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THE POWER OF QUESTIONING: A CASE STUDY OF COURTROOM DISCOURSE

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Abstract

The article discusses linguistic approaches to power and deals with question-answer types of interaction in institutional discourse. The main focus is on discursive tools available to participants with an institutional status and the way these powerful participants restrict their interlocutors through questioning. The article starts with introducing general principles applicable to all institutional discourse types; it then proceeds to demonstrating these principles on a detailed analysis of several extracts from courtroom discourse.

Keywords

institutional discourse, courtroom discourse, cross-examination, discursive resources, pragmatic strategies, power, closed questions, open questions

1 Approaches to power

The phenomenon of power poses many challenges to researchers aiming at delimiting, let alone measuring it. The understanding of power has been developing for decades and originates in Foucault's theory of power (1977, 1980, as quoted in Thornborrow 2002: 7). Foulcaut stresses that power is activated through interaction. Critical linguists, who were inspired by Foulcaut, consider power to be pre-determined rather than negotiable or shifting. According to critical linguists, power is attributed to the participants of talk according to their institutional identity, social status or gender (ibid.).

The main ideas of critical linguists were taken up by Fairclough (1989) and developed into a more complex theory of "power in discourse, and power behind discourse" (ibid.: 43). For Fairclough, "power is won, held and lost in social struggle" (ibid.: 74) and as such it is manifested in different types of social and factual constraints (ibid.: 74-76). As Thornborrow (2002: 16) puts it, such an approach makes it necessary to consider social relations (e.g. control over the interactional space, turn-taking, topic management, formulation of facts, modality, politeness features) as well as social reality (e.g. lexical choice, metaphorical meanings) when analysing power in texts.

CA (conversation analysis) scholars have also been dealing with the question of power, though in a very tentative way, preferring to use the term

asymmetry. Following the CA methodology, Drew and Heritage (1992: 47-51) mention three reasons which give rise to asymmetries in institutional discourse: a question-answer pattern of interaction, different amount of knowledge shared by the participants, and the perception of a client's unique case as a routine situation. The authors consider the question-answer pattern of interaction to be the most important reason of asymmetries. Asymmetry is thus viewed mainly in terms of interactional space and turn-taking management (Thornborrow 2002: 21). In his article, Hutchby (1996: 484) justifies the CA's focus on the local management of talk-in-interaction as a basis for the analysis of power relations in institutional settings. On examples extracted from British talk radio shows, the author demonstrates that the exercise of power and resistance to it become observable only after a thorough analysis of the sequential organisation of interaction.

The methodology followed in this article is after Thornborrow (2002), whose approach to power relations in institutional discourse lies in between CA and CDA (critical discourse analysis). In her book *Power Talk*, the author follows the sequential development of the interaction and at the same time considers how individual turns fit into a wider social and institutional context. Thornborrow thus discusses institutional discourse from the perspective of power balance paying special attention to discursive tools that an institutional status allows powerful interlocutors to use.

2 Institutional discourse

Institutional discourse offers a rich source for analysing power since there are big differences between the participants in their institutional roles or social statuses. One of the most typical features of institutional discourse is restrictions on types of contributions that participants are allowed to make (Drew & Heritage 1992: 22-25, Levinson 1992: 97). Thornborrow (2002: 4) specifies two types of such restrictions: the asymmetrical distribution of speaker rights and obligations (e.g. barristers have the right to ask questions, witnesses are obliged to provide answers) and the differential access to discursive resources and identities (e.g. barristers are more likely to ask questions than witnesses). These characteristics are shared by a wide variety of institutional interactions ranging from classroom discussion talks to police interrogations (ibid.: 135).

Drew and Heritage (1992: 25-29) point out that institutional interactions set in formal settings share more common features within their category than with institutional interactions set in non-formal settings. Witness examination in court and news interviews are, for instance, among the most formal institutional interaction types and display such features as strictly restrained turn-taking

(i.e. turn-taking rules that do not allow any deviations from the formally prescribed procedures) and the phenomenon of an overhearing audience (i.e. the talk between the direct participants is aimed at the third party that does not have an opportunity to participate, cf. Drew & Heritage 1992: 25-27).

As far as turn-taking is concerned, Sacks et al. (1974: 701) make an assumption that in institutional dialogues turn order and turn size are pre-specified instead of being locally managed as is the case for everyday conversation. Atkinson and Drew's (1979) analysis of courtroom examination shows that apart from turn order and turn size it is also the type of turn and distribution of turn that are fixed. This also applies to media interviews (Hutchby 1996). More powerful institutional members thus have control over all aspects of turn-taking (i.e. turn order, turn size, type of turn, distribution of turn).

As far as the phenomenon of an overhearing audience is concerned, it is important to realise that in courtroom discourse, for instance, the mere act of asking a question and answering it implies a more complex system, in which more participants are engaged. During witness examination the witness is the addressee of a counsel's question, but other participants are indirect targets as they follow the examination and, what is more, perceive covert messages implied in questions. Similarly, the real addressee of witness replies is not the counsel (since counsels usually know the answers to their own questions) but the judge and jury (Heffer 2005: 49). The counsel-witness interaction can therefore be characterised as a display talk (Cotterill 2003: 122, after Goffman 1981). The same applies to media interviews as they are conducted with respect to the public who is following the interview on the radio or TV or open class examination when students are called to answer the teacher's questions and other students are expected to follow the teacher-student exchange.

3 The exercise of power through questions

The research on power in institutional discourse pays special attention to the role of questioning and inequalities created by the fact that institutional participants are expected to ask questions as well as insist on replies (e.g. Wang 2006, Tracy & Robles 2009). The power of questioning has been researched in many different types of institutional discourse (e.g. medical discourse – Frankel 1990; police discourse – Haworth 2006, Newbury & Johnson 2006; media discourse – Hutchby 1996, Thornborrow 2001; courtroom discourse – Matoesian 2005, Chang 2004, Bülow-Møller 1992).

Hutchby (1996: 484) points out that questions are a powerful interactional resource due to the fact that they limit the recipients in their discourse options

and force them into providing answers. Wang (2006) explains that "the inborn features of questions make them naturally bound up with power in that questions possess the ability to dominate and control" (ibid.: 531). By the mere act of asking a question, the questioner chooses the speaker, takes a turn, and defines the type of the following turn (i.e. questions are typically followed by responses, cf. Sacks et al. 1974). What is more important, though, is that the questioner can define the topic, type and length of a response (Wang 2006: 533). Hutchby (1996: 485) stresses that individual questions restrict individual answers, but sequences of questions are even more restrictive since a series of questions can limit the topic more effectively and influence the audience through various connections implied in questions.

Institutional figures such as doctors, interviewers, counsels, policemen are thus in control of not only questions, but also responses and implied messages their audiences perceive.

4 The role of questioning during cross-examination

Witness examination is an essential principle of the adversarial legal system. By examining witnesses, the prosecution and the defence present their versions of events to the judge and jury. While it is expected that witnesses are being prepared for the examination-in-chief part, cross-examination proceeds in a very hostile atmosphere as witnesses do not know what to expect from opposing counsels. The main aim of a cross-examiner is to discredit the testimonies of witnesses by casting doubt on their credibility or their presentation of events (Gibbons 2003: 112). This is achieved by controlling witnesses with coercive questioning.

According to Hobbs (2002: 416), counsels view cross-examination as an opportunity to communicate their interpretation of evidence to jurors. The obvious way to shape the juror's opinions is through the replies of witnesses. Experienced cross-examiners, nonetheless, know that even the mere act of asking a question is a powerful tool on its own. The moment the jurors hear the question with an additional implied message, it opens their eyes to alternative interpretations implied in the message. The actual response from a witness (even if the witness is denying the embedded message) may lose its significance. Hobbs (2002: 413-414), a former practising lawyer, stresses that counsels expect the audience to draw inferences on the basis of implicit connections proposed through their questions.

Quantitative research on cross-examination questioning in court (Woodbury 1984, Danet et al. 1980, Luchjenbroers 1997) has shown that the most frequent

types of questions counsels use are closed questions (i.e. *yes/no* questions, alternative questions, declarative questions and tag questions). This is not surprising since coercive closed questions control witness responses, and thus reduce witnesses to the role of minimal responders. Closed questions give counsels an opportunity to give evidence on behalf of witnesses (Hobbs 2003: 486-487).

While the syntactic form of questions helps to define the response boundaries and elicit type-confirming replies, pragmatic strategies are of equal importance. It is a strong understanding of the interaction between meaning, context, and communication that helps counsels to corner witnesses effectively. The research on pragmatic cross-examination strategies has shown that counsels make use of various aspects of language and communication. Cross-examination tactics thus range from lexical means (a careful choice of words used in questions, see Cotterill 2004) to prosodic means or even turn-taking management (ironic tone or prolonged pauses after significant replies can be used strategically to convey additional meanings, see Gibbons 2003: 117-126).

5 Discursive tools available to cross-examiners

Figure 1 below illustrates discursive tools that enable cross-examiners to control all aspects of cross-examination including witness replies and the jury's perception of the information presented.

There is a variety of discursive tools available to cross-examiners. The primary one is the right to ask questions, which gives them an opportunity to control replies and limit witnesses to merely a powerless position of having to provide answers (Heydon 2005: 115). The obvious option cross-examiners can use in order to limit the length of witness replies is to ask closed questions. In addition, cross-examiners' institutional right to require type-conforming responses basically forces witnesses into *yes/no* minimal responses (Raymond 2003: 957). If, for instance, a witness does not want to answer a *yes/no* question with a minimal response, the counsel or the judge can request him/her to do so or treat the witness as non-responsive.

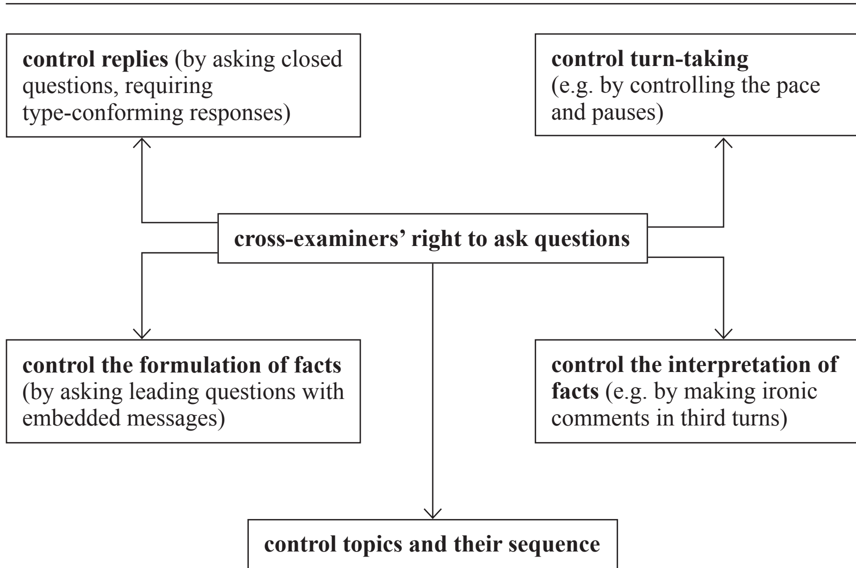

Figure 1: Discursive tools cross-examiners use to control witness testimonies

Witnesses are also left without the right to suggest new connections since cross-examiners have the privilege to control the topics discussed and even their sequence (Wang 2006: 541). Leading questions (i.e. questions asked in a manner that suggests the answer pursued by the questioner) is yet another powerful tool as they give cross-examiners control over the formulation of facts. In addition, control over the turn-taking enables cross-examiners to violate the normal length of pauses between the turns and to make use of deliberate overlapping or prolonged pauses in order to stress facts or dramatise events (Gibbons 2003: 117). Cross-examiners even have a possibility to control the way the jury should interpret responses by a skilful use of third turns. They can, for instance, support or challenge answers by evaluating them in third turns (Gibbons 2003: 124-125).

Examples in the next section show how a highly qualified and experienced libel lawyer Richard Rampton QC uses the above-mentioned discursive tools in order to restrict witnesses. The witnesses he cross-examines find it difficult to resist pressure put on them and gain a more powerful position in order to tell the court their side of the story.

6 Examples

The data are drawn from the court transcripts of the non-jury libel case McDonald's Corporation v. Helen Steel and David Morris. Steel and Morris (the defendants) were accused in a writ by McDonald's UK and US (the plaintiffs) of publishing and distributing a leaflet called 'What's wrong with McDonald's? Everything they do not want you to know', which contained criticism of McDonald's poor business practices. McDonald's hired a legal team led by a highly qualified and experienced libel lawyer Richard Rampton QC (for more information, see Tkačuková 2010). Below are two examples extracted from cross-examination conducted by Mr. Rampton, QC.

In the first extract, Example 1, Rampton cross-examines an expert witness on nutrition. The counsel tries to challenge the scientific expertise of the witness in order to reduce his professional status as well as his role as an expert witness in the trial.

1 2	Q	*Can I ask a little bit more, please, about your professional role in relation to, is it called the World Cancer Research Fund?*
3	A	*Yes.*
4	Q	*I take it you are not a scientist by training?*
5	A	*As I said this morning, no, I am not.*
6		*(...)*
7	Q	*You have a degree in physiology?*
8	A	*Yes.*
9 10	Q	*Your role is, therefore – I am not trying to demean it – your role is that of an educated or intelligent or both layman, is that right?*
11 12 13 14	A	*No, I would say that going back to the point that my Lord made this morning, I would say my expertise here is one of experience rather than formal qualification, yes. I have, nevertheless, spent the last 10 years chiefly concerned with the translation of science into public policy. I am not quite sure what profession that puts me in.*
15		*(...)*
16	Q	*So what do you do?*
17 18 19 20 21 22 23	A	*Meta analysis is a technical term which is rather different from what these reports have done which I myself have analysed. In the ordinary meaning of the word, yes, meta analysis would I guess do for that. In the scientific world meta analysis is more concerned by means of very sophisticated mathematical techniques, assessments of the relative probability judged between large numbers of epidemiological studies taken together, which is an altogether a different exercise from the one I have been engaged in and, indeed, from the one that the committees of scientists who produced these reports are engaged in.*
24 25	Q	*The committees of scientists to which you pay attention in making what you call translations, what I might call summaries of the cumulative effect; is that fair?*
26	A	*Yes.*
27	Q	*Is that rather a rapportaire, that kind of function?*

28 29 30 31 32 33 34	A	*Yes, I think that is a fair way of putting it. I think I have already drawn the analogy of a parallel between the work they do and the work that is done in a place like this. I think it is a good analogy. It is often said that the COMA committee which is the official committee in this country in this context has a judicial function. So what they are concerned to do is to look at the evidence and in the case of more complex reports, actually themselves review the evidence which is going back to scientific bedrock, as I said, and then on that take a view.*
35 36 37	Q	*So when you do your work, if I have understood it correctly, you will correct me if I am wrong, what you look at is what the various committees say about the scientific literature which they have reviewed?*
38	A	*That is exactly right, yes.*
39	Q	*You yourself do not review the scientific literature itself?*
40	A	*The cancer division of the World Cancer Research Fund does do that, but we do not do it ourselves. (...)*

Example 1: Cross-examination of Cannon conducted by Rampton on October 3, 1994

Rampton starts his cross-examination with introductory questions (lines 1-2, 4, 7, 9-10, 16) on the position of the witness and his job description. The counsel then proceeds to gradually nail down the witness's answers with a series of closed questions (lines 24-25, 27, 34-36, 38) in order to emphasise that the witness is a layman rather than a professional with a proper scientific background. The strategy of nailing down is described by Matoesian (2005: 755) as a method when a cross-examiner asks a series of questions about the same things gradually underpinning individual details. This strategy allows Rampton to reformulate his questions several times and demonstrate the witness's limited position in different ways. The counsel pushes the witness into agreeing with the proposition that his expertise comes vicariously through the reviews of scientific works; the witness is thus not involved in the research and not even reviewing the research works himself. Apart from nailing down witness replies with numerous closed questions, the counsel also asks negative questions with "hostile question content" (Heritage 2002: 1428) in lines 4 and 38; these questions show Rampton's disapproval towards the role of Cannon as an expert witness in the trial.

Another important feature of Rampton's cross-examination questions is the presence of '*so*' summarisers (lines 16 and 34). Cotterill (2003: 150-151) notes that '*so*' summarisers are abundant in cross-examination. Their role is to summarise and evaluate previous responses. Johnson (2002: 108) also states that so-prefaced questions during police interviews of adults are formed to "recapitulate, summarise and evaluate the interviewee's previous responses in a way that expects and assumes agreement" (ibid.: 108). In line 16, Rampton uses

the '*so*' summariser to stimulate and direct the witness into answering a specific *wh*-question. However in line 34, his question already evaluates and summarises the replies previously mentioned. Here, the '*so*' summariser intensifies the nailing down strategy.

The counsel's implied message (i.e. the message that the witness is just a lay person) is further supported by his semantic choices. Cotterill (2004: 530) introduces the term 'lexical landscaping' to refer to the cross-examination strategy when counsels intentionally incorporate into their questions words that semantically fit into their interpretation of events. The tactic of lexical landscaping helps Rampton create a picture of how little training is needed for the tasks performed by Cannon (*an educated or intelligent or both layman* in lines 9-10; *summaries of the cumulative effect* in line 25; *a rapportaire* in line 27; *You yourself do not review the scientific literature itself* in line 38). These lexical phrases imply that the only task the witness performs is summarise the literature.

Rampton also makes use of another common strategy, a false friends strategy (Aldridge & Luchjenbroers 2007: 102), when developing his arguments through his questions under the pretence of being helpful and polite (*I am not trying to demean it* in line 9; *if I have understood it correctly, you will correct me if I am wrong* in lines 34-35).

In general, Rampton follows clearly specified strategies and makes the witness agree with his propositions and implied messages. He does not leave much space for the witness to digress or disagree with him. Even '*so*' summarisers or lexical means he uses serve a special purpose and support his coercive questions.

Another extract from Rampton's cross-examination, Example 2, illustrates how skilful the counsel is in providing connections and justifying them even when these connections could be perceived as misleading. In the trial, one of Rampton's aims was to show that research linking diet to health problems has been inconsistent and that there may be other more serious causes of heart diseases or cancer (causes other than a frequent consumption of fast food). As he explains to the judge: "Along with my experts it is necessary to demonstrate the inconclusive and indeed contradictory nature of the findings in relation to diet and cancer" (July 22, 1994). When cross-examining expert witnesses on nutrition, Rampton constantly stresses a low degree of certainty in studies linking nutrition to cancer and other diseases. Example 2 shows how Rampton evokes the story of Galileo and his struggle for the truth. The counsel uses Galileo's life story in order to suggest that even widely accepted facts may be erroneous and that people can never be unerring.

1	Q	*It was widely held at one time, we can agree perhaps, that the world was flat, was it not?*
2	A	*Yes.*
3	Q	*Certain people were persecuted for holding that maybe that view was wrong?*
4	A	*Yes.*
5	Q	*It turned out that the people who were persecuted were right, did it not?*
6	A	*You mean Galileo, for example, was right?*
7	Q	*Yes.*
8	A	*Indeed so.*
9	Q	*The world is not flat, is it?*
10	A	*It is generally agreed that the world is round, indeed so, yes.*
11		*(...)*
12	Q	*Virtually every respectable medical man would now accept, perhaps you would agree, that*
13		*there is a causal relationship – I stress the word 'causal' – between a diet high in fat and,*
14		*particularly, saturated fat and the incidence of cardiovascular disease, would they not?*
15	A	*Yes.*
16		*(...)*
17	Q	*What do you make of this book [book called State of the Art]?*
18	A	*Well, that is the state of the art, not only as far as nutritional science is concerned in this*
19		*country, but again to talk about the status of the report. The important thing about COMA*
20		*Reports, when they are accepted by government, as that is, is that that is not merely a*
21		*scientific document. It takes the whole process a stage further. That is a document not only*
22		*published by the government but endorsed by government. It is the scientific foundation of*
23		*the Health of the Nation initiative.*
24	Q	*Let us leave the Minister of Health or the Secretary of State for Health, whatever it is, on*
25		*one side. This document is written and has the stamp, therefore, of approval of a large*
26		*number of medical and nutritional experts, does it not?*
27	A	*Indeed so, yes.*
28		*(...)*
29	Q	*(Handed). State of the Art. Chapter 3 is about fat, page 39. On 49 we get the particular*
30		*panel's views about the relationship between the consumption of fat and cancer, yes?*
31		*(...)*
32	A	*"The panel concluded that there is currently insufficient evidence on which to base a*
33		*recommendation for decrease in fat intake to prevent cancer, although an increase in*
34		*consumption of any fatty acids should not be encouraged. The panel agreed that the DRVs*
35		*based on other considerations and presented in paragraph 3.8 were consistent with a*
36		*prudent view of the current data relating dietary fat and the occurrence of cancer".*
37		*(...)*
38	Q	*But that is the fact? It is the conclusion of the panel of experts?*
39	A	*As endorsed by the government, yes.*

Example 2: Cross-examination of Cannon conducted by Rampton on October 3, 1994

The counsel uses natural narrative structure (Gibbons 2003: 123) in order to bring to light the topic of widely known misconceptions. By asking short closed questions (lines 1, 3, 5, 9), Rampton narrows down a complicated narrative to short

phrases, which are easy to comprehend and remember. The prosecuting counsel thus sets the ground for the infallability trap (Gibbons 2003: 116), a strategy that aims to depict the witness as an expert who overestimates his professional skills and knowledge. In the context of Galileo's story, the witness appears as someone who is firmly convinced of his opinion and does not realise that there may be other causes (apart from diet) of serious illnesses. After developing a strong narrative, the counsel asks a question on the existence of causal links between McDonald's type of foods and cardiovascular diseases (lines 12-14); the question elicits a positive reply. What is important, though, is that the question in lines 12-14 is put in contrast with the Galilean story. The message Rampton projects in his question is that the witness may be holding yet another erroneous opinion when overestimating the link between a diet high in saturated fat and heart problems.

The counsel then moves on to arguing that modern science cannot prove that a diet has a significant influence on the development of cancer and presents an official report called *State of the Art* (line 17). He asks the witness to read out a quotation that supports his view (lines 32-36). In the quotation, it is explicitly stated that "there is currently insufficient evidence on which to base a recommendation for decrease in fat intake to prevent cancer" (lines 32-33). Rampton supports the source by referring to it as a document that is "written and has the stamp, therefore, of approval of a large number of medical and nutritional experts" (lines 25-26) as well as being "the conclusion of the panel of experts" (line 38). The tactic of lexical landscaping thus helps the counsel to establish the veracity of the document.

In this cross-examination sample, similarly to Example 1, the witness is not given a chance to digress. It is the counsel who proposes topics, formulates connections and controls the interpretation of the witness's replies.

7 Conclusions

The article demonstrates a variety of ways cross-examining counsels limit witnesses in their responses. Courtroom setting is very specific due to highly formal court procedures, the phenomenon of the overhearing audience as well as the right of counsels and judges to make witnesses answer questions they may resent. Counsels have control over all aspects of questioning including turn-taking, witness responses, interpretation of answers by the jury or judge. Coercive closed questions are the primary means used by counsels. But they also use pragmatic tools that require training and experience; pragmatic strategies range from lexical means to pragmatic means.

It is clear that discursive tools available to counsels during cross-examination create an unequal distribution of power in their favour. Unfortunately, there is little witnesses can do as they have to answer the questions with the form, content and implications they cannot influence. Even if they try to resist control, they may "win the battle but lose the war" (Matoesian 2008) since counsels can use the resources available to them to re-contextualise witness testimonies in a variety of ways either during witness examination or even after it (during closing speeches).

Discursive tools and tactics exemplified in the article apply to other institutional discourse types as well, in particular media interviews and police interrogation. But questions play a similar role in job interviews or even in classroom. It is thus important to be aware of the restrictive power of questions when analysing or co-constructing institutional discourse.

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