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Changes in Judicial Behaviour after the Reform of the Lithuanian Civil Procedure

VYTAUTAS NEKROŠIUS, JURGIS BARTKUS
Faculty of Law, Vilnius University, Saulėtekio Ave. 9, Block 1, Vilnius 10222
Email: vytautas.nekrosius@tf.vu.lt, jurgis.bartkus@tf.vu.lt

The article aims to assess whether the procedural innovations introduced by the reform of the civil procedure law of the Republic of Lithuania have brought changes in judges' behaviour, which the reform intended to achieve. The study analyses the driving reason behind the reform of the civil procedure law, its objectives, and the ways the five innovations brought about by the reform changed the behaviour of the judges. The analysis of the legal sources and the empirical study show that some of the innovations introduced by the Civil Procedure Code have not yet been properly assimilated and that the code, which has been in force for twenty years, is still not fully operational and understood.

Keywords: civil procedure law, judicial behaviour, civil procedure reform

INTRODUCTION

On 28 February 2002, the Seimas of the Republic of Lithuania adopted a new Civil Procedure Code of the Republic of Lithuania (hereinafter the CPC, Civil Procedure Code of the Republic of Lithuania, 2002), which entered into force on 1 January 2003. The new CPC aimed at reinstating democratic values in Lithuanian civil procedure while moving away from the Soviet model of procedure, rebalancing court-party dynamics, and, in the long-term, generating change in the behaviour of judges. The 20th anniversary of the reform prompts a need to assess whether the reform has achieved its objectives. Given the objectives of the reform, it is inevitable to assess whether the new procedural instruments of the CPC have had a positive impact on the behaviour of the judges in the proceedings.

The object of this article is changes in the behaviour of judges brought about by the reform of the CPC. Given the limited scope of the article, it focuses exclusively on the changes in the behaviour of the judges of the court of first instance in the district courts.

This article **aims** to assess whether the procedural innovations introduced by the CPC have brought about the changes in judicial behaviour that the reform of the CPC was intended to achieve.

The methodology and review of references. In addition to the traditional legal sources such as case law, legislation, and legal scholarship, the paper analyses the results of a survey

of district judges conducted by the authors. During the survey, a questionnaire containing questions on the judge's application of the procedural innovations of the CPC reform was distributed to all district courts of the Republic of Lithuania. The judges had the option of either choosing one of the alternatives offered by the authors of the questionnaire or giving their personal views. Given the limited scope of the article, this article is limited to the judges' views and behaviour concerning the five essential parts of the CPC reform: (1) the role of the court in the proceedings, (2) the prohibition of abuse of procedural rights, (3) the limitations of *ius novorum*, (4) the default judgment, and (5) the preparation of the trial. A total of 40 responses were received, which, as will be shown below, show certain trends in judiciary behaviour.

The level of research and importance of the problem. The issue has not been examined in Lithuanian legal scholarship. The importance of the study is that the assessment of changes in judicial behaviour will allow assessing the success of the 2003 reform and show directions for future improvements. The authors are not aware of any similar studies conducted abroad. In this respect, however, it should be noted that research on judicial behaviour is quite widespread in US legal scholarship (Epstein et al.: 2013).

THE IMPACT OF THE CIVIL PROCEDURE REFORM ON JUDICIAL BEHAVIOUR

Background of the Reform and Objectives of Modern Civil Procedure

In Lithuania, the Soviet model of civil procedure prevailed until 1994. The Soviet model was based on the sole responsibility of the court for establishing the objective truth and its virtually unlimited powers to act *ex officio* (Žeruolis 1983: 18). The principle of adversary procedure in the Soviet model was declarative as the court could interfere in the dispute and the collection of evidence in a virtually unlimited manner (Žeruolis 1983: 20). After the restoration of Lithuania's independence, a need arose to reform the civil procedure law as the Soviet model did not correspond at all to the changing economic and political realities of society.

Describing the Austrian civil procedure reform of the late nineteenth century, Franz Klein, one of its main fathers, stated that this reform aimed at changing the way participants thought in the proceedings and the way they approached the proceedings (Klein 1891: 7). Essentially the same task was set for the new CPC. The reform took place in two phases: the urgently-needed amendments to the Soviet CPC of 1964 and the drafting of the new CPC. The drafting of the new CPC was necessary because it was the only way to make a relatively rapid transition to a modern democratic civil procedure, which would replace the Soviet procedure based on the unlimited power of the court and the devaluation of the role of parties.

The first stage of the reform, the 'patching up' of the Soviet CPC of 1964, could not last long as it was only a quick reaction to the problems that arose; it did not lead to any systemic changes. The abolition of the unlimited rights of the court in civil proceedings in 1994 was not replaced by anything new, and the civil procedure itself became highly convenient for delays: unlimited exercise of the oral principle, unlimited possibility to present new evidence throughout the proceedings, and the unclear role of the presiding judge. All these problems created a tradition of unlimited abuse of procedural rights, against which the courts were unable to offer any effective remedy.

The working group on the new CPC, which commenced its activities in 1996, first had to answer the question of what the concept of the new CPC would be: should it be based on a liberal or social civil procedure model?

Evgeniy Vaskovsky, one of the most prominent professors of Vilnius University in the first half of the twentieth century and a representative of the liberal model of procedure, argued that the essence of litigation was to verify and finally confirm the legality and validity of the claims of one of the parties to the dispute (Васьковский 1914: 365). He viewed civil proceedings as a strictly private matter, deeming the involvement of the court unnecessary for matters like landlord-tenant arrangements or inheritance decisions (Васьковский 1914: 365). Vaskovsky thus emphasised a passive role of the court, limited to evaluating presented evidence and ensuring the compliance of procedure with procedural rules. This model was the basis for the 1864 Russian Imperial Civil Procedure Law, which was in force in inter-war Lithuania. The possibility of returning to these origins was discussed quite seriously.

The origins of the social civil procedure can be traced back to the Austrian Code of Civil Procedure of 1895 and the aforementioned Franz Klein, who no longer saw civil procedure as a private dispute between two parties. According to him, a dispute is a social phenomenon that can affect society as a whole, and there are certain public objectives that must be taken into account in the handling of a civil dispute (Klein, Engel 1927: 187). The public objectives of the civil procedure include the proper application of the law, the substantive and not formal equality of the parties, and the reasonable management of the time and cost of the proceedings (Klein, Engel 1927: 194–196). In justifying the length of the proceedings as a public interest, Klein and Engel point out:

> Instead of the normal and harmonious development of relationships that would serve the public good, legal conflict sows frustration, hostility and anger. Every day of such conflict increases this antagonism, which extends to others. It is quite clear that this phenomenon cannot be absolutely avoided, as there are many causes of conflict, but a sensible society should strive to eradicate these conflicts as soon as possible (Klein, Engel 1927: 195).

The balancing of public objectives and the private nature of civil procedure led to various procedural innovations, including a more active role of the court, without replacing the adversarial nature of civil procedure.

The civil procedure reforms that took place in Europe in the twentieth century were based precisely on the ideas of social civil procedure. Lithuania was no exception in this respect. The CPC working group chose the model of social civil procedure, and the new CPC was not only supposed to help fulfil the objectives of modern civil procedure by introducing new procedural instruments, but its application was supposed to change the way the courts thought and behaved in the procedure. As the CPC reaches its twentieth anniversary, let us look at how these ambitious objectives have been achieved in the context of five procedural innovations of the CPC reform.

The Role of the Court in Civil Proceedings

Following the reform of the CPC, the court has two main functions: (1) ensuring that the hearing is conducted in accordance with the procedural law and (2) exercising substantive control over the proceedings. The substantive management of the proceedings means that the court must take active steps, by means of the measures provided for by law, to ensure that the essential facts of the case are brought to light (CPC Article 159(1)) and that the final judgment establishes not formal, but substantive truth (CPC Article 176(1)).

Unlike the Soviet process, substantive management of the proceedings does not imply unlimited judicial power. On the other hand, the judge is not merely a passive observer. Most

of the 'instructions' of the court are not binding on the parties, as the principle 'the court proposes, the parties decide' applies. For instance, while the court can recommend representation, it cannot compel a party to have one. This relationship between the powers of the court and those of the parties in the proceedings ensures that the principle of adversarial proceedings is properly implemented.

Case law suggests that substantive control of the proceedings has established itself as the main model of the court's behaviour in civil cases:

> The court controls the evidentiary process, is responsible for the proper allocation of the burden of proof and the determination of the subject matter of the case, may require explanations from the persons involved in the case, may instruct them as to the circumstances necessary to establish the facts in order to correctly examine the case, and may propose to the persons involved in the case that they submit additional evidence (Ruling of the Supreme Court of Lithuania of 13 March 2019).

The survey of judges carried out for this research also shows that as a result of the CPC reform, a significant number of judges are aware of the change in the court's role: 55% of judges understand that the court's role is not limited to passive observation. On the other hand, the second highest proportion of judges surveyed, 37.5%, indicated that all the measures provided for in the CPC were not fully effective as the court ultimately bore sole responsibility for the proper handling of the case:

Table 1. **How do you see your role as a judge in civil proceedings**

Answer options	Percentage of agreeing
The court is an impartial observer and arbitrator obliged to resolve the dispute in accordance with the claims formulated by the parties and the material submitted by the parties	2.5%
The parties are primarily responsible for defining the boundaries of the dispute and for presenting the factual material, but if the court sees that the outcome of the case will not be in accordance with the objectives set out in the CPC, it has to be proactive and take steps to remedy these shortcomings	5%
The parties are primarily responsible for defining the boundaries of the dispute and for presenting the factual material, but if the court sees that it will not be able to ensure a proper outcome of the case, it must take steps to draw the attention of the parties to what is required by the CPC	55%
All of the measures provided for in the CPC are not effective as the court is ultimately responsible for the proper handling of the case	37.5%

The answers show that a significant number of judges are unable to reconcile the balance of power between the court and the parties and that, unfortunately, the judiciary is not fully implementing the model of social civil procedure.

Prohibition of Abuse of Procedural Rights

Prohibiting abuse of procedural rights is an integral part of the principle of procedural fairness. The general prohibition of abuse of procedural rights is laid down in CPC Article 7(2) and

further elaborated in Article 95. While recognising that certain conduct by parties is impermissible, the legislator also recognises that the principle of party disposition has certain limits, which are determined by the aforementioned public objectives of social civil procedure.

It took 15 years for the courts to properly apply Article 95(1), which provides:

> A person participating in a case who, in bad faith, has brought an unjustified action (appeal, cassation appeal, application for reopening of the proceedings, or any other procedural document), or who has acted intentionally to prevent the fair and expeditious hearing and settlement of the case, may be ordered to pay compensation to the other person involved for the loss suffered by that person.

Article 95(2) provides that the court may impose a fine of up to EUR 5000 on the person concerned.

Abuse of procedural rights can lead to quite severe procedural consequences. For example, the decision to impose a substantial fine for the late submission of evidence is not easy, especially when the criteria for abuse of process are formulated in a rather vague way. What does bringing an action in bad faith or acting deliberately against a fair and expeditious hearing mean? Courts initially refrained from applying this rule due to concerns that higher courts might overturn their decisions for lack of actual bad faith. A turning point in case law occurred only in 2018, when the Supreme Court of Lithuania acknowledged that not only an act of a party that caused severe damage but also an act of the party aimed at disrupting the ordinary course of the proceedings had to be considered as an abuse (Ruling of the Supreme Court of Lithuania of 31 December 2018). Such legal interpretation led to the full application of CPC Article 95.

The survey of judges largely confirms this. Although 47.5% of the judges surveyed did not invoke this article frequently, they did not doubt its effectiveness and acknowledged that, in most cases, it was sufficient to warn the parties of the possibility of applying CPC Article 95; 32.5% of the respondents also indicated that they considered Article 95 to be effective as a last resort.

Table 2. **How often do you have to invoke CPC Article 95 to combat abuse of procedural rights in proceedings**

Answer options	Percentage of agreeing
Not often; usually it is sufficient to warn that this article may be applied	47.5%
It is not applicable, as this measure is ineffective	7.5%
Frequently, because it works well as a disciplinary measure	0%
Not frequently applied, but effective as a last resort	32.5%
It is not applicable. Firstly, I do not have time for 'extraneous' actions. Secondly, the management of the proceedings is smooth enough to reach an agreement with the parties on the conduct of the proceedings	2.5%
It is subject to very high standards of case law, and it is unrealistic to meet them and apply it	2.5%
I apply it, but, unfortunately, the appeal court quashes it, so the effect is zero	2.5%
I sometimes apply it, more often when requested	2.5%
I have not had an opportunity to apply it	2.5%

Limitations of *ius novorum*

The limitation for parties to submit new evidence at any stage of the proceedings was one of the most important innovations of the CPC, which aimed to ensure both fair and expeditious proceedings. The main rules limiting the submissions of new evidence are CPC Article 181(2), which establishes the court's right to refuse to admit evidence that could have been submitted earlier if its submission would delay the proceedings, and CPC Article 314, which prohibits the submission of new evidence at the appellate instance unless the need to submit such evidence arose at a later stage or the court of first instance unjustifiably refused to admit it.

These limitations were perhaps the most important innovations, and their proper implementation required a change of mindset on the part of judges. Unfortunately, the behavioural change has so far been slow.

The courts of first instance are still hesitant to apply the provisions of CPC Article 181(2). This situation is primarily due to the case law of the higher courts, according to which only the evidence which is not essential for the case may be refused (Ruling of Vilnius Regional Court of 1 June 2023). For many years, the Supreme Court of Lithuania had been developing case law that completely disregarded the good faith of the parties and gave absolute priority to the fairness of the case:

> The court's refusal to accept evidence, however late, which is of such evidentiary importance for the case as to determine the result of the examination of the case would be indefensible from the point of view of reasonableness, good faith and justice (Ruling of the Supreme Court of Lithuania of 21 June 2013; Ruling of the Supreme Court of Lithuania of 30 March 2022).

A certain positive breakthrough should be attributed to the above-mentioned ruling of the Supreme Court of 31 December 2018, which provided a proper interpretation of CPC Article 95, and to the ruling of the Supreme Court of 2 December 2020, which refused to give absolute priority to a fair examination of the case and additionally took into account the parties' good faith, thus paving the way for the proper application of CPC Articles 181 and 314 (Ruling of the Supreme Court of Lithuania of 2 December 2020).

Nevertheless, according to the survey, as many as 45% of the judges stated that they did not apply this measure at all because of unfavourable case law of the higher courts; 25% stated that they only exercised this right in exceptional cases where a party had been informed more than once of the need for new evidence; 15% stated that they did not apply this measure because it was not effective and the conditions for its application were not clear:

Table 3. **Do you often have to refuse to accept late evidence**

Answer options	Percentage of agreeing
I do not apply this measure because the case law of the higher courts is unfavourable to the application of CPC Article 181(2)	45%
I rarely exercise this right, in principle only in exceptional cases when the party has been informed more than once of the need for new evidence	25%
I made use of it when it was brought to the party's attention during the preparatory phase that additional evidence should be adduced in support of a particular fact, but the party failed to do so during the preparatory phase	10%
I do not apply this measure because it is not effective, and the conditions for its application are not clear	15%

Table 3. **(Continued)**

Answer options	Percentage of agreeing
I apply it because there are situations when, in fact, the party receives the evidence late, and the representatives do not always communicate properly with their clients in order to be able to submit the evidence in time. On the other hand, a civil problem is being solved, which is a sensitive issue for the parties and not a formal imitation of the process	2.5%
Often, the evidence is relevant to the outcome of the case, and if it is not admitted, it is still admitted at appeal, and the decision is modified or even overturned	2.5%

Therefore, even 85% of the judges still do not apply the limits of *ius novorum* properly. The substantial impact on judicial behaviour in this area has yet to be achieved, although there is some positive movement.

Default Judgment

Virtually all modern civil procedural systems are familiar with the default judgment. Legal scholars recognise that the default judgment is one of the few effective tools developed by scholarship and practice to deal with an abusive party's failure to appear in the proceedings (Baur 1993: 488; Nekrošius 2002: 172).

The concept of the default judgment was absent from the Soviet model but was introduced through Articles 285–289 of the new CPC, posing challenges to its proper implementation by courts. Lithuania has embraced a 'true' default judgment model, where the court formally reviews evidence from the participating party without considering evidence from the non-participating one. While the legal community, including the courts, debated its effectiveness and fairness, the optimal model of the default judgment has now been firmly established.

The survey of judges also confirms this: 42.5% of the judges considered the default judgments to be a sufficiently effective tool for combating procedural delays. Although half of them did not consider it ineffective, they saw room for improvement. Half (50%) of the respondents indicated that it could be even more effective if the system for reviewing a decision were less liberal or if the court could conduct an actual rather than a formal assessment of the evidence. Thus, in practice, more than 90% of the respondents consider the default judgment an effective tool, albeit one that could be improved.

Table 4. **What is your position on the default judgment**

Answer options	Percentage of agreeing
It could be more effective if the procedure for reviewing a decision were less liberal	40%
It is a sufficiently effective tool to combat delays in proceedings	42.5%
It would be even more effective if the court made an actual rather than a formal assessment of the evidence when adopting a decision by default	10%
No opinion	2.5%
The content of the default judgment should be further clarified; issuing a court's decision without any motifs when the claims are upheld could be allowed when the claims are upheld	2.5%

Table 4. **(Continued)**

Answer options	Percentage of agreeing
It happens that in the absence of the defendant, the claimant still opposes the default judgment, perhaps because they do not know whether the claim will be upheld. There could be a provision that if there are grounds for granting a default judgment, the court may grant a default judgment without the claimant's consent	2.5%

Preparation for the Trial

Preparation for the trial is one of the stages of civil proceedings that has changed the most. In Soviet times, it was a formal stage that had virtually no impact on the proceedings. Under the CPC, it has become one of the most essential stages of civil proceedings. Nowadays, the distinction between preparation for trial and the trial is apparent. During the preparatory phase, the boundaries of the dispute are defined, and the parties have to present all their arguments and evidence. In contrast, during the trial, the submitted evidence is examined and evaluated, and, ideally, there should be no additional submission.

According to the survey, as many as 47.5% of the judges consider the pre-trial phase a positive step as it helps to concentrate all the necessary factual material in the case before the trial. Additionally, a significant number of respondents, while not indicating that they consider this phase negatively, see various possibilities for its improvement. Fewer than a third of the respondents (27.5%) consider that the efficiency of this phase is reduced by the possibility of presenting additional arguments and evidence during the trial, while 15% of them hold the view that the heavy workload of the judge limits the efficiency of the preparation. Thus, while the pre-trial phase could be improved, the majority consider this stage as an effective one.

Table 5. **Do you think the pre-trial phase is an effective phase**

Answer options	Percentage of agreeing
I consider it a positive step as it helps to concentrate all the necessary factual material in the case in advance of the trial	47.5%
The effectiveness of the preparatory phase is limited by the possibility of presenting additional arguments and evidence during the trial	27.5%
The efficiency of the preparation is limited by the heavy workload of the judge	15%
It is too formalised. All this – preparation, examination, clarification, etc. – could be done from the very beginning of the proceedings, without being 'dragged' into the formal process	2.5%
I try to avoid the preparatory phase as much as possible as the actual position of the parties is revealed during the proceedings, and the process does not prohibit the introduction of new evidence, but it is necessary to use and justify the opportunity creatively. The practice of refusing to admit evidence shows that the evidence will still be admitted on appeal	2.5%
Effective preparation for the trial is through preparatory written documents, but it is not always available	2.5%
I consider it positive as it helps concentrate all the necessary factual material in the case in advance of the trial, but it does not work as it is supposed to under the CPC as the new evidence, applications for a change of the subject-matter or grounds, etc. are admitted at a later stage if there is a need for the case to be heard properly	2.5%

CONCLUSIONS

Twenty years after entering into force, the procedural innovations introduced by the Civil Procedure Code have been exerting a positive impact on the behaviour of judges. Judges generally have a good understanding of the prohibition of abuse of procedural rights, the default judgments, and the pre-trial phase. On the other hand, the above theoretical and empirical analysis suggests that the CPC is still not fully operational and not fully understood. Some innovations of the CPC, such as the court's role in civil procedure or the prohibition to admit late evidence, still need to be adequately internalised. Moreover, some procedural innovations, such as the default judgment or the pre-trial phase, could be improved or reformed to some extent to have an even more significant impact on judicial behaviour.

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4. Ruling of the Supreme Court of Lithuania of 12 December 2018 in a civil case No. 3K-3-518-248/2018.
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VYTAUTAS NEKROŠIUS, JURGIS BARTKUS

Teisėjų elgesio pokyčiai po Lietuvos civilinio proceso reformos

Santrauka

Straipsnio tikslas – įvertinti, ar Lietuvos Respublikos civilinio proceso kodekse įtvirtintos procesinės naujovės nulėmė teisėjų elgesio pokyčius, kurių buvo siekiama Lietuvos Respublikos civilinio proceso reforma. Tyrime analizuojama, kodėl reikėjo vykdyti civilinio proceso teisės reformą, kokie buvo jos tikslai ir kaip penkios reformos įvestos naujovės pakeitė teisėjų elgesį. Teisės šaltinių analizė ir empirinis tyrimas atskleidė, kad kai kurios reformos įvestos naujovės dar nėra tinkamai įsisavintos, o dvidešimt metų galiojantis kodeksas vis dar nėra visiškai veikiantis ir iki galo suprastas.

Raktažodžiai: civilinio proceso teisė, teisėjų elgsena, civilinio proceso reforma