PART III

# COURT CULTURE AND INNOVATIONS IN JUSTICE

Chapter 1.

## NEW COURTROOM TECHNOLOGIES – FEARS, NEEDS AND EXPECTATIONS

**Arkadiusz Bieliński**[1]

Twentieth and twenty–first centuries are a period of extremely intensive development of societies, changes in their functioning and, above all, the development of science and technology. The latter area is multi–faceted, resulting in extremely dynamic changes in terms of both our private and professional lives. Very noticeable is the development of information technology, which is strictly associated with the development of the so–called information society and information society services functioning in its framework. The European Union considers the transformation of the society into the information society as both one of the highest socio–economic challenges currently faced by Europe and a great opportunity for development. The activities undertaken as part of a policy for the information society is to adapt the European society to technological changes in recent years that have made information and communications a key element of economic and social life in the world[2].

1 Dr. Arkadiusz Bieliński, Institute of Civil Law, Department of Civil Law, Faculty of Law, University of Białystok, Poland.

2 M. Kuliński, *Regulacje komunikacji elektronicznej w rozwoju społeczeństwa informacyjnego Unii Europejskiej,* Warszawa 2010, p. IX.

The information society is a concept outlined by theorists in the form of the artificial plan under the influence of current and potential capabilities of information technologies. Information technologies have always influenced the way of social organisation and governance. The Internet impacted (quantitatively accelerated) and steered (qualitatively shaped) socio–economic processes. Information processes have always driven development but still are separate from humans, which makes people separated from the development itself[3]. As Anna Kościółek rightly says, modern technology, requiring new approaches in many areas, is now one of the main determinants of change. Developments in technology increase the effectiveness and improvement of most human activities. The most significant role in this aspect is played by the development of the so–called information technology, which can be defined as a combination of IT solutions – in particular hardware and software – with the technology communication solutions to provide advanced mechanisms for carrying out activities related to the processing of data. The development of information technology is especially accompanied by two basic processes – computerisation and informatisation[4]. It can be stated that the stage of computerisation, in most cases, is over – everywhere computers and different types of peripheral devices and software in this equipment can be seen. Today, however, a much more important aspect is informatisation (you can also call this process digitisation), which is based on a frequent use of data entered to the computer systems. Therefore, informatisation is not the preparation of electronic documents using computers or other devices, saving them on servers and then printing in order to attach them to paper files. One can speak of informatisation only if the data already entered into information and communication systems are rationally used by other ICT system to the greatest possible extent[5].

3 J. Jankowski, *Cybernetyzacja prawa*, [in:] E. Galewska, S. Kotecka (eds.), *Księga pamiątkowa z okazji dziesięciolecia Centrum Badań Problemów Prawnych i Ekonomicznych Komunikacji Elektronicznej i Studenckiego Koła Naukowego – Blok Prawa Komputerowego*, Wrocław 2012, p. 397.

4 A. Kościółek, *Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym,* Warszawa 2012, p. 17–18.

5 S. Kotecka, *Informatyzacja postępowania cywilnego w Polsce*, [in:] J. Gołaczyński (ed.), *Informatyzacja postępowania sądowego i administracji publicznej*, Warszawa 2010, p. 4.

Moreover, information technology begins to play more and more important role in the legal provisions, including court procedures[6]. From day to day, the scope of various uses of communication means based on modern technologies is extended. This expansion also includes successively the sphere of law and civil procedural law does not constitute an exception in this respect. Striving for use of ICT in the field of civil procedural law has created not only the need, but even the necessity of introduction of new provisions, a fundamental review of the traditional legal institutions and changes of the underlying ideas[7]. The current judicial procedures, in particular civil procedure, had in fact been created at a time when there was no Internet and computers, and necessarily all of them (except electronic proceedings by writ of payment constituting a kind of novelty) refer to the analogue world. This has now some essential drawbacks, at least the practice of paper–based documentation well–constituted in the legal world – in particular filing pleadings with the court, serving them with the use of registered mail and finally the analogue archiving thereof. How much these procedures differ from today's solutions can be seen at the offices of the courts or in law firms[8]. This chapter aims to concern some legal institutions associated with the informatisation of Polish civil procedure, and in particular the so–called e-protocol, and tries to answer whether these new solutions can be a source of fears, inspiration or can set some expectations.

An overview of legal institutions shall be begun with the very possibility of filing pleadings in an electronic way. As Article 125 § $2^1$ ccp. says: "if a specific provision provides so, pleadings shall be filed using the communication system supporting litigation (by electronic means). If a specific provision provides that the pleading shall be filed only in an electronic way, the pleading not filed in this way have no legal consequences that the statute says would flow from the filing of a pleading with the court". The data communications system is a set of IT equipment and software providing for the processing and storage as well as sending and receiving data through an electronic network.

6 For example, more on the development of informatisation of court proceedings can be found in the book edited by Jacek Gołaczyński; see J. Gołaczyński (ed.), *Informatyzacja postępowania sądowego w prawie polskim i wybranych państw*, Warszawa 2009.

7 A. Kościółek, *op. cit.*, p. 18.

8 J. Gołaczyński, *Sąd pod znakiem IT*, Na Wokandzie 2013, No. 1, p. 48.

Submitting pleadings in electronic form is related to the creation of the so–called e–court and the introduction of electronic proceedings by writ of payment[9]. The latter owes its character and distinctiveness to its essence seen in the fact that the operation of this procedure is based on a modern ICT system, which allows lodging of pleadings and service of judicial documents in an electronic way[10]. In its framework the plaintiff, using an ITC system, files a claim on the basis of which (under certain conditions) the defendant can be ordered to pay. It should be noted that the entire procedure generally takes place only in electronic form (unless the defendant has not accepted this form of communication). The solution adopted in Article 125 § $2^1$ ccp. is the starting point for a wider opening to the future use of the option to institute proceedings with the help of modern technology. Currently, electronic proceedings by writ of payment are fully functioning proceedings of this type. On the other hand, the possibility of electronic communication with the court has been provided for in the registration proceedings (in June 2012 the possibility of obtaining excerpts from the National Court Register directly from its IT system was introduced) or the land register proceedings (in 2011 electronic access to the land register and the possibility to obtain printouts regarding the state of the land register were introduced). There is a close connection between the electronic proceedings by writ of payment and the electronic signature on the statement of claims – according to Article 126 § 5 ccp., the statement of claims filed in an electronic way must have an electronic signature[11]. It should be noted that although an electronic signature has functioned in Poland generally from August 2002, there were few legal institutions that provided real opportunities for its use. This indicates the fact that modern technological and legal solutions often need specific time for their implementation and practical application. Also for the purposes of e–court there was provided the opportunity to serve in an electronic form – "in the electronic proceedings by writ of payment, service to

9 M. Sorysz, [in :] A. Góra–Błaszczykowska (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom I*, Warszawa 2013, p. 400. Electronic proceedings by writ of payment are in force in Polish civil procedure from 1 January 2010 and they are regulated by Articles $505^{28}$–$505^{37}$ ccp.

10 R. Flejszar, [in:] A. Góra–Błaszczykowska (ed.), *op. cit.*, p. 1337.

11 Legal provisions on the electronic signature are contained in Act of 18 September 2001 on Electronic Signature (consolidated text Journal of Laws 2013, item 262).

the plaintiff shall be effected via an electronic communication system supporting the electronic proceedings by writ of payment (electronic service), and to the defendant – if he/she filed a pleading in an electronic way" (Article $131^1$ § 1 ccp.).

The legal institution which could revolutionise the Polish justice system is undoubtedly the so–called e–protocol. This is due to the fact that the technical aspects of minuting were neglected in Polish judiciary many years ago. Despite the procedural rules allowing taking minutes in the form of stenographic record, that method was not applied in practice. It has become the rule to take handwritten minutes as dictated by the judge. Moreover, they failed to create uniform standards for the form of minutes, such as the obligation to note the interviewer questions and not just responses. Recently, the computers have been in every courtroom in the country. A judge, using an additional monitor, has been given the opportunity to exercise control over the record of the course of the trial. Many recording clerks have been trained in the mnemonic method of typing on the computer[12]. Nevertheless, this situation has been considered insufficient and it was decided to change it. It should be noted that the slowness of handwriting or typing on the computer resulted in a number of negative effects. First of all, it used to slow down the proceedings. Dictating the minutes by the judge has become a necessity. It was necessary to interrupt a spontaneous speech of an interviewed person. The judge often had to modify, e.g. shorten, a speech of an interviewed person which could lead to discrepancies. The judge was hardly able to control whether the recording clerk did not make further modifications. This method of recording of the course of legal proceedings meant that the time taken to produce minutes was several times longer than the speech could be if it was not interrupted and an interviewed person was allowed to speak freely[13]. In conclusion, the introduction of e–protocol was dictated by concerns for: recording of the full contents of the activity; refraining from interrupting witnesses to modify (e.g. shorten) their responses; a better basis for the assessment of the evidence; the elimination of the need to dictate contents of the

12 D. Sielicki, A. Templin, *Zastosowanie zapisu audio/video do utrwalenia przebiegu rozprawy sądowej – opis eksperymentu*, e–biuletyn 2010, No. 1, p. 8–9.

13 *Ibid*, p. 9.

minutes to the recording clerk; giving a full perception to the judge; the acceleration of trials; the speed of proceedings in the era of the information society and the knowledge economy[14].

That fundamental change regarding the form of minutes was introduced by Act of 29 April 2010 amending the Code of Civil Procedure[15], which entered into force on 1 July 2010. According to the wording of the amended Article 157 § 1 ccp., "the course of a public session shall be minuted by the recording clerk. Minutes shall be made by recording the course of the session by means of the audio recording or the audio and visual recording, as well as in writing under the direction of the presiding judge, in accordance with Article 158 § 1". As an exception to this rule, it is allowed to make minutes only in the traditional form (in writing), if for technical reasons the recording of the course of the session by means of the audio recording or the audio and visual recording is impossible (Article 157 § $1^1$ ccp.). Article 158 § 1 and 2 ccp. closely connected with Article 157 ccp. specify requirements for the form and contents of the minutes. In fact there are two types of minutes. The first one is the traditional written minutes and the second one is the minutes recorded electronically by means of the audio recording or the audio and visual recording. If the course of a public session is recorded by means of the audio and visual recording, the abridged minutes that meet the requirements of Article 158 § 1 ccp. should be produced. Written minutes include the designation of the court, place and date of the session, the names of the judges, recording clerk, prosecutor, the parties, the interveners, as well as statutory representatives and plenipotentiaries attending the session and the designation of the case and the statement on the openness; moreover, the written minutes should include the list of rulings and judgments given at the session and a statement that they have been announced and the activities of the parties affecting a decision of the court (settlement, waiver of claims, defendant's admission of the claim, withdrawal or modification of the claim, extension or limitation of the claim) and other activities of the parties that – according to the specific

14 W. Łukowski, *Nagrywanie rozpraw – niebezpieczeństwo czy szansa?,* Iustitia 2010, No. 1, p. 10–11.

15 Journal of Laws 2010, No. 108, item 684.

provisions of the Act should be drawn, written, adopted, filed, reported or put into the minutes. If preparation of a separate conclusion of the judgment is not required, it is sufficient to enter contents of the decision into the minutes. Additionally, the minutes should reflect acts which – under separate provisions – must be entered into the minutes, such as oral power of attorney (Article 89 § 2 ccp.) or drawing attention of the court to a procedural infringement (Article 162 ccp.)[16]. In addition to such abridged written minutes, the electronic minutes containing the audio or the audio and visual record of the course of the session should be prepared. The latter should be signed by the recording clerk with an electronic signature that guarantees the identification of the clerk and the recognition of any subsequent changes to the minutes (Article 158 § 2 ccp.).

Technical issues related to the functioning of e–protocol are dealt with in the Ordinance of the Minister of Justice of 10 August 2011 on Audio Recording or Audio and Visual Recording of a Public Session[17]. It specifies, among others, what is included in an electronic record, i.e. the general view of a courtroom from the perspective of the presiding judge, with particular reference to the view of all other persons participating in the public session, and – if it is possible for technical reasons – the audience; the view of the person having a speech from the place of a witness including the view of the upper half of his/her body in such a way that the record of gestures and an image of a face are available; the record of the sound by a microphone used from the place of the plaintiff and the defendant, panel of judges and a witness (§ 7 section 1 and 2 of the Ordinance). Electronic minutes during their preparation can be complemented by notes of two types. Some of them are open to the public and are available for parties (such as that witness X begins testimony) and others are available only to a judge and are intended to facilitate the construction of the conclusion of the judgment and its reasons (such as the description of a witness as "unreliable witness"). As a result, a judge preparing to give a judgment may at any time see

16 M. Sorysz [in:] A. Góra–Błaszczykowska (ed.), *op. cit.*, p. 443–444.
17 Journal of Laws 2011, No. 175, item 1046.

the relevant part of the record and make sure of his/her position[18]. In some cases, basing only on the electronic record of the trial may cause some inconvenience, and therefore there is provided the possibility of transcription of the electronic minutes into written minutes if it is necessary for the proper adjudication of dispute (Article 158 § 4 ccp.). It should be emphasised that nobody can claim the transcription of the whole minutes because, first of all, it would question the expediency or usefulness of e–protocol, and, second, the transcription is a costly and time–consuming task that – in the case of an experienced recording clerk – takes from 3 to 4 hours per each hour of digital record. The model of transcription depends on the legal regulation adopted in the given country. For example, in Finland the transcription is mandatory if requested by the trial court, a party or other person. In Spain, the transcript is made only in exceptional situations. The transcription is decided, however, only by the presiding judge. On the other hand, in the UK the transcript is made if an interested party submits a request subject to the relevant fee[19]. Judge Grzegorz Karaś of the Regional Court in Wrocław was asked about the use of transcripts and answered that he asked to produce them mainly due to the large volume of evidence. He stressed, however, that the mere transcription was also very extensive and reading dozens of pages can consume more time than watching a record of the hearing[20]. Parties have the opportunity to see the electronic minutes in court; there are places with appropriate equipment, specifically prepared to do this. It is also possible to get the record but only the audio record for the listening thereof.

At the beginning, the introduction of e-protocol raised mainly concerns of the judges. They feared that the need for a fundamental change in the way of the recording of the trial would lead to fewer hearings at the assize of a given judge because of the need to record the full course of the sessions without a possibility of, for instance, affecting the witness statements in respect of their relevance for the present

18 G. Saniewska–Żabińska, *E–protokół: sprawnie, jawnie, sprawiedliwie*, Na Wokandzie 2012, No. 3, p. 11.

19 A. Zalesińska, *Sporządzanie protokołu sądowego przy wykorzystaniu nowoczesnych rozwiązań technologicznych w prawie polskim i wybranych państw europejskich*, Rejent 2010, No. 9, p. 99.

20 G. Saniewska–Żabińska, *op. cit.*, p. 12.

case. It has even been argued that the need for recording of procedural activities in their entirety and behaviours in their unaltered form is irrational. Not everything that is spoken during the session is important and noteworthy from the perspective of the object of civil proceedings[21]. Another concern was related to the fact that the perception of the written words is better than the perception of transmitted image and/or sound. There were also peculiar opinions that making notes in the electronic minutes conflicted with the dignity of the office, as well as with the idea of the amendment to the Code of Civil Procedure, according to which the presiding judge should not be distracted by the recording of the course of the trial[22]. However, the e–protocol results in several advantages: first of all, it reduces the hearing by up to 30% compared to the session recorded in the traditional manner; it fully reflects the course of the session due to the fact that it is not modified by the presiding judge dictating to a recording clerk, e.g., the contents of the testimony of witness; it motivates the court, the parties and attorneys to behave appropriately in the courtroom. According to the latest data of the Ministry of Justice, the e-protocol operates on the 753 courtrooms in 65 courts (11 courts of appeals, 44 regional courts and 10 district courts). From 1 January 2013 to 31 July 2013 over 153 000 hearings were recorded in those courts[23]. On the other hand, the introduction of e-protocol has also some disadvantages, e.g. already identified concerns of judges and attorneys if this method does not complicate their work; frequent need for listening to the whole minutes due to the limited scope of possible transcription; high costs of implementation of infrastructure related to recording of the hearings in digital form. With reference to the e-protocol, it should be noted that by the end of 2012 in all the courts of appeals and district courts the information portals have been launched to enable participants in the proceedings (in particular professional representatives) to examine on–line the documents, electronic agenda, and – beginning from 2013 – also e–protocols[24]. It is a prelude to the

21 M.J. Naworski, *Nagrywanie rozpraw w sprawach cywilnych – wybrane aspekty zagadnienia*, Monitor Prawniczy 2011, No. 2, p. 71.

22 *Ibid*.

23 http://ms.gov.pl/pl/informacje/news,5292,minister–sprawiedliwosci–marek–biernacki–na.html (26 September 2013).

24 J. Gołaczyński, *Sąd*…, *op. cit.*, p. 48.

implementation of the electronic circulation of documents to wider extent than it takes place today.

In conclusion, I fully agree with the position that the Polish justice has no other way than informatisation. In the modern world one can no longer function without the use of solutions provided by the digital technology. The end of the paper era and the development of civilization based on the electronic exchange of information in real time are facts[25]. The possibility of contact with the court by electronic means undoubtedly speeds up court proceedings; it also contributes to saving costs and time of the court, the parties and the attorneys (for example, the possibility of unassisted obtaining excerpts from the National Court Register or from the electronic land register reduces considerably the need to visit the court). Undoubtedly, the introduction of the novelties may raise fears, but after a transitional period one can appreciate the benefits of introduced solutions. Furthermore, the appreciation of introduced solutions rises expectations for new solutions planned for implementation.

25 *Ibid.*