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# Remote hearings and judicial symbolism. A draft<sup>2</sup>

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## Abstract

The purpose of this text is to answer the question of whether and to what extent traditional court symbols and rituals remain (and should remain) present at remote hearings. Some legal symbols have archetypal meaning. Others are born with their era, judged in a particular context. There are many of them in traditional courtrooms. Which remain on computer screen? The author investigates whether and to what extent visual symbols (e.g. elements of architecture, furnishings) are present at remote hearings. Considering courts and online courts (or ‘e-courts’) as heterotopias (in Michel Foucault’s sense), she looks deeper into and explores their properties.

**Keywords:** legal symbols, remote hearing, “augmented space of the judiciary”, e-hearings.

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# Zdalne rozprawy a symbolika sądowa. Szkie<sup>3</sup>

## Streszczenie

Celem tego tekstu jest uzyskanie odpowiedzi na pytanie, czy i w jakim zakresie tradycyjne symbole i rytuały sądowe pozostają (i czy powinny pozostać) obecne na zdalnych rozprawach. Niektóre symbole prawne mają znaczenie archetypowe. Inne rodzą się wraz ze swoją epoką, ocenia się jej w konkretnym kontekście. W tradycyjnych salach rozpraw jest ich wiele. Które z nich pozostały na ekranach komputerów? Autorka analizuje, czy i w jakim zakresie symbole wizualne (np. elementy architektury, wyposażenia) są obecne na zdalnych rozprawach. Uznając, sądy i e-sądy za heterotopie (w rozumieniu Michela Foucaulta) przygląda się ich właściwościom.

**Słowa kluczowe:** symbole prawne, rozprawa zdalna, „rozszerzona przestrzeń wymiaru sprawiedliwości”, e-rozprawy.

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<sup>3</sup> Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

The purpose of this text is to answer the question of whether and to what extent traditional court symbols and rituals remain – and should remain – present at remote hearings. And in what form if so.<sup>4</sup> Is it necessary or inevitable for them to continue to support the authority of courts, to strengthen the legitimacy of judicial power by appealing to the collective imagination and collective emotions, and to reinforce the values inherent to the law in the 21<sup>st</sup> century in much the same way as they have for centuries? Or maybe all – or some – of them are already ‘dead’ (i.e. they do not evoke any emotions, impressions, and associations) or should be considered anachronistic and redundant in the times of fashion for egalitarianism, accessibility, simplification, ‘de-anchoring’ of cultural experiences, e-democracy, inclusive institutions?<sup>5</sup>

The virtual court space has become especially important because of the pandemic. COVID has resulted in a worldwide proliferation of remote court sessions, held with the use of technical devices that make it possible for them to be conducted remotely with simultaneous direct transmission of video and audio.<sup>6</sup> After the pandemic, they will remain a tool used in courts around the world, though probably to varying degrees.

Does the arrival of e-hearing, or ‘court on the computer’ or ‘court by phone’, mean the end of theatricality and decorativeness of hearings? Or perhaps the scope of the changes that will take place will be limited? Perhaps a new or formally transformed symbolism will replace the traditional one? After all, symbols are

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<sup>4</sup> In the text, the term ‘remote hearing’ is used in the meaning of Article 15zszs<sup>1</sup> of the Polish Code of Civil Procedure:1. “During the state of epidemic emergency or state of epidemic declared due to COVID-19 and within one year from the lift of the last of them, in cases heard according to the provisions of the Act of 17 November 1964 – Code of Civil Procedure, hereinafter referred to as the “Code of Civil Procedure”:1) a hearing or an open hearing shall be conducted using technical devices that allow it to be conducted remotely with simultaneous direct transmission of image and sound (remote hearing), provided that the persons participating in it, including members of the adjudicating panel, do not have to be in the court building” (Polish Journal of Laws 2022, item 2095).

Between 3 July 2020 and 27 July 2021 alone, approximately 146,000 cases were conducted remotely (online) in common courts in Poland. Data: Clifford Chance, HFHR, Report. *New Technologies. New Justice. New Questions. Implementation of New Technologies in Justice*, Warsaw 2021.

<sup>5</sup> The overview of the problems is only an outline of the field of the empirical research into the symbolism at e-hearings to be carried out.

<sup>6</sup> Cf. in more detail: [https://e-justice.europa.eu/37147/PL/impact\\_of\\_covid19\\_on\\_the\\_justice\\_field?clang=pl](https://e-justice.europa.eu/37147/PL/impact_of_covid19_on_the_justice_field?clang=pl). A report on remote hearings in Poland: FCWP\_raport\_sady\_dostepne\_przez\_internet\_szanse\_i\_zagrozenia.pdf-Foxit Reader; it addresses the matter of the extent of digitisation of the judiciary of many countries around the world.

a universal language, and it is quite common in social sciences to consider image in social communication not just a ‘supporting actor’, but a factor that strongly influences reasoning, stimulates emotions, and influences the perception of reality – also in the digital age.<sup>7</sup>

In this paper, the notion of ‘augmented space of the judiciary’ refers to the traditional court space (including especially the courtroom) augmented by the web, which enables the participants of a hearing to be *online* in different (various) locations.<sup>8</sup>

The physical space of the court and the virtual accessible spaces where other e-hearing participants are located create a single common space (structure) of the judiciary at a given moment and in a given place. The interactions of professional (e.g. judge, advocate, counsel) and non-professional (e.g. parties, witnesses) participants of a hearing in such a ‘patchwork’ space of adjudication take place within a complex architectural, social, and digital setting. They call for a question of which court symbols and rituals are still there and how they are used in it.<sup>9</sup>

A symbol is an object or a sign representing (denoting), bringing to mind (based on tradition, convention, agreement, mental association, emotional connection, binding norms) a particular concept, activity, phenomenon.<sup>10</sup> Symbols co-create and open certain dimensions of reality by appealing to the collective imagination and collective emotions. They create planes of cultural identification with values. They consolidate the imagination of collectives and individuals. They are capable of evoking collective suggestions. The consistency of symbols makes it possible for an individual to function and feel comfortable, familiar in a particular culture – such as a legal culture. Symbols make values – both those that have been reviving for centuries and carried over from old to new orders and systems as well as new ones, those that communicate messages of change – present. Centres of political power aim to perpetuate the symbolic order. They expand and try to monopolise it because

<sup>7</sup> This is known as the *visual turn* in the social sciences. Cf. e.g. R. Howells, *Visual Culture*, Polity Press, Cambridge 2008. The comments in this text are made from the perspective of the theory and philosophy of law and legal rhetoric, which means I do not refer to any specific solutions in the Polish legal system.

<sup>8</sup> On the concept of justice – see e.g. J. Rawls, *Teoria sprawiedliwości*, Warszawa 1994; K. Ajdukiewicz, *O sprawiedliwości*, [in:] *Język i poznanie*, vol. 1, Warsaw 1985; W. Dziedzic, *Rozważania dotyczące pojmowania sprawiedliwości*, “Studia Iuridica Lublinensia” 2021, issue 2.

<sup>9</sup> The description is a model. It contains many simplifications and refers to remote hearings in the courts of democratic states with a statutory law system. It is formed of many hypotheses due to the fact that the solutions adopted for the time being in light of the pandemic are makeshift, temporary, and many countries – including Poland – are still working to develop appropriate target solutions. Empirical research is also necessary.

<sup>10</sup> Cf. J. Jabłońska-Bonca, *Prawo w kręgu*, Gdańsk 1995, p. 146. On symbols – cf. e.g. P. Bourdieu, *Language and Symbolic Power*, Cambridge 1991; E. Hałas, *Symbol w interakcji*, Warsaw 2001; on the aesthetics of law, symbols, trial as a performance – cf. K. Zeidler, *Estetyka prawa*, Gdańsk–Warszawa 2018; J. Prieur, *Symbol światła*, Gdańsk 1982.

symbols help to mythologise power so that its authority goes beyond the rational framework and appeals to emotions. Some symbols have archetypal meaning, shaping the foundations of the imagination (e.g. Themis, scales, left and right sides). Others are born with their era, judged in a particular context (e.g. the hand symbol in the JITSI Meet, signalling a raise of the hand). Symbols are also ubiquitous in the modern world. “Symbolism is spiritual Esperanto”, as Jean Prieur writes in his “Les symboles universels”.<sup>11</sup>

A ritual is a set of traditional behavioural practices (acts and statements) performed to achieve conventional effects that consolidate some *status quo*, supporting myths, ideologies, and values. Conventions also help mythologise authority (and law) so that its authority and influence transcend rationality and speak to emotions of individuals and collectivities. ‘Repetition’ is the essence of rituals. It promotes the stability of power, it involves containing change and spontaneity, it enables control, it triggers a sense of inevitability and constancy in citizens.<sup>12</sup>

We will look at symbols in courts, features of heterotopia in courts, elements of rituals, and what matters although it creates an environment (‘non-place’) and remains outside the courtroom, one by one.<sup>13</sup> In particular, we will examine which symbols have made it to computer screens.

The architecture of courthouses has been part of what is known as ‘talking architecture’, or ‘speaking architecture’, for centuries.<sup>14</sup> It sends messages – it symbolically expresses the authority, power, and solemnity of the court.<sup>15</sup> The architectural form of courts is primarily meant to be associated by those who come to witness it with a monumental vision of justice, power, and the need to conform to procedures.<sup>16</sup> But there is a different trend now: fashionable ideas of accessibility, inclusion, democratisation, understanding, dialogue, and a culture of egalitarianism, which have reached the courts already and are making modest attempts to offer competitive architectural symbolic expression. For example, some new court buildings around the world are extending the inner spaces shared by judges and

<sup>11</sup> J. Prieur, *Symbole...*, p. 8.

<sup>12</sup> For simplicity, I refer to civil cases and district courts operating in the Polish legal system.

<sup>13</sup> Cf. extensively on the matter: W. Świerczyńska-Głownia, *Komunikowanie z perspektywy sali sądowej*, Kraków 2019, which is about court corridors in the literal or metaphorical sense, which can be called, following Z. Bauman’s nomenclature, ‘quasi-places’ or, following M. Augé’s nomenclature, ‘non-places’. These places are not conducive to identification, establishing relationships, and creating stories. They are ‘corridor-like’, but even though they are ‘behind’ the stage, the rules of behaviour set by authorities still do apply there.

<sup>14</sup> D. Sudjic, *Kompleks gmachu. Architektura władzy*, Warszawa 2015.

<sup>15</sup> On the subject of court architecture – cf. e.g. K. Zeidler, *Estetyka...*, pp. 207–2017; M. Stępień, *Symbolika architektury sądu. Przypadek Costitution Hill w Johannesburgu*, [in:] *Samorząd terytorialny, architektura, dzieła sztuki, prawo*, eds. P. Dobosz et al., Kraków 2018, pp. 67–78.

<sup>16</sup> “Sometimes the architect succeeded, sometimes not at all” – as K. Zeidler points out, *Estetyka*, p. 207

participants of hearings. There are shared hallways, entrances, elevators, and car parks.<sup>17</sup> And since have ‘moved’ the court to the Internet, understood as a tool of inclusion and equality, it is during remote hearings, as advocates of greater egalitarianism and enhanced dialogue argue, that these values are achieved and materialised. The distance between the government and the citizen is radically shortened. There is more space for dialogue and partner communication.<sup>18</sup>

However, the vast majority of courthouses in the 21<sup>st</sup> century are still monumental structures, ornamented with columns, pediments, caryatids, staircases, statues, and glass. They are called ‘palaces of justice’ or ‘temples of justice’.<sup>19</sup>

“According to many, justice is the most important value associated with law. Let us remember that Domitius Ulpianus (Ulpian) derived the concept of law from justice. (*Ius – Iustitia* – author’s note). Gustav Radbruch claimed that: “The idea of law can be none other than justice”. John Rawls wrote: “[...] justice is the first virtue of social institutions”.<sup>20</sup> Some symbols fuse with the myths from which they originate. Such is the case with the symbol of justice – Themis (in Rome, it is Iustitia), which tends to be a frequent element of the aesthetics of court architecture and remains a contemporary symbol of law and justice, although her attributes (scales, sword, blindfold) give room to a range of different meticulous interpretations.<sup>21</sup> Paintings, frescoes, and statues of Themis have been regular ornaments of court buildings for centuries.

Courts often resemble palaces or ‘secular cathedrals’ – not only on the outside, but also on the inside, in the courtrooms. The judges’ bench is similar to an altar, the jury – to a choir, there is a pulpit for witnesses – like that in a church, and there are benches for the faithful – or the public. Usually there is also a special entrance from the side of the ‘altar’ of justice to a separate meeting room (like a sacristy). It seems to be legitimate to argue that courthouse architecture has long featured ‘subliminal religious symbolism’ as well as theatrical symbolism.<sup>22</sup>

<sup>17</sup> In Germany, there are common areas; in Australia, judges are separated from other groups in court buildings.

<sup>18</sup> On the power distance in the courtroom, see: M. Dudek, M. Stepień, *Courtroom Power Distance Dynamics*, Springer Cham 2021

<sup>19</sup> The halls in courts are often small. The place for the audience is one bench placed against the wall or two or three. The halls are also damaged and neglected. This is a topic beyond the scope of this work.

<sup>20</sup> W. Dziedziak, *Rozważania...*, p. 70

<sup>21</sup> Scales: justice, power or: “a kilogram of gold and a kilogram of scrap weigh the same”; blindfold: impartiality or blindness, analogy to Fortune, who is also blindfolded and acts without principle; sword: division between good and evil, or ruthlessness.

<sup>22</sup> C. Camion, K. Bates, S. Anstis, C. Piché, M. Khan, E. Grant, *Judicial Architecture and Rituals*, [https://lawexplores.com.translate.google/judicial-architecture-and-rituals/?\\_x\\_tr\\_sl=en&\\_x\\_tr\\_tl=pl&\\_x\\_tr\\_hl=pl&\\_x\\_tr\\_pto=op,sc](https://lawexplores.com.translate.google/judicial-architecture-and-rituals/?_x_tr_sl=en&_x_tr_tl=pl&_x_tr_hl=pl&_x_tr_pto=op,sc) (accessed: 20.05.2022); L. Mulcahy, E. Rowden, *The democratic courthouse: A modern history of design, due process and dignity*, London 2019.

Are there (will there be?) also strong symbols-value carriers on computer screens in e-courts? Symbols similar in their function to those embedded in traditional court architecture? Pictograms of scales? Themis' silhouette? Other symbols of (law and) order? The participant of e-proceedings does not see the court building, they connects with it through a link – just like with a friend or family. What does it mean then for the authority and solemnity of courts? How does the recent silence of the symbolic language of court architecture – so important to and in human communication since ancient times – affect the traditional image of courts?

Can a participant of an *online* hearing have a similar experience and similar impressions of the institution of the court (its power, its authority) at home as in an actual court?<sup>23</sup> Or perhaps they do not need this experience and these impressions in the 21<sup>st</sup> century? The emotions that would generally accompany them upon entering a monumental courthouse and a courtroom are 'pared down'. Have these emotions been replaced with others? And if so – what other emotions have actually replaced them? What is certainly new is the anxiety, common to our times, about the stability of the Internet connection.

In general, e-hearings are considered in positive terms by lawyers and citizens because they democratise the justice system and bring the court virtually 'closer' to people used to *online* communication. The 'mystery' of adjudication is unintelligible, unappealing to young people. It seems that they do not feel the need to give in to 'social magic' – they simply want to get their business done just as they would do it at a post office or in a shop.<sup>24</sup>

The act of 'entering' a virtual court through a shared link gives rise to at least some anxiety (and can be very difficult for the digitally excluded). But it is pretty simple for the younger digital generation, though. 'Court in a smartphone' or on a computer or phone screen is consistent with the lifestyle of the digital generations of today.

How should one view these organisational changes from the perspective of the universal need of every political system and society to strengthen the authority of courts, to consolidate the legitimacy of the judiciary? The participant of a hearing sees the 'augmented space' of a courtroom, which now includes private home interiors, sometimes the interior of a car, or even artificial backgrounds – such as a seashore. Is there (or should there be) a place for symbols there?

Centuries ago, even though courts were held, for example, in the open (a symbol of transparency), they were also held in special places of symbolic significance,

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<sup>23</sup> These are problems that have yet to be investigated empirically. In this text, I am only making provisional hypotheses.

<sup>24</sup> It is something worth exploring.

such as under a majestic tree, the ‘tree of the knowledge of good and evil’, the ‘tree of justice’. Rooted in the ground but reaching with its branches ‘to heaven’ and eternity at the same time, it is considered a symbol of the world axis.<sup>25</sup> Tree is one of the oldest symbols known to man – also in courthouse architecture.<sup>26</sup>

Can archetypal symbolic impulses be considered irrelevant and thus marginalised in the 21<sup>st</sup> century? Of course not – despite all of the said changes taking place. Symbolic communication is a universal, real element of social and community life. Ernst Cassirer makes an observation that “while modern man no longer believes in natural magic, he has by no means given up the belief in a sort of ‘social magic’.”<sup>27</sup> Often without even knowing it.

In courtrooms, the significance and impact of judicial authority is expressed through many symbols and rituals. Which of them remain on computer screen? Maybe there are some new signs that communicate traditional or new values? Let us take a look at the screen during a hearing.

First, the computer screen behind the judge shows the emblem (all or part of it) on the courtroom wall.<sup>28</sup> The emblem of the Republic of Poland is a right-facing white eagle wearing a golden crown, with golden talons and beak. The symbol has its roots in the dynastic coat of arms of the Piasts. The judge has a chain with the image of a white eagle. In Greek mythology, the eagle was an attribute of Zeus.

Second, all professional participants of hearings are usually appear in traditional, regulation black gowns with distinctive collars, cuffs, and jabots in symbolic colours.<sup>29</sup>

The symbolism of the court gown is in its colours: – black – the colour of solemnity, dignity, the absolute, and the purple of the collar – a colour between red and blue – a symbol of mediation, balance, composure, and its form: the gown covers private attire and lets the judge be perceived as a person serving the law, neutral, bestowed with special competencies (similarly, other professional participants of hearings wear traditional gowns, which differ in the colours of their jabots (red – prosecutor, green – advocate, blue – legal counsel).“As a result, the words and

<sup>25</sup> M. Bruce-Mitford, *Ilustrowana księga znaków i symboli*, Warszawa 1997, pp. 45–46.

<sup>26</sup> On the symbolism of trees: J. Prieur, *Symbole...*, pp. 81–100.

<sup>27</sup> E. Cassirer, *Esej o człowieku. Wstęp do filozofii kultury*, Warszawa 1971, p. 19. Cf. in more detail: J. Jabłońska-Bonca, *Prawo...*

<sup>28</sup> Author’s participant observation (member of the public) – Polish online hearings (January – February 2022), district courts, civil divisions. In the current state of the law in Poland, a judge may conduct a hearing remotely from home – but should have an emblem ‘on display’ in such situations. However, I have not come across of any such cases. In Great Britain, Canada and Australia there are national emblems in the background; Italian and Argentine courts show the cross; in France and Germany, engravings on law and justice are sometimes visible.

<sup>29</sup> In Polish common courts.

actions of a judge, prosecutor, or advocate are not their words as a private individual, but those of a person who plays their important procedural role as a judge, prosecutor, or advocate, respectively.”<sup>30</sup>

There is some debate in the legal literature and on social media as to whether upholding the court dress symbolism during remote hearings for the parties’ attorneys makes sense when those individuals are in various locations outside the courthouse (offices, apartments, cars, and even garages).<sup>31</sup> The practice followed in Poland during the pandemic has varied from case to case. Advocates and counsels usually appear in gowns – but not all and not always. The matter needs to be regulated in order to dispel any doubts.

If we acknowledge that the physical space of the court and other venues, i.e. a virtual e-hearing, forms a single shared environment – an augmented space of the judiciary with the characteristics of heterotopia (in Michel Foucault’s sense – more on this to follow below), then gowns should remain a standard. If e-courts are to maintain a certain social magic, to remain ‘special’ places, juxtaposing different spaces and symbols that are seemingly incompatible, functioning in the realm of special rituals, having their own systems of opening and closing, then the said tradition should not be done with. If the democratisation of the Internet and the new legal procedures move towards attempts to remove this ‘magic’ of the ‘temples of justice’ as a permanent fixture of 21<sup>st</sup>-century mores, with the aim e.g. to turn the court into a kind of ASAP business or office providing consumers with ‘portions’ of justice, court dresses will become a bizarre, silly feature indeed.

Court benches have a symbolic meaning too (i.e. sacrificial table, Last Supper, round table, etc.). A judges’ bench is a massive raised desk with a wide top. “This long table is something like the top of an altar” – Stanisław Waltoś points out.<sup>32</sup>

It is no longer visible on the computer screen, so it has no effect. It does not impose a clear spatial distance between the independent court and the participants of a hearing. It does not emphasize the power and authority of the court or the conventional, age-old hierarchy. The screen shows only a fragment of the top of a judge’s desk. A similarly symbolic prop in the traditional courtroom is the mas-

<sup>30</sup> K. Zeidler, *Estetyka...*, p. 148.

<sup>31</sup> A. Patryk, *Na zdalną z togą, bez papierosa i kawy – savoir vivre w dobie nowoczesnych rozpraw*, <https://www.prawo.pl/prawnicy-sady/savoir-vivre-na-e-rozprawie,512372.html> (accessed: 20.06.2022).

“It’s always a good idea to have your gown ready. But there’s no unanimity here. As Wojciech Wróbel, attorney at law, points out, different judges take different approaches to the issue of attorneys wearing official attire at remote hearings. – Some disapprove of the lack of official attire, while others even recommend taking off the gown because, in their opinion, official attire is only obligatory in the court building” – he points out.”

<sup>32</sup> S. Waltoś, *“Teatr” w sądzie*, [in]: K. Grodziska, G. Nieć (eds.), *“Studia Lodomeriana. Historia-Kultura-Prawo”* 2007, p. 198.

sive, high chair of the judge – of the presiding judge of the panel. It can hardly be seen on a computer or phone screen because its size only matters from the perspective of a traditional courtroom. An online spectator can sit at home in a stately chair whose ornate, carved high backrest will overshadow the judge's chair on screen in both size and style. The matter of where the boundaries for the content and for of the background used in hearing participants' 'windows' – i.e. the aesthetic boundaries – is also up for discussion.

The traditional structure of the courtroom – including the division into a part where the proceedings take place and a part for the public, separated for the sake of order – is also absent from the computer or phone screen.<sup>33</sup>

There are no benches for spectators, obviously. The public in a traditional courtroom is required not to disrupt the proceedings or leave without the court's permission. And what about remote hearings? This standard is expressed, for example, in the JITSY videoconference participation manual: "Under the 'Meeting password' button, you will see two buttons labelled with microphone and camera symbols. When connecting to the court, you must have both the microphone and camera running (this option is enabled when the microphone and camera icons are not crossed).(…) At the bottom of the screen there are buttons labelled with microphone and camera symbols. Do not turn off the camera or microphone during the hearing except with the permission or at the request of the court or court staff. The middle button marked red is used to leave the videoconference. Do not click it until the hearing is over, except with the permission or at the request of the court or court staff."<sup>34</sup>

Members of the public appear at a random location on the screen. Taking part in remote hearings as a member of the public, I appeared in a window the same size as the judge, parties, and attorneys. This disrupts the traditional sense of judicial order – and even a sense of security in those taking active part in the proceedings.<sup>35</sup> The 'territorial' boundaries in the virtual courtroom have been blurred. Such deterritorialisation of the e-courtroom is a completely new factor.

<sup>33</sup> M. Rossner, D. Tait and M. McCurdy, *Justice reimagined: challenges and opportunities with implementing virtual courts*, „Current Issues in Criminal Justice” 2021, Vol. 33, s. 94–110, <https://www.tandfonline.com/action/showCitFormats?doi=10.1080%2F10345329.2020.1859968> (accessed: 20.06.2022); R. Susskind, *Online Courts and Future of Justice*, Oxford 2019;

Allen, C., *Open justice and remote court hearings under the UK's Coronavirus Act*, London 2020; H. Genn, *Online Courts and the future of justice*, London 2018, [https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead\\_lecture\\_2017\\_professor\\_dame\\_hazel\\_genn\\_final\\_version.pdf](https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf) (accessed: 20.06.2022).

<sup>34</sup> <https://krakow-podgorze.sr.gov.pl/container/Regulamin%20Systemu%20Wideokonferencji.pdf> (accessed: 20.05.2022).

<sup>35</sup> A clearly upset young advocate asked the judge what I was doing there (I was watching a remote hearing as member of the public), and when my webcam unexpectedly went off for a moment, he

Other culturally important traditional symbols used in courts are vertical and horizontal symbols.

The vertical symbolism present in courts is expressed in the fixed elements of the architecture and the furnishings. Since 'up' symbolises power, heaven, peak, and 'down' means subjects, hell, the earth, the panel sits behind a raised bench, the presiding judge has a chair larger than the others, and the participants in the proceedings and the public are positioned physically lower.<sup>36</sup>

Is this clearly archetypal symbolism preserved on screen? Could it be? Should it be? Right now, it surely is not because courts are using many different platforms that do not have special software to ensure that the judge always shows up 'in the window' at the top and in the middle of the screen.<sup>37</sup> This is feasible and doable, and I believe it is a very necessary thing to do. The power of this symbol of authority is an important figure of the collective psyche. It is one of the fundamental ideas, a highly significant landmark in the subconscious.

The judge thus appears on the screen in a window of identical size to the window of any other person in this virtual courtroom – such as someone who is a member of the public.<sup>38</sup> On the phone, the dimensions of the 'window' with the judge's face are, for example, 0.5 x 0.5 cm.

Courts feature also elements of horizontal symbolism. The symbolic meaning of the right and left sides corresponds to the principle of adversarialism, which has also been consolidated for centuries in judicial architecture, furnishings, and rituals.<sup>39</sup> The right side in the courtroom is the 'better' side, a symbol of legality (righteousness) of the law, authority, legitimacy, law-governance. This is the side where the prosecutor and the plaintiff stand in court. The right arm carries the weapon, 'being somebody's right hand', etc. The left side is the 'inferior' side. This side is often considered the 'wrong' side. In the Polish language, 'left' is synonymous with 'false' or 'shady' in particular context. This is the side where the accused and the defendant sit in the courtroom, just like 'the condemned' stand on the left during the Last Judgement. "The common floor and the positioning of parties opposite each other have become symbols of equal actors in the proceedings."<sup>40</sup>

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immediately turned to the court to reprimand me by telling me that the webcam must be on. (event: February 2022, district court, civil case).

<sup>36</sup> J.F. Jacko, *Struktura symboli wertykalnych a ich rola w komunikacji międzykulturowej i w zarządzaniu*, [in]: *Religion in the Time of Changes*, ed. E. Klima, Łódź, 2005, p. 176.

<sup>37</sup> At the remote hearings (civil district courts) I attended online in January and February 2022, the judge sometimes appeared off to the side or even in a window at the bottom of the screen.

<sup>38</sup> I watched the proceedings taking place on the JITSY Meet platform. Courts use other platforms too (such as MS Teams).

<sup>39</sup> The tree axis divides the court in a similar way.

<sup>40</sup> S. Waltoś, *Teatr*, p. 198.

This symbolism is not preserved on the computer screen these days either. The graphic equalisation ('windows' of the same size) of the status of all participants and the judge at e-hearings and bringing everyone in random order to one agora (forum) of the computer or phone (which is the case now) does not make it easier for non-professional participants of court proceedings to communicate in a transparent manner and get a clear picture of the situation.

I think it is essential to divide the augmented space of e-courts on the computer screen in a permanent way as it will give the participants of remote hearings a sense of security and order. Setting symbolic boundaries, adopting a symbolic distance improves the comfort of the parties, the court, and the public. An orderly, organised structure does not compromise democratic values.

Nowadays, during remote hearings, the traditional court architecture does not 'speak' anymore because architectural objects have 'disappeared' as channels of sociocultural and socio-political communication (although many courts still offer the opportunity to take a 'virtual tour' inside their premises), which calls for consideration of whether and what kind of changes to the aesthetic code, the 'historical costume' are necessary to preserve the values hitherto conveyed by architecture. The idea of hierarchy and the idea of division into right and left, into 'good' and 'evil', are elementary ideas of culture. Removing them will be counterproductive. These are forms of extradiscursive cultural understanding. They are manifestations of the 'inheritance' of cultural values, and, as C.G. Jung sees it, landmarks in the subconscious, recipients of instinctive, mentally necessary responses to certain situations. It appears reasonable to think about a new artificial language of judicial symbols, to gradually produce a new communication culture, which should encompass – among other things – the architecture of the computer screen <sup>41</sup>

The traditional courtroom where public proceedings are held has belonged for centuries – and continues to belong – to the public sphere.<sup>42</sup> Now, during an e-hearing, the 'augmented space' consists, by default, of: a) the courtroom where a judge and a court reporter are located; b) the places where the parties and the parties' attorneys are present, and they can either be present in one room or in different locations; attorneys are often in their offices and participants are usually at home; c) the place where the public is located. Thus, the flat screen of a computer

<sup>41</sup> Perhaps there will be much more use of pictograms or ideograms as a means of non-verbal communication.

<sup>42</sup> The separation of public and private spheres is still the subject of a doctrinal debate. Hannah Arendt related the distinction between spheres to ancient Greece and the opposition of the household (oikos) and the political community of free and equal citizens (polis). What was related to a free individual's participation in the decision-making process concerning the affairs of a polis belonged to the public sphere.

J. Kaczor, *Sfera publiczna i sfera prywatna w społeczeństwie konsumpcyjnym*, <https://www.repozytorium.uni.wroc.pl/dlibra/publication/95365/edition/89597/content> (accessed: 20.05.2022).

or phone can become a space that features several places at once. The court reality has been 'stretched' to include private places, 'incorporated' into the public sphere. This phenomenon of 'extension' of an individual's perceptual apparatus to virtual reality makes it "necessary today to create a new spatial sensibility", remarks Derrick de Kerckhove in "Powłoka kultury".<sup>43</sup>

The places where real people are present during remote hearings are also part of the 'augmented space' of the court setting. They can have real backgrounds (e.g. an apartment, a law office, a car) or conventional, computer backgrounds (e.g. a wall-paper with a motif of the sea, a photo of a study, or Matejko's Battle of Grunwald). These backgrounds can include private symbolic signs – can a court judge them?

At the time of a hearing, what is the nature of these 'extra' spaces? Are they public or private? Can e-hearings be considered further and clear evidence of the disintegration of the usefulness of the division between public and private spheres in the age of mass online society?<sup>44</sup> Participants of e-hearings interpret their own and others' behaviour in this hybrid space. The consistency of the frame (courtroom) does not exist physically. It is necessary to recognise the screen as such a frame and anchorage, bearing in mind that said participants can be affected by various factors (such as other people in the room) which may not be seen on the screen.

A traditional courtroom is an isolated place, and everyone (including the public) is bound by precise and strict legal norms of behaviour.<sup>45</sup>

During an e-hearing, participants who are outside the court building – although still subject to the court procedure – can experience a wide variety of visual and acoustic sensations that would not happen in a courtroom and that cause a range of responses that are difficult to predict in advance (e.g. a courier with a package rings the doorbell, a child starts to cry, etc.).<sup>46</sup> In court, there are no such interferences. Also, there are other new stimuli on the screen itself: you can see faces up close, you can take a look at the interiors of other people's homes, etc. This, too, can cause distraction. And, quite paradoxically, the opposite may be true: on a tiny smartphone screen you can see very little.

A traditional courtroom offers silence (silence – a symbol of balance and composure) and limits stimuli. An e-hearing can involve an excess of visual stimuli off-screen – and often acoustic noise.

<sup>43</sup> D. de Kerckhove, *Powłoka kultury: odkrywanie nowej elektronicznej rzeczywistości*, Warsaw 2001.

<sup>44</sup> J. Kaczor, *Sfera publiczna...*

<sup>45</sup> W. Świerczyńska-Głownia, *Komunikowanie z perspektywy sali sądowej*, Kraków 2019, especially Chapter IV. It addresses the issues of court symbolism and proxemics extensively.

<sup>46</sup> They may be distracted by street noise, crying children, dogs, telephones, doorbells, other household occupants.

In view of the specifics, can both traditional courtrooms (courts) and 'augmented court spaces' be called heterotopias in Michel Foucault's sense?<sup>47</sup> M. Foucault, in his lecture *Of Other Space*, delivered in 1967, pointed out that there are 'other spaces' that are different from all other places due to their saturation with values, symbols, and rituals. These privileged 'other places' are heterotopias. The Greek *topos* is 'place'; *heteros* is 'other', 'different'. Heterotopia is therefore a different, unique, special place. It has its entrance and exit systems. It is governed by special rituals. Courts have a special ceremony for conventional activities. Despite the principle of openness, transparency, courtrooms are still not accessible to everyone.<sup>48</sup> They have special opening and closing systems. E- courts are places that juxtapose different spaces and places that appear to be incompatible. Moreover, in the law and in courtrooms, time acts in many unusual ways (for example, the court 'stops' time by 'suspending' proceedings). The traditional (courthouse) and 'virtual' courtrooms thus meet the conditions of Foucault's model. E-courts can therefore be called heterotopias. "Heterotopia is able to juxtapose in a single real place several spaces, several sites that are in themselves incompatible."<sup>49</sup> This claim by M. Foucault is an apt description of the multi-element, multi-feature imagined, unreal 'place' in which remote hearings take place.

The value of openness of a court hearing is one of the cornerstones of a fair court.<sup>50</sup> In Solon's time, the court met outdoors, in an open-air square in full sun. Similarly, in the Middle Ages, openness meant being tried in the open – in Poland, it was often under a linden tree. Later on, first court buildings appeared, but they had benches for the public. Today, we have glass as a new symbolic element in these buildings. Architects designing modern court buildings choose them as a symbol of transparency and openness of the judiciary. For example, the façade of the Supreme Court building in Poland is covered with reflective glass, and inside the building there is a staircase made of glass and a transparent lift shaft.<sup>51</sup>

A remote hearing is not only about symbols in space. It is also about time, its symbolism, and the rituals associated with it. In general, the nature of time is that of an internalised value. Time affects the attitude of exponents of a given culture to reality at the pre-reflective level, Time means passing. The rules governing time

<sup>47</sup> M. Foucault, *O innych przestrzeniach. Heterotopie*, „Kultura Popularna” 2006, issue 2, p. 11.

<sup>48</sup> E.g. for adults only, no weapons; in the room, each individual has their own seat, the public may not occupy the seats of the parties to the proceedings, etc.

<sup>49</sup> *Ibidem*, p. 11

<sup>50</sup> The pandemic has led to some restrictions in this regard as well as to a transformation of the way in which the principle of openness is implemented.

<sup>51</sup> A. Cizyńska, *Wymiar sprawiedliwości a architektura – ze szczególnym uwzględnieniem gmachu Sądu Najwyższego w Warszawie*, „Przegląd Prawniczy Uniwersytetu Warszawskiego” 2019, issue 1.

form the 'silent language' of a culture. The law in general and courts in particular have a symbolic 'power over time'. In this regard, little or nothing has changed when it comes to remote hearings. It's very interesting to see that while the Internet has triggered phenomenon of 'compression' of time in many social and economic areas, nothing has been done with time in the case of remote hearings. Early observations suggest that they are not at all shorter, and often take even longer due to the connection problems that tend to occur.

Chronos, the Greek god of time, moving the 'wheel of the zodiac', and Themis, the goddess of justice, share many common values. Although globalisation and the Internet are now changing the image of time, offering a new way of understanding it, a trial before a court – in the organisational and procedural sense – has been basically the same for centuries, sometimes taking days, weeks, or even months and years.

A hearing is based on interpersonal interactions – either in the courtroom or *online*. The law specifies the timing of certain actions in court proceedings by indicating the time and dates or events that condition the timing of the actions in question. There is no time compression at all. The court decides on the temporal borders of the collected resources to be used as evidence in court proceedings. Lawyers see a number of advantages that the ritualised management of time in court proceedings guarantees. The law's inability to compress time has serious advantages. Thanks to the many ways of capturing time in rigid ways in legal texts, the law itself and lawyers (although indirectly) remain 'the rulers of time'. During a hearing, the judge wields a special symbolic 'power over time', deciding when to start and end the session, how long to listen to the participants, and so on. Thus, they symbolically express their power over others.<sup>52</sup> The law stipulates that court cases be heard within a 'reasonable time', which is not the same as 'as soon as possible'. In the context of law, time is relativised to the value of procedural justice, not speed.

Rites of passage (entrance and exit) are also important symbolically for heterotopias. Entering the court building in the 21<sup>st</sup> century is not difficult, no special skills are required. In the 21<sup>st</sup> century, all you have to do is open the door and go through the electronic security gate, find the right room and wait in the corridor next to it for the hearing to begin. Entering the court, however, means finding

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<sup>52</sup> The law can 'stop' and 'move' time. For example: "the suspension of proceedings stops the time limits in the proceedings", which means that the court metaphorically 'stops time' and then 'resumes its passage'. The law uses a lot of metaphors referring to sports rhetoric and decides, just like a referee in a stadium, when it is necessary to 'suspend the course' or 'stop the course' of an event for some special reasons. J. Jabłońska-Bonca, *Prawnik i czas*, inaugural lectures, academic year 2013/2014, Warsaw 2013, pp. 87–95.

yourself in a place where different rules apply. And you have to adapt to them as soon as you cross the doorstep. Courts as buildings are so-called 'quasi-places' (Z. Bauman) or 'non-places' (M. Auge). It is about court corridors in either a literal or metaphorical sense.<sup>53</sup>

The ritual of 'entering' a remote hearing seems to be much more complicated than entering a traditional court and courtroom. You need to have special skills and go through the videoconference call manual available on the court's website. Such manual often includes the rules of conduct during the proceedings (sic!). For example: "The camera and microphone should not be turned off during the hearing, except with the permission or at the request of the court or court staff."; "The 'raise your hand' button should be used after this form of speaking up during the hearing has been approved by the court or court staff."; "Do not use the chat room during the hearing unless you need to report some technical problems with the microphone."<sup>54</sup>

The JITSY Meet manual, the manual used most commonly by Polish courts, is 20 pages long.<sup>55</sup> It is necessary to get a link, know how to use a computer or phone with the right application installed on it, have a good Internet connection, and be in a place that makes it possible to participate in the proceedings undisturbed. If one wants to participate in a videoconference hearing using a mobile phone, it will be necessary to download and install a dedicated mobile application. The link is sent by email from the court, so one must have an email address. It is necessary to address the court with a request to participate in a public hearing as a member of the public in order to initiate the process of generation of the link, and for this purpose, it is necessary first to find the relevant form and fill it out. In the face of the serious problem of digital exclusion, not everyone – despite the best intentions – will manage to make it to a remote hearing. The barrier to entry is therefore rather high. On the other hand, the problems related to the potential inconvenience or the time and cost of travel to the court disappear.

Traditional court procedures abound with conventional behaviour and statements with symbolic meaning, starting with phrases like: "All rise, the court is now in session" or "Your Honor". There is also the ritual of those present standing up when taking the oath from a witness and announcing the operative part of the ruling, or basically the obligation to testify standing up. These ritual behaviours are meant to perpetuate and strengthen the respect for the court and its authority.

<sup>53</sup> Cf. extensively on the matter: W. Świerczyńska-Głownia, *Komunikowanie z perspektywy sali sądowej*, Kraków 2019, pp. 140–155.

<sup>54</sup> <https://krakow-podgorze.sr.gov.pl/container/jitsi.pdf> (accessed: 20.05.2022).

<sup>55</sup> *Ibidem*.

They are also meant to appeal to the emotions associated with the duty to tell the truth and to make plausible, credible claims in such conventionalised circumstances.<sup>56</sup>

Supporters of the democratisation of court procedures see no need to maintain this custom. The new times are more egalitarian in terms of culture.

Remote hearings are thus devoid of many rituals, although the main procedures have formally remained essentially unchanged for the time being. The court (judge) is now sitting behind the bench already when the parties 'enter' the hearing. Gone is the traditional symbolic moment of everyone rising as the judges enter the room. Participants show up in 'windows', and the court – also 'squeezed into a window' – often talks to participants at the beginning about the technical aspects of the hearing, checks if everyone can hear and see the transmission, calls for technical assistance if necessary, etc.<sup>57</sup> This can undoubtedly be a difficult moment for a judge, who is not an IT specialist, but is supposed to inspire confidence and trust, have charisma, create an atmosphere of authority of the law, independence, professionalism, order, calmness, etc. Participants sit. They don't stand up during testimony and questioning, and often don't stand up either during the taking of the oath and the announcement of the verdict.

What is absent from the screen?

First of all, we can't see what's going on outside of the view of the participants' cameras. There may be third parties in their rooms, who may be engaged in a range of different activities, like filming, photographing, eating, drinking, prompting, distracting the participants of the hearing, etc. This is what makes a remote hearing different from a traditional one. The spaces outside the screen are not part of the augmented court space, but can they be considered 'backstage' like the traditional court corridor? Not really, it seems. The stimuli coming from the corridor in a traditional court do not reach the participants.

The 'backstage' (with similar features to the court corridor) is where a participant of a hearing, logged on the right platform, is waiting. It is such a 'quasi-place'. And although it is in a law office or an apartment, this place is 'corridor-like' in a metaphorical sense. When waiting for an e-hearing to start, it is necessary to perform certain actions (e.g. enter one's password, name, check the chat to see if there is some delay). Waiting 'in a virtual corridor' ends until someone, some court

<sup>56</sup> *Ibidem*, p. 354.

<sup>57</sup> „In the UK video hearings pilot (...), a key feature of the service included preliminary checks of parties' equipment. A court administrator arranged a pre-hearing call with each participant, testing their connection, camera, and microphone, and offering advice on suitable lighting and backdrop. Users welcomed these preparatory steps, indicating that it helped them to be 'camera-ready' for their hearings and reduced their anxiety”, M. Rossner, D. Tait, M. McCurdy, *Justice reimagined: challenges and opportunities with implementing virtual courts*; “Corrent Issues in Criminal Justice” 2021, No. 33.

staff member, grants the waiting person access to the videoconference at the right moment, until they 'open' the virtual door and 'lets' the hearing participant into a virtual patchwork courtroom (courtroom, offices, apartments, artificial backgrounds, etc.).

Witnesses in a traditional courtroom are questioned one by one. They enter the courtroom when summoned, and they don't know the content of the testimony of those who testified before them. They stand behind a witness barrier in the middle of the courtroom, facing the judge. The public is behind them. This prevents members of the public from influencing or distracting the witness during testimony, and makes communication take place directly between the judge and the witness (including by making them face each other physically).

During a remote hearing, the communication 'behind the scenes' and in the 'virtual courtroom' is quite different.

In an office, an apartment, or a park, all the spectators (if they met in one place) can listen to and watch the witness testifying 'from outside the frame' and remain invisible to the judge. The person testifying could also benefit from third-party prompts, or may be coerced into specific answers by someone off-screen. Such behaviour violates the law, but if one conducts a remote trial, the judicial inspection of out-of-court locations is made difficult, the 'virtual whereabouts' is essentially beyond the reach of the court's real power.

The communication with a witness at an e-hearing is different from that in a traditional courtroom also because the witness can see the non-verbal reactions of the parties and the audience to his statements on the screen. They don't stand sideways or with their back turned to anyone. Does this help a judge in judging the credibility of testimony?

The questions are many. The changes are serious and significant for the symbolic legal culture. It would also be reasonable to study their effects from the perspective of anthropology, sociology, and psychology. Justice in the 21<sup>st</sup> century depends not only on the law and people, but also – to some extent – on the concept of the use, operation, and implementation of digital infrastructure.

But there is a risk not yet sufficiently explored. It may occur that the apparent advantage of virtual systems can also create a false sense of effective communication. Virtual media, which were originally a special and transitory instrument of justice, may become an increasingly important tool. Some lawyers claim this democratises and makes the judiciary more egalitarian, while others say it can lead not only to the undermining of the court's seriousness and authority, but also to the inequality and depersonalisation of the parties and the dehumanisation of the proceedings. For example, Judge Marcelo Vazquez (Judge of the Criminal, Juvenile and Misdemeanor Chamber of the Autonomous City of Buenos Aires, Argentina)

argues that “the symbolic character and solemnity of the trial, as the fundamental and most relevant phase of the criminal process, can be reduced to the same value as a television series.”<sup>58</sup> In contrast, Judge Zainun Ali (a federal court judge in Malaysia) claims that “it has to be said that a common objection against online hearings is the perceived notion that the trials may not be fair”, and counters this by saying that thanks to “online hearings, disputes can be “resolved without inordinate delay.”<sup>59</sup> It seems that it is a subject of a global debate. For centuries, judicial symbolism has been making use of visual representations to produce important impressions and emotions related to the values of justice. It acts as an intergenerational transmission of the content of legal culture. It will probably change now. It may become limited to court pictograms. Depriving e-hearings of many conventional signs and symbols can distort communication, tainting the image of the court. If the law is to have authority beyond mere coercion, judicial power should be ritualised and express values through systems of symbols. And only time will tell what these systems and symbols will be.

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<sup>58</sup> <https://www.unodc.org/dohadeclaration/en/news/2021/10/the-judicial-profession-and-the-ethical-limits-of-a-virtual-justice-system.html> (accessed: 20.05.2022).

<sup>59</sup> <https://www.unodc.org/dohadeclaration/en/news/2020/10/malaysian-courts-accessibility-to-justice-in-the-time-of-covid19.html> (accessed: 20.05.2022).

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