Ritual, Symbolism and… Cyberjustice?

A reflection on how ritualistic practices seem to hinder the integration of technology into the legal process

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Introduction

Some historians argue that prayer – or rather the Catholic ritual of joining hands and kneeling “before God” to pray – is in fact a device created by medieval lords to strengthen their hold on the peasants who farmed or otherwise occupied their land. Kings forced their followers to worship them in this manner, and the practice was extended from serfdom to religious worship.

By having peasants manifest their servitude, as well as their faith, through the symbolism of kneeling (an act of submission in itself) and joining hands, these warlords created a psychological bond between themselves and God in the minds of those they kept in serfdom; they lead their followers to believe that kings and princes were in fact of divine descent. The fact that, to this day, we still refer to them as “lords”, only serves to strengthen that association.

If this historical belief is accurate, it would imply that, ironically, the way Catholics pray could be construed as being blasphemous under Christian doctrine. After all, this practice upholds the belief that there is no “one true God”, but rather a certain number of lords who possess the same divine powers as God (him or her)self.

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2 An act commonly referred to as “genuflexion”.
4 Information gathered at the Gratia Dei exhibit, at Quebec City’s Musée de la Civilisation, in 2003.
One might ask what this historical anecdote has to do with the use of technology to solve problems associated with today's legal process (mostly costs, delays and accessibility). The answer to such a question is quite simple: everything.

For years now, legal scholars and practitioners alike have been condemning the poor state of Quebec's legal system\(^5\). Costs keep rising exponentially\(^6\); citizens must wait months, if not years before they can get their “day in court”\(^7\); and the bureaucracy associated with filing a case is such that legal secretaries must take yearly refresher courses to simply keep up with the changes. In Montreal, even physical access to the judicial system is difficult, since certain services seem to be playing musical chairs inside and outside the courthouse.

As in many other jurisdictions, technology is seen by many as a solution to some, if not most, of these problems\(^8\). Efiling systems could (as they did in British Columbia\(^9\), some American States\(^10\) and Australia\(^11\)) cut costs and delays. In a province like Quebec, where a relatively small population is scattered across a very large territory, videoconferencing could resolve problems due to distances and travelling, since many

\(^{5}\) In the last 30 years, the number of cases has dropped by 55%, even though the general population is now 20% larger. See Hubert Reid, *Rapport d'évaluation de la Loi portant réforme du code de procédure civile – Mémoire à la commission des institution*, January 31\(^{st}\), 2008. See also Mélanie Beaudoin, “Réforme du *Code de procédure civile* : Pour une amélioration de la justice”, (2008) 40(1) *J. du Bar*. 7.
\(^{6}\) Hubert Reid, *Rapport d'évaluation de la Loi portant réforme du code de procédure civile – Mémoire à la commission des institution*, January 31\(^{st}\), 2008.
\(^{7}\) Hubert Reid, *Rapport d'évaluation de la Loi portant réforme du code de procédure civile – Mémoire à la commission des institution*, January 31\(^{st}\), 2008. For a one day trial before the Superior Court, one must wait approximately 6 months. For a three day trial, the average wait is about a year and a half.
\(^{10}\) See: [http://www.abanet.org/tech/ltrc/research/efiling/](http://www.abanet.org/tech/ltrc/research/efiling/).
citizens are far removed from a courtroom and even further removed from one where hearings are held more than once a week, a month, or even a season\(^\text{12}\).

So if technology is the Holy Grail which could help save our legal system, why is the legal community so slow in implementing technological solutions? A common argument is that of the general conservatism associated with the legal profession\(^\text{13}\). But lawyers have embraced technological advances for years: faxes, laptops and cell phones are all as common in law firms as paper and pens. In fact, one could probably argue that the legal community has more Blackberries™ \textit{per capita} than any other professional community.

If technophobia is not the reason for our refusal to embrace what some have coined “cyberjustice”\(^\text{14}\) (i.e. the use of technology for procedural and evidentiary purposes), what is? We submit that the answer can be summed up in one simple notion: the “ritualization” of the judicial process.

Like the Catholic Church, the legal community has incorporated a series of rituals\(^\text{15}\) and symbols into its practices\(^\text{16}\). It could even be argued that the judicial system is one of the most ritualized processes in modern society\(^\text{17}\). The gavel, wig and robe are all symbols of the judge’s authority; the need to stand to address the court, to sit at a precise place whether you’re a plaintiff or a defendant, the oath or the order in which parties will present their case are all rituals with somewhat unclear origins and purposes. If the Christian idea of prayer is in fact a machination aimed at serving warlords, couldn’t some

\(^{12}\) On the isles of Îles de la Madeleine, for example, the Tax Court of Canada is only in session once every year or even two years for a few days in August due to inclement winter weather, difficult access and a very small population.


of these and other legal rituals and symbols also be misconstrued? If such is the case, shouldn’t we, as members of the legal community, try to better understand the goals or purposes behind such rituals and symbols to then reevaluate their use?

The purpose of this paper is not to dismiss all ritualistic behaviour within the legal community as outdated and useless. Ritual is important: without it, there would be anarchy. However, blindly following ritualistic practices is senseless. Our aim is to start a debate on which rituals are useful and which could or should be discarded. In our opinion, this is the first step in properly integrating technological advances into legal practices. By properly identifying the purpose of rituals and symbols, we can better understand how technology can be used to attain said purpose, and when necessary, update those rituals and symbols. On the other hand, rituals and symbols identified as purely archaic and nostalgic shouldn’t affect our technological choices.

On a side note, it must be understood that the ideas put forth in this paper are actually part of a greater reflection on how technology can be used to help reform and reengineer procedural and evidentiary law. These questions and others are currently being studied by an international group of researcher under the tutelage of the CRDP. Through a series of projects such as the Cyberjustice Laboratory, the Cyberjustice Cluster and the Observatory on Law and Justice, CRDP researchers hope to be able to develop and offer concrete technological solutions to the judicial system’s woes.

1. Identifying ritualistic behaviour

An author notes that:

“Adults are usually capable of ascribing a meaning to ritualized behaviours, but from the child’s point of view that meaning cannot be obvious; it does not declare itself. […] In other words, there is no notion

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19 Most notably, Professors Karim Benyekhlef and Pierre Trudel ([http://www.crdp.umontreal.ca](http://www.crdp.umontreal.ca)).
for the child that these arbitrary acts are symbolic of something else, that they have meaning beyond themselves.”

In the particular context of legal rituals, one could argue that we are in fact all children in the sense that we follow these rituals without question, and without really understanding their source or their underlying value.

So why do we consider these rituals – which we do not fully comprehend – as being essential to the integrity of our legal system? We do it for one simple (some might say simplistic) reason: it’s the way things are, and have always been done. For example, the person who has the burden of proof in a case is expected to speak first. This concept seems difficult to contradict since it follows the logic that if you accuse someone of wrongful deeds, he should hear the extent of your proof and only then will he be able to mount a proper defence. It also serves to save the court’s time since, if the plaintiff cannot meet his burden, the judge could dismiss the case without hearing the defendant’s testimony or examining his evidence.

But, with full disclosure rules and evidentiary hearings, is this sacred order of things still warranted? It’s not when one appears in front of the Tax Court of Canada where, in certain cases, the judge will hear the Crown’s position before the appellant’s (the citizen), even though he is the one contesting an auditor’s report and, therefore, the one who has a burden to meet. This situation has yet to throw the Canadian tax system into a state of disarray. It could therefore be argued that the order of things should not be set in stone.

Furthermore, one of our previous statements is admittedly fallacious. Our evidence-based system has not “always been” the way it currently is. Modern rules of evidence are, in fact, relatively recent in some legal spheres. In the Middle Ages, evidence was somewhat irrelevant. In order to “prove” one’s innocence, an accused had to go through

an ordeal\textsuperscript{21}, or “trial by fire”, where the outcome of the case would depend on how successfully he completes his task\textsuperscript{22}. For example, a metal object would be placed at the bottom of a tub of boiling water, and the accused would be asked to take it out. The severity of the burn pattern would indicate the degree of guilt\textsuperscript{23}.

Modern observers would obviously find such a manner of determining guilt to be barbaric and unjust. Yet, as a belief system\textsuperscript{24}, it fit within the rationality that God wouldn’t let the innocent be harmed or the guilty go unpunished\textsuperscript{25}. As such, this ritual was perfectly inline with societal and cultural reason. Of course, hindsight is 20/20, and there is little doubt that our current belief system and the rules of evidence baring its fruits seem more just and equitable. But who’s to say that, as a ritual, it cannot be more effective? Could people in 2500 A.D. mock our rituals as we mocked those of our medieval ancestors? After all, as irrational and barbaric as ordeals might seem, they had the advantage of being swift. An accused was “judged” and sentenced within minutes of his crime. To an outside observer, this could seem more respectful of the accused and his rights than to have him wait in a jail cell for a year before he can plead his case before a judge\textsuperscript{26}. Once again, a parallel with religious rituals and practices can be drawn. As the Romans discarded Egyptian religious beliefs as archaic, Christians regard Roman deities as folklore…

Once a certain behavioural scheme has been identified as being ritualistic in nature, and once it’s established that said ritual could be updated, the next phase is to determine if it

\textsuperscript{21} « Middle English ordal, from Old English ord æl; akin to Old High German urteil judgment, Old English d æ l division”, “a primitive means used to determine guilt or innocence by submitting the accused to dangerous or painful tests believed to be under supernatural control”. Merriam Webster dictionary.

\textsuperscript{22} Philippe CHIAPPINI, Le droit et le sacré, 2006, Paris, Dalloz, p. 204.

\textsuperscript{23} Philippe CHIAPPINI, Le droit et le sacré, 2006, Paris, Dalloz, p. 204.


\textsuperscript{26} Philippe CHIAPPINI, Le droit et le sacré, 2006, Paris, Dalloz, p. 204 and ss.
should be updated, and why. In order to do so, one must however understand the reasoning behind adopting such a ritual in the first place.

2. Understanding and updating ritualistic behaviours

As Kenneth B. Nunn points out, trials take place within a given culture, and a given belief system\(^{27}\). The author goes on to explain that:

“This belief system is transmitted to each member of society through such means as formal education systems, media, authoritative pronouncements and word of mouth. A cultural belief system allows us to attach meaning to symbolic representations that appear in culturally determined contexts. Thus, the imagery of the courtroom – the “dignity” of the proceedings, the “impartiality” of the judge, the adversarial posture of litigants – and the juxtaposition of symbols of authority – the flag, the judge’s black robe, the police officer’s badge – all communicate culturally determined meaning”\(^{28}\).

In order to understand why a given ritual or symbol could make it difficult to adopt certain technologies, we must therefore try to identify the underlying meaning of said ritual or symbol\(^ {29}\).

The problem, however, lies in the fact that the meanings associated with particular rituals or symbols are so deeply ingrained within our belief system, we sometimes forget them and simply look at the ritual or symbol as if it held some sort of monopoly on the meaning it conveys. As author Peter A. Winn puts it, “in the understanding of legal


\(^{29}\) Christina TOREN, “Ritual, Rule and Cognitive Scheme”, (1995) 6 J. Contemp. Legal Issues 521, 527: “the nature of ritual and ritualized behaviour is such that it demands that we seek out its deeper meaning; that is, if one must behave in a certain way, this implies that the behaviour itself has significance, that there is a meaning there to be found. However, it is important to note here that many if not most of these ritualized behaviours become automatic [...]”.
institutions, the concrete legal rituals themselves can be structurally more important than the justification given to them”\textsuperscript{30}.

A perfect example of this reality is that of the signature. The rise of ecommerce has made it necessary to “sign” electronic documents and, therefore, programmers and legal scholars alike tried for years to create “electronic signatures”. But the signature in itself is nothing but a symbol; a symbol with two distinct yet closely linked meanings. The first meaning of the signature is that it helps us identify the signatory\textsuperscript{31}. Signatures are supposed to be as unique as their owners and, in such, allow us to determine whether our co-contractor is whom he claims to be. The second meaning or purpose of the signature is to manifest consent\textsuperscript{32}. By signing, we know that we agree to be bound by the terms of the document we sign.

By clearly identifying the meanings behind the act of signing, we realize that it becomes counterproductive to try to create hardware that lets us sign an electronic document as we would sign a check. We simply need to find a method “to identify the party and to indicate that party’s intention in respect of the information contained in the electronic communication”, as stated in article 9, section 3 of the \textit{United Nations Convention on the Use of Electronic Communications in International Contracts}\textsuperscript{33}.

Therefore, one should not discard econtracts simply because they cannot be “signed”, but rather if it’s impossible to establish who entered into them and if that person really intended to do so. The \textbf{symbolism} of the hand-written signature can therefore be replaced by a number of technological procedures (clicks, exchange of emails, etc.) without changing the \textbf{meaning} of the acts of consenting and identifying oneself\textsuperscript{34}.

\textsuperscript{31} Section 2827 of the \textit{Civil Code of Quebec} (L.Q. 1991, c. 64) states that “A signature is the affixing by a person, to a writing, of his name or the distinctive mark which he regularly uses to signify his intention” (emphasis added).
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\textsuperscript{33} Adopted by the U.N. General Assembly on November 23\textsuperscript{rd}, 2005.
This same intellectual process can, and should, be utilised with identified procedural rituals and symbols. Once such a process is completed, it becomes possible to better understand the purpose of that ritual and to decide whether it can be updated or, otherwise, if it can simply be put aside as no longer relevant or useful.

3. Forgoing unwarranted rituals and how to replace them

When discussing rituals or symbols that seem to have lost their significance, one has to look no further than the robe. Why do lawyers still feel the need to play dress-up when appearing before the Court or, rather, why do judges request it? As Ethan Katsh so humorously puts it: “if you’re going to be logical, if you’re going to use reason, and that’s the justification for making a determination, for deciding this is free speech and this is protected and that is not, why do you have to wear robes?” The author goes on to make the statement that “law isn’t simply a matter of logic and reason”.

But it should be, and it used to be. The symbolism of robes wasn’t always lost on the common man (or even the experienced lawyer). It served a purpose. In the Middle Ages, lawyers were university students and the robes were more or less their school attire. The robes therefore served a simple function: to identify lawyers as such; to show their credentials. Today, that same purpose is served by a simple piece of plastic known as a Bar Card… Robes are therefore somewhat obsolete since they have been replaced by a more practical device with the same function. This could explain why more and more jurisdictions no longer require lawyers to be robed, and why even judges are “disrobing” to a certain degree...

35 In Quebec, the assembly of judges has the power to adopt strict rules regarding courtroom behaviour and process. This prerogative ranges from choosing which size paper and characters to use to general courtroom decorum, including imposing a certain dress code. See: Myriam JÉZÉQUEL, “La petite histoire de la toge”, (2008) 40(5) J. du Bar. 15, 15.
37 Id.
But robes, although the very symbol of legal conservatism\textsuperscript{40}, are not a hindrance to the implementation of technological solutions within the legal system. In fact, when technologies are shunned by lawyers and judges alike, seldom is the robe used as a reason for such exclusions. Rather, two more rational and complex objections constantly resurface: our reliance on paper (a) and the need for parties, lawyers and the judge to be physically present in the same room (b).

\textbf{a) A paper-based judicial system}

The \textit{Quebec Code of Civil Procedure}, despite going through two major reforms since its adoption in 1867, still has the same philosophical foundations\textsuperscript{41} (which are closely linked to the paper on which procedures are drafted and through which evidenced is presented). Our whole legal system is based on the idea that physical documents are the best form of evidence\textsuperscript{42}.

Our reliance on paper evidence is, in fact, a ritual we inherited from our roman ancestors\textsuperscript{43}. Ancient Greek laws, as well as Hebrew and even Christian doctrine, saw testimony as a perfectly reliable means of proving one’s position\textsuperscript{44}. In fact, the matching testimonies of two witnesses was accepted as the truth\textsuperscript{45}: “In your own Law it is written that the testimony of two men is valid”\textsuperscript{46}.

So if oral traditions were (and in certain cases still are) one of the main aspects of the legal landscape, this is to say that discourse has always been an integral part of legal proceedings, it proves that paper is not as central to the legal process as one might think. If it’s true that the wording used in laws and other legal texts is closely associated with paper documents, this is a sign of the times in which these laws were drafted, not a necessary component of or legal system. In Quebec this observation has recently been proven to be accurate with the drafting of Bill 65, the \textit{Act respecting the application of the Act to establish a Legal framework for information technology}. This act aims at making

\footnotesize{\textsuperscript{40} Frances Gibb, “Lord Chief Justice and his funky new gown”, (2008), available at: \url{http://business.timesonline.co.uk/tol/business/law/article3919653.ece} (May 14th, 2008).}
Quebec’s legal corpus more technologically neutral by eliminating references to paper and replacing them with “functionally equivalent” terms.

This goes to show that paper is in fact an artefact which has come to symbolise its content. As one author puts it: “the materials on which words have been written down have often counted for more than the words themselves”47. The example of the contract speaks volumes on this issue. Most laymen associate a contract with the paper document they sign. However, a contract is simply an “agreement of wills”48, it usually does not need to take a particular form to be binding49.

Paper, as any other technology, is simply the vehicle carrying the information necessary to the legal process. It is, and has been, a necessary part of the process because it was the only practical and reliable format in which information could be transmitted without being modified. As such, it remains more reliable than oral testimony. However, technological advances having eliminated paper’s monopolistic hold on reliable data transferring, the rituals associated with paper documents should be revisited so as to be adapted to new, more efficient technologies.

In this sense, the “paperless office” trend is slowly gathering support within the legal community50. More and more lawyers are now simply digitalizing their paper documents

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42 See sections 2812 and ss. of the Civil Code of Quebec, L.Q. 1991, c. 64.
43 Gerald A. BEAUDOIN, Le commencement de preuve par écrit dans la province de Québec, Master’s thesis, Université de Montréal, Montreal, 1954, pp. 10 and 11.
46 John 8:17.
48 Section 1378 of the Civil Code of Quebec, L.Q., 1991, c. 64.
49 Section 1385 of the Civil Code of Quebec, L.Q., 1991, c. 64.
in order to save room and time. Of course, as long as courtroom procedure will keep requiring paper copies of documents, a completely paperless system will be impossible to achieve. However, with many tribunals now slowly moving away from the printed document and towards efiling\(^{51}\), there is a distinct possibility that the rituals associated with paper document will soon be a thing of the past.

b) A “face-to-face” judicial system

Possibly the greatest myth carried by the legal profession is that justice has to be rendered when all parties are physically present in the same (court)room. It’s also possibly the biggest impediment to universal access to justice. Requiring all parties to be in one physical location at a given time implies that they make themselves available at that time, and for the hours (or days) prior to, and following. Being in Court in Montreal on a Monday at 9 A.M. means leaving Quebec City at 6 A.M. or Kuujjuaq a few days before (depending on plane schedules). Coupled with the time wasted waiting to be heard (and the fees paid to one’s lawyers during that period, and for his trip to the courthouse), this amounts to useless costs, loss of time, and a general loss of productivity.

Some might argue that these are the necessary ills associated with a fair and just court system, but why is it so essential that parties see each other to resolve a conflict? Once again, some would argue that the answer probably lies in the ritualistic nature of the legal process:

“why is physical presence a recurring theme among those who seem to fear the establishment of cyberjustice? Beyond immediate and contingent arguments, such as the importance of cross-examination in the common law, a plausible explanation lies in the deep ritualization of the legal process in general. If the parties are absent, there is a loss of theatricality, and this troubles some lawyers.”\(^{52}\)

\(^{51}\) In Canada, that’s the case with the Supreme Court, the Federal Court and the Tax Court.

In 1996, the Université de Montréal’s Centre de recherche en droit public put forth an experimental platform aimed at solving disputes between consumers and online merchants. The Cybertribunal, as it was christened, offered a series of arbitration and mediation services through the web. The procedure was completed online without any need for the parties to see each other. Although it was met with great scepticism within the legal community, the Cybertribunal, like its follow-up projects (eResolution and ECODIR), has been a very successful endeavour, and helped settle hundreds of cases.

This goes to show that parties do not need to see each other in order to resolve a conflict. In fact, in certain cases, it might be preferable for parties not to be in the same room (e.g. in divorce cases where there is great animosity between parties).

But one might argue that the physical presence of all parties, especially in criminal trials, is a fundamental right. The right to a public trial, and the right to face one’s accuser necessarily imply that all parties be in the same physical location during the trial… Don’t they? Actually, the Canadian Supreme Court was faced with that very question in R. v. L. (D.O.), and, like its American counterpart, came to the conclusion that “a State's

53 http://www.cybertribunal.org
54 “At the time, most lawyers could not imagine how technology could be used to conduct either legal (such as arbitration of domain name disputes) or para-legal proceedings (such as mediation) without the physical presence of the parties. Their presence seemed necessary at all steps in the proceedings. In the legal imagination, the behavioural grammar of disputes required that the parties or their lawyers see each other”. Karim BENYEKHLEF and Fabien GÉLINAS, “Online Dispute Resolution”, (2005) 10(2) Lex Electronica, pp. 1 and 2, http://www.lex-electronica.org/articles/v10-2/Benyekhlef_Gelinas.pdf.
55 See: http://www.udrpinfo.com/eres/.
56 http://www.ecodir.org
58 Section 11 of the Canadian Charter of Rights and Freedoms states that “Any person charged with an offence has the right (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.
interest in the physical and psychological well-being of [...] victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court”\textsuperscript{61}.

This is not to say that the ritualistic practice of pleading before the court and the symbolic nature of the courtroom are completely outdated and useless. It does imply, however, that we should stop using the “need to be in the physical presence of all parties” as a reason to exclude technological advances that allow long-distance communicating between parties. In fact, the Supreme Court in \textit{R. v. L. (D.O.)}\textsuperscript{62} goes on to say that “It would seem contrary to the judgments of our Court [...] to disallow evidence available through technological advances, such as videotaping, that may benefit the truth seeking process”\textsuperscript{63} simply because the videotaped witness is not physically in the courtroom.

\textbf{Conclusion}

Ritual and symbolism shouldn’t deter us, as members of the legal community, from our general goal of making the legal system more accessible and, hopefully, more just. As technology seems to be one of the main pieces to the puzzle that is a more efficient legal system, its implementation should be encouraged, not impeded. Of course, technology should not be imposed upon the legal community blindly: the failure of certain cyberjustice projects shows us what happens when this is done\textsuperscript{64}.

\textsuperscript{60} \textit{Maryland v. Craig}, 110 S.Ct. 3157 (1990). As mentioned by the Canadian Supreme Court in \textit{R. v. Levogiannis} (1993 CanLII 47), the American Supreme Court’s position “is all the more remarkable since both the United States Constitution and numerous state constitutions guarantee an accused the right to confront those witnesses testifying against him or her at trial, a right on which the Canadian Charter is silent.”


\textsuperscript{62} 1993 CanLII 46 (S.C.C.).


One could therefore sum things up by saying that technological advances shouldn’t do away with rituals, but that rituals shouldn’t stop progress. The importance, use and purpose of the ritual should guide our technological choices on whether to leave a ritual unencumbered or whether to update or even eliminate it. As some authors put it:

Technology leads to a disenchantment with and trivialization of ritual. Yet, ritual, particularly through its symbolic aspect, contributes to the social order. The challenge for cyberjustice is thus to re-invent appropriate rituals that are, of course, based on those of the past, or at least to adapt rituals to new technology so that the concurrence and therefore authority that they cast on the thing they adorn appear consubstantial with the exercise of justice. Cyberjustice cannot be exempt from rituals that assure continuity with the more traditional rituals of law.65

Of course, when influential members of the legal community ask whether lawyers and their clients are ready for our Code of Civil Procedure to allow more room for the use of new technologies in the courtroom66, one has to come to the conclusion that this is easier said than done…

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