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# The protection of vulnerable witnesses during criminal trials in Malawi: Addressing resource challenges

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**Summary:** *It is widely acknowledged that crime victims and witnesses for a long time have not been treated fairly in most criminal justice systems. In a bid to remedy this situation, particularly with respect to vulnerable witnesses, most common law jurisdictions have introduced innovative procedural and evidential law changes, which include screening the witness from the defendant's sight; prohibiting the defendant from personally cross-examining the witness; and restrictions on improper cross-examination, including evidence relating to sexual history. Virtually all these measures have underpinning resource requirements. Presently Malawi does not afford adequate protection to vulnerable witnesses. The article argues that the protection of vulnerable witnesses during trial in a resource-poor nation such as Malawi lies in the hands of judges. While on the face of it Malawi's lack of resources may appear to be an obstacle to the protection of vulnerable witnesses, the system has a wealth of alternative options that may be used for their benefit. All that is needed is for judges to proactively utilise the available alternatives to the benefit of such witnesses as well as continuing training and education to reinforce their competencies in this regard.*

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**Key words:** *criminal justice; vulnerable witnesses; Malawi; procedural safeguards; resource restraints*

## 1 Introduction

Similar to many countries the Malawian criminal justice system is premised on the public prosecution model. Under this model a criminal wrong is considered an injury against society and not only against the person who has been harmed.<sup>1</sup> The state is a party to the action and represents society that acts against the accused person. The state plays a central role in criminal proceedings by initiating trials and overseeing the entire process. Consequently, the role of victims tends to be overlooked and their interests neglected. Victims are included only as a means to an end in the state's bid to hold the accused accountable for the crime.<sup>2</sup>

It was not until late in the twentieth century that victims began to challenge their treatment and to demand dignity, fairness and respect in the criminal justice system.<sup>3</sup> Advocates for victims' rights and interests usually advance two arguments as to why laws protecting the rights of victims are necessary: First, even in the context of the public prosecution model a specific individual has suffered harm and that must be acknowledged; second, the criminal justice system must avoid imposing secondary harm on victims during the prosecution process.<sup>4</sup> Some scholars have even advocated that criminal justice systems need a victim-participation model. Unlike a crime-control model that values the efficient prosecution of crime for the benefit of society and the due-process model, which values procedural fairness in prosecuting crime for the benefit of the defendant, a victim-participation model is one that values victims' interests.<sup>5</sup> It advocates that victims should be treated with dignity, respect and fairness and even be granted 'due process-like' rights to actively participate in the prosecution of the offender.<sup>6</sup>

Victims have seven particular interests in criminal proceedings:<sup>7</sup> an interest in receiving information concerning the case; an interest in

1 LC Bande *Criminal law in Malawi* (2017) 5; MM Giannini 'The procreative power of dignity: Dignity's evolution in the victims' rights movement' (2016) 9 *Drexel Law Review* 63.

2 As above.

3 Giannini (n 1) 64.

4 Giannini 83.

5 Giannini 84.

6 As above.

7 AN Young 'Crime victims and constitutional rights' (2005) 49 *Criminal Law Quarterly* 432 438.

recovering property and receiving compensation for harm suffered; an interest in the verdict of the court; an interest in receiving protection from the threat of further victimisation; an interest in a suitable sentence being passed by the court; an interest in the protection of their privacy; and an interest in ensuring respect for the protections afforded to them in law with regard to their cross-examination.

While all these interests are valid for victims of crime in Malawi, our focal point is the fourth, sixth and seventh interests. A victim's right to be treated with fairness and respect for their dignity and privacy is not limited to court proceedings but applies at all levels of the criminal process.<sup>8</sup> Nonetheless, this article limits its scope to protection during trial.

While it is acknowledged that the interests of victims of crime should be respected, concerns predominantly involve vulnerable categories that comprise children, adult complainants of sexual offences and adults with intellectual disabilities.<sup>9</sup> Internationally, the first major international instrument to underline the interests of victims in the criminal process, the Rome Statute of the International Criminal Court (ICC), emphasises the need for special measures to protect victims of sexual violence and children who are victims or witnesses.<sup>10</sup> The article intends to focus on protective measures with respect to adult complainants of sexual offences and children. It has been indicated that a large number of Malawian women face various forms of sexual assault and that child sexual abuse remains a serious problem.<sup>11</sup> With respect to children, their lack of exposure to formal situations, coupled with their underdeveloped social, emotional, intellectual and linguistic capacities, all serve to compound their courtroom stress. As well, the vulnerability of adult complainants in sexual offence cases stems from the intimate nature of these offences and the evidence required to convict offenders.<sup>12</sup>

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<sup>8</sup> Giannini (n 1) 88.

<sup>9</sup> P Bowden, T Henning & D Plater 'Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: An impossible triangulation' (2014) 37 *Melbourne University Law Review* 539 541; V Marinos et al 'Victims and witnesses with intellectual disability in the criminal justice system' (2014) 61 *Criminal Law Quarterly* 517; P Roberts & A Zuckerman *Criminal evidence* (2010) 442.

<sup>10</sup> Art 68 (2).

<sup>11</sup> NR Kanyongolo & B Malunga 'The treatment of consent in sexual assault law in Malawi' 2013 <http://www.theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf> (accessed 2 January 2018).

<sup>12</sup> TA Cooper 'Sacrificing the child to convict the defendant: Secondary traumatisation of child witnesses by prosecutors, their inherent conflict of interest and the need for child witness counsel' (2011) 9 *Cardozo Public Law, Policy and Ethics Journal* 267; L Ellison *The adversarial process and the vulnerable witness* (2001) 14.

Most legal systems now acknowledge the difficulties encountered by such vulnerable witnesses and have special measures in place to protect them. There is a proliferation of research analysing the treatment of vulnerable witnesses in criminal justice systems. Research has predominantly focused on acknowledging the role of the victim of crime;<sup>13</sup> the treatment of vulnerable witnesses in adversarial systems;<sup>14</sup> procedural innovations and changes in the criminal justice system to reduce stress for such witnesses; and the extent to which such changes alleviate vulnerable witness' plight without undermining the essential precepts of a fair trial.<sup>15</sup> The argument in this article is that in a jurisdiction with limited resources, judges bear the key responsibility for protecting vulnerable witnesses during trial. Underlying virtually all the special measures for the protection of vulnerable witnesses are resource requirements, material or human. As such, until such time as Malawi reaches the point where it can afford the requisite resources, judges bear the responsibility of coming up with creative interventions to the problems facing vulnerable witnesses. The word 'judge' is used generically in the article and includes magistrates as well as other judicial officers.

Malawi has a common law adversarial procedural system. The problems faced by vulnerable witnesses are compounded in such systems because of the combative nature of the advocacy.<sup>16</sup> Vulnerable witnesses are considered at particular risk of being unable to present good quality evidence and so are deemed in need of special measures to enable them to testify optimally.<sup>17</sup> In many common law jurisdictions popular measures for the protection of vulnerable witnesses usually comprise the use of screens to shield the witness from the defendant; video-recorded evidence; live television links allowing the witness to give evidence in a separate room; clearing the public gallery; the removal of legal attire (wigs and gowns); the use of intermediaries and communication aids; the prohibition of personal cross-examination of the witness by the defendant; and restrictions on the cross-examination regarding sexual history.<sup>18</sup>

13 A Keane 'Cross-examination of vulnerable witnesses: Towards a blueprint for re-professionalisation' (2012) 16 *The International Journal of Evidence and Proof* 175.

14 As above; Ellison (n 12) 2.

15 MB Bates 'A balancing act: The rights of the accused and witness protection measures' (2014) 17 *Trinity College Law Review* 143; CR Matthias & FN Zaal 'Intermediaries for child witnesses: Old problems, new solutions and judicial differences in South Africa' (2011) 19 *International Journal of Children's Rights* 251; Roberts & Zuckerman (n 9) 442.

16 E Henderson 'Bigger fish to fry: Should the reform of cross-examination be extended beyond vulnerable witnesses' (2015) 19 *The International Journal of Evidence and Proof* 83; Ellison (n 12) 2.

17 F Raitt *Evidence: Principles, policy and practice* (2013) 24.

18 L Ellison & VE Munro 'A "special" delivery: Exploring the impact of screens, live links and video recorded evidence on mock juror deliberation in rape trials'

This article intends to focus on three measures that have a bearing on the most profound problems for the Malawian vulnerable witness. These are the screening of the vulnerable witness from the defendant; prohibiting the defendant from personally cross-examining the witness; and restrictions on improper cross-examination including evidence regarding sexual history.

## 2 Malawian criminal justice system

Malawi is one of the world's poorest countries. Out of 189 countries on the United Nations Development Programme (UNDP) Human Development Index (HDI) in 2019, Malawi was ranked on position 172. The common law adversarial tradition is keenly adhered to, from legal regalia to procedure.<sup>19</sup> There are virtually no jury trials, all cases being presided over by a magistrate or a judge sitting alone. Most litigants are unsophisticated, uneducated and unrepresented.<sup>20</sup> The adversarial procedures applicable in the courts are too complicated for most people who do not appreciate the importance of cross-examination, let alone know how to conduct it.<sup>21</sup>

The problem is compounded by the remarkably small number of lawyers available. As of 15 April 2020 the country had only 502 lawyers licensed to practice<sup>22</sup> against a population of around 19 million people. Most lawyers are concentrated in urban areas, yet the majority of the population live in rural areas. The Legal Aid Bureau<sup>23</sup> was established by government to provide free legal aid to poor citizens, but normally there is an acute shortage of lawyers.<sup>24</sup> Consequently, the majority of defendants encounter the criminal justice system with no legal representation. Only in homicide cases is a defendant guaranteed legal representation at the state's expense if they cannot afford it.

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(2013) 23 *Social and Legal Studies* 4; S Walklate (ed) *Handbook of victims and victimology* (2007) 292.

- 19 S Gloppen & FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalisation, vulnerability and the law' (2007) 5 *International Journal of Constitutional Law* 260.
- 20 W Scharf et al 'Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums' unpublished DFID Malawi Report (2002) 12. Although no recent data is available, this problem seems to persist.
- 21 Scharf et al (n 20) 13. This compels people in rural areas to prefer informal justice systems such as adjudication by chiefs. See J DeGabriele & J Handmaker 'Justice for the people: Strengthening primary justice in Malawi' (2005) 5 *African Human Rights Law Journal* 148.
- 22 According to official Malawi Law Society records. The actual figure may be slightly higher if one factors in non-practising lawyers.
- 23 Established under the Legal Aid Act of 2011.
- 24 S Kayuni 'Court fees and access to justice: Towards a policy oriented approach in Malawi' (2015) 41 *Commonwealth Law Bulletin* 29.

Given the poverty levels, justice is not considered a high priority for government. The judiciary receives 0,8 per cent of the national budget, which is far below the 3 per cent that it requires to operate optimally.<sup>25</sup> Consequently, the court infrastructure generally is in a poor state and most courts are in acute need of basic facilities such as furniture, office equipment and stationery.<sup>26</sup>

### 3 Legal framework for the protection of vulnerable witnesses in Malawi

To begin with, the Malawian Constitution stipulates that the dignity of all persons is inviolable.<sup>27</sup> The Constitution also provides that in any judicial or other proceedings before any organ of the state, respect for human dignity shall be guaranteed. Respect for dignity is especially important for victims of crime, and in the United States of America it has been used by victims' rights movements to further their goals of protecting victims' interests and eliminating secondary victimisation.<sup>28</sup> Also important is the right to privacy guaranteed under section 21 of the Constitution as well as the right not to be subjected to inhuman or degrading treatment.<sup>29</sup> In relation to children, section 23 of the Constitution emphasises that they are entitled to equal treatment before the law and that the best interests of children shall be a primary consideration in all decisions affecting them.

The Criminal Procedure and Evidence Code (CP & EC)<sup>30</sup> is the main statute regulating criminal procedure and evidence in Malawi. Section 71A of the CP & EC is the key provision specifically dealing with the protection of vulnerable witnesses. Section 71A was introduced into the CP & EC in 2010. The Report of the Law Commission on the review of this Act states that the Commission considered favourably the introduction of a provision to deal with the protection of victims of sexual offences, particularly, victims of rape.<sup>31</sup> While section 71A is to be commended, it is regrettable that it restricts itself to the protection of victims of sexual offences. There are other vulnerable witnesses outside this group, for instance, child

25 According to the *Malawi Judiciary Strategic Plan* (2019-2024), [www.judiciary.mw](http://www.judiciary.mw) (accessed 28 April 2020).

26 Scharf et al (n 20) 22.

27 Sec 19 Constitution.

28 Giannini (n 1).

29 Sec 19(3) Constitution.

30 Criminal Procedure and Evidence Code Act 14 of 2010.

31 Malawi Law Commission, Report of the Law Commission on the Review the Criminal Procedure and Evidence Code, Malawi Law Commission Report 10 (Malawi Law Commission, Lilongwe 2003).

victims of physical abuse who are equally deserving of protection. Similar statutes in other countries such as Zimbabwe have broad provisions stipulating many protective measures for all categories of vulnerable witnesses.<sup>32</sup>

Prior to the enactment of section 71A, adult complainants of sexual offences were not expressly and comprehensively protected under the law. Section 71A provides:

- (1) Where a victim of a sexual offence is to give evidence in any proceedings under this Code, the court may, of its own motion, upon application made by a party to the proceedings, or a victim of a sexual offence, make one or more of the following orders –
  - (a) that the court close while evidence is being given by the witness in the proceedings ...
  - (b) that a screen, partition or one way glass be placed to obscure the witness's view of a party to whom the evidence relates, but not so as to obstruct the view of the witness by the magistrate or the judge ...
  - (c) that the witness be accompanied by a relative or friend for the purpose of providing emotional support;
  - (d) that the evidence of the witness be given at a place outside the courtroom and transmitted to the courtroom by means of closed circuit television.

To begin with, in providing for closed-court proceedings and screening for the said victims, this section has the potential of protecting vulnerable witnesses from the ordeal of testifying in public and facing the defendant in court. However, since the section uses the discretionary word 'may', and leaves it to the court to decide whether the outlined measures are warranted in a particular case; adult complainants of sexual offences are at the mercy of the court. This may be problematic as Malawian courts value conventional adversarial modes of giving evidence which may make such discretion unfortunate, but that remains to be seen.

In respect of paragraph (d), which mentions the transmission of evidence to a courtroom through closed-circuit television, while it is a good innovation it may not have much effect beyond paper due to a lack of technological resources to realise it. At present only a few child justice courts have closed-circuit television services. Nevertheless, it is good to have this provision which can perhaps motivate government to invest in technological resources for the courts. Lastly, it is regrettable that section 71A does not cover the improper cross-examination of sexual offence victims, including

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<sup>32</sup> Criminal Procedure and Evidence Act, Ch 9:07 of the Laws of Zimbabwe.

sexual history evidence, which is another challenge faced by vulnerable witnesses as the subsequent paragraphs will show. Also regrettable is the fact that the courts are not making frequent use of this section. In *R v Richard Mandala Chisale*<sup>33</sup> the High Court lamented the fact that most magistrate's courts do not appreciate the importance of putting into effect the provisions of section 71A of the CP & EC. The Court actually was of the opinion that in sexual offences involving children section 71A should be used as a matter of course.

Further to the above, sections 214(5) and 215(3) of the CP & EC are also relevant in respect of vulnerable witnesses. The former stipulates that cross-examination must relate to relevant facts, while the latter section gives the court the power to forbid any questions or inquiries which it regards as indecent or scandalous. As will be argued below, these provisions are important for restricting improper cross-examination and inquiries regarding sexual history.

In relation to children it must be noted that although the Child Care, Protection and Justice Act<sup>34</sup> is the framework law on children's matters, regarding court proceedings the Act focuses on children suspected of having committed offences, and no mention is made of children as victims or mere witnesses. For child suspects, however, the Act is to be commended for making provision for special measures to aid in their testimony. Section 145 of the Act provides that proceedings of a child justice court should be informal; official uniforms and professional robes should not be worn; and there should be regular breaks in the proceedings with necessary provisions for the child. Most importantly, section 145(d) provides that children with disabilities must be accorded assistance to meet their special needs.

#### **4 Challenges faced by vulnerable witnesses in Malawi**

In adversarial systems the significance attached to direct and public confrontation has proved a potent obstacle to improving the treatment of vulnerable witnesses.<sup>35</sup> The adversarial process assumes that evidence given in open court is made more reliable by the testing conditions operating therein, such as public scrutiny, the presence of the accused and the formality of the courtroom itself, which are

33 Criminal Review Case 7 of 2014.

34 Act 22 of 2010.

35 Keane (n 13) 175; Henderson (n 16) 83; Ellison (n 12) 83.

thought capable of exciting the conscience of a lying witness.<sup>36</sup> The vulnerable witness in Malawi is also a victim of these perceived adversarial ideals, leading to the problems discussed below.

First, section 162 of the CP & EC expressly provides that all evidence is to be taken in the presence of the accused. It is common practice for the witness, child or adult, to testify in the presence of the accused. This is problematic. There is considerable evidence to the effect that facing the defendant causes vulnerable witnesses significant anxiety and distress.<sup>37</sup> Studies reveal that women are fearful of facing the defendant and research from the United States of America indicates that many women had an intense emotional response when they encountered the defendant in a courtroom.<sup>38</sup> Facing the defendant is a visual reminder of the traumatic experience.

This problem is amplified when a child is involved. It has been noted that a face-to-face encounter with the defendant remains children's top concern and this may even cause them to give ineffective testimony.<sup>39</sup> Reliving the experience by relating the details of the abuse aggravates it. Further, for complainants in children's sexual abuse matters, a face-to-face confrontation may give the defendant a chance to intimidate the witness, thereby impairing the testimony that is given.<sup>40</sup> In most cases abusers have already threatened children not to reveal their ordeal when the offence was committed. 'No one should underestimate the impact of having to face one's alleged attacker when one is in the witness box.'<sup>41</sup>

Second, because defendants rarely have legal representation, virtually all vulnerable witnesses personally are cross-examined by the defendant. 'Cross-examination is widely regarded as the aspect of trial proceedings that witnesses find most difficult, even traumatic.'<sup>42</sup> It is worse for vulnerable witnesses where an unrepresented defendant carries out the cross-examination himself.<sup>43</sup> Yet, this is common practice in Malawi. In this respect the court remarks as follows in *R V Milton Brown*:<sup>44</sup>

When defendants represent themselves in criminal trials problems regularly arise. Such defendants lack that knowledge of procedure,

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<sup>36</sup> Ellison (n 12) 7.

<sup>37</sup> Cooper (n 12) 251.

<sup>38</sup> Ellison (n 12) 17.

<sup>39</sup> Cooper (n 12) 251.

<sup>40</sup> Matthias & Zaal (n 15) 297.

<sup>41</sup> *R v Milton Brown* [1998] 2 Cr App R 364.

<sup>42</sup> Ellison (n 12) 159.

<sup>43</sup> Keane (n 13) 175.

<sup>44</sup> *Milton Brown* (n 41).

evidence and substantive law; that appreciation of relevance; that ability to examine and cross-examine witnesses and present facts in an orderly and disciplined way; that detachment which should form part of the equipment of the professional lawyer. These problems exist even where the defendant is representing himself in good faith. However, the problem is magnified one hundredfold where the defendant is motivated by a desire to obstruct the proceedings or to humiliate, intimidate or abuse anyone taking part in it.

Clearly, the fact that the cross-examination of witnesses is done by the defendant personally is another major shortcoming in the Malawian criminal justice system which, unfortunately, has not been provided for by section 71A.

Third, vulnerable witnesses are subjected to inappropriate cross-examination including cross-examination of their previous sexual history: Criticism of the treatment of rape complainants during cross-examination predominantly focuses on the use of sexual history evidence and the various assaults on their private lives.<sup>45</sup> The use of sexual history evidence in rape trials causes distress to complainants, can affect the verdict and deters the reporting of what is already an underreported crime.<sup>46</sup> Improper and degrading cross-examination unnecessarily traumatises complainants and affects their ability to give evidence to the best of their ability.<sup>47</sup> Malawi has seen instances of accused persons, sometimes with the help of their lawyers, dealing with issues of penetration in a manner that seeks more to embarrass than to prove the particulars of the alleged offences.<sup>48</sup> In addition,

in Malawi the law on sexual assault and consent has historically reflected stereotypes about what constitutes consent ... in sexual offences, the prosecution has to prove absence of consent on the part of the complainant to the commission of the offence. Thus, there is an intense focus on the character and motivation of the complainant in most sexual offences. Traditionally, this focus has translated into a preoccupation with aspects of the complainant's behaviour which are not related to the circumstances of the offence.<sup>49</sup>

45 C McGlynn 'Rape trials and sexual history evidence: Reforming the law on third party evidence' (2017) 81 *Journal of Criminal Law* 367; L Levanon 'Sexual history evidence in cases of sexual assault: A critical re-evaluation' (2012) 62 *The University of Toronto Law Journal* 609 610.

46 Ellison (n 12) 116.

47 McGlynn (n 45) 367; S Easton 'The use of sexual history in rape trials' in M Childs & L Ellison *Feminist perspectives on evidence* (2000) 41.

48 LP Chikopa 'Judicial activism and the protection of the rights of vulnerable groups in Malawi' in Southern African Litigation Centre (eds) *Using the courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi and Zambia* (2014) 10, <http://www.southernafricalitigationcentre.org> (accessed 2 April 2020).

49 Kanyongolo & Malunga (n 11) 3.

Thus, unregulated questioning regarding evidence of sexual history is problematic in that such evidence easily may distract the fact-finder from the real issue. Sexual history evidence is highly prejudicial when received in the context of prevailing views of women's sexuality.<sup>50</sup>

## 5 Special measures for the protection of vulnerable witnesses

Most legal systems acknowledge the difficulties encountered by vulnerable witnesses and have special measures in place to protect them. At the international level the Rome Statute of the ICC was the first major international instrument to acknowledge and give effect to the interests of victims at all levels of the criminal process. The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends that measures be taken at the international, regional and national levels for the protection of victims of crime. In addition, the 2005 United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime emphasises that children who are victims and witnesses are particularly vulnerable and need special protection and support.

Special measures for the protection of vulnerable witnesses comprise the use of screens to shield the witness from the defendant; video-recorded evidence; live television links allowing witnesses to give evidence in a separate room; clearing of the public gallery; the removal of legal attire (wigs and gowns); the use of intermediaries and communication aids; the prohibition of personal cross-examination of the witness by the defendant; and restrictions on the cross-examination regarding sexual history.<sup>51</sup> Nevertheless, the discussion in this article will be limited to the measures with the greatest bearing on the challenges faced by vulnerable witnesses in Malawi, which are screening the vulnerable witness from the defendant; prohibiting the defendant from personally cross-examining the witness; and restrictions on improper cross-examination, including regarding evidence relating to sexual history.

### 5.1 Shielding the vulnerable witness from the defendant's sight

The shielding of vulnerable witnesses from the defendant's sight is done for witnesses' protection. At common law young children and

50 Easton (n 47) 167.

51 Ellison & Munro (n 18) 4; Walklate (n 18) 474.

rape complainants were entitled to a screen to shield them from the sight of the defendant.<sup>52</sup> As noted previously, a substantial problem for vulnerable witnesses is the possibility of facing the defendant even disregarding the cross-examination. They need to be shielded from seeing the defendant and this can be done by placing a screen between them. Screening, video-recorded interviews and live television links are effective means of preventing direct contact between the witness and the defendant.<sup>53</sup> Screens only prevent a face-to-face showdown and do not prevent the defendant from hearing the witness or responding accordingly.<sup>54</sup> Additionally, if the defendant is represented, his lawyer is able to face the witness.

Screening mechanisms not only ease the strain of testifying for vulnerable witnesses but also aid the truth-finding process.<sup>55</sup> A screen can be arranged in such a way that the defendant still is able to see the witness although the witness cannot see the defendant.<sup>56</sup> A screen minimises the stress for child witnesses and enhances the chances of them giving effective evidence.<sup>57</sup> In Scotland, in addition to a live television link and a supporter, a screen is regarded as a standard special measure for the protection of vulnerable witnesses and the court is compelled to grant such measures.<sup>58</sup>

It has been argued that in terms of protection, screens rate poorly as the witness is not protected from being in the same room as the defendant, which is stressful for many witnesses.<sup>59</sup> However, if being in the same room is stressful, a face-to-face encounter could be worse so screens still alleviate some stress for vulnerable witnesses. Further, although the witness is shielded from seeing the defendant in the courtroom, there is no guarantee that they will not meet while they attend the trial. Nevertheless, a face-to-face encounter at the court cannot last long and may easily be avoided. Indeed, seeing the defendant in the fixed formal setting of the courtroom is more stressful.

52 C Tapper *Cross and Tapper on evidence* (2010) 242. See also the cases of *R v Smellie* (1919) Cr App Rep 128 and *Hampson v HMA* 2003 SLT 94.

53 Ellison & Munro (n 18) 4; M Burton et al 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales' (2007) 11 *The International Journal of Evidence and Proof* 1.

54 Matthias & Zaal (n 15) 297.

55 Ellison & Munro (n 18) 4; J Doak 'Confrontation in the courtroom: Shielding vulnerable witnesses from the adversarial showdown' (2000) 5 *Journal of Civil Liberties* 307.

56 Raitt (n 17) 42.

57 Cooper (n 12) 251.

58 Raitt (n 17) 41.

59 Ellison (n 12) 41.

The claim has been made that shielding the witness from direct contact with the defendant infringes the defendant's right to challenge contrary evidence; that the right to challenge is a corollary right to a face-to-face confrontation which is violated when physical or technological barriers are interposed between an accuser and accused.<sup>60</sup> However, there is no authority supporting the defendant's right to be present and have opposing witnesses subjected to cross-examination which entails a physical confrontation.<sup>61</sup> Courts have even held that the right to a fair trial does not entail a right to physical confrontation in the courtroom.<sup>62</sup> As such, the defendant's right to confront witnesses against him and to a fair trial cannot be violated by placing a screening device between him and the testifying witness.<sup>63</sup>

The word 'screen' here is given its literal meaning, that is, a fixed or movable partition or curtain used as a room-divider or anything used to give concealment or privacy.<sup>64</sup> As such, unless a video link is being used to screen the defendant from the witness's sight, this remedy generally is not costly in terms of material requirements. In some instances it suffices to re-arrange the court changing positions or moving seats around.<sup>65</sup>

## **5.2 Restrictions on defendant personally cross-examining vulnerable witnesses**

The second measure for the protection of vulnerable witnesses concerns the identity of the cross-examiner. As noted previously, vulnerable witnesses experience stress when subjected to cross-examination by the defendant personally. As such, it is important for these witnesses to know that they will not be improperly cross-examined by the defendant and also that they will not be cross-examined by him at all.<sup>66</sup> In England and Wales, following several high-profile instances of abusive cross-examination by defendants

<sup>60</sup> Ellison 65.

<sup>61</sup> Doak (n 55) 306.

<sup>62</sup> *Donnelly v Ireland* (1998) 1 IR 321 (SC).

<sup>63</sup> P Zieff 'The child victim as witness in sexual abuse cases: A comparative analysis of the law of evidence and procedure' (1991) 4 *South African Journal of Criminal Justice* 38.

<sup>64</sup> *Oxford English dictionary* online, <http://www.oed.com> (accessed 2 January 2018).

<sup>65</sup> *R v Smellie* (n 52) 128.

<sup>66</sup> DJ Birch 'A better deal for vulnerable witnesses?' (2000) *Criminal Law Review* 223.

conducting their own defence, the right of a defendant to cross-examine vulnerable witnesses in person was removed by Parliament.<sup>67</sup>

Cross-examination now mostly is conducted by a third party – a lawyer or an intermediary – in the case of children.<sup>68</sup> Where a prohibition on personal cross-examination applies, the accused has to arrange legal representation or the court must appoint legal representation for him.<sup>69</sup> However, the question arises as to why the defendant should be replaced by a lawyer when lawyers in adversarial systems have been known to abuse witnesses during cross-examination. A possible response to this can be that, first, the lawyer is not the culprit so his effect on the witness to that extent is minimised. Second, lawyers are regulated by bar regulations and codes of conduct so it should be easy to control and even punish them should they transgress their code of conduct.

Intermediaries are introduced to minimise children's trauma from a perceived aggressive advocacy culture and to make their evidence more comprehensible.<sup>70</sup> The role played by the intermediary varies from court advisor to a type of straightforward translator to proxy examiner, depending on the particular country and its specific driving concern.<sup>71</sup> South Africa is one of the few countries that for many years has used intermediaries.<sup>72</sup> The South African intermediary operates as a go-between translator during trial and all questions and answers must pass through them, but they are not required to have the professional qualifications expected of their English counterparts.<sup>73</sup> Other African countries, such as Namibia and Zimbabwe, also permit the appointment of an intermediary to assist a child witness in court.<sup>74</sup>

Friedman argues that a mandatory prohibition on personal cross-examination infringes the defendant's longstanding right to challenge the evidence against him face-to-face and that preparation and the

<sup>67</sup> Roberts & Zuckerman (n 9) 450. This was under the Youth Justice and Criminal Evidence Act 1999, secs 34-36.

<sup>68</sup> As above.

<sup>69</sup> Ellison (n 12) 123.

<sup>70</sup> E Henderson 'Alternative routes: Other accusatorial jurisdictions on the slow road to best evidence' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012) 67. See also H Jackson 'Children's evidence in legal proceedings: The position in Western Australia' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012) 75.

<sup>71</sup> Henderson (n 70) 59.

<sup>72</sup> Matthias & Zaal (n 15) 252.

<sup>73</sup> Henderson (n 70) 67.

<sup>74</sup> CG Bowman & E Brundige 'Child sex abuse within the family in sub-Saharan Africa: Challenges and change in current legal and mental health responses' (2014) 47 *Cornell International Law Journal* 282.

support of complainants are preferable.<sup>75</sup> However, such right is not absolute, and even Friedman admits that it may be curtailed for the protection of children and the mentally-challenged. In addition, a defendant who prefers to personally question the complainant when he is in a position to utilise the services of a competent lawyer may have ulterior motives and so should be held in check. Further, involving intermediaries in the trial process does not interfere in the defendant's right to a fair trial. On the contrary, through the use of intermediaries court proceedings not only become less stressful for vulnerable witnesses but also fairer for defendants because of the better flow of more accurate communication.<sup>76</sup>

With respect to resource requirements, an intermediary system requires a technology-enabled setting which is lacking in many regions of Africa.<sup>77</sup> In South Africa intermediaries are usually placed with a child in a room separate from the courtroom, but they are linked electronically by audio speakers and either closed-circuit television or a one-way mirror.<sup>78</sup> Even if it is possible to improvise on and minimise these technological requirements, adequate human resources are required. Often the intermediary requires professional qualifications, as is the case in England,<sup>79</sup> and where they do not require such qualifications they may still need training in court processes. In addition, where lawyers are required to cross-examine on behalf of defendants, this inevitably requires the availability of an adequate number of lawyers in the system.

### **5.3 Restrictions on improper cross-examination and sexual history evidence**

Another measure for the protection of vulnerable witnesses is the restriction of improper cross-examination and evidence regarding a complainant's sexual history. At common law a defendant could attack his victim's general reputation for chastity, but even then excessively intrusive or irrelevant cross-examination relating to sexual history of a type that humiliates and degrades witnesses was not allowed.<sup>80</sup> Such cross-examination underpins the rationale for rules prohibiting a defendant from cross-examining the witness in person discussed above.

<sup>75</sup> RD Friedman 'Face to face: Rediscovering the right to confront prosecution witnesses' (2004) *The International Journal of Evidence and Proof* 1.

<sup>76</sup> Matthias & Zaal (n 15) 267.

<sup>77</sup> Bowman & Brundige (n 74) 283.

<sup>78</sup> Matthias & Zaal (n 15) 252.

<sup>79</sup> Henderson (n 70) 67.

<sup>80</sup> Raitt (n 17) 215–218; A McColgan 'Common law and the relevance of sexual history evidence' (1996) 16 *Oxford Journal of Legal Studies* 275.

Most common law jurisdictions have introduced legislation restricting sexual history evidence.<sup>81</sup> The type and extent of restrictions vary from country to country. Restrictions on sexual history evidence are the most controversial of the special measures for vulnerable witnesses.<sup>82</sup> Also referred to as the rape shield, they limit the questioning of sexual offence victims about their sexual history or bad character.<sup>83</sup> Such restrictions are meant to protect the complainant from degrading and embarrassing evidence and also to prevent the risk of prejudice against the complainant being created in the mind of the jury or judge.<sup>84</sup>

It is admitted that restrictions on sexual history evidence to some extent curtail the rights of the defendant in order to improve those of the vulnerable witness.<sup>85</sup> As far as this aspect is concerned, all that can be said is that the right to fair trial is not an absolute right. Under the Malawian Constitution this right is subject to limitation.<sup>86</sup> Section 44(1) of the Malawian Constitution allows limitations that are prescribed by law, reasonable, recognised by international human rights standards and necessary in an open and democratic society. The CP & EC forbids cross-examination that is irrelevant, indecent or scandalous.<sup>87</sup> Thus, to the extent that sexual history evidence is regarded as such, restrictions on it are prescribed by law. Reasonableness demands that laws should not be arbitrary and that the limitation must be rationally connected to its stated objectives.<sup>88</sup> Sexual history evidence is restricted mainly because it often is irrelevant and excluding irrelevant evidence does not constitute an injustice to the defendant.<sup>89</sup> Restrictions on it may therefore be said to be reasonable. The fact that limitations on sexual history are sanctioned in many countries with comparative human rights law serves to prove that such limitations are recognised by international human rights standards and are necessary in an open and democratic society.<sup>90</sup> Therefore, it is submitted that restrictions on sexual history evidence do not unlawfully or unjustifiably limit the accused's right to a fair trial. Any measure aimed at reducing the trauma experienced by complainants and improving the accuracy of

81 P Duff 'The Scottish "rape shield": As good as it gets?' (2011) 15 *Edinburgh Law Review* 218 219.

82 McGlynn (n 45) 369.

83 Duff (n 81) 218.

84 As above.

85 Walklate (n 18) 292.

86 D Chirwa *Human rights under the Malawian Constitution* (2011) 43.

87 Secs 214(5) & 215(3).

88 Chirwa (n 86) 48.

89 McGlynn (n 45) 370; Levanon (n 45) 611; J Temkin *Rape and the legal process* (2002) 223.

90 Chirwa (n 86) 49.

their evidence cannot be said to undermine the defendant's right to a fair trial.<sup>91</sup>

In terms of resource requirements, not much is required to restrict improper cross-examination including on sexual history evidence other than perhaps having an adequate number of lawyers to appropriately conduct cross-examination and training judges to properly implement such restrictions.

In conclusion, three observations may be made from the above discussion. First, special measures for the protection of vulnerable witnesses are a positive development. Research shows that vulnerable witnesses who had the benefit of special measures were less likely to feel anxious or distressed than those not using them and that a third would not have been willing and able to give evidence without them.<sup>92</sup> Special measures have benefited from comparatively extensive empirical evaluation and have achieved considerable success.<sup>93</sup>

Second, underlying the effective implementation of each special measure are resource requirements. The cost implications of special measures can be substantial. Even in cases where the basic need is a human resource such as the use of intermediaries, more resources are required through which the defendant can indirectly follow the proceedings. A lack of resources is the most critical gap compromising the effectiveness of special measures for protecting vulnerable witnesses.<sup>94</sup> Even in an advanced economy such as that of the United Kingdom, 'due to resource needs, including training, it took time from the introduction of the law for special measures directions to take off in England and Wales and to date, special measures are subject to availability at the relevant court centre'.<sup>95</sup> Scotland has also faced similar challenges.<sup>96</sup> Similarly, in South Africa (one of the most developed countries in Africa), although theoretically there are various special measures provided for, the vast majority of vulnerable witnesses testify in open court without any special protections because of a lack of resources.<sup>97</sup>

<sup>91</sup> Bowden (n 9) 539.

<sup>92</sup> C Hoyle & L Zedner 'Victims, victimisation, and criminal justice' in M Maguire et al (eds) *The Oxford handbook of criminology* (2007) 476.

<sup>93</sup> Roberts & Zuckerman (n 9) 462.

<sup>94</sup> Bowman & Brundige (n 74) 284.

<sup>95</sup> Roberts & Zuckerman (n 9) 458.

<sup>96</sup> Raitt (n 17) 42.

<sup>97</sup> Henderson (n 70) 69.

Finally, special measures do not necessarily impair the fundamental right to a fair trial for the defendant. The prejudicial impact of special measures for protecting vulnerable witnesses appears to have been exaggerated. These measures do not significantly erode the rights of defendants as opponents claim.<sup>98</sup> Additionally, balancing the interests of witnesses and of the defendant is not necessarily inimical to a robustly adversarial trial process.<sup>99</sup> Most importantly, findings indicate that the use of such protective measures do not put defendants at an increased risk of conviction.<sup>100</sup>

To the limited extent that it is admitted that some special measures, such as the restrictions on sexual history evidence, have a bearing on the defendant's fair trial rights, it is argued that the right to fair trial is not absolute. The landmark European Court of Human Rights ruling in *Dooson v The Netherlands*<sup>101</sup> states that '[t]he principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify'.<sup>102</sup> As such, the defendant's right to a fair trial does not exclude the interests of witnesses, more so of vulnerable witnesses.

## **6 The efficacy of applying the above special measures to the Malawian criminal justice system**

It has been highlighted that the treatment of vulnerable witnesses in Malawi is problematic. The challenge is the feasibility of the special measures explored above in a Malawian context. These measures were introduced to alleviate the plight of vulnerable witnesses in the various common law jurisdictions mentioned and, as already noted, have gone a long way to ease the problems faced by vulnerable witnesses. Since the challenges that motivated these innovations are the same in Malawi, such measures should be of interest to Malawi.

However, there are certain differences between Malawi and the jurisdictions discussed, prominent among which is the lack of resources. As mentioned previously, underlying virtually all these special measures are resource requirements, material or human,

<sup>98</sup> Ellison & Munro (n 18) 21; Matthias & Zaal (n 15) 267; Bowden (n 9) 545.

<sup>99</sup> Bowden (n 9) 545; LC Hoyano 'Striking a balance between the rights of defendants and vulnerable witnesses: Will special measures directions contravene guarantees of a fair trial?' (2001) *Criminal Law Review* 948.

<sup>100</sup> Ellison & Munro (n 18) 21; A Cossins 'Prosecuting child sexual assault cases: Are vulnerable witness protections enough?' (2006) 18 *Current Issues in Criminal Justice* 313.

<sup>101</sup> *Dooson v The Netherlands* (1996) EHRR 330.

<sup>102</sup> As above.

which Malawi does not have. What, then, does that mean for the vulnerable witness in Malawi? Subsequent paragraphs will explore the efficacy of applying the special measures mentioned above in the Malawian context. Where it may not be viable to transplant such measures into our system, alternative options will be considered.

### 6.1 The use of screens and partitions

Under Section 71A(1)(b) of the CP & EC the court can order that a screen, partition or one-way glass be used to obscure the witness's view of the defendant or other party to which the evidence relates. As such, there should be no obstacle to the shielding of a vulnerable witness (especially a sexual offence victim under this provision) from the defendant or any party to whom the evidence relates. Better still, with or without resources there are various options for screening. Courts can improvise and use anything to conceal the relevant parties from each other's sight, including re-arranging the court creatively. 'In the absence of access to CCTV, judges in Kenya and Zimbabwe have used handmade screens and the positioning of bookshelves to protect child witnesses from having to face the accused during their testimony.'<sup>103</sup> In fact, as early as in 1919 in the case of *Smellie*<sup>104</sup> the Court ordered the defendant to wait on the stairs at the side of the dock so that he could not be seen by his 11 year-old daughter while she was testifying against him. Screening is that simple and Malawian judges have no excuse for not shielding vulnerable witnesses from the defendant's sight.

In addition, since the section only covers victims of sexual offences, the common law can be useful to protect other witnesses deemed vulnerable but not covered by the section, such as child victims of physical abuse. Judges have the power at common law to shield a witness from the defendant's sight.<sup>105</sup> Most importantly, the CP & EC is premised on the principle that substantial justice should be done without undue regard for technicality,<sup>106</sup> thus the end should justify the means. In deciding whether or not to screen a witness the court can enquire as to witness's wishes, if they are old enough, or consider the witness's relationship to the defendant. The defendant's conduct may also be relevant in this regard. If he seeks by his dress, manner or questions to dominate, intimidate or humiliate a complainant

<sup>103</sup> Bowman & Brundige (n 74) 284.

<sup>104</sup> *R v Smellie* (n 52).

<sup>105</sup> As above.

<sup>106</sup> Sec 3 CP & EC.

or should this be reasonably apprehended, the judge should not hesitate to order the erection of a screen.<sup>107</sup>

## 6.2 Mandatory prohibition of personal cross-examination of vulnerable witnesses by defendants

Malawi has no provision prohibiting the cross-examination of a vulnerable witness by the defendant. As noted previously, there are very few lawyers in Malawi and it is only in homicide cases that a defendant is guaranteed legal representation at the state's expense if he cannot afford it personally, which usually is the case. As such, virtually all defendants in non-homicide cases have no choice but to go through the criminal justice system without legal representation. In addition to this, the typical defendant is unsophisticated and uneducated. Most defendants are unfamiliar with the law and court procedures and do not know how to conduct cross-examination. Even though courts may endeavour to explain the procedure to litigants, trial observations have revealed that litigants have miserably failed in conducting their cases.<sup>108</sup>

As noted previously, in systems where a mandatory prohibition of personal cross-examination by the defendant operates, such defendants either find or are provided with professional advocates to cross-examine witnesses on their behalf. It is clear that this cannot work in the Malawian system as there are no such advocates to do the work on the defendant's behalf. The Malawian defendant often is not unrepresented by choice. It is submitted, therefore, that in this respect, especially where adult vulnerable complainants are concerned, the defendant should still personally cross-examine the witness. The trauma occasioned by such a situation to some extent will be minimised by the erection of a screen as suggested above. It is not an ideal situation but the best that can be done in the circumstances.

What of the risk of abusive cross-examination? It has already been indicated that abusive cross-examination actually underpins the rationale for the prohibition of personal cross-examination by a defendant. A possible solution to that may be for the courts to take advantage of the opportunity presented by the fact that they explain court processes and procedures to unrepresented defendants. The courts can guide the defendant to focus on relevant matters and on how to properly conduct the cross-examination including questioning

107 Milton Brown (n 41).

108 Scharf et al (n 20) 14.

about sexual history evidence. If he does not comply with such instructions, the judge may intervene and secure compliance and may even stop further questioning by the defendant or take over the questioning of the complainant himself as was recommended in the case of *Milton Brown*.<sup>109</sup> Where the judge takes over the questioning he can always ask the defendant if there is anything further that he wishes the judge to ask on his behalf.

As far as children are concerned, in England and Wales, at a time when there was no provision ensuring legal representation for a defendant who could not cross-examine a key witness, in child witness cases the best practice was thought to be for the trial judge to take over the cross-examination of child witnesses.<sup>110</sup> Malawian judges can borrow a leaf from this. Thus, whereas for adult witnesses the judge should only intervene if the cross-examination becomes abusive, this need not be so for children. The only challenge is that without legislative support it may not be easy for judges to just start cross-examining child witnesses on behalf of the defendant in the absence of abusive cross-examination.

As noted above, other jurisdictions use intermediaries to protect children from personal cross-examination by the defendant, even by lawyers. It was also noted that the intermediary comes in various forms, from go-between translator to child communication professionals, depending on the country. Due to resource constraints, Malawi may not be in a position to afford the fresh employment of intermediaries in whatever form. The best would be to borrow from the South African approach where the intermediary is a translator and to train all court clerks in cross-examining children in the vernacular language. With appropriate training such clerks could be used as transmission channels in cases involving very young children or children unable to testify. The lawyer or defendant could be asked to give the clerk any questions they wish to ask and the clerk can then appropriately transmit them to the child on their behalf. For older children, it is submitted that the same approach suggested for adult complainants can be followed. The judge would have to be more alert in such a case.

<sup>109</sup> *Milton Brown* (n 41) 364.

<sup>110</sup> J McEwan 'In defence of vulnerable witnesses: The Youth Justice and Criminal Evidence Act 1999' (2000) 4 *The International Journal of Evidence and Proof* 21.

### 6.3 Restricting improper cross-examination and sexual history evidence

As noted above, Malawi has no specific provisions covering the improper cross-examination or sexual history evidence in respect of vulnerable witnesses. In this context the common law is useful. There is no doubt that the common law rules of cross-examination contain sufficient authority to enable judges to control improper questioning.<sup>111</sup> In addition, section 214(5) of the CP & EC, which stipulates that cross-examination must relate to relevant facts, appears to have codified the common law position and can also be useful in this regard. Such provisions on relevance may also be used to exclude sexual history evidence which generally is excluded for being irrelevant. Section 215(3) of the same Act goes further to state that the court may forbid any question that it considers indecent or scandalous. All these provisions may be used by the court to restrain the unnecessary and offensive cross-examination of vulnerable witnesses.

More important than the common law and the CP & EC provisions, the Malawian Constitution guarantees the right to privacy<sup>112</sup> and the right not to be subjected to any inhuman or degrading treatment.<sup>113</sup> It provides further that 'in any judicial proceedings respect for human dignity shall be guaranteed'.<sup>114</sup> It is submitted that these constitutional guarantees may be used by courts to protect vulnerable witnesses by curtailing offensive cross-examination which intrudes on the witness's privacy or otherwise is degrading. As previously indicated, this is an allowable limitation of the right to a fair trial.

A concern can be raised that, due to the nature of the adversarial system, the judge, by intervening to stop what is perceived as improper questioning, may confuse the process since he is not in control of the evidence available so as to know where a line of cross-examination might be leading.<sup>115</sup> However, this may not be a significant problem in the Malawian context as the typical defendant is unrepresented and has no cross-examination techniques or structure as to suffer confusion through the judge's intervention.

Further to the above, various approaches are used in different jurisdictions in dealing with sexual history evidence: the legislated

111 Henderson (n 70) 58.

112 Republic of Malawi Constitution, 1994 sec 21.

113 Sec 19(3).

114 Sec 19(2).

115 Ellison (n 12) 109.

exceptions approach; the evidentiary purpose approach whereby the admissibility of such evidence depends on the purpose for which it is being offered; and the judicial discretion approach which simply grants to judges the broad discretion to admit or bar evidence of sexual history.<sup>116</sup> The judicial discretion approach only requires a judicial determination that the proffered evidence is relevant and that its probative value is not outweighed by its prejudicial effect.<sup>117</sup> Unlike the legislated exceptions approach, this approach would be good for Malawi because the former are easily implementable where lawyers are involved in the process. The typical Malawian defendant representing himself would not be able to apply legislative exceptions to his evidence, let alone know evidentiary purposes.

The other advantage is that this discretion is similar to that exercised by judges under the common law. Therefore, there would be no need for law reform which in Malawi is an inordinately long process.<sup>118</sup> The important thing is that the discretion must not be exercised arbitrarily. It will be submitted below that judicial training can partially solve this. In New Zealand such a discretionary approach to sexual history evidence once operated with some success.<sup>119</sup>

In restricting sexual history evidence in the Malawian system, it would be important to differentiate between a represented defendant and one without legal representation. It may be easy to restrain improper questioning including on sexual history evidence by a lawyer because the code of conduct for the Malawian bar requires them to treat all witnesses with fairness and provides disciplinary measures accordingly.<sup>120</sup> Unrepresented defendants, on the other hand, have no similar provisions for holding them accountable, but the court can always use its common law power and the CP & EC provisions discussed above.

The greatest advantage of the Malawian system in this regard is that it rarely uses the jury system. Malawian judges are virtually sole arbiters of fact and law. Most of the concerns with prejudice that may be associated with special measures involve jury prejudice.<sup>121</sup>

<sup>116</sup> MJ Anderson 'From chastity requirement to sexuality licence: Sexual consent and a new rape shield law' (2002) 70 *George Washington Law Review* 51; McGlynn (n 45) 367.

<sup>117</sup> Anderson (n 116) 51.

<sup>118</sup> Eg, the CP & EC was re-enacted in 1969 and since then remained largely unchanged until 2010 when it was wholesomely reviewed; Law Commission Report (n 31).

<sup>119</sup> J Temkin 'Regulating sexual history evidence: The limits of discretionary legislation' (1984) 33 *International and Comparative Law Quarterly* 977.

<sup>120</sup> Malawi Law Society Code of Ethics (2006) Ch 12 para 21.

<sup>121</sup> Matthias & Zaal (n 15) 298; K Quinn 'Justice for vulnerable and intimidated witnesses in adversarial proceedings?' (2003) 66 *Modern Law Review* 154.

Much of the reluctance to rely on special protections or alternative procedures for vulnerable witnesses is rooted in the fear that the jury will give inappropriate weight to the evidence in question. Equally, it may be suggested that many of the tactics deployed by counsel to undermine and unsettle witnesses during cross-examination are for the jury's benefit.

Ellison goes further to say that because the presence of a jury may impact upon the nature of questioning experienced by rape complainants, the replacement of the jury by career judges may also be considered relevant as a solution.<sup>122</sup> Sexual history showdowns are usually about impressing the jury who, unlike a judge, may overestimate the probative value of the evidence.<sup>123</sup>

In the Malawian system, where one competent professional is the sole arbiter of fact and law, a discretionary approach to sexual history evidence should be able to work perfectly. It may of course be argued that this does not totally solve the prejudice factor as Malawian culture is conservative and patriarchal attitudes towards women and sexuality prevail. These may find their way onto the bench. The saving grace is that judges are permanently employed competent professionals who can be educated accordingly. Additionally, unlike juries who are once-off lay fact finders, judges have considerable experience of adversarial presentation and so can keep a level head and not easily be misguided by irrelevant evidence. In other words, the impact of their prejudice cannot be as bad as in the case of juries and with proper and adequate training can be properly handled.

From the above discussion, while the special measures in issue are the ideal, a copy-and-paste approach would not at present be workable in Malawi. The best starting point would be to proceed as suggested above.

It therefore is submitted that judges are the best hope for the protection of vulnerable witnesses in Malawi. Starting with screens, section 71A leaves it up to the judge to decide whether to make such an order. Regarding witnesses falling outside that provision, the power to order the erection of a screen is also in the discretion of the judge. The CP & EC and constitutional provisions as well as the common law discretion, while useful for curtailing improper cross-examination including sexual history evidence, cannot come to life if judges do not apply them to protect vulnerable witnesses in

122 Ellison (n 12) 153.

123 As above.

court. Further, the code of conduct for lawyers does little to prevent improper cross-examination if judges do not rightly intervene.

The argument is stronger for sexual history evidence since Malawi has no specific legislative provision regulating it and, even if there was, such would need judges to appropriately implement it. The same applies to preventing unrepresented defendants from abusing witnesses during cross-examination. Judges must appreciate that that is a difficult situation for the witness and do all they can to alleviate the stress of the witness. Of course, with respect to clerks acting as intermediaries for very young children or children unable to testify, they need to be trained accordingly.

## 7 Moving forward: Judicial education and proactive interventions

Malawian judges bear the main responsibility of assisting vulnerable witnesses within the available resources in the ways suggested above. Unfortunately they have not been adequately proactive in practice. Most Malawian judges are driven by the need to be seen to be impartial in line with common law tradition and so play too passive a role in the proceedings.<sup>124</sup> Yet the English legal system, from which Malawi borrowed such culture and which often is regarded as the paradigm of the adversarial tradition, is not a perfect example of such: Even in criminal courts it allows deviations from the proper adversarial structure.<sup>125</sup> Malawi surely cannot afford the luxury of being a paragon of the adversarial tradition.

Reality calls for a more proactive approach on the part of judges to defend the rights of the vulnerable. It is submitted that judges' competence in this regard needs to be reinforced with continuing training and education. Inadequate training and continuing legal education for some time have been key weaknesses of the judiciary.<sup>126</sup> The judiciary's training programmes tend to be *ad hoc* and donor driven.<sup>127</sup> Consequently, critical legal issues, including the protection of vulnerable witnesses, may not be addressed or may be addressed, but insufficiently and unsystematically. In its 2019-2024 strategic plan, the judiciary acknowledges this problem and plans to establish a judicial training institute which will be a good initiative

124 Scharf et al (n 20) 1.

125 J McEwan *Evidence and the adversarial process: The modern law* (1998) 1.

126 E Kanyongolo 'State of the judiciary report: Malawi 2003' (2004) IFES State of the Judiciary Report Series 24; The Malawi Judiciary Strategic Plan, 2019-2024.

127 As above.

for reinforcing the knowledge and skills of judicial officers in this area and others.

Until this is established, the newly-established Malawi Institute of Legal Education (MILE),<sup>128</sup> a professional training institution set up to provide post-graduate legal training for those intending to practise law in Malawi, affords a golden opportunity for comprehensive and systematic training in this regard. MILE focuses on practical legal courses, including criminal procedure and the law of evidence. If the curriculum includes the fair treatment of victims and, in particular, the protection of vulnerable witnesses, then every professional magistrate and legal practitioner will begin work while acquainted with these areas. MILE has also been mandated to organise and conduct courses for continuing legal education purposes. This may be used to further the knowledge and skills of those who are already in the system regardless of rank. A particular advantage of the judiciary where MILE is concerned is that the judiciary has been very instrumental in establishing this institution and many judges are teaching various courses at this institution.

In addition, the High Court should also take advantage of its oversight role over magistrates by writing comprehensive judgments in this area to educate and guide magistrates on handling vulnerable witnesses, as happened in the case of *R v Richard Mandala Chisale*.<sup>129</sup> Such efforts can go a long way in addressing the limited understanding of some judicial officers and others of the special needs of vulnerable witnesses and how they can be protected.

To a large extent Malawian judges have not been proactive in using the available options to protect vulnerable witnesses. What guarantee is there that any training or education programme can change that? Indeed, there is no guarantee but it nevertheless is hoped that the right training can help, if not all judges, then at least some of them, to unlearn any negative attitudes whether inspired by the adversarial culture or sexual offence stereotypes and to be proactively interventionist.

## 8 Conclusion

This article set out to analyse the protection of vulnerable witnesses during criminal trials in the face of resource challenges. Significant challenges faced by such witnesses in the Malawian criminal

128 Set up under sec 14 of the Legal Education and Legal Practitioners Act 2018.

129 Criminal Review Case 7 of 2014.

justice system were highlighted as well as the negative impact of the adversarial tradition. It has been indicated that, unlike Malawi, most common law jurisdictions have introduced special measures to mitigate the plight of vulnerable witnesses, significant among which are screening the witness from the defendant's sight; prohibiting the defendant from personally cross-examining the witness; and restrictions on improper cross-examination, including on sexual history evidence. An assessment of these three measures indicated that they are capable of co-existing alongside the defendant's fundamental right to a fair trial.

It has further been highlighted that, with the exception of screening, underpinning all these special measures are resource requirements. While on the face of it this factor may appear to be an obstacle to the protection of vulnerable witnesses in Malawi, the discussion brought to light a wealth of options to be explored for the benefit of such witnesses. All that is needed is for judges to be proactive and actively interventionist.

If vulnerable witnesses are treated unfairly, the only interests that will be served are those of (often) guilty defendants. It therefore is in the interests of justice to protect vulnerable witnesses. Although this is not easy to do in a resource-poor nation such as Malawi, judges are in a position to make a difference.