6 June 2013, the Court stated that '[...] the court's refusal to accept evidence, however late, which is of such evidentiary importance for the case that it would have determined the result of the examination of the case, would be unjustified from the point of view of reasonableness, fairness and justice'. This decision effectively allowed the Court to prioritise

the establishment of truth, permitting the admission of late evidence at the cost of speedy and an efficient resolution of cases.

However, this view has changed over time due to changes in the Supreme Court's case law. In its ruling of 2 December 2020, the Supreme Court stated an important conclusion: 'The possibility of submitting new evidence in the court of appeal, which, *inter alia*, is linked to the court's duty to do justice, i.e. to investigate all the circumstances relevant to the case and to give a correct decision, must not be interpreted as obliging the court of appeal to accept new evidence in all cases where it is used to prove circumstances that are legally relevant to the case' (Ruling of the Supreme Court of Lithuania of 2 December 2020). In other words, the Supreme Court has recognised that the court may refuse to admit a new evidence even if it is crucial for establishing the truth.

The Supreme Court has redistributed the priorities in civil proceedings and thus refused to overemphasise the objective of establishing the truth. Nevertheless, this evolutionary path from the Soviet thinking towards the Western legal tradition took more than 17 years and is still not complete. Our 2024 survey showed that 60% of judges surveyed did not apply Article 314 of the CPC, and 25% rarely applied it (Nekrošius, Bartkus 2024: 39). The reason for this is undoubtedly the lack of change in judges' mindset.

## The Balance Between the Court and the Parties

The model of civil procedure created by the CPC is based on the idea that the parties are the main masters of the proceedings and that the court has the duty to provide substantive guidance. Substantive guidance means that the court must take active steps to bring to light the essential facts of the case (Article 159(1) of the CPC). On the other hand, a judge must not be inquisitorial. Most of the court's guidance is not binding on the parties. For example, a court may suggest that a party arrange for representation, but it cannot oblige a party to have a representative in the case.

Contrary to the Western legal tradition, in the Soviet civil procedure, the court had the central role and was solely responsible for hearing the case. The parties were only passive observers, and the Soviet inquisitorial judge had practically unlimited powers – to collect evidence on his own initiative and to oblige the parties to produce evidence (Žeruolis et al. 1983: 200).

One of the most important shifts in judicial thinking following the implementation of the CPC should have been the understanding that judge's powers are limited by the rights of the parties and by the law, and that a judge cannot do everything. Unfortunately, this shift has not been fully realised. Our previous empirical study revealed that 37.5% of judges surveyed still believed the court, rather than the parties, was responsible for the course of the case (Nekrošius, Bartkus 2024: 37).

Another example of misunderstanding the balance between the court and the parties is the court order. A court order is a special procedural document issued by the court after reviewing a creditor's motion for monetary claims against a debtor. The CPC adopted a 'one-step' procedure, where the court does not assess the merits of the creditor's claim but only verifies that it meets formal requirements (Article 435 of the CPC). If the claim is formally correct, the court issues an order, which becomes enforceable only if the debtor, upon receiving the notification, does not oppose its issuance (Article 439 of the CPC).

The first version of Article 437(4) of the CPC stated that the court must inform the debtor in the notification that it did not assess the validity of the creditor's claim when issuing the court order. While this point was clear, its application led to the significant controversy and

the inconsistent case law. Formally, the divergence arose from Article 435(2)(4) of the CPC, which required the court to refuse a court order if the creditor's claim was 'manifestly unfounded'. However, the 'manifestly unfounded' criterion was intended to be a simple 'first look' test, designed only to determine whether a specific legal claim was even conceivable. Despite this, courts often thoroughly examined the merits of the creditor's claim.[*] One reason for such an approach was the courts' belief that the court, rather than the debtor, should have the final say in the court order procedure.

The situation changed substantially only on 21 June 2011 when an amendment to Article 435(3) of the CPC introduced a mandatory provision that the court does not examine the validity of the creditor's claim when deciding on the issuance of the court order. The new Article 433(3) of the CPC also provided that evidence shall not be annexed to the application for a court order. These changes have altered the mindset of the courts – the mandatory provision of the CPC, which directly prevented judges from assessing the merits of the claim, limited the court's powers and thus facilitated a more efficient issuance of the court order.

## Default Judgment

The default judgment is the third procedural innovation that demonstrates the importance of judicial thinking. The Soviet civil procedure law did not establish such a procedural instrument, which made its appearance in the CPC a serious challenge.

A default judgment is a tool from the Western legal tradition to address abuses when a party fails to appear or submit preparatory documents. Under the CPC, the court only formally assesses the evidence from the party that appeared. It does not evaluate evidence from the absent party and hypothetically considers whether there would be grounds for a decision in favour of that party if the content of the evidence were to be confirmed (Article 285 of the CPC).

The introduction of default judgment in the Lithuanian civil procedure led to an entirely new role for the court. The court is no longer obliged to determine the facts relevant to the case when one of the parties fails to appear at the hearing or to submit a preparatory document without a good cause. In such a case, the court must carry out only a formal assessment of the evidence, i.e. limit itself to the formal rather than the objective truth.

The new role of the court has been a primary concern for judges involved in drafting the CPC. Many were sceptical about the requirement to disregard evidence from a party simply because a party failed to appear at the hearing (Nekrošius 2017: 28). This scepticism contributed to the slow adoption of default judgment in the case law. One reason is the flawed belief that the civil procedure should prioritise establishing the objective truth. This mindset led judges to think that a judgment based solely on the evidence of the active party did not reflect 'real' justice, resulting in the infrequent use of default judgment.

Article 285(3)(4) of the CPC was amended on 8 November 2016 to ensure the effectiveness of default judgment. Article 285(3)(4) provided that 'The court shall not grant a party's request for a default judgment [...] where the circumstances and evidence submitted by the appearing party cast serious doubts on the court'. This amendment established a 'serious doubt' standard, limiting judges' discretion to deny default judgment. Judges could no longer refuse it simply because it did not align with their views of justice. These changes have improved the application of default judgment (Nekrošius, Bartkus 2024: 40–41). However, one

[*] For example, see Ruling of Kaunas District Court of 22 December 2008; Ruling of Vilnius District Court of 13 October 2008; Ruling of Kaunas District Court of 16 September 2008.

must not forget that the default judgment took over a decade to develop, with judges' flawed mindsets being a key obstacle.

## REASONS AND CHANGES IN THE MINDSET OF JUDGES

An analysis of the three CPC innovations leads to the following conclusion: changes in legislation do not imply changes in judges' attitudes or thinking. We can create an ideal civil procedure system based on the best ideas of the Western legal tradition, but if we do not change judges' mindsets, the legal reform will not achieve its goals.

Once the problem is identified, the next step is to explore why the judicial mindset has not changed. The reasons are likely diverse. For instance, the judiciary is one of the most conservative institutions in the legal system, so courts tend to be cautious about accepting legislative changes. Another possible reason is judicial independence. Courts are responsible for definitively interpreting the law's content and are shielded from most internal or external interferences in their work.

The courts' mindset towards the CPC's procedural innovations highlights another key reason: the lingering influence of the Soviet-era civil procedure. As noted earlier, the Soviet system fundamentally contrasts with the principles underlying the CPC. These Soviet-era paradigms, such as the pursuit of objective truth, the inquisitorial role of the judge, and the disregard for party rights have shaped, and continue to shape, the implementation of the CPC.

Of course, we cannot conclude that every judge in Lithuania has been influenced by the Soviet system of civil procedure. A large number of judges have nothing to do with Soviet civil procedure ideas. However, the above analysis shows that ideas close to the Soviet system have had, and in some cases still have, a tendency to manifest themselves in the courts, which in turn has a negative impact on the implementation of the CPC.

How can we reduce the negative impact of the Soviet system in the future? The following parts identify several safeguards that could help to facilitate changes in judges' mindsets when applying the CPC: (1) awareness and understanding of the problem itself; (2) models of legislative action that can change the behaviour of judges.

### Awareness that Judges are Influenced not only by Legislation but also by Cultural, Social and Political Factors

A crucial step in changing judges' attitudes is for judges themselves to recognise and understand the underlying problem. Since the French Revolution, judges have been seen as rational lawyers with almost unlimited capabilities. Confidence in their judgment was so strong in the 18th century that some French judges could resolve disputes without referring to the existing law simply by asking how a good person would handle the matter (Cardozo 2012: 135). Today, this confidence persists, with judges often compared to Ronald Dworkin's ideal 'Judge Hercules', capable of understanding and resolving a wide range of legal issues (Dworkin 1998: 239).

The reality is different from the ideal. While judges are educated, insightful and attentive, like all humans, they are prone to errors. Psychological research from the 20th and 21st centuries has shown that people, including judges, tend to make irrational decisions (Kahneman 2016). Studies indicate that judges can be influenced by (1) the way information is presented, rather than its content (Guthrie et al. 2007); (2) moral beliefs leading to decisions contrary to the law (Viscusi 2000); (3) emotions (Maroney 2011); (4) political views (Miles, Sunstein 2006); and (5) the socio-cultural group to which they belong (Kahan et al. 2012).

In light of the research, it is not surprising that judges are influenced by cultural, social and political factors, in addition to legislation. These factors often impede the effective implementation of the CPC in Lithuanian civil proceedings. Since ancient Greek times, Aristotle's concept of *phronesis* (practical wisdom) in Nicomachean Ethics has recognised that legal decision-making requires more than the mechanical application of rules; it requires the ability to see the general in the particular, while remaining aware of one's limitations (Aristotle 1934: 1140a–1142b). Modern academic literature also suggests that recognising these influences is key to more objective decision-making (e.g. Guthrie et al. 2007: 33–42). Hence, acknowledging their limitations and potential biases would improve judicial effectiveness, while denial of these issues could worsen the problem.

## Models of Legislative Action that can Change the Behaviour and Thinking of Judges

Another safeguard that allows for a long-term change in judges' thinking is the different models of legislative action. Below, we describe three possible models.

*Firstly*, the first model is an evolutionary change in the judicial mindset. The legislator must recognise the judiciary's conservatism and accept that the amended CPC will not immediately change court behaviour that has developed over decades. Evolutionary approach can be traced back to Aristotle who points out the following: 'For the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law' (Aristotle 1999: 40).

An example of an evolutionary change is the limitation of new evidence on appeal. As mentioned above, this innovation of the CPC has not yet been fully implemented. However, after quite a long period, we have been able to see positive developments in the application of Article 314 of the CPC.

The evolutionary approach involves slow changes in the judicial mindset and must be combined with the recognition that cultural, social and political factors influence judges. Systematic training on the application of the CPC is also essential. While this approach may take time, it is likely to be the most sustainable, leading to long-term changes in judges' mindsets in applying the CPC.

*Secondly*, the second model is legal intervention which seeks to bring more certainty to the application of the CPC. This model focuses on reducing judicial discretion. While discretion allows the law to adapt to society's evolving needs, it also opens the door to the potential abuse of power. The three examples of CPC innovations discussed earlier demonstrate how judges misapplied provisions due to their flawed mindset, highlighting the risk of such abuse.

One way to reduce judicial discretion is by implementing legal rules that clearly define the judge's decision-making process in specific situations (Ehrlich, Posner 1974: 265–266). For example, the court order was effectively implemented in the case law only after the amendment of Article 435(3) of the CPC, which clearly stated that the court must not assess the validity of the creditor's claim when deciding on issuing the order. This provision establishes a clear legal rule, removing discretion and obligating the judge not to examine the merits of the claim.

Another example is the amendment of Article 285(3)(4) of the CPC, which introduced a 'serious doubt' standard for default judgment motions. This standard limits the court's discretion by requiring it to refuse a motion only if there are serious doubts. The court cannot reject the motion based on mere doubts or personal perceptions of justice.

These examples are not meant to imply that discretion should be eliminated altogether or that legal rules will automatically change judges' thinking. Legal rules alone will not ensure

the proper application of the law unless judges' attitudes are changed. However, a reduction in judicial discretion may lead to a faster change in the judicial mindset.

*Thirdly*, the third model is legal intervention, which seeks to strike a compromise between the objectives pursued by the CPC and the established rules of judicial conduct. The golden mean rule can be an effective basis for changing judicial thinking, as radical changes in the law often provoke rejection from judges who are accustomed to the status quo. Cognitive psychology research shows that people, including judges, tend to resist deviating from the established norms (Thaler, Sunstein 2021: 36–37). Therefore, legislators should sometimes aim for a balance between the CPC's goals and the prevailing attitudes of judges.

A good example of this approach is the default judgment and the amendment of Article 285(3)(4) of the CPC, which introduced the 'serious doubts' standard. This standard limits judicial discretion while also offering a compromise. On the one hand, default judgment helps combat the abuse of process, and judges should not reject it simply because it does not align with their perceived standards of justice. On the other hand, judges have been sceptical about a legal provision that allows them not to assess the evidence presented by a party to a case. The 'serious doubts' standard reconciles these views by allowing judges to refuse a default judgment only when the evidence of the appearing party raises serious doubts.

## CONCLUSIONS

The mere creation of new legal provisions is insufficient for the effective application of the CPC. No less important is a change in the mindset and attitude of judges. One of the reasons that hinders the change in judges' thinking towards the Western legal tradition is the legacy of the Soviet civil procedure. There are at least a few aspects that can ensure more effective changes in judicial thinking: (1) understanding that judges' decisions are influenced not only by the law, but also by various political, cultural and economic factors; (2) the article identifies three models that can contribute to positive changes in judicial mindset, i.e. evolutionary change in judicial thinking, legal interventions aimed at reducing judicial discretion, and legal interventions aimed at a compromise between the objectives of the CPC and the established judicial behaviour.

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# Civilinis procesas kaip mąstymo būdas

*Santrauka*

Straipsnyje analizuojama teisėjų mąstymo svarba taikant Lietuvos Respublikos civilinį proceso kodeksą. Keliama problema: kodėl, praėjus beveik trisdešimčiai metų nuo Lietuvos Respublikos civilinio proceso priėmimo, kai kurios iš Vakarų teisės tradicijų perimtos civilinio proceso naujovės iki šiol nėra tinkamai taikomos? Viena to priežasčių – iki šiol nepakitęs teisėjų mąstymo būdas. Tyrimas parodo, kad tam tikrais atvejais teisėjų mąstymui iki šiol įtaką daro sovietinio civilinio proceso paradigmos. Straipsnyje taip pat atskleidžiama, kaip ateityje būtų galima paskatinti spartesnius teisėjų mąstymo pokyčius.

**Raktažodžiai:** civilinio proceso teisė, teisėjų mąstymas, teisėjų elgsena