Litigants-in-person as intruders in court

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1. THE BUZZ AROUND PRO SE LITIGANTS

The common saying that “the lawyer who represents himself has a fool for a client”1 conveys the view held by many legal professionals. Self-represented litigants experience many difficulties, which range from having to manage various administrative tasks and legal matters to standing before court and interacting with legal professionals and witnesses. Yet many lay people do choose to represent themselves and self-representation is especially common in divorce cases and small claims cases.

Litigants opt for self-representation even in high-profile cases. The list of some of the notorious cases from the USA and UK is very versatile: John Allen Muhammad v. the Commonwealth of Virginia in 2003 (after presenting his opening speech, the defendant agreed to being represented by an attorney); Farhad v. United States in 1998-1999; USA v. Zacarias Moussaoui in 2002-2006 (the defendant was ordered to proceed with a court appointed attorney later in the course of the trial); Colin Ferguson v. USA in 1994; Kolen- der v. Lawson in 1983; David Irving v. Pinguin Books Ltd and Deborah Lipstadt in 2000; McDonald’s Corporation v. Helen Steel and David Morris in 1994-1996. There have also been cases with pro se litigants before Interna- tional Criminal Tribunals2: a former president of Serbia and Yugoslavia, Slobodan Milošević, represented himself in 2002-2004; the first president of the Republic of Serbia, Radovan Karadžić, represented himself in 2008-2009.

Social, educational and financial background of the above-mentioned self-represented litigants widely varies; their reasons for representing themselves

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2 Ibidem.
also differ greatly. In general, one of the most common reasons for self-representation is the lack of financial means for counsel fees. In civil proceedings, litigants usually have to represent themselves in case they cannot afford a lawyer. In criminal proceedings, however, the court appoints an attorney or a counsel in order to ensure the fairness of the trial. Nonetheless, even in criminal cases litigants who distrust the appointed lawyers sometimes choose to represent themselves rather than deal with biased lawyers. Self-representation is also chosen by litigants who hold strong ideological beliefs and want to address the jury and witnesses in person in order to elicit sympathy from them.

Self-representation is not always a readily-available option and courts consider, for instance, mental health before granting litigants the right to represent themselves. In the past, there have been occasions when self-representation was misused. During the rape case in 1996 in the UK, the rape victim Julia Mason was subjected to a six-day long cross-examination conducted by Raston Edwards, who was later convicted of raping her. The defendant kept asking his victim embarrassing and provocative questions about the rape. This particular case contributed to a reform, which has lead to the Youth Justice and Criminal Evidence Act 1999. Under the Act, it is no longer possible for the accused to cross-examine the victim; cross-examination would thus have to be conducted by a court appointed lawyer.

The phenomenon of self-representation has not been fully researched yet. The reasons for conducting a detailed research are manifold: the frequent occurrence of cases with self-represented litigants, the importance of the accessibility to justice, the significant influence the proceedings may have on the individuals’ lives, etc. The pioneering socio-linguistic analysis on lay people representing themselves during small claims cases was performed by O’Barr and Conley. Another strand of research was introduced by the author herself in a single-case study that has dealt with questioning strategies, interaction patterns and turn-taking management during cross-examination conducted by pro se litigants. Nonetheless, linguistic research on self-representa-

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tion is scarce. The above-mentioned sources concentrate mainly on the pro se litigants’ use of language during the proceedings. What is being completely disregarded is the influence of pro se litigants on the proceedings.

This very aspect is, on the contrary, emphasized in legal scholarly papers. The mere presence of pro se litigants in court puts pressure on judges, the opposing counsels and the court staff. Goldschmidt describes tense atmosphere typical of cases with pro se litigants: judges struggle between the requirement for impartiality and the need to provide advice; pro se litigants are nervous of all the requirements that they have to fulfill; opposing counsels and the court staff are frustrated because of delays caused by inexperienced lay people.

The purpose of the article is to explore the aspects that have been ignored in the linguistic research so far. The article presents a single-case study and deals with the influence pro se litigants have on the role of the judge and the opposing counsel. The analysis deals with interaction patterns, (im)politeness strategies and use of honorifics.

2. Data

The data for the article are drawn from the court transcripts of the non-jury libel case McDonald’s Corporation v. Helen Steel and David Morris. Steel and Morris were accused in a writ by McDonald’s UK and US of publishing and distributing a leaflet called “What’s wrong with McDonald’s? Everything they do not want you to know”. The leaflet contained criticism of McDonald’s poor business practices in relation to the nutritional value of the meals, advertising, animal treatment, food poisoning, employment practices and other aspects of their business. While McDonald’s hired a legal team led by the highly experienced libel lawyer Richard Rampton QC, Steel and Morris had to represent themselves on their own for the lack of financial means.
They were occasionally assisted with legal matters by a volunteer lawyer Keir Starmer. Neither Steel nor Morris had any previous experience with legal proceedings. The two litigants-in-person fought their case in strong belief that the public has the right to know about dishonest business practices of the multinational corporation.

The disadvantaged situation of the pro se litigants became evident even before the trial started since McDonald’s legal team managed to achieve the cancellation of a jury under the pretence that the jury would not be able to understand all complicated issues. For Steel and Morris, it was much more difficult to present their case to the judge only. Lay people in the jury would have been more sympathetic with them\(^7\).

In defiance of all the obstacles, the pro se litigants managed to prepare a strong case against McDonald’s. The outcome of the trial shows that they won several important issues (e.g. they managed to prove that McDonald’s exploits children in their advertisements, offers bad working conditions, and advertises deceptive information on the nutritional value of their food); they lost in less important issues (e.g. the destruction of rainforests, discarding of litter on the streets, or firing pro-union workers). Steel and Morris also won a legal action against the British Government at the European Court of Human Rights in Strasbourg, which ruled that the libel case McDonald’s Corporation v. Helen Steel and David Morris was “in breach of the right to a fair trial and right to freedom of expression”\(^8\).

The trial lasted for two and a half years (from June 1994 till December 1996). During the period, the contradictions between the opposing parties deepened to such an extent that it was difficult for them to conceal their personal dislike of each other\(^9\). For the opposing counsel (Mr. Rampton, QC) as well as the judge (Mr. Justice Bell), the case presented a dilemma because of the halt in their professional development. Rampton, who was well-known for his well-staged public court performances, found himself facing two lay people, with whom the public sympathised\(^10\). For Mr. Justice Bell, it was his first libel case and instead of gaining more experience with various cases, he was presiding over the gigantic and extremely complicated trial, during which he constantly had to make decisions on how to help the pro se lit-

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\(^10\) Ivi, p. 169.
The body language is telling: when Rampton talks, Bell leans back, an evident, relaxed equal. With Steel and Morris he leans forward, on one level saying, “Yes, I’m here to help”; on another, illustrating his superiority. The body language during the trial as follows:

The above-mentioned extra-linguistic aspects of the case play an important role in the analysis of interaction between the pro se litigants and the legal professionals (mainly the judge and the opposing counsel) because their attitudes towards each other are reflected in the language choices they make.

3. Methodology

The article presents a qualitative research of interaction between legal professionals and pro se litigants based on a fully searchable electronic corpus. When compiling the corpus, the author considered the criteria of sampling, balancing and representativeness of the text. These criteria need to be considered in connection to the size of the corpus. Small specialized corpora need to be planned very thoroughly. Koester emphasizes that representativeness is of special importance for small corpora since it is important to ensure that “the range of linguistic distributions found in the target situation are reproduced in the corpus” (70). In order to meet the representativeness criterion, it is thus necessary to consider situational context and linguistic context. Sampling the corpus and balancing it refers to choosing the appropriate extracts that represent a wide range of typical situations. Though small corpora need to be thoroughly thought over, they provide a more detailed picture of the language and link patterns to specific pragmatic functions.

The corpus was created with the aim of comparing how the parties from the analysed case manage to interact during such a hostile speech event as cross-examination. When preparing the corpus, the situation context was

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11 Ivi, p. 172.
14 Ivi, p. 69-71.
considered alongside the linguistic context. The most important topic of the trial was the part on nutrition. Linguistically it was also the most relevant topic since both sides were aware of the importance of the topic and did their best in order to win this part of the trial. The cross-examination samples included in the corpus were thus extracted from cross-examination of the key expert witnesses on nutrition (these include cross-examination conducted by the two litigants-in-person as well as the professional counsel Rampton).

The corpus was created using the software Sketch Engine and the corpus was automatically tagged and is fully searchable according to speakers, types of utterances (questions, answers or other) or lexical units.

4. INTERACTION BETWEEN THE JUDGE AND PRO SE LITIGANTS

In the analyzed case, Mr. Justice Bell was responsible for resolving not only the questions of law, but also the questions of fact (which is usually a task for the jury). His role was further complicated by the fact that he had to ensure that the pro se litigants received fair treatment. On the one hand, he had to provide them with necessary information on the procedural rules. On the other hand, he had to be very careful when giving them advice on the adversarial strategies so that he would not be accused of being impartial. The examples below illustrate that the judge was performing several communicative goals. His main objectives were to ensure that (1) courtroom time was used efficiently, (2) the litigants-in-person understood important legal concepts, and (3) witnesses were examined in an effective way without any misunderstandings. Most of the examples are from cross-examination because it is the most crucial and difficult stage in non-jury trials.

Example 1.1 is an excerpt from cross-examination conducted by the counsel. Steel raises an objection (lines 9-11) and the judge solves the matter by taking the lawyer’s stance and shortly explaining to Steel what the counsel is doing (lines 12-15, 17). Once the counsel is finished with a given line of questioning, the judge returns to the question raised and tries to explain to the pro se litigants what they are entitled to do during cross-examination (starting with line 19).

1 MR. RAMPTON: Do you ever remember having said that men who
2 eat a diet high in fat, 25 per cent of them are likely to wind up
3 impotent. Do you remember saying that?
4 WITNESS: I rather doubt I would have put it in that way,
5 but I would be pleased to tell you about the links between
MR. RAMPTON: Let me give you the exact words: “25 per cent of males will be impotent by eating meat”.

MS. STEEL: I want to make an objection to this. Mr. Rampton is saying those are the exact words, but he has not proved the source of this.

MR. JUSTICE BELL: We will see. If the witness accepts it there will be no need for it. If he does not accept it, then it is left in the air. It is not a matter which is in evidence and we will have to see if it does come into evidence.

MS. STEEL: He said those were the exact words.

MR. JUSTICE BELL: No, he is asking the witness.

MR. JUSTICE BELL: Can I just explain one thing about where matters are put in cross-examination, not so much to explain what Mr. Rampton has done but in case you want to explain it. If something, for instance, has been read in a paper quoting the witness, let us suppose there was a newspaper article – this is not apropos what Mr. Rampton said – it may just be a report of something which has been alleged to have been said on television, you can put to the witness: “Did you say something to this effect?” You can go on, if you want to say: “I suggest the exact words were these”. If the witness says “yes” or words to that effect, then that is in evidence that he has accepted he says that. One can look at whether it advances any of the issues in the case or not in due course. If the witness says: “No” and that statement is not proved by other admissible evidence in due course, it falls away. You need not concern yourself that something which Mr. Rampton puts to a witness which is not accepted by the witness and not proved in any way, will go into my mind as evidence of the truth of it, because saying it is so does not make it so. The same applies to you. You are entitled to put to a witness in cross-examination: “Did you say this?” even if you do not have admissible evidence that it was said. If they accept that they said it, then it is in evidence. If they do not accept that they said it and you do not have other evidence of it, it falls away and disappears from the case. If you have other evidence on it, you can set about proving it.

MS. STEEL: I was particularly concerned about the use of “these are the exact words”.

MR. JUSTICE BELL: I think that was just shorthand for saying “I suggest that these were the exact words”, that is all. I have raised it not really apropos what Mr. Rampton said, but so that you understand what you are entitled to do in cross-examination yourself, if you want to, in the future. Anyway, you understand what I have put to you?

(…)
MS. STEEL: It is just, obviously, we discussed it previously and it is just whether, because obviously there is a lot of controversial stuff in there that Dr. Barnard does not accept, if it is not put to you by – if it is not put to the witness by Mr. Rampton, will you read it anyway or what?

MR. JUSTICE BELL: What I propose to do in relation to that is only to read what either Mr. Rampton puts to the witness or what you put to the witness in re-examination. Obviously, I cannot stop my eyes falling on other parts, but unless they are strictly proved or accepted by the witness in evidence, I will not take them into account. It is a fact of life in litigation that when you are before a single professional judge, some things will come out which he just has to or she has to put to one side because, at the end of the day, they have not been proved and it is sometimes difficult for people to accept that one can do that, but one spends one’s whole life doing it.

Example 1.1 · Dr. Barnard cross-examined by R. Rampton, QC (October 11, 1994)

In lines 9-11, Steel makes an objection to Rampton’s questions about the percentage of male rats that became impotent as a result of a diet high in fat. The judge reacts to the objection by briefly explaining that it is up to the witness whether he will accept the statement as truthful or whether he would refuse it (lines 12-15). What is important though is that courtroom discourse is a multi-party interaction. While the pro se litigants are the addressees of the judge’s comments, other participants (including the witness) are indirect targets. The judge’s comments can thus be characterized as display talk. The fact that the witness can also hear the commentary in lines 21-24, places Rampton at a disadvantage: the pace of questioning is briefly interrupted, the witness is given time to think about the answer, and what is more, the witness is indirectly provided with an explanation on the importance of his answer and the possibility of refusing the statement attributed to him. Once Steel expresses her concern about the use of the phrase exact

words (line 16), the judge dismisses the objection and Rampton continues in his cross-examination.

The judge returns to the explanation of the concept once Rampton is finished with the cross-examination. The judge offers his advice to the pro se litigants in a hesitant way (Can I just explain one thing … in line 19, What I propose to do … in line 58). He starts with general comments emphasizing his impartiality and stressing that his comments do not refer directly to what Mr. Rampton was doing (not so much to explain what Mr. Rampton has done in lines 20-21, not apropos what Mr. Rampton said in lines 24, 48).

He aims to give the pro se litigants a general understanding of what they can do in cross-examination (so that you understand what you are entitled to do in cross-examination in lines 49-50).

The judge introduces a complicated idea through plain language which is simple semantically (mostly non-technical vocabulary), structurally (mostly clear sentence structures which in spoken language are further disambiguated through intonation) and conceptually (e.g. saying it is so does not make it so in lines 36-37). The judge checks their understanding (Anyway, you understand what I have put to you? in lines 50-51) to make sure that everything is clear. He explicitly shows his understanding of the fact that the concept may be difficult to comprehend to lay people (it is sometimes difficult for people to accept that one can do that in lines 66-67). In the original version of the extract (which was shortened here), it takes the judge five turns to arrive to a mutual understanding with the pro se litigants. Even though it can be time-consuming, the judge tries to make sure the pro se litigants can comprehend legal aspects.

Apart from providing explanation to the pro se litigants, the judge was functioning as a mediator between them and witnesses. The judge often interrupted witness examination to clarify misunderstandings, ask specific questions, and ensure the pro se litigants were not wasting time on things which were not important for his decision-making process. In Example 1.2, the judge stops Steel’s cross-examination on the McDonald’s press releases in order to explain to her what is relevant for his decision-making.

MR. JUSTICE BELL: Where are we actually going on this? I am not interested in any of the press releases or how any party in the case is approached by the media, save in so far as it helps me to an issue.

MS. STEEL: Right.

MR. JUSTICE BELL: If it helps me on whether the press
releases you complain of were defamatory or whether there was
some qualified privilege for them, or something like that, then I
can see that motivation may go to that and then it is relevant,
but it may surprise you, I do not think it probably will, I
really am not interested in the relationships of any party in
this case with the media.
MS. STEEL: Right.
MR. JUSTICE BELL: Save in so far as I can see that it does
bear upon an issue such as that.
MS. STEEL: The only reason I was bringing it up was because
they said they had only responded to McLibel Support Campaign
media.
MR. JUSTICE BELL: Very well, but you have put that point.
The other thing I would suggest is when we have clearly got an
issue between what you are putting and Mr. Preston’s answer,
unless you think you have particular ground to make, leave it
there because it is then a matter of argument as to whether I
accept Mr. Preston’s answers, or whether I accept the contrary
view you would put.
MS. STEEL: OK.

Example 1.2 - Mr. Preston cross-examined by Steel and Morris (May 9, 1996)

The judge goes bald-on-record and interrupts Steel’s cross-examination by
asking a direct question (line 1). He uses imperatives (save in lines 3, 13)
to show his institutional power and he stresses that he is the one making the
decision (so far as it helps me in lines 3-4, if it helps me in line 5, I really am
not interested in lines 9-10, so far as I can see in line 13, whether I accept Mr.
Preston’s answers in lines 22-23). At the same time, the judge makes tentative
suggestions using negative politeness strategies (very well, but ... in line 18, I
would suggest in line 19).

Similarly to Example 1.1, here the judge also shows his understanding for
the pro se litigants’ viewpoint (it may surprise you in line 9). In lines 5-11
and 18-24, he explains everything in plain language. Steel acquiesces to his
institutional power and shows respect, agreement and comprehension (right
in lines 3, 12; OK in line 25).

Apart from explaining the procedures to the pro se litigants, the judge
was also intervening into their cross-examination in a more abrupt way, es-
pecially when there were misunderstandings between the witness and the
pro se litigants. Example 1.3 is extracted from the pro se litigants’ cross-
examination of an expert witness on the link between diet and cancer. In the
part preceding the extract, Dr. Arnott testifies that medical scholars’ opinions on the importance of the link vary and that the influence of diet on cancer used to be expressed in stronger terms than in the time of testimony, i.e. in 1996.

MR. JUSTICE BELL: No, that is quite inconsistent. We listened to the evidence before. You know, as well as I do, that Dr. Arnott said the tendency had been for some time growing then.

Whether you accept it as evidence or not, that is what he said.

MS. STEEL: You said that it was beginning to develop at the time when you last gave evidence?

WITNESS: No, I did not actually say that.

(...)

MR. JUSTICE BELL (to the witness): You had better just say what you think if one can pinpoint the beginning of the great scepticism. I have to say it seems to me to be rather difficult because there have always been enthusiasts, and there have always been sceptics, and what we are now talking about is a body of common opinion which has become more sceptical, as I understand it. Is that what you are meaning to put? There have been sceptics right from the start and there have been enthusiasts right from the start, have there not?

WITNESS: In fairness, as I said this morning, when people first began to relate what appeared to be dietary variations throughout the world, and the variations in the incidence of breast cancer and large bowel cancer, it seemed clear cut that diet or dietary variations could account for perhaps 80 per cent of the differences. It is only following that, when people began to try to confirm these variations, that they ran into difficulties and appreciated that the situation was far more complex than had originally believed to be the case.

MS. STEEL: But that situation, as you said in your statement, was in the 1960s and 1970s which was a long time before you last gave your evidence?

WITNESS: Indeed, yes, and it is actually since that time that there have been inconsistencies in the reports which have appeared.

(...)

MS. Steel: So you are saying it was in the mid to late 1980s that the medical scientific communities decided, or their general view swung away from there being a causal relationship between diet and cancer to ---

WITNESS: No, I am not saying that.

MR. JUSTICE BELL: That is not what he has just said now.

MS. STEEL: I am just trying to understand what he is saying; I cannot follow it.
MR. JUSTICE BELL: You started by saying “so” as if that is what he has just said. He said, “In the mid to late 1980s” —

Example 1.3 · Dr. Arnott cross-examined by Steel and Morris (May 22, 1996)

In lines 1-4, the judge stops Steel by interrupting her line of questioning and describing her strategy as inconsistent (line 1). He goes on to express shared knowledge (You know, as well as I do in line 2) about the previous part of testimony. In line 4, the judge states that the witness has already expressed his opinion and does not have to be questioned about it continuously. Once the witness rejects the statement attributed to him (line 7) in Steel’s question (lines 5-6), the judge takes over witness examination. In lines 9-17, the judge phrases the question saying you had better just say, which undermines Steel’s authority implying that her questions were not relevant. Steel then resumes her cross-examination and rephrases her understanding of the situation in the so-prefaced question (lines 33-36), but the witness disagrees with her.

The judge then intervenes once again (lines 38 and 42-43) to make sure the cross-examination goes smoothly and leads to a conclusive answer. The judge goes bald-on-record and asserts his institutional power. Even though interruptions by the judge help save time, these interferences undermine the institutional power of the pro se litigants. As the author has concluded in the previous study, the pro se litigants experienced difficulties maintaining their institutional authority over witnesses; as a result of this, witnesses mostly managed to provide misleading answers. This prevented the litigants-in-person from successfully showing their side of the case. The fact that the judge did not reinforce their role of cross-examiners further complicated everything for them.

5. CONCLUSIONS ON THE FUNCTION OF THE JUDGE

The above-mentioned examples show the linguistic means the judge chooses in order to provide the pro se litigants with an explanation, direct their witness examination or mitigate between them and the witnesses.

When the judge aims to explain something to the pro se litigants, he uses politeness strategies and hesitation features. In general, politeness features are common in institutional discourse since powerful interlocutors use them abundantly in order to redress the face-threatening acts that they have to per-

18 T. TKACUKOVA, Cross-examination questioning: lay people as cross-examiners, cit.
form\textsuperscript{19}. It is negative politeness features that are especially relevant to institutional settings\textsuperscript{20}. In the above-analysed examples, the judge uses negative politeness strategies abundantly when providing the pro se litigants with an explanation or advice. He shows his understanding for the way lay people percept legal concepts but, at the same time, he stresses his impartiality by describing the rights of both parties and avoiding giving explicit pieces of advice.

Use of politeness strategies in court settings depends on the situational context. Participants holding institutional power can opt in favour of not using politeness strategies in case they need to explicitly show their power\textsuperscript{21}. Mr. Justice Bell goes bald-on-record when directing the pro se litigants’ witness examination or mitigating disagreements between them and witnesses. The examples illustrate that the judge stops the litigants-in-person, corrects them or even takes over their witness examination. The judge is institutionally entitled to do so since he has to ensure that courtroom time is used efficiently. The problem is that by interrupting the pro se litigants, the judge was also vicariously undermining their authority before witnesses and slowing down the pace of questioning. There is no doubt about the appropriateness of his interruptions. What is problematic is the influence his interruptions have on the pro se litigants’ credibility in the institutional role of self-represented litigants.

Another problem stems from the diversity in the roles the single judge had to perform. Multiple roles arose partly due to the fact that it was a non-jury trial, but mainly because of the presence of pro se litigants. The judge was thus responsible for the following tasks: decision making, legal aspects, trial organization, providing information to the self-represented litigants, mitigating problems between the pro se litigants and witnesses or even the opposing counsel. The adversarial legal system dictates the judges to remain impartial under all conditions, but retaining impartiality is almost impossible in cases with pro se litigants. Goldschmidt\textsuperscript{22} claims that in an effort to ensure fairness of the proceedings, judges become passive observers of the unavoidable failure of the unrepresented party. There are many views on how the situa-


\textsuperscript{20} Ivi, p. 33.

\textsuperscript{21} J.L. CASHION, op. cit.; S. HARRIS, op. cit.

\textsuperscript{22} J. GOLDSCHMIDT, op. cit., p. 42-44.
tion could be improved for legal professionals and lay pro se litigants. The unifying idea is that the court personnel as well as judges should take a more active role in providing the most important information and advice to the pro se litigants.

Goldschmidt\(^\text{23}\) advocates an approach according to which the adversarial system could adapt some features from the inquisitorial legal system in order to support a more active role of judges. The scholar, for instance, argues that judges should be permitted to call and question witnesses as well as conduct independent research. The judge could also deal with a part of witness examination and ask pro se litigants to concentrate on specific topics. In view of the analysed examples, it is possible to argue that such an approach would help to avoid interruptions during pro se litigants’ witness examination and prevent the judge from undermining their authority before witnesses.

6. INDIRECT INTERACTION BETWEEN THE PRO SE LITIGANTS AND THE OPPOSING COUNSEL VIA THE JUDGE

As shown above, use of politeness strategies is expected of judges, who hold the most powerful position in court. They can, of course, go bald-on-record whenever the situation is more serious and requires an abrupt interference. Counsels also use politeness strategies, but the rationale behind their politeness strategies is often very different. For instance, the ‘false friends’ strategy\(^\text{24}\) is used during cross-examination to lure the witness into revealing incriminating details. In the adversarial legal system, it is impoliteness as a strategic choice that is commonly expected of lawyers during cross-examination\(^\text{25}\). Impoliteness as a strategy is also expected during the indirect interaction between the opposing parties, i.e. interaction which is mediated through the judge.

The following examples illustrate how Rampton uses the multi-party character of courtroom interaction in order to delimit the pro se litigants as non-professionals. His comments expressed in open court and directly addressed

\(^{23}\) Ivi, p. 45-53.
towards the judge are full of sarcasm and impolite features that are supposed to reveal that the pro se litigants (the indirect targets) are incompetent. Example 2.1 shows Rampton’s reaction to Steel’s complaint that they have not had access to the documents that are being discussed.

1 MR. RAMPTON: Ms. Steel keeps forgetting or mishearing or not listening to what is said in court. The copies of the books which were made available for the Defendants – I mean copies in the sense that they were photocopied – had sat here in the court from the beginning of the trial and the Defendants were told that they were here. They never did anything about picking them up.
2 That deals with that point.
3 MS. STEEL: That is not true.
4 (...) 
5 MR. JUSTICE BELL: What I suggest you do, because at the moment we are on the question of you having copies of what you want. If at any stage in the future we come to questions of the defendants having copies of what they want, then we will deal with that then.

Example 2.1 - Witness examination by R. Rampton, QC (October 3, 1994)

The extract starts with Rampton reacting to Steel’s complaint; the direct addressee of his comment is the judge, but the pro se litigants are indirect targets. The counsel refers to Ms Steel and accuses her of forgetting or mishearing or not listening to what is said in court (lines 1-2) using a three-part phrasal structure, which is a typical feature of lawyer rhetoric26. Here the structure is used to reinforce the associations about Steel’s seemingly deliberate behaviour. The counsel also refers to the pro se litigants as the Defendants (line 3) stressing their inferior institutional position. He finishes with a resolute note that further discussion is pointless (That deals with the point in line 6). Once Steel disagrees (line 7) and they further discuss the availability of the books, the judge takes a neutral position and makes a suggestion on arrangements for future. The judge uses politeness strategies and hesitative features (What I suggest … in line 9).

The next example (Example 2.2) shows Rampton using politeness features when addressing the judge and being impolite when speaking indirectly towards the pro se litigants. In the example, Rampton raises objections during

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Morris’s cross-examination. The pro se litigant was reading out extracts from the court transcripts of the previous testimony of the witness and asking the witness to comment on the extracts. The counsel objects against the fact that Morris takes quotations out of context.

Example 2.2 - Mr. Preston cross-examined by Steel and Morris (May 7, 1996)

The extract shows that Rampton uses negative politeness features when explaining his actions (I am sorry in lines 1, 5; this is awful of me to have to keep jumping up in lines 5-6). But he is impolite when describing Morris’s actions (the vice of what Mr. Morris is doing in line 2, what Mr. Morris doing is wholly improper in lines 10-11, Mr. Morris was unwilling to read in lines 13-14).

Another feature that stands out in the extract is the use of forms of address. The counsel addresses the judge almost every time he speaks to him (my Lord in lines 1, 13). The pro se litigants, however, never address the
judge directly. Whenever they speak to him, they do not use any honorific forms of address. This difference in addressing the judge shows that the counsel is emphasising his official status and knowledge of courtroom etiquette, whereas the pro se litigants are stressing their equality by refusing to abide by these formalities.

Steel addresses the counsel (Mr. Rampton in line 9) without using any forms of address traditionally used for counsels in court (e.g. Counsel, Counsel for the Prosecution/Defence)\(^{27}\). The counsel also refers to the pro se litigants in the same way (Mr. Morris in lines 2, 6, 10, 13). What is important though is that he judge refers to both legal parties by their surnames (Mr. Rampton in line 30) shedding the use of honorific in order to demonstrate his objectivity.

In lines 15-26, the judge explains to the pro se litigants that he will decide which side he takes once he hears all the evidence (I am going to have to decide that in line 18, I have to make up my own mind in line 22). The judge explains everything using plain language and stressing his intent to be objective (I will do that having heard all the evidence in lines 23-24). Morris reacts to the explanation by showing his comprehension and agreement (line 27).

Example 2.2 shows the counsel drawing a dividing line between the legal professionals and the lay people by his constant use of traditional forms of addressing the judge and his impoliteness towards the litigants-in-person. The judge retains impartiality through addressing both parties in the same way and explaining his decision-making process by giving examples for both parties (lines 23-26). Nonetheless, the Example 2.3 illustrates that even despite the judge’s attempts of being objective, he sometimes lets the counsel assist in explaining the legal concepts to the pro se litigants. The extract is from the beginning of the trial when interpersonal relations were not so tense. The example is an extract from Rampton’s cross-examination about the meaning of the word ‘nutrition’.

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1. MS. STEEL: Can I just ask what the purpose of the last 20
2. minutes was? (…)
3. MR. RAMPTON: I am sorry Ms. Steel does not like it, my
4. Lord, but I am afraid that I see that it is very central to this
5. case.
6. MS. STEEL: I just think it seems like a waste of time.
7. MR. JUSTICE BELL: I am sorry. I cannot accept that. One of
8. the issues maybe whether it is or was at any time agreed medical

\(^{27}\) Ivi, p. 82-83.
fact that certain things were so, or whether the most one can say is that some things have been promoted, have evidence query strong, query not in support of them, but that there is remaining extensive debate. MS. STEEL: I thought they were debating whether it applied to rats that had had children. MR. JUSTICE BELL: No, you can argue it in due course. One has to say that we have had an awful lot of evidence in this area of nutrition which may or may not at the end of the day turn out to be relevant to what the issues are. But since our system of conducting these cases is not, for instance, to decide what the meaning of a statement which has been alleged to be defamatory is until the end of the day, indeed, until judgment is delivered. MR. RAMPTON: I know. MR. JUSTICE BELL: One cannot curtail the area of investigation on the basis that the meaning is X or Y; is that right, Mr. Rampton? MR. RAMPTON: Of course it is, it is always right in jury cases it has traditionally been right in judge alone cases. I believe that in one or two recent cases it has been suggested – whether it has happened yet, I do not know – that because the judge is 13 people rolled into one, it would not be inappropriate for him to decide the meaning of the words complained of at the beginning of case or even before that. MR. JUSTICE BELL: I can see advantages in being able to save time, but what then happens if something crops up during the eventual trial which might be relevant to what the meaning was? MR. RAMPTON: It might particularly in innuendo cases; that is always a possibility. MR. JUSTICE BELL: I see it may be difficult. MR. RAMPTON: It saves time very often but it may be unnaturally a straitjacket. MR. JUSTICE BELL: Anyway, the point is I have done my best not to restrict the evidence which you call on this point, and I am not minded to restrict the points which Mr. Rampton makes. I have to say that when we have done nutrition and we are getting on to other factors, it may be easier for us by agreement (and only by agreement) to limit some of the evidence or issues which are canvassed. But that is just a general comment for everyone to think about.

Example 2.3 - Witness examination by R. Rampton QC (October 13, 1994)

Steel raises an objection against Rampton’s previous cross-examination questions; she goes bald-on-record asking a direct question (lines 1-2) and
calling Rampton’s strategy a waste of time (line 6). As it is shown in the previous study conducted by the author, one of Steel’s linguistic features that she shows regularly throughout the trial is that she goes bald-on-record whenever she wants to show her power. The effect is usually reverse since whenever she is impolite towards witnesses, she is perceived as a powerless cross-examiner and witnesses manage to provide misleading answers. The same happens here when Steel goes bald-on-record, but she is silenced with the arguments raised by the judge in cooperation with the counsel.

The cooperation of the judge with the counsel in explaining legal concepts to the litigants-in-person reveals the alliance between them since they share the professional background. Both of them show negative politeness features when interacting with each other: the counsel apologizes when explaining his strategy (I am sorry in line 3, I am afraid in line 4) and uses honorific (my Lord in lines 3-4); the judge asks the counsel for confirmation (is that right, Mr. Rampton? in lines 24-25). They cooperate on explaining the reasons for behind the need to define the meaning of terms after the evidentiary stage (Rampton: I know in line 22, Of course it is in line 26).

When addressing the litigants, they go bald-on-record since they present an opposite viewpoint to them (Rampton – Ms. Steel does not like it in line 3; the judge – I cannot accept that in line 7, No, you can argue it is due course in line 15). In lines 41-48, the judge makes conclusive remarks and emphasizes his impartiality and willingness to agree with both sides on further approach.

The last example shows that the counsel does try to demonstrate that he belongs to the same profession as the judge (forms of address to the judge, explicit demonstration of his knowledge). But the judge here, similarly to the other examples, manages to summarise the main points stressing his objectivity and willingness to help.

7. CONCLUSIONS ON THE STRATEGIES OF THE OPPOSING LAWYER

As shown in the examples, the counsel is overtly impolite towards the pro se litigants. The study by Johnson and Clifford shows that the same counsel Rampton made use of impoliteness strategies while representing Penguin Books and Lipstadt in the libel case David Irving v. Pinguin Books Ltd and Deborah Lipstadt. According to the authors, the counsel used direct and

28 T. Tkacukova, Cross-examination questioning: lay people as cross-examiners, cit.
29 Ibidem.
30 A. Johnson, R. Clifford, op. cit.
indirect impoliteness strategies in order to manipulate Irving during cross-examination. In the analysed case, impoliteness helps Rampton draw a dividing line between the lay litigants-in-person and the legal professionals, i.e. the judge and himself. Although impoliteness can be justified for the purposes of cross-examination, it should not occur in professional settings to disadvantage pro se litigants.

The judge does manage to remain objective; this is evident in his constant use of hesitation and politeness features, which help him mediate and remedy problems between the parties. But the judge could also instruct the lawyer to be more respectful so that the pro se litigants would not have to face hostile atmosphere.

8. Further research

The main motivation for the article was to show linguistic intricacies of courtroom interaction between the professional lawyers and pro se litigants. It is necessary to search for further solutions and raise the awareness of legal professionals of all the problematic aspects of lay advocacy. Legal scholars have already raised doubts about the effectiveness of the existing help scheme for pro se litigants. Goldschmidt supports the need to introduce elements from the inquisitorial legal system, e.g. the right of the judge to conduct independent investigation and directly question witnesses on pre-agreed aspects of the case. As shown here, this would prevent pro se litigants from losing control over witnesses and force witnesses to provide the necessary answers. It would also be helpful to ensure that litigants-in-person do not have to experience any hostilities from the opposing party in court. Further changes could be proposed on the basis of well-founded research.

31 J. Goldschmidt, op. cit.