

Lay Litigation Behaviour in Postcolonial Hong Kong Courtrooms

Janny H. C. Leung

University of Hong Kong

Abstract. *Many jurisdictions have recently experienced a significant increase in the number of litigants in person (LiPs) in their civil justice systems; related research (e.g. Baldacci, 2006; Moorhead, 2007; Richardson et al., 2012; Zuckerman, 2014) has assessed the impact of this on the legal system. In postcolonial Hong Kong, implementation of legal bilingualism (as a result of which ordinary citizens may use their local language, Cantonese, to litigate) and the changing political environment following the 1997 transfer of sovereignty, have also led to a surge in unrepresented litigation. Drawing on both observation data collected in Hong Kong courtrooms and interviews with litigants, this interdisciplinary study explores how LiPs in Hong Kong engage, and struggle, with the justice system, and how changing patterns of interaction in these courtrooms reflect a postcolonial legality. It illustrates the strategies LiPs adopt in presenting their case, which are not displayed by represented litigants or professional advocates, and explains their behaviour in linguistic and sociocultural terms. It is argued that the communication gap between laypersons and legal professionals is ideological and structural, and cannot be bridged simply by adopting present approaches to either assisting or educating the former.*

Keywords: *Unrepresented litigation, litigants in person, courtroom discourse, Hong Kong, post-colonialism.*

Resumo. *Várias jurisdições registaram recentemente um aumento significativo do número de litigantes em pessoa (LiPs – litigants in person) nos seus sistemas de justiça civil; estudos nesta área (e.g. Baldacci, 2006; Moorhead, 2007; Richardson et al., 2012; Zuckerman, 2014) avaliaram o impacto deste aspeto no sistema jurídico. Em Hong Kong pós-colonial, a implementação do bilinguismo jurídico (decorrente do qual os cidadãos comuns podem utilizar a sua língua local, o Cantonês, para efeitos de litigância) e a mudança do ambiente político que se seguiu à transferência de soberania de 1997 também conduziram ao aumento de litigância não representada. Este estudo interdisciplinar baseia-se, quer na observação dos dados recolhidos nos tribunais de Hong Kong, quer em entrevistas com as partes, para analisar de que modo os LiP em Hong Kong se relacionam, e lutam, com o sistema de justiça, e de que modo a mudança dos padrões de interação nestes*

tribunais reflete uma legalidade pós-colonial. O artigo ilustra as estratégias adotadas pelos LiP para apresentarem o seu caso, que não são expostas por partes representadas nem por advogados profissionais, e explica o seu comportamento em termos linguísticos e socioculturais. Defende-se que o fosso comunicativo existente entre os leigos e os profissionais jurídicos é ideológico e estrutural, e que não pode ser eliminado simplesmente através da adoção de abordagens atuais para assistir ou educar os primeiros.

Palavras-chave: *Litigância não representada, litigantes em pessoa, discurso em sala de audiências, Hong Kong, pós-colonialismo.*

Introduction: The Phenomenon of Unrepresented Litigation

Despite a substantial body of research showing that effective legal representation improves the chance of winning a case (e.g., Genn and Genn, 1989; Seron *et al.*, 2001; Latreille *et al.*, 2005; see Kritzer, 1998 for an exception¹), many litigants choose not to be represented. They are known as ‘litigants in person’ (or ‘LiPs’) in the UK and in Hong Kong; in the US, typically ‘*pro se* litigants’; in some other jurisdictions, ‘unrepresented litigants’ or ‘self-representing litigants’. These litigants may or may not have received advice in preparation for trial. The phenomenon of self-representation is on the increase internationally. Such increases have been reported in the US, in both state and federal courts (Landsman, 2009), and it is particularly alarming for defendants, following a Supreme Court decision in 2004, that they do not need to be advised about the dangers and disadvantages of a counsel waiver (*Iowa v Tovar*; analysed in Cook, 2005), despite their competence to stand trial on their own being subject to questionably low criteria, even for capital defendants (Greenlee, this volume). In the UK, civil cases also show high levels of non-representation. In the wake of recent budget cuts in legal aid services, those rates seem set to show a further rise (Civil Justice Council, 2011; Judiciary of England and Wales, 2013). Growing concern has been reported in other countries including Australia (Law Council of Australia, 2004), Canada (Cohen, 2001) and New Zealand (Smith *et al.*, 2009). Although there may be shared reasons for the global prevalence of the phenomenon, such as an increase in literacy (Goldschmidt, 2002) and funding cuts for legal aid, there are likely to be regionally variable contributing factors.

This article shows how self-representation has acquired special significance in postcolonial Hong Kong. Unlike in the US, few would suggest that being litigious is deeply rooted in Hong Kong culture. In fact, a traditional Cantonese saying has it that stepping into court is analogous to going to hell. Although colonial law was often used as a tool of oppression, at the same time it allowed the colonized to take advantage of its services and develop the legal consciousness of the colonial legal system (Merry, 2004). As in many other postcolonial jurisdictions, the law of Hong Kong was forged in the colonial era. During 150 years of British colonial rule, establishment of the rule of law has inculcated ideas of rights and property and instilled faith in the legal system. Under Chinese rule, a weakening of the legislature² in Hong Kong has shifted political opportunities to the judiciary, prompting advocacy groups to use the law to pursue their own goals (Tam, 2013). The autonomy and efficiency of a ‘legal complex’ (especially an independent and functioning judiciary) has also inspired confidence in litigants to use the justice system to defend their rights. Further, with increasing contact and conflict between Hong Kong and mainland China, the rule of law, despite being a colonial legacy, is now seen as a

core part of Hong Kong's identity and used as a way of distinguishing the city from the mainland, with the consequence that a new form of legal consciousness is emerging from the ideological struggle (Silbey, 2005).

During most of the colonial period, English was the only official language used in the legal system, despite the fact that the vast majority of the population did not speak it fluently. It was not until 1987 that Chinese became an additional legal language, and then the translation of legislation into Chinese was only completed in 1997, the year of sovereignty change. Now that locals can litigate in Cantonese (the mother tongue of most Hong Kongers, although a low variety during the colonial days) and be heard directly (instead of through an interpreter), litigants no longer take it as self-evident that they should rely on lawyers, not least because of the lifting of the language barrier.

In 2011, 36% of litigants in the High Court and 51% in the District Court did not have legal representation (Information Services Department (Hong Kong), 2013). In addition to providing legal aid, which is granted if applicants pass a means test³ and a merits test⁴, the government set up a Resource Centre for Unrepresented Litigants in 2003 to offer assistance to LiPs; general counter enquires handled by the Centre grew steadily from 4,268 to 10,108 cases between 2004 and 2008 (LC Paper No. CB(2)601/08-09(04)). Even so, an earlier study by the author (Yeung and Leung, 2015) has shown that the written materials provided were largely incomprehensible to laypeople. This situation was to some extent acknowledged when, as further help for LiPs, a free, means-tested legal advice scheme on civil procedural matters was introduced, currently in the pilot phase for two years.

For common law jurisdictions, the phenomenon of unrepresented litigation is particularly problematic. The adversarial system places a considerable burden on opposing parties in many ways, making litigation a very challenging game for lay players⁵. The Interim Report of the Civil Justice Reform (Interim Report 2001, Hong Kong) specifically highlights the issue of LiPs, acknowledging that "the traditional civil justice system is designed on the basis that parties are familiar with the procedural rules and will take the necessary steps to bring the case properly to trial or to some earlier resolution". This fundamental assumption regarding the system is potentially disrupted by widening participation by laypersons. As in other jurisdictions where self-representation is common, trials may be prolonged and judicial resources consumed (Landsman, 2009). Judges also find themselves taking on an altered role in cases involving unrepresented litigants (Moorhead, 2007). That new and still evolving role involves fresh challenges in preserving crucial judicial functions, including maintaining impartiality, ensuring courtroom decorum and smooth process, and overseeing efficient use of judicial resources.

Current Study

Existing studies focus mainly on 'problems' that unrepresented litigants 'create' for a justice system (e.g., Schwarzer, 1995); they also examine reasons for litigants not having legal representation, the burden such litigants bring to the justice system, and ways to eliminate those problems (e.g., by providing judicial assistance in trials, or legal representation through legal aid). Such studies are necessary and laudable in illuminating the legal process as a whole, but they give insufficient attention to litigants' experience of the justice process. When it comes to interactions in the courtroom, for example, there is a tendency for legal professionals to dismiss litigant behaviour as irrational, unpre-

dictable or disruptive, especially from the opposing lawyers' perspective (Garland, 1998; Zuydhoek, 1989). Unrepresented litigants are also blamed for cluttering up cases "with rambling, illogical reams of what purport to be pleadings, motions, and briefs" (Nichols, 1988). Turning to the linguistics literature, studies of courtroom discourse have overwhelmingly focused on represented litigations (notable exceptions⁶ include Tkačuková (2008) and Tkačuková (2010)). The absence of counsel – at least to some extent – subverts the stereotypical interplay between power and language in the courtroom commonly portrayed in the wider legal discourse literature.

Similarly, in Hong Kong, previous legal studies have tended to take a top-down approach (Kelly and Cameron, 2003; Chui *et al.*, 2007), describing litigants' behaviour through the eyes of judges and lawyers. This exploratory study ventures into uncharted territory by documenting litigant behaviour in Hong Kong courtrooms, with a focus on explaining why such litigants behave as they do, and what strategies they adopt in order to handle a situation they are unlikely to have encountered before. It also highlights fundamental mismatches between litigants' expectations from a common law legal system and what that system is designed to offer.

An interdisciplinary approach to these issues is taken: the analysis offered is both socio-legal and linguistic. Courtroom observations and interview data involving unrepresented litigants were collected during litigation in the lower courts of Hong Kong (i.e., where LiPs cluster). Findings presented below are based on 119.5 hours of observation conducted between July 2012 and May 2013, involving 11 trials in: District courts (8), High Court (1), Land Tribunal (1) and Small Claims Tribunal (1). In terms of selection criteria, apart from screening out cases that involved legal representation on both sides (as indicated in the judiciary's Daily Cause Lists), as well as avoiding scheduling conflicts with the researchers' classes, cases were also chosen from different courts to cover a range of cases, including breach of contract, defamation, damages against a former employer, assessment of damage, medical negligence, debt, divorce, property, land and contractual disputes. In 8 out of the 11 trials examined, both parties were unrepresented, meaning that, excluding one LiP who was absent during her own trial, the courtroom behaviour of 18 LiPs has been observed. All 18 were participating in civil cases. They were approached by the researchers at the end of their trial for an interview regarding their reasons for self-representation, preparation for trial and courtroom experience. The interviews were audio recorded. The benefit of approaching these LiPs after having observed their trials is that the researchers could compare their subjective experience with our observation.

Because no official transcript or recordings are available⁷, courtroom data were collected in the form of notes and transcriptions made by the author and/or her assistant. As a result, the reported data cannot claim precision in terms of micro-linguistic features such as length of pauses, tonal changes, fillers, speech rates and overlaps, which can be highly important in sociolinguistic research (Jefferson, 2004). Instead of analyzing the language data at this level, this paper takes a more macro perspective and an interdisciplinary approach by describing recurrent patterns of litigant behaviour in both linguistic and sociocultural terms, comparing their discourse style with professional advocacy where appropriate, and interpreting litigant behaviour through the interview data. At some points, extended quotation is used to indicate more precisely the verbal texture of courtroom interaction. Unless otherwise stated, the original data are in Cantonese. For

the purpose of this article, however, my own English translations are used, except for stretches of code-mixing (where both languages are given).

Lay Litigation Behaviour and Strategies

This section reports frequently exhibited LiP behaviour and strategies, which are not commonly displayed by represented litigants or professional advocates. Legal normativity is generated through recursive performance, which is not bounded by a fixed set of rules, but reflects the law as “a distinctive manner of imagining the real” (Geertz, 1983), leaving those unfamiliar with it to struggle to perform effectively in the courtroom (Heffer, 2005). A great deal of the behaviour documented in the study is clearly not pre-planned but reflects litigants’ struggles to react to their situation; at the same time, there are observable patterns as regards the strategies that such litigants use to make their case. Data and discussion are presented in a series of sub-sections dealing with the following aspects: non-verbal behaviour, speech style, understanding of participant roles, familiarity with procedures, cross-examination, evidential matters and reasoning process and strategies in argumentation.

Non-Verbal Behaviour

Witnesses who have been ‘prepared’ by their lawyers learn the performative logic of the courtroom; for example, they know that they have to avoid excessive emotional displays (Boccaccini, 2002). Their lawyers also help them to organize their relational stories into rule-oriented accounts (Mertz and Yovel, 2005). By contrast, as has been described by lawyers who faced LiPs in court (Chui *et al.*, 2007), when expressing themselves some LiPs cried, knocked on the table, and pointed their finger at others (including the judge), behaviour that may be theatrically powerful, but is not allowed or expected on the courtroom stage. Numerous examples were observed of LiPs not knowing when to sit or stand and when to speak or remain silent. LiPs were asked not to express themselves by using gestures (such as nodding or shaking their head), not because such gestures are non-communicative, but because they would not be registered by the court recording system.

LiPs were also observed raising their hands to request a conversational turn and showing respect to authority, only to learn that turn-taking in the courtroom, as well as rituals including sitting down and standing up, follow different rules than they had assumed. At such moments of procedural irregularity or failure of etiquette, the layperson may have borrowed ideas from required classroom behaviour, a situational context with obvious resemblance to the courtroom in terms of power hierarchy, but not in terms of the adversarial and the adjudicative nature of the courtroom.

From an insider’s perspective, such litigant behaviour fails to show deference to legal authority by adjusting to the normative behaviour of the courtroom, in which lawyers have been trained. From an ‘outsider’ perspective, the litigants are simply bringing commonplace conversational practice from the wider social sphere into the highly unusual setting of a courtroom.

Pace, Lexical Choice and Speech Style

LiPs also face problems with speech. One such problem is that they tend to speak quickly. Their tempo might be normal in social interactions, but judges (and courtroom researchers) have problems following them, especially given the need for note taking.

The register used by LiPs typically shifts when speaking to judges and speaking to the opposing party, with whom a more informal style is used. Due to the lack of detailed linguistic analysis reported in the literature, it is unclear whether LiPs display similar speech patterns in other jurisdictions. Some verbal behaviour exhibited in the data, however, was undoubtedly distinctive of the Hong Kong bilingual situation. Common law Chinese, a variety of legal Chinese specifically developed for the common law jurisdiction of Hong Kong, is a relatively recent invention, and not something the average citizen is likely to be familiar with. Knowing that the courtroom situation is associated with the formal register, LiPs on occasion resort to archaic Chinese expressions that belonged to the feudal legal system (e.g. 法官大人, literally ‘Judge, Your Big Man’, roughly equivalent to ‘Judge, Your Excellency’ instead of 法官閣下, or ‘Sir/Madam Judge’, to address the judge, as previously documented in Ng, 2009). Such lexical items are commonly heard in historical dramas on television. An alternative form of address that some LiPs adopt is simply to use the pronoun “you” to address the judge which undermines the courtroom formality (and potentially symbolic authority; Stinchcombe, 2001) created by the physical distance and impersonality of legal personnel.

Other than in their address terms, in an effort to be formal some LiPs attempt to insert phrases from the written form of Chinese into their speech. Examples include 時間短促的關係 (“due to the shortness of time”), 好遺憾地 (“with great regret”), and 拎鐵尺警示佢 (“use the iron ruler to caution him”). The result is that their speech consists of an awkward mixture of informal, formal and occasionally hyper-formal vocabulary, sometimes within a single phrase or sentence. This highly distinctive register mix is especially striking in Cantonese because (unlike English and many other languages) the spoken language and the written language are markedly different.

Closely associated with hyper-formality is over-elaboration. In one case, when the judge asked a LiP whether he had submitted a document, the LiP gave a long-winded explanation of the time he arrived at a location and the address of the post office. The judge instructed him that, since his answers had not been challenged, he should “explain only when I ask you to explain”. The issue at stake is not merely one of style: in a US study related to behaviour of this type, O’Barr found that mock jurors were more likely to discredit witnesses who spoke with a hypercorrect style (O’Barr, 1982). Such hyper-formality and over-elaboration are akin to over-acting in the theatre, which reflects LiPs’ excessive effort to appear to be credible and innocent in front of the judge, a kind of performance that seems to be more important in adversarial than inquisitorial settings.

Code-mixing and lexical borrowing are common in the social sphere in Hong Kong, but can now also be heard in the specialised environment of the courtroom. Civil procedures in Hong Kong stipulate that mixing of codes in the spoken form in court is acceptable, but not in the written form in documents. So, the practice is permissible in court, although rarely employed by lawyers in order to avoid sounding unprofessional. When LiPs mix codes, the base language they are using is usually Cantonese, with legally-related English lexical items inserted, especially when a LiP is talking to the judge. Examples of lexical borrowing from the data include:

- 我想請問你個court的文件係冇冇... – “I want to ask you whether the *court* has the *file*...”

- 咁我就收到梁生的一份civil litigation, 我覺得好奇怪, 因為佢唔係呢個trademark的持有人... – “Then I received the *civil litigation* from Mr. Leung. I found it strange because he does not own the *trademark*...”
- 同埋佢根本establish唔到, 話我偷野, 係邊度, 邊度偷, 邊張相... – “And he simply cannot *establish*, that I stole, where, which photograph...”
- 請佢prove返證據... – “Ask him to *prove* with evidence...”

While the mixing of codes may be habitual, the pattern it creates is not random (Myers-Scotton, 1993). The English insertions are linguistically marked, especially given that it is the ex-coloniser’s language and the native language of the common law. Possible explanations include that lexical borrowing is used to borrow authority, or to align with legal professionals, including the judge. The practice may in some cases be contrived to reflect positively on the speaker’s socio-economic and educational status. Codeswitching in the courtroom has been reported in other former British colonies. In her study of Malaysian courtrooms, David (2003) found that Malaysian lawyers codeswitch to English to show audience awareness, to highlight culturally alien concepts, and to add emphasis.

Understanding Participant Roles and Turn-Taking

LiPs are largely dependent on the judge when it comes to procedural matters (similar to what has been reported in Moorhead, 2007 in the UK context). Sometimes they expect judges to teach them what arguments to make in order to succeed, how they should proceed, and what kind of evidence they will need. Although judges are not tasked with facilitating trials by providing legal advice, they are generally sympathetic towards LiPs, despite occasional signs of irritation.

In many respects, litigants’ understanding of courtroom interaction may have been misinformed by what they have seen in the popular media. At trial, objections are properly initiated only for evidential or procedural reasons (Imwinkelried, 2012), and such reasons must be clearly stated within the same objection sequence (Heffer, 2005). Genuine grounds occur rarely⁸, but some LiPs act as if they can express their disagreement with an argument by objection:

D: *Mr. X (plaintiff) never gave me the document –*

P: *(stood up; interruption) I object!*

J: *Don’t fight for a turn! You sit down. He was talking!*

In this interchange the LiP has failed to appreciate that turn-taking in the courtroom is governed by a complex set of rules (illustrated in Heffer, 2005) based on participant roles and stages of the trial, and differs fundamentally from the patterning of daily conversation in which overlapped speech is frequent and speakers self-select to talk (Sacks *et al.*, 1974); during courtroom examination, for example, both turn order and the type of turn which each speaker is allowed to take are fixed (Atkinson and Drew, 1979). It is possible that the LiP was imitating scenes from TV courtroom dramas that tend to exaggerate the frequency of objections. Features of everyday conversation now encroach increasingly on courtroom discourse, as LiPs compete for the floor (incidentally posing a new challenge to accurate trial recording). This would have been unimaginable in the courtroom of British Hong Kong, given the presence of court interpreters who mediated exchanges mostly between Cantonese speaking witnesses and English speaking legal actors. By contrast, some LiPs in the data sought to gain a speech-turn by politely asking for one, as in the example below:

P: *Your Honour, can I talk now?*

J: *Ask all your questions in one go later. Take notes so that you won't forget!*

In a different case, when a request for a turn was declined an elderly LiP petitioned further. After the judge told him it was not his turn to talk yet, he said "I am old and my memory is not strong. I want to reply immediately. You are not allowing me to talk..." He pointed out, in a dignified protest but unsuccessfully, that he was illiterate and so unable to take notes, in effect highlighting how unrealistic it was for him to follow the established procedure. This example presents the kind of problem for which an adversarial system is not well prepared. When parties are represented, the presumption is that lawyers are literate, can remember the points they wish to make, and will make their submissions at the correct time.

Knowledge of Procedures

In order to ease some of the difficulties outlined so far, judges frequently assist by calling for breaks, for example, so that LiPs can photocopy documents they forgot to prepare for the witness, to amend a document, or think further about arguments they wish to submit. In one case, the judge found that the unrepresented plaintiff's oral submission in court was quite different from his written statement of claim. It turned out that the plaintiff did not understand his own statement of claim, either in terms of content or purpose, because the claim had been prepared in English by a lawyer who had then ceased to represent him. The judge ordered a three-hour break for the LiP to decide precisely what his claims were, but still ended up having to help him narrow down his list based on the limited evidence he had available.

Normally in a trial, the opening statement provides an opportunity to highlight the main issues and present a summary narrative of the case, in order to frame the facts which will be presented in witness testimony (Wilkinson, 1995). Confusion between statement and evidence is common among LiPs. On the other hand, given that it is the same LiP who does all the talking, it can be difficult conceptually for that person to distinguish between rehearsing their litigation strategy and testifying on the facts. Sometimes one or more procedures of the trial (such as opening statement and cross-examination) may end up being skipped in order to expedite the trial process.

LiPs show a tendency to see procedural matters as mere obstacles to their narration, as is evident in another case involving a land dispute in the course of a dialogue between the judge and an unrepresented respondent:

J: *You are going to testify in a moment. Will you use the witness statement you submitted to the court?*

R: *What?*

J: *The witness statement you handed to court – will you be making use of it?*

R: *What?*

J: *You handed the court a witness statement – will you use it?*

R: *Statement?*

J: *Use the witness statement or not?*

R: *He [the tenant] does not want it. (Switches to start narrating his story)*

J: *Wait, Mr. X, don't start yet...*

For the litigant, their version of the event naturally takes the form of narrative. But this manner of speaking is often deemed as irrelevant or rambling in the courtroom (Baldacci,

2006); as has been shown in other jurisdictions, rejection of narratives is a systematic way of silencing LiPs (Bezdek, 1992). The litigant's opposing party, also unrepresented in this case, appeared equally baffled and was unable to structure his narrative into appropriate legal sub-genres, as is evident in the following exchange:

J: *Do you want to take the witness stand first, to give your testimony, and then give your statement? If the two are the same and you don't want to repeat, you can go straight to the witness stand...*

A: *I have something to say.*

J: *Testimony or statement?*

A: *I have something to say*

J: *I heard you. Testimony or statement?*

A: *What's the difference?*

J: *A statement is a statement; the other party cannot ask you questions. If you are providing a testimony, both Mr. X and I could ask you questions.*

Examples of this kind (which echo bewilderment about trial process among LiPs reported in studies of UK tribunals; Genn and Genn, 1989) show unfamiliarity not only with procedures but also with the legal rationales behind them. What is at issue, accordingly – and something too easily passed over in analyses of courtroom dialogue – is not simply the register or style of interaction during court proceedings, but also the related effectiveness of advocacy.

Questioning and Answering

Cross-examination, which provides an opportunity to ask questions to a witness who has testified on behalf of the opposing party (Zander, 2007), offers another interesting lens through which to observe LiP behaviour. Except in these circumstances, it is rare to see laypersons occupying the shoes of a lawyer, questioning witnesses and challenging the different story they may have to tell (Tkačuková, 2010).

In cross-examination, a series of linked questions is frequently employed, with each question covering single facts one at a time but with the goal of cumulatively building up an effective account. Some legal advocacy guides in fact state that a successful cross-examiner should ask questions in such a way that the witness will keep saying *yes* throughout (Evans, 1993). Sociolinguists (for example Gibbons, 2003 and Eades, 2012) have also documented the way lawyers use coercive questioning techniques to control witnesses. The data collected bear little resemblance to such findings, however. Many LiPs we observed failed to appreciate the purpose of cross-examination (although it is possible that learning may take place over time if the case lasts long enough; see Tkačuková, 2010; however, see also the counter example below). As a result, they are often unable to benefit from this opportunity to cast doubt on others' testimony. In daily discourse, speakers rarely have to pose informational questions (as contrasted with rhetorical questions) to people they are arguing against. Some LiPs seem to believe that their best strategy is to not allow the witness to speak, by dominating the discourse or by avoiding rather than asking questions. More generally, LiPs struggle to formulate suitable questions. In one case, an unrepresented defendant (D) simply wanted to concede his turns, unknowingly waiving his right to question witnesses.

D: *I don't know how to ask (questions), your Honour.*

J: *Just say you don't agree with... (detailed instruction omitted in transcript), then you are asking a question. I can't ask questions for you.*

D: *Then I don't have a question.*

J: *That would mean that you agree with everything that was said in the statement.*

D: *I see...*

In another case involving a rental dispute, the judge asked the respondent to cross-examine the applicant. But the respondent appeared to view this as simply a chance for his opposing party to speak, so he would rather dictate what the other party should say rather than asking them questions.

J: *You can now cross-examine, Mr. X.*

R: (respondent) *What?*

J: *Ask him questions!*

R (to applicant): *Eh then, you say you don't rent it (a property) to me, you say it!*

These examples contrast strongly with professional advocacy, in which lawyers show great skill in demonstrating through questioning that witnesses may be wrong, forgetful or dishonest, by exploring a witness's forgetfulness, asking leading questions and setting traps (following the kind of advice proposed by Evans 1996, 103, such as 'don't spring the trap until the witness is inside').

As in other respects already discussed, the justice system shows itself to be premised on an assumption that parties will be represented, with the result that cross-examination procedures, for example, can seem redundant when LiPs are involved instead. On one occasion, after an unrepresented defendant answered questions from the plaintiff, he had to be re-examined as a witness by the defendant (i.e., by himself). When the judge asked him whether he wanted to re-examine himself, he was puzzled and merely said 'no'.

Faced with these seeming distortions of established legal process, some judges offer more extensive help to LiPs, by reformulating their questions or even asking questions on their behalf, a line that judges in some other jurisdictions try not to cross, though without uniformity (Moorhead, 2007). In this way common law judges in Hong Kong, when LiPs are involved in a trial, seem increasingly to take on a more inquisitorial role than is customary in a common law system (see comparisons between the inquisitorial and the adversarial systems in Ainsworth (this issue) and Chapter 4 of Zander, 2007).

Documents, Evidence Rules and Legal Reasoning

Unlike barristers, few LiPs have developed the habit of referring to a page number and line number when referring to a document. As a result, judges and witnesses often struggle to follow the particular point being discussed in the trial documentation. In one case a LiP attempted to introduce into the bundle during trial a number of additional documents that had not been included in the process of discovery beforehand.

When the moment finally arrives, some LiPs are unable to provide evidence for critical "facts" that they have asserted are in their pleadings. In a case involving a financial dispute, a LiP failed to produce any documentary proof of a crucial insurance claim paid to him. In another (divorce) case, the husband (H) wanted to submit a police statement to the judge (J) regarding an earlier dispute between his wife (W) and himself about child abuse. She tried to stop him from submitting the evidence:

J (to H): *Do you understand me, sir? I am not refusing to accept it but it won't do anything to your case.*

W (raising her hand): *Your Honour, I agree with you, I don't accept the document either.*

J: *I don't need your acceptance.*

W: *I object.*

J: *You wait. Later if you object to anything you can ask him questions. You can disagree with points made but you cannot stop him from submitting evidence to the court.*

W: *I object.*

J: *Read it first! You haven't even read the document before you object.*

Due sometimes to a lack of understanding on the part of LiPs of the legal crux of their own cases, it happens that questions and answers deteriorate into squabbling. Sometimes LiPs do pick up on what has been said during cross-examination, but focus wrongly on points that may not be legally relevant. The following excerpt comes from a case in which an employer sued an employee for breaching his contract by delegating a job to a third party who then caused damage. Both parties were unrepresented. The following exchanges took place during a stage in the proceedings when the plaintiff (P) was supposed to cross-examine the defendant (D):

P (to D): *Do you sometimes look for part-time jobs?*

J: *How is that related to our case?*

P: *He said he is poor!*

J: *Whether he is poor or not has nothing do with this case.*

Such irrelevant squabbling not only prolongs trials, but also distracts everyone present from the genuinely important points of a case.

In their approach to amateur advocacy, LiPs often focus on their feelings and personal experience rather than substantive law; this is a legitimate persuasive device in everyday discourse but not part of legal reasoning. As Merry (1990: 147) has observed in a different context, litigants often fail to formulate their social problem as a legal problem. This may be unsurprising if one considers the rule of law as an imagined order, which is not interested in the whole story of what happened but a reduction of it to legal facts rendered from a specific social construction (Geertz, 1983). In the following excerpt, for example, the LiP displays limited understanding of what law can do for them:

J: *Law is law; grievance is grievance. (One) has to follow the spirit of the contract.*

D: *I feel cheated.*

As argued by Tannen in her general account of adversarial argument, the “requirement to ignore guilt, innocence, and truth for the sake of the law is deeply upsetting to many” (Tannen, 1999: 148). LiPs do frequently refer directly to the law in what they say, but usually they do so using stock phrases such as something being “against the law”, or echoing very broad notions such as “Hong Kong has the rule of law”. They tend not to be specific about what legislation they are relying on, or about the precise legal basis of their claims. Only one LiP out of the 18 observed cited a legal case, notwithstanding the importance of legal precedents in common law.

Domination, Bargaining and Quarrelling

In a manner that also echoes Tannen's general insights, common argument strategies used by LiPs include trying to dominate the conversation and objecting to anything the

opponent says, even if the point is not material. In a medical negligence case for instance, a LiP digressed to challenge the doctor's report by finding flaws in a statement that was immaterial to the case.

By contrast, the next aspect of LiP argument style to be discussed relates specifically to a Cantonese manner of speaking. A significant number of LiPs in the data attempted to make themselves more convincing by making statements that sounded more absolute than they had grounds to support. For example, they made an accusation more serious than had been alleged elsewhere in the case documentation, possibly in the hope of negotiating or haggling down, in the way a street vendor starts with an absurdly high price but expects to meet the buyer at mid-point after bargaining. This strategy, however, can prove detrimental to their case, as is shown in one judgment among the cases observed in which the judge describes an unrepresented plaintiff who was suing a hospital, "*Mr. X is clever and has received higher education. He obviously has some medical knowledge. I have considered his testimony and manner of presentation. I think he has exaggerated and distorted the facts on a number of occasions, therefore I find him unreliable*".

Sometimes a LiP does not appear to realize that serious accusations presented in exaggerated form can have legal consequences; and many LiPs have received a warning similar to the following from a judge in the data collected.

D: *(I confessed to a crime because) I thought it was a minor incident, the police said it's not a big deal, they misled me.*

J: *Your accusation is very serious! You said the police misled you.*

Here the LiP justified his own behaviour by putting the blame on others, not an uncommon strategy in social interaction, without being aware that this constitutes an accusation with legal significance. After being warned by the judge, the witness accepted that the word 'misled' was incorrect. In a similar vein, LiPs occasionally accuse the other party of forging documents or of lying when they disagree with what has been said. One LiP persisted in saying that "every single thing" the other party had said was a lie, to which the judge responded:

J: *This is a court. You can say you disagree. If you say they are lying, this may constitute defamation!*

Personal attacks are not uncommon, either, or LiPs calling each other names (such as 'villain', 'dishonest character', and 'a scum'). All the strategies discussed in this section are common in day-to-day quarrelling but fall into legal categories of understanding the world that bring consequences. Their use contrasts with professional advocacy where lawyers may persuade by highlighting or downplaying facts, but they must not suggest evidence that is irrelevant or inadmissible (Ross, 2005).

Sophisticated Self Representation

Two LiPs in the data displayed comparatively sophisticated advocacy styles and are now discussed separately. One of them had been coached by a lawyer before the trial, and the other (identified as P below) was a veteran litigant, who had represented herself in at least three lawsuits that she had initiated in the previous ten years. In addition to having litigation experience, this LiP was also a highly educated (doctorate-level) professional, spoke fluently the language of the proceedings (in the only case in the data tried in English), and had seemingly devoted a lot of time to researching and preparing

her submissions. She had evidently acquired sufficient basic legal vocabulary, addressed the judge correctly and had also acquired a range of stock phrases that lawyers use or are believed to use ('at the material time at the material place', 'let me just take you back to the time'). She appeared confident and argumentative, to the extent that she sometimes attempted to dominate the judge, as is shown in the following example.

J: *I don't care if she (P's supervisor) has made any changes (to P's appraisal).*

P: *I care!*

J: *I'll decide at the end of the day! Don't ask me. I'll take care of it, when defence witness is called.*

P: *Did you see it?*

J: *Don't ask questions!*

Despite her apparent familiarity with the courtroom setting, just like other LiPs portrayed above this educated litigant also focused overwhelmingly on her feelings and experiences rather than on legal reasoning. She made serious allegations against others without proof and had difficulty in keeping her testimony relevant. She displayed a tendency to use chains of intensifiers and adjectives to emphasise her points: 'every single', 'never ever', 'malicious, humiliating, discriminatory, degrading, abusive', all of which prompted the judge to remind her more than once how serious her allegations were.

J: *'manipulative', 'abusive', ... you know how strong were these words? You know your words?*

The contrast between this litigant and others is clear. The stereotypical unrepresented litigant is considered to have low income and low literacy (Alteneider, 2007), and as a result to be likely to make obvious mistakes in court. This litigant, by contrast, showed no obvious lack of capacity but nevertheless still faced challenging hurdles in the courtroom, which might therefore be systemic and have little to do with lack of general education, literacy, motivation or effort.

Understanding Litigants' Behaviour from their Perspective

Among the 18 LiPs observed in this research, 9 (50%) were later interviewed in a face-to-face setting in the court building following an approach made to them at the end of their trial. The resulting sample is small, so it cannot be claimed that this data is representative of LiPs in Hong Kong, but at the same time, this is the first Hong Kong study in which LiPs' voices are directly heard on the question of litigation. Their view of the justice process provides useful clues to explain the observation data; importantly, whether court users feel that the legal procedures they went through are fair can powerfully influence their acceptance of legal authority (Tyler, 2003).

Reasons for Not Having Legal Representation

The majority of LiPs interviewed cited financial reasons for representing themselves, implying that increased provision of legal aid services might well significantly reduce the present number of LiPs. However, as shown in Kritzer (2008) in other countries, different considerations may come into play. Some worried that the opposing party might deliberately delay trial to increase cost and so expose them to open-ended financial risk. Some thought they would be able to keep costs under control if they did not have to pay lawyer fees. Some knew that the other party would not have money to pay costs even if they succeeded at trial.

One had been refused legal aid on account of the lack of merit of his case, rather than for financial reasons. There are no statistics on the number of unrepresented litigants who proceeded to trial after having been declined legal aid for lack of merit, but this group of litigants deserves research attention given that debates surrounding increases in legal aid are almost always linked to assisting the poor.

Alongside financial explanations, another prevalent line of reasoning was that, if litigants could just “tell the truth”, justice would do the rest. This same belief in justice has been reported in American culture⁹, and reflects a strong reservoir of commitment to the relation between a common law system and democracy. It is not clear how specific this is to LiPs, rather than more widely to all litigants; but it appears to be this belief that explains some of the observations reported above, including the otherwise surprising lack of attention paid to legal reasoning and trial procedures. Indeed one LiP stated during her interview that she did not need a lawyer because she was not lying. Another interviewee showed confidence in his ability to represent himself by suggesting that lawyers could not be more familiar with his case than he was himself. Another commented significantly that she had faith that the judge would be impartial to unrepresented litigants.

Preparation and Courtroom Experience

Most interviewees claimed that they had spent a lot of time preparing their case, but they had limited access to professional legal advice. Some had undertaken research on the judiciary. Only one said he had not prepared at all, because he felt he would just do whatever the judge told him to do when he turned up in court, an attitude closely connected to the point made above about litigants’ belief in the adequacy of simply telling the truth. This LiP was however ignorant about cross-examination and did not understand either the relevant legal procedures or terminology. One LiP named a courtroom drama on TV as a useful reference point in preparation. Interestingly, none of the interviewees who attended their trials following the introduction of the free legal advice pilot scheme referred to at the beginning of this article had actually heard about the scheme. Neither had most of them heard of the Resource Centre for Unrepresented Litigants. The two who had heard of the Centre had not visited it because they imagined it would be bureaucratic and, in their words, useless. Some confused the Centre with the Legal Aid Department (whose service is means-tested). Two had visited the Resource Centre, but only one found it useful. These results suggest that both the publicity and the effectiveness of the existing resources available to LiPs could be strengthened.

Some LiPs felt there was a big difference between what they had expected and what actually happened in the trial. Interviewees indicated that legal terminology was difficult to understand and confirmed that they were frequently confused about who should speak when, as well as about other procedural arrangements. Overall, there is a high degree of consistency between their stated reflections on their courtroom experience and what was observed (perhaps other than their somewhat inflated confidence in their understanding of the trial and the strength of their own case). One interviewee, who felt there had been a huge mismatch of expectation, was disappointed that the judge “did not make any investigation before delivering his judgment” (showing confusion about the role of the judge in the common law system), and “did not rule in accordance with what the contract says”. He also felt that the judge was biased against the middle class (in this case, himself).

Discussion

Litigation in a common law jurisdiction has become a professionalized activity¹⁰, for a range of reasons to do with the increased complexity of social life, the reach and detail of administrative oversight, and increased legislative activity (Tai, 1994). If professional knowledge is considered power (Foucault, 1980), then what is on show when a LiP comes up against a lawyer amounts to a clear instance of power asymmetry. We can see an interweaving of language and power in cases involving LiPs on both sides. But the power struggle involved is different from cases involving legal representation. In cases involving two opposing LiPs, the power asymmetry lies less in how far an opposing lawyer can exploit the situation to the advantage of his or her client, or in the complicated legal language he or she may choose to use in advocacy, or even in trick questions apparently devised primarily to overpower witnesses (all of which are typical findings from forensic linguistics studies, see Coulthard and Johnson, 2007); rather, what is involved is a sometimes confused struggle between the two LiPs and the legal system with which they are both engaged.

Judged from the perspective of the legal professionals, unrepresented litigants are likely to be viewed as a burden to courts and their behaviour erratic. The picture that emerged from the above analysis is that lay litigant behaviour is reasonable and rational, but only if we interpret it with reference to where they come from. Ordinary people rely on narrative (O'Barr and Conley, 1985; Baldacci, 2006); by contrast, professional advocates rely heavily on logico-scientific reasoning, with some narrative elements skillfully incorporated to facilitate jurors' understanding (Heffer, 2005). For LiPs, legal procedures are merely an obstruction. When confronted with the opposing party, litigants may respond with accusations that have no strong evidential basis, as one might do in an ordinary argument. In fact, speech features displayed by many LiPs, such as excessive hedging, empty intensifiers, and hypercorrectness, are associated in the sociolinguistics literature with powerlessness (O'Barr, 1982).

Although ineffectual courtroom performance by unrepresented litigants is generally associated with low literacy rates, the data reported above show that there is also an ideological gap, even for highly educated veteran litigants. What LiPs struggle with is not only specific legal language or procedures. Rather, it is the underlying concept of an adversarial trial in a common law system, and the contrived boundary between social and legal worlds. LiPs seek help from the legal system because of their personal grievances; but their narrative and feelings are often ignored and deemed legally irrelevant. This echoes a constant complaint by witnesses whom Conley and O'Barr interviewed in the 1970s – that “I never got a chance to tell my story” Conley and O'Barr, 1998: 67. Given the expectation mismatch between what a LiP hopes to obtain from the justice system and what they are likely to achieve, there is little surprise that LiPs become frustrated users of the legal system. They find themselves caught in a paradoxical situation: they have chosen to mobilize the law in order to gain authority in resolving their personal problems but at times their helplessness is intensified rather than alleviated by their courtroom experience.

It is also of interest to note that whether a trial has been prolonged by the presence of LiPs – a frequent concern in the relevant literature – is not a good indicator of whether that trial is problematic. As shown in the data, trial procedures are sometimes skipped and rights may be unknowingly waived by LiPs (a problem emphasized in En-

gler, 2006, and at other times procedural clumsiness may lengthen a trial. Whether a trial is prolonged or not may also be correlated with judicial patience with LiPs. Courtroom ethnography shows that quality of justice is not something that can just be presumed.

The current bilingual policy has allowed Chinese cultural elements, once suppressed and lost in translation, to surface in colonial-style common law courtrooms in Hong Kong. A lot of the interactions documented in this paper would not have been seen when trials took place only in English in British Hong Kong, regardless of whether litigants represented themselves. In those trials, Cantonese-speaking litigants could only speak to the court via interpreters; such linguistic mediation made it extremely difficult for litigants to interrupt a judge, or raise objections as a way of conveying disagreement. The changing courtroom atmosphere, especially the weakening of judicial formalism, is one facet of the localization process of a colonial import.

The question that then arises is whether the system delivers the kind of justice, or even experience of justice, that meets their cultural expectations, which in turn shapes their perception of the legitimacy of the system. In postcolonial Hong Kong, despite increased legal mobilization and apparently improved access to justice, laypersons still face an ongoing struggle in dealing with the law. The rule of law, now reinvented as a core value of Hong Kong, has become a rhetoric that may inflate litigants' confidence in what the law can do for them.

Despite the struggle and the increased confidence, self-representation reflects the uniqueness of the legal ecology in Hong Kong. With its unusual mix of colonial heritage and political environment, under the 'one country two systems' policy, Hong Kong has become the only Chinese city where legal mobilization has emerged.

Conclusion

To the extent that communication breakdown does occur in the courtroom and that trials do not proceed effectively, there may be substance in warnings that an increase in LiPs may compromise the "quality of justice" (Hirsch, 2011). Who is responsible for that threat to the quality of justice, however, is another matter. In the United Kingdom, for example, Lord Woolf aptly noted in his highly influential report *Access to Justice* (Lord Woolf MR, 1995: 119) that

Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of justice exists. The true problem is the court system and its procedures, which are still too often inaccessible and incomprehensible to ordinary people.

Litigation has become so professionalized that allowing litigants to represent themselves – if this involves subjecting them to identical standards of procedural competence as legal counsels – does not amount to giving them access to justice. The problem is arguably worse in Hong Kong than in many other common law jurisdictions, given the language hurdle: the vast majority of LiPs are Cantonese speakers, but legal reference materials, especially case law, are mostly available only in English. The question that faces the justice system, accordingly, is how far the court can accommodate the litigant procedurally without damage to due legal process. The main problem highlighted in this paper is not incompetence on the part of the litigants and therefore solutions should not seek to bring litigants up to par. For this reason, I argue that the kind of help that the Hong Kong government has been providing, namely judicial assistance, the Resource Centre, and the

legal advice scheme, does not address the fundamental problem. Given the dramatically upward trend of unrepresented litigation, the legal system needs to be organised in such a way that justice will be meaningfully accessible to LiPs. Increased use of narrative may be considered, especially given that jurors are predisposed to process stories more readily than discrete facts or statistical probabilities (Pennington and Hastie, 1991). Reforms at the structural level might include simplifying the rules of evidence and relaxing judicial formality in the lower courts, in a manner similar to how some American courts have relaxed procedural requirements for LiPs (Landsman, 2009). More radical advocates suggest that an inquisitorial system would be better suited for LiPs, and might be partially adopted in the lower courts of a common law jurisdiction (e.g., Baldacci, 2006; Finegan, 2009). Use of mediation or other settings that allow unrepresented litigants to communicate effectively may be encouraged.

The increased presence of LiPs in the postcolonial Hong Kong courtroom challenges existing practice and presumptions, and the legal system is now confronted with a pluralistic understanding of justice that was less visible during the colonial period. It may be argued, however, that such challenges present a timely opportunity to improve procedural justice and bridge ideological gaps.

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Notes

¹Although the author challenges the necessity of having legal representation, he does stress the importance of legal assistance provided by lay specialists in effective litigation. In other words he does not dispute the relevance of legal expertise to advocacy.

²By changing the election system of the legislature and restricting legislative power, see Tam, 2013.

³Currently under the Ordinary Legal Aid Scheme, for civil legal aid, a person is only eligible if his financial resources amount to less than HKD 269,620 (approximately USD34,567)

⁴“The main purpose of the “merits test” is to determine whether an applicant has a reasonable claim or defence or whether the grant of legal aid to an applicant is justified.” Legal Aid Department.

⁵In the course of professionalizing the justice system. The adversarial aspect of the common law is relatively recent. See Langbein, 2003).

⁶A series of important papers have also been produced by O’Barr and Conley (1985), who are legal anthropologists interested in courtroom discourse.

⁷Access to such official materials is granted at the discretion of the judge. The Hong Kong Judiciary rejected my application multiple times without any reason given, despite the fact that all the cases observed were tried in an open court.

⁸In the UK and in Hong Kong. Objections are raised more frequently in the US.

⁹As expressed in a lawyers’ joke in Galanter (2005), cited in Landsman (2009: 446), which suggests that only liars need lawyers.

¹⁰Litigants represented themselves in ancient times (Roth and Roth, 1989). A class of persons who offer legal services emerged in western Europe shortly after 1200; prior to that, dispute resolution did not require expert assistance (See Brundage, 1988 for a historical overview). Three hundred years later, receiving legal assistance was seen as right in England; Henry VII declared the right to free legal counsel in 1495 (in force until 1883), see Johnson, 1985.

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