

# THE IMPACT OF THE NEW TECHNOLOGIES ON THE SHAPE OF CIVIL PROCEDURE\*

(ABRIDGED VERSION)

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## FOREWARNINGS

1.- The new technologies are currently under construction. The distinction between the written and oral forms in litigation is currently being demolished. Therefore, the subject is an invitation to talk about something that does not exist, something that is not certain!

2.- Writing is, in the linguistic sense, a “message endowed with sense, made up of variable legible signs representing word and thought that a sender encodes into natural language and prints by means of any medium”. In this respect, electronic messages and faxes, although they are part of what we understand by new technologies, would, in any case, be written. However, their particularity does not lie exclusively in their method of transmission or medium. In fact, they are written in a less formal way. They would be a kind of “oralised” writing that, although they share with writing the fact of being “solidified”, their spontaneous and informal style could lead them to be included in the oral discourse.

The oral character refers to the verbal: “that which is stated with speech”. However, if speech is “that which has been said”, it also means, by extension, “that which a text expresses”, which merely adds to the confusion. In this case, the term verbal is preferable, as it means “that which is expressed orally, in person”. But its second meaning is “that which relates what has just been said”, which once again takes us back to the written word. The use of the videoconference, the telephone and sound recording could be considered as oral manifestations in civil procedure. If the communications media used belong to the category of new technologies, then it is the oral character, although deformed, that is prevailing, as it has been stripped of all physical contact. Speech, the word, is fixed in the corresponding recording. However, it accentuates above all the distance between the interlocutors.

3.- In reality, the new technologies do not participate in the nature of either the written or the spoken. Rather they display the confusion, not to say fusion, of the two means of expression. They cloud the distinction even more, if this is possible, which leads us to ask if it would not be better to go beyond the mere externalisation of intention and focus the question on the functions attributed to both the spoken and the written word. Their hybrid nature invites us to perceive them more as a tool than as an end in themselves, in such a way that the written or the spoken word would be accentuated, depending on the objective specified in a

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certain type of procedure, or in a particular stage of it, although the general tendency is to assimilate them into a secondary form of orality. The supposed advantages of orality – flexibility, simplicity, direct contact between the protagonists, greater respect for the adversarial procedure – would in some way be extolled by the new technologies.

4.- When studied, this breath of hope could, however, turn into a wind that causes panic, as it rests on a superficial, not to say artificial, view of orality. It reveals the obsession for having an efficient public justice system, which causes a certain fear as far as a strict respect for guaranteeing the due process of law. The sacred union between the written and the spoken in a kind of legal second life could, on the other hand, mean a policy of flow management of affairs that is happy with a dehumanised procedure. If the new technologies apparently offer, in the first place, the hope of a renewed orality (I), they provoke fear of an orality from which the flesh has been stripped, bodiless, in other words, depersonalised (II).

#### I. A RENEWED ORALITY

5.- “The current electronic age is also the age of a “return” or “secondary” orality, to distinguish it from the age of “primary orality” prior to the invention of writing”. This secondary orality, which is in keeping with the meaning of the history of the process, gives a second boost to the omnipresent and selfish search for an even more efficient procedure. On the one hand, the purpose of rules belonging to civil procedure would explain the move to another form of expression, as well as the fascination for the new technologies (1). On the other hand, they invite us to question ourselves essentially on the forms of the so-called secondary orality, as a witness to the underlying question of procedural formalism. (2).

##### **1. The purpose of a secondary orality**

6.- Today, the competition between the different legal systems also means competition between its litigation systems. The new technologies appear to be renewing the hope that had once been placed in the use of orality when the codes of civil procedure was reformed. Thanks to a kind of law of substitution, each procedural model is extolled only to be discredited in the interests of the constant search for procedural efficiency. Following the succession of the written, and later, the oral form, it is now the turn of the hybrid form that takes in the new technologies, which we assume will bring a breath of fresh air to civil litigation. They bring speed (A) and quality to the procedure (B).

##### ***A) Speed in the procedure***

7.- The first of the virtues attributed to the new technologies is, without a doubt, that of speed. They speed up communications and allow us to avoid problems when calculating periods.

Communication with the court clerk by Internet also saves on useless journeys to hold merely formal hearings, the only purpose of which may be a postponement. The “electronic” hearing of civil cases offers even greater efficiency in the exchanges, as well as in the organisation of the work of those participating in the procedure. For example, the possibility of requesting a date for the hearing of a referral procedure by Internet has been welcomed. In a wider sense, the new technologies erase distances and the notion of space in civil

litigation. They are therefore greatly appreciated in very large countries such as Russia, Brazil or Mexico, where the so-called “tyranny of distance” reigns.

The recording of videoconferences, where it is permitted (in Spain, for example) is also a synonym of speed. The recordings can be reused in appeals. This avoids having to recall all the witnesses to be heard, saving on the time and cost of new appearances. Speed is also intimately linked to quality, in so far as the passing of time leads to a loss of efficiency in the testimonies concerning the facts, due to the loss of freshness of memory.

### ***B) Quality of procedure***

8.- The new technologies could also contribute to a fair and equitable procedure. They would facilitate access to the judge. Proximity to the judge is not only physical, here they are moving towards the possibility of initiating a court action at a distance. Likewise, all the resources and information that can be obtained online contribute to the simplification of the procedures. These include lawsuit model forms, as well as a large amount of general information. Videoconferences lower the cost of witness examination and their speed allows access to justice to be effectively guaranteed. Space is no longer important, which in part also justifies the reform of the Carte Judiciaire.

It is also symptomatic that consumers’ associations invoke the use of the new technologies to begin class actions (collective or group actions). The dispersion of the victims and the small amount of damages likely for each party requires an effective reduction in the costs of the action, as well as facilities for it to be carried out. In addition, the absence of technical terms in the electronic documents allows the drafting of the records to be flexible and uncomplicated. The use of the written document can, at last, be separated from the obligatory representation. In this way, the security offered by the written form is also provided for minor cases.

9.- The new technologies also favour respect for the adversarial procedure. An illustrious example of what could be an adversarial procedure reinforced by the use of the new technologies can be found in the recent British reform. This is an experimental reform, limited exclusively to the commercial jurisdiction, which came into force on February 1, 2008. It allows the defendant to respond to the conclusions of the plaintiff using the same medium. The replies are included in the same document and can be distinguished by a different colour or type of character. This provides the judge with an efficient, combined reading of the opposing positions. Lawyers consider that this tool gives the defendant better access to justice, as, in this way, it is easier to understand what is being debated.

In the United States, final statements sent by electronic methods contain links to evidential documents. Following a sentence that refers to a specific piece of evidence, there will be a link to it (which has, for example, been scanned). This type of reading of the file is a great help to the work of the judge. The security and reliability of the documents must, of course, be verified, but this can be done by another officer of the court, rather than the judge.

The new technologies also encourage dialogue, particularly thanks to videoconferences. One virtue of the oral discussion is that it builds the debate as the exchange progresses. This cannot be found in writing, as the opposite happens

– it is immobilised. Unfortunately, this exchange can suffer from setbacks, as it favours surprises and the evolution of the dispute at the last minute.

10.- The development of the new technologies is also an exponent of economic development. Commercial exchange will be guaranteed and encouraged by a simpler procedure. This will reassure investors. It will also bring about a development of the transnational rules regulating civil litigation.

The new technologies present themselves as the holy union between the written and the oral, a superior method of expression at the service of the subjects who participate in the process. In this respect, they are sometimes described as if they were a kind of renewed “secondary orality”. However, their hybrid form surpasses the dichotomy between the written and the oral and invites us to raise the essential question of the formalism in civil procedure.

## **2. The forms of secondary orality**

11.- We need to know whether the new technologies are a resurgence of the written word, an exaltation of the oral, or a third, hybrid way. The new technologies assimilate themselves, formally, either in a non-formalist written form, or in a formalised orality, and both are, alternatively, permitted (A). This verification invites us to ask ourselves whether the real debate should not be about formalism in civil procedure (B).

### ***A) Forms of new technologies***

12.- Here, the question raised is knowing whether the move to the new technologies will mean a simple equivalence between what is written on paper and what is written in electronic format, or whether this step will mean a flexibilisation of the forms. At first sight, it appears that this will only affect the way the writing is transmitted. Therefore, the formal requirement should remain intact. In civil law, the Act of 13<sup>th</sup> March 2000 establishes in France the equivalence between that written on paper and that written on an electronic medium, in such a way that the type of medium containing the manifestation of intention makes no difference to the procedure.

13.- The informal, electronic document can be useful in written procedures as a new method of communication between judges and magistrates. Apart from the records of formal procedures, there are also informal communications at the heart of a written procedure. For instance, a very revealing example of this would be the procedural bulletins that provide information on the state of the case and which are directed by the court to the judicial assistants. Here, the medium is less important than the method of transmission. In this respect, the new technologies may contribute the figure of non-formalised written documents.

Electronic messages are “spoken or oralised written documents”, given the absence of formality and the spontaneity with which they are drawn up, although this lack of formality does not always benefit the person preparing it. Indeed, unlike the word, which can be taken by the wind, the electronic document leaves footprints. When we are not dealing with the communication itself, but the evidence, such informal documents are highly problematical, as can be seen in the judgement of the *Chambre Sociale de la Cour de Cassation* of 23 May 2007, in which one of the parties had to accept that a piece of evidence obtained by SMS was opposed against him. This evidence was not considered untrue as the party

could not ignore the fact that message had been recorded in the telephone's memory. The word, spontaneous, hasty speech, is captured.

14.- From a new written form, we inevitably pass to a new form of orality, in which the videoconference is a perfect example. With this method, a hearing is held at a distance and is expressly authorised under the European Regulation of 28 May 2001. The resulting orality is, however, secondary. Firstly, it is nearer to the written document, as its content is "immobilised" in the recordings. It offers numerous advantages. It can be heard again during deliberation if there is any doubt as to what was said, or in the manner in which it was said. In addition, its use during an appeal can result in a considerable cost saving. The perennality and security of the written document is found, as we can see, in this secondary orality. The assimilation to writing is produced by the distance between the transmitter and receiver of the message. Of course, videoconferences take place at exactly the same time. However, there is a risk of breaking the direct, physical contact between the actors in the procedure, due to the distance. Distance and a fixation on what is being said are also attributes of the written word. Thus, orality reproduces particularities of what is written.

15.- Put another way, the new technologies blur the distinction between the oral and the written, constituting hybrid media. To tell the truth, the new technologies do not create new problems between the written and the oral, rather they exacerbate the recurrent difficulties of civil procedure. Behind the problem of how to manifest intention in civil procedure, we mainly find the demands of a procedural formalism.

### ***B) Formalism in civil procedure***

16.- There is no automatic link between formalism and writing. Formalism assumes respect for the formalities, which may be either written or spoken.

However, some writers consider that the procedures followed in exceptional jurisdictions are oral because they are not formalist. This assimilation of formalism in the written word can be understood to the extent that the only required formality is that of oral expression. Beyond this support of the intention, no other time-honoured form is demanded. Having said that, we cannot reduce formalism to its written expression. As proof, when the Code de procédure civile stipulates that the procedure is oral, the Cour de Cassation considers that orality becomes a formality. It imposes, therefore, respect for orality so that the case records can be considered valid.

17.- Most of the time, formalism in the procedure is clearly protective. Thus, in oral procedures the simplicity of the oral form protects the defendant, as it guarantees him or her proximity to justice. Likewise, the written form is a way of formalising the protection of the parties with the information it contains and provides. In this case, we speak about informative formalism.

On the other hand, formalism can be executive, as it is in the case of the requirement for the formal presentation of written conclusions. In this case, the link is made between the formalism and efficiency of the procedure. Rigour in its writing facilitates the work of the judges. Precision, rigour and structure could also be required in orality, although if there is no legal assistant involved, they would be very difficult to guarantee.

18.- How then can we adapt the new technologies to formalism? There are three possible and plausible ways as far as the relationship between formalism and the new technologies is concerned. In the first place, it could make no difference at all to the new technologies and we would copy a regime relative to the written or the oral, depending on their use.

The written and the oral are in effect still ways of manifesting intention in civil procedure. Among these means of expression, the choice made sometimes works to the benefit of a particular formalism. The medium, therefore, could make no difference whatsoever as far as formalism is concerned. If what is written on paper is assimilated into what is written electronically, the forms should therefore be scrupulously reproduced.

19.- Secondly, the new technologies could open the door to consensualism in civil procedure. What is important is that the intention is steered towards its intended recipient, the method of expression is of little importance. Thus, if the law of -jurisprudence sometimes requires a certain consistency in the recording of procedures, it is to guarantee judicial security. The question is, therefore, more a question of giving evidence of the content of the intention than of its form of expression. In this respect, the new technologies bring new methods of communication, whose merits lie in their simplicity and the fact that their use leaves a trail. In this way we could also simplify the exchanges, favouring the *negotium* over the *instrumentum*, through the decadence of formalism translated into indifference in the form of expression. This way would not necessarily lead to consensualism, but to a less onerous formalism or a directed consensualism.

Moreover, the new technologies reveal a flexible image of the exchange between the judge and the parties. Less marked by the managerial function of the judge, the space allowed for informal dialogue becomes more important. These acts are today increasingly visible, as the appearance of the new technologies has thrown doubt on the problem of the rule of a telephone conversation or the sending of an electronic message. Thus, the iCourtLab, set up in 2006 in Singapore, is experimenting with the new technologies in communications between lawyers and court officers via mobile phone.

The absence of form does not impede conferring some legal effects on said acts, as could be the possibility of interrupting the expiry period of an application by means of an e-mail, which would manifest a true procedural boost. It is only a short step from there to considering that consensualism wins the civil procedure.

20.- Thirdly, and paradoxically, there is a fear that the new technologies will lead to a resurgence of an archaic formalism. The Unified Internal Law Regulations immediately perceived the need to regulate the new technologies as far as professional secrets, confidentiality, and the obligations of the lawyer to indicate the Internet address, etc. are concerned.

Moreover, the practice comes up against new types of problem, and the tendency is to be even more demanding than with ordinary written documents. The concern for guaranteeing the security of the communications runs the risk of limiting the seduction of the new technologies, making them paradoxically more formalist. In this respect, the new technologies would lead to a step backward towards a Romano-Germanic procedure, a regression. Thus, the technology eases the work of the lawyer, who can easily obtain a date for an expedited proceeding, although it subsequently prevents modifications to the rigidity of the system.

The new technologies offer another possibility to show intention that leads us to once again bring up the question of formalism in civil procedure. Technically, the tool is not neutral, because it cannot be reduced to either the written or the oral. Categorised as secondary orality, however, it has no soul. It would be orality without a body, disincarnated, depersonalised.

## II. A DISINCARNATED ORALITY

21.- With the excuse that they offer simplicity, speed and efficiency, characteristic features of orality, these, however, deprive it of its soul: the contact with the protagonists of the procedure. This depersonalisation prevents a functional equivalent to the written and the oral being considered. This third mode of expression of intention in the procedure offers a seductive innovation for certain acts, for certain types of procedure, although it is doubtful whether it can incite the creation of an exclusively electronic procedure. An appreciation of his form of incorporeal orality should, therefore, be made (1) in order to judge its correct place in civil procedure (2).

### 1. An appreciation of secondary orality

22- Above all, the new technologies have to overcome the obstacle of breaking the direct contact between the protagonists in the procedure. However, that contact is essential for the orality to be effective, and even constitutes a principle of the procedure in the Iberian processes. The principle of immediation, direct contact with the sources of evidence, which can be translated as the principle of presence, is common to all procedures, even if its formulation is not clearly delimited (A). Moreover, the new technologies appreciably change the tasks of the actors in the procedure (B) in such a way that both the written and the oral contain the defect of their advantages.

#### A) *The principle of presence*

23.- The new technologies are a response to the concern to give proximity, simplicity and access to justice, features also attributed to oral procedures. That is why they are sometimes categorised as secondary orality. Nevertheless, the soul of orality appears to have disappeared. The cold screen of the computer is a barrier, which easily allows simulation. When we are dealing with a videoconference, physical contact is also absent. The geographical distance places an emotional space between the protagonists in the procedure. It is not even possible to remedy this with a wall-sized screen that allows the whole of the protagonists' bodies to be seen.

Iberian procedures establish the principle of immediation, which can be translated in France as the principle of presence, and is that for which there has to be a physical meeting between the judge and the parties. The rule is important, as, if proceeding otherwise, the procedure may be fully overturned, by the judge herself *ex officio*.

24.- Although such a principle does not exist in every country, we should at least point out what lies beneath it. Thus, in Common Law procedures, influenced by the work of J. BENTHAM, they regain substance. Human contact is even more important in Common Law systems, such as in the United States, that function with a jury. The strength of persuasion is greater with physical presence. The efficiency of the cross examination may depend on this physical presence of

the protagonists of the procedure. There is also the physical play of the lawyer that evolves on the stage of the courtroom.

25.- The principle of presence can be distinguished from orality and publicity, even when these are intimately intertwined. A procedure held by videoconference respects the orality and the publicity, but not the presence of the parties. The use of electronic documents, on the other hand, does not respect the publicity. There are mechanisms available and they are sometimes used to compensate.. We can consider the possibility of allowing Internet access to procedures in which a physical hearing is not held. However, this publicity is less intense. There, where the procedural gondolas could pass through the canals of the Palais to hear the justice, now, however, we would have to file a petition for accessing the report of a particular procedure. Thus, publicity is not directed *erga omnes*, but only to the parties.

Some countries, such as Brazil and Scotland, even allow the hearing to be transmitted on television channels. This kind of transmission is prohibited in France, except in exceptional cases. It is said that it would even improve the understanding of what is at stake and the challenges faced by the institutions. However, the judgement of the European Court of Human Rights concerning the radio and television transmission of a procedure states that “the live transmission of a procedure could lead to increased pressure on its participants, unduly influence their behaviour, and therefore hinder the correct administration of justice”.

26.- The new technologies reveal the risk of losing the physical link that is essential for efficiency in litigation. The barrier of the screen poses the problem of a reduction of solemnity in the declaration. Many procedures work exclusively in writing. However, in addition to being limited to technical disputes in which room for discussion is *a priori* considerably reduced, the move to the electronic document is a new alteration to the principle of presence that has such strength and that could even be used in procedures today considered as oral. This is the case, for example, of minor disputes, especially those relating to consumers and users, a kind of proximity dispute that could be more adaptable to physical distancing. However, the danger could be even greater, as, unlike paper documents, electronic documents are not read so conscientiously. Reading from a computer differs appreciably from reading from paper - “the comprehension and memorisation are proportional to the reading speed”. Although until now the electronic document can and should be copied and turned into a written document, no one doubts that the search for speed in the justice system will eventually lead to this being completely abolished one day, and that this step involves considerable time and costs that are sometimes intolerable and useless.

27.- When the new technologies resort to the videoconference, the alteration is minimal, although it still exists. One could ask whether the guarantees of a fair procedure are respected in the absence of human contact. In fact, article 6§1 of the European Convention on Human Rights, stipulates that “everyone is entitled to a fair and public hearing”. This brings up two questions. Should this hearing be oral, or can it be written? This means we have to ask ourselves about the meaning of the word “hearing”, and if it should be interpreted in its strict sense, or can it also be used to mean “able to express themselves”? If there is no legal requirement for the hearing to be oral, then it cannot be denied that this is opportune.



From here it passes obliviously from the legal to the sociological: the feeling of justice. Justice offers a dehumanised view of itself, a kind of Kafkaesque process in which justice no longer allows itself to be seen. Independently of the new technologies, in France the risk has already been shown, as with the written procedure, in which the parties have waived the right to make oral declarations, and in which the judgement is pronounced by depositing it with the court clerk. In the contact between the judge and the party there are speeches, customs, which are also judicial symbols.

Moreover, testimony given at a distance poses the problem of how to film it. No one doubts that to avoid setting scenes and any dramatic effect, any movement of the camera should be proscribed. A fixed shot, framing the witness, avoids gaining an overall impression. Did he or she show particular stress with untimely leg movements? Did the parties look insistently?

28. We cannot therefore admit the new technologies into civil procedures without asking ourselves “what type of presence should be required in a procedure in the future?” Is a physical or bodily presence really necessary, or should we be satisfied with written exchanges or videoconferences? On the answer to such an important question depends the place we have to give the new technologies in the procedure. This also depends on the way in which the new technologies will disrupt the role of the persons taking part in a case.

### ***B) The roles of the actors in civil litigation***

29.- The written or oral nature of a procedure is intimately linked to the functions relating to the roles of the protagonists in the procedure: the judge and the court officials. Neither the accusatory model, nor the inquisitive model exists in a pure state. In civil procedure it is more a cooperation between the parties and the judge, which is verified whatever the justice system. This balance of power between the protagonists in a procedure is found in the considered use of the written and the oral in civil procedure, although it could also be disrupted by the appearance of the new technologies. The idea would be for the new technologies to allow the judge greater control over how the application is heard, which would disturb the balance established by the principle of cooperation, and would once again give an inquisitive image of the office of judge in the civil law countries. Indeed, the new technologies are being absorbed into a resurgence of the written document, and of the instruction, a symbol of the direction of the application by the judge.

30.- On the other hand, the new technologies could reduce the role of the judge in the determination of the litigious object. In an oral procedure, the absence of obligatory legal representation involves the judge in the debate to an even greater extent. Proximity to the parties in the hearing allows the judge to establish an interactive dialogue between them. In this respect, he or she would have a reinforced role, supposedly to help the parties formulate their wishes. We need to know whether this scheme is affected by the intervention of the new technologies. However, the new technologies clearly favour the written, even when they are “oralised”. For this reason, they mean a distancing of the defendant from his judges. It seems, therefore, that his cooperation in determining the litigious material is diminished. The exchange, even the formal one, will not now take place in a unit of time and place.

31.- As far as the tasks of the other protagonists in the procedure are concerned, the evolution will be quite appreciable. The new technologies change the practice of lawyers. The written procedure should be less formalist with the simplification of communications, as is revealed by E-Barreau. The new technologies would allow improved handling of written procedures. Thus, this means the possibility of consulting the state of a case on the Internet, of receiving electronic notes, and of not having to travel anymore to formal hearings merely for the purpose of requesting an adjournment. This is a longstanding demand of law professionals – to preserve orality only where it serves a purpose.

32.- With respect to the oral procedures, the possibility of taking informal written documents could lead to the emergence of a need for new aids in the drawing up and transmission of said documents. The new technologies bring about the need for new court officials, such as Internet operators, who would be able to certify the receipt of an e-mail. The involvement of private companies poses the question of their status in the procedure. Fear has been expressed that IT companies could have an interest in lengthening a dispute. The iCourtLab in Singapore, which works on new technologies, also works in close cooperation with the cutting edge technology industry to create useful products.

This intervention of electronic actors could be lamentable in the sense that the communication is the technical translation of the contradiction. When this is carried out by court officials, independence and impartiality are guaranteed. In France, the *huissier de justice* in particular has an informative mission that makes him essential for electronic notifications. There is a true principle of presence referring to him. Historically, he had to touch the addressee with his copper or ivory rod, although today it is enough to do it orally and confirm in writing that this procedure has been carried out. It would be difficult to apply such professional ethics to Internet operators.

33.- New technologies and litigation policy. The new technologies are a new means of expression for the subjects of a procedure. Due to their seductive nature, they have raised questions that have yet to be resolved concerning the status of the oral and the written in civil procedure. And the lack of theorisation in this respect is making itself felt. This lack can be explained by the fact that multiple and varied activities are involved in a procedure. Final statements rub shoulders with simple letters and telephone calls.

The written, the oral, the new technologies are all tools of a litigation policy that, in the constant search for procedural efficiency, must be combined in the best possible way for each type of dispute. To admit the equivalence of the written document with the electronic document, or of the “direct” oral hearing with the videoconference, is to participate in this concern for the speed of justice. However, the quality of this could be affected and mean, judicially, a less efficient adversarial procedure, or sociologically to project a different image of justice. For this reason some countries, such as Japan, forbid the electronic transmission of the most important activities, including the pleading or the judgement. The use of the new technologies, therefore, appears to be limited as far as civil procedure is concerned, or they should be confined to certain modalities in the realisation of an application, or to certain types of case.

## **2. Delimitation of secondary orality**

34- If the new technologies are a new method of expression in a procedure, it remains for us to determine their place next to the written and the oral. There are numerous reasons for this complementarity of the new technologies. The first is, without a doubt, an eminently practical one. The use of the new technologies means having and using computer equipment. Whereas this starting point does not pose any difficulties to the court offices or the court officials, the question is more delicate as far as private citizens are concerned. The material equipment is a *sine qua non* condition. This is why the regulations often provide for the fact that the party must accept being contacted electronically. Simplified access to justice depends on access to a computer. For this reason, some countries have set up places at which defendants can receive assistance with computers. The equipment does not only concern private citizens, but also the courts. The ZPO limits the use of electronic documents to those courts that are equipped to handle them. Some initiatives have been taken to facilitate this access. In Morocco, for example, defendants can access computer terminals on the court premises. It is an absurd situation when the defendant has to travel to the court, not to explain his situation, but to find him or herself face to face with a computer screen!

Beyond the material aspect, the person also has to be qualified. The difficulty is so great that some have even spoken of a real “numeric fracture”.

35.- The complementarity of the new technologies arises from the fact that it is quite unusual to find examples of paperless justice. In fact, the usual thing is for documents sent electronically to then be sent on paper as well. This has the disadvantage of increasing the costs of the judiciary due to the transmission and conservation of the documents. However, it allows for a better reading of the document and also has the advantage of rapid transmission. The practical problems of printing documents and of approval of the media used will not go away.

36.- As far as videoconferences are concerned, these would be useful in cases where the distance was such that the cost of travel would be disproportionate. In other words, the judges should appreciate the specific opportunity of being able to have a direct, physical appearance of the party in question. The fear of seeing speed triumph is justified. However, no one is better placed than the judge to regulate this practice, as he or she is already at the heart of the system.

36.- However, although we can envision a fully computerised procedure, it would not be completely desirable. The trend is, for example, to allow this for procedures involving the requirement to pay amounts of money.

It is symptomatic that, with respect to this matter, the European Union allows procedures involving the requirement to pay amounts of money to be computerised and even automated, and the videoconference would only be an eventuality if the debtor contested the case. In Germany, the automated monitory procedure known as “machine processing” is already used.

It is generally considered that they are repeat procedures that prevent the justice system from focusing on more important cases. Thus it is symptomatic that the monitory procedure is at the centre of a reflection on the dejudicialisation of justice. However, the image of justice is being damaged and it is not clear whether the end justifies the means. It is true that the human aspect is less important than in other disputes, but from there to systemising that way of proceeding there is a

step that can be quickly cleared if what we want is for the economic to be unbreakably linked to the sociological.

38.- The “all electronic!” has also been invoked for the purpose of the group action. Connecting people, the new technologies could smooth the way for the group action and the conditions this requires. They ensure rapid, low cost communications between the members of the group and eliminate the distance between them. They have been used in a group action of small investors against a bank in Austria. It is conceivable that they can help in the case, providing there is access to computers. The whole procedure could therefore be useful and happily computerised, especially to avoid the courts being turned into football fields. That having been said, they should not obscure the paper document that may be drawn up by the lawyer, and even the oral allegations could be transmitted over the Internet. Therefore, making the new technologies something exclusive would not make any sense.

39.- Let's not be Manichaeic! There is no “all or nothing” policy in civil litigation. We should not enclose the electronic procedure in a relationship of exclusivity to the other procedures. It has been necessary to accept the new technologies as new procedural methods. They are sometimes put forward as the functional equivalent of the written, and of the oral, which is not quite correct; others fail to regulate themselves at all and lose the flexibility required by legal practice. Electronic expression may be hybrid, but it does not create a hybrid procedure.