The recent “Victims Law” proposals by Sir Keir Starmer QC throw up the suggestion of judge as inquisitor and challenge our adversarial system. Professor Penny Cooper enters the debate and questions whether judges could or should cross-examine vulnerable witnesses?

Writing under the heading ‘A Voice for Victims of Crime’ the former DPP Sir Keir Starmer QC is rightly concerned about matters which discourage victims from coming forward to report crimes and from subjecting themselves to cross-examination. He chairs a Labour Party Task Force (established in December 2013) which is to come up with proposals for a new ‘Victims’ Law’. He has suggested that a better way forward might be for judges rather than advocates to challenge the accounts of vulnerable witnesses:

‘The idea that if the prosecution and defence attack each other as fiercely as possible the truth will somehow pop out has its attractions, but for particularly young and vulnerable witnesses there are obvious downsides. Without casting around the world for the elusive perfect criminal justice system, the taskforce will consider the extent to which it might be possible to blend the adversarial and inquisitorial systems. Perhaps judges should be given the task of questioning young and vulnerable witnesses?’ (Guardian, 6 April 2014)

Responding the following day on BBC Radio 4’s World at One the Attorney General, Dominic Grieve QC MP, said that it has been acknowledged ‘for some time that we need to improve the way in which we deal with vulnerable victims and witnesses’ and that progress needs to be kept under review. He welcomed Sir Keir’s contribution to the debate but on the issues of judges cross-examining vulnerable witnesses he was cautious, not because judges can’t be trusted but because it raises ‘some quite profound issues about the right to a fair trial’.

Not against the Rules but...
Perhaps all barristers instinctively side with the Attorney General on this one, but the argument should go beyond gut instinct. Would it be against the rules as they currently stand? The Criminal Procedure Rules (CPR) Part 29 covers measures to assist witnesses to give evidence and refers to special measures set out in the Youth Justice and Criminal Evidence Act 1999. This includes questioning through ‘an intermediary’, further described in the legislation as questioning through ‘an interpreter or other person approved by the court’ (s29(1) YJCEA 99). Neither the Act nor the CPR allow for questioning by the court itself; such a change would require new legislation but this arguably would not conflict with the principles of the CPR.

The judge has an overriding objective to ensure that cases are ‘dealt with justly’ (CPR 1.1(1)) and this includes ‘respecting the interests of witnesses’ (CPR 1.1(2)(d)) and ‘dealing with the case efficiently and expeditiously’ CPR 1.1(2)(e). It also includes ‘recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights’ (CPR 1.1(2)(c)). Placing cross-examination in the hands of the judge would not of itself breach the defendant’s right to a fair trial:

‘Article 6 requires that the proceedings overall be fair and this normally entails an opportunity to challenge the evidence presented by the other side. But even in criminal proceedings account must be taken of the article 8 rights of the perceived victim: see SN v Sweden, App no 34209/96’ (Baroness Hale in Re W [2010] UKSC 12 at para 22).

Re W laid down the correct approach to children being called as witnesses in family cases. Baroness Hale noted that one option in the family court would be challenging the child’s account through an intermediary: ‘This could be the court itself, as would be common in continental Europe and used to be much more common than it is now in the courts of this country’ (para 28). In our own family courts, the inquisitorial role of the judge already exists in children cases and if anything is gaining strength as the proportion of litigants in person increases. Crime has always been seen as different not least because in jury trials the judge does not take the final decision;
his or her role is to hold the balance and simply ‘bolting on’ the questioning of vulnerable witnesses to the existing role of the judge could create problems.

Judging like an advocate?
If a judge did cross-examine, it would need to be in accordance with the ground rules for that particular vulnerable witness, rules which presumably the judge would have imposed on himself. Who would intervene during his questioning and who would decide that the judge had breached his own ground rules? (This brings to mind that scene in Orson Welles’ ‘The Lady From Shanghai’ when a witness cross-examines himself.)

Many cases involving vulnerable witnesses come before a jury and as we know the judge’s summing up must be impartial, avoiding the language of an advocate, and ‘[t]he guilt of a defendant is to be judged by the jury as the tribunal of fact on all the evidence in the case’ (R v Bentley (Deceased) [1998] EWCA Crim 2516). A judge’s necessarily partial cross-examination followed by their necessarily impartial summing up would send a mixed message to jurors.

Jurors’ perceptions
Notwithstanding any direction to the contrary, it is hard to see how the jury would not be tempted to set apart the evidence of a witness cross-examined by the judge. If the judge had failed to undermine that witness, would their evidence carry extra weight in the minds of the jury compared to evidence of others who were merely cross-examined by counsel?

Even if new legislation were passed to allow judicial cross-examination of vulnerable witnesses and Parliament specifically excluded the accused (as it did with VJCEA 99 ‘special measures’), this would not prevent the courts from ordering it for defendants under their inherent jurisdiction (see R v Camberwell Green Youth Court (Respondents) ex parte D (a minor) [2005] UKHL 4). It is estimated that up to two thirds of defendants are vulnerable on account of difficulties or disorders affecting their communication. Assuming judges have the requisite skills to cross-examine vulnerable defendants, they could find themselves very busy indeed.

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Sir Keir Starmer QC, Guardian, 6 April 2014

In some cases the only person cross-examined by the judge might be the vulnerable defendant. If the prosecution case was that the defendant was lying, the judge would be required to cross-examine accordingly since where a court is asked to disbelieve a witness, he is entitled to have that put to him (see ‘the rule’ in Browne v Dunn (1894) 6 R 67, material passages helpfully cited by Jacob LJ in Markem Corporation & Anor v Zipher Ltd [2005] EWCA Civ 267). One could imagine the effect on a jury if the defendant was the only person in the trial whom the judge accused of the lying.

When the Attorney General said he was ‘flagging up’ that mixing aspects of inquisitorial (questioning by a judge) and adversarial (questioning by the party’s advocate) systems could make a fair trial quite difficult, he was right.

What’s the alternative?
But Sir Keir is also right to look for alternatives not least because of widely reported and discussed trials such as that of Operation Chalice in 2011 where trafficked young women were cross-examined by multiple defence counsel and not always appropriately and of Michael Brewer where the complainant, Mrs. Frances Andrade, took her own life some days after being cross-examined. In March 2014 Surrey County Council completed the Serious Case Review into the death of Mrs Andrade. One finding was that judges should be ‘proactive’ in introducing special measures for vulnerable witnesses even where that witness, as Mrs Andrade had, refuses them.

Judges questioning vulnerable witnesses would be taking proactiveness to a new level in criminal cases but it is not unthinkable. In democratic, rule of law countries such as Austria and Norway, they have found alternatives when the witness is a child. In Austria a pre-trial judge (not the one conducting the trial) can conduct the questioning; alternatively it can be conducted by an expert. In Norway specially trained interviewers under judicial supervision question the child; the parties can suggest topics and areas to be investigated and challenged. In England and Wales the recent debate on cross-examination of vulnerable witnesses has centred on educating the advocates, but Sir Keir’s comments have shifted the focus. A new Government in 2015 could go further and take vulnerable witness handling away from advocates.

In April 2011 a working party of the Advocacy Training Council recommended in Raising the Bar ‘a fundamental change of culture’ and compulsory, participative training on handling vulnerable witnesses and defendants. However neither the Bar Council nor the Bar Standards Board has embraced this, yet. If compulsory training is unlikely in the near future, then there should at least be easily accessible training. The Attorney General cited theadvocatesgateway.org; the toolkits contain best practice (Criminal Practice Directions 2013). In addition HHJ Rook is chairing an Advocacy Training Council working group of experts to develop detailed, participative vulnerable witness and defendant advocacy training. Until such training is compulsory and brings about the necessary culture change the legitimate question remains: Who should cross-examine vulnerable witnesses?

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