R. v. Ryan: Leaving Battered Women to the "Justification" of Self-defence?

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In *R. v. Ryan*[1], the Supreme Court confirmed that duress operates as a distinct defense and cannot be used simply to fill in gaps left by other defenses. It is not enough for a criminal defendant to say that she was compelled to act by circumstances; she must have been compelled to break the law as a result of a specific demand that she do so, backed by a threat. The Court's careful parsing of the defense, which some might view as excessively formalistic, was sensible. It is surely for Parliament and not the courts to lead the way in deciding when it is permissible to harm or endanger others. Moreover, as the *Ryan* case vividly illustrates, there was sore need for clarification of the components of duress. The Court has provided this.

The Court insisted on a strict division between self-defence and duress, not only because they respond to different factual contexts, but because they represent distinct exculpatory concepts: justification and excuse. The Court thus breathed new life into a distinction that, since Dickson J. deployed it in *Perka v. R.*,[2] has seemed primarily theoretical. The Court's insistence on it is all the more striking given that the recent amendments to the *Criminal Code* self-defence provisions have removed the reference to "justification."[3] The new wording might have suggested a continued blurring of the lines between self-defence and duress, but the Court's analysis in *Ryan* implies that self-defence must be treated as a justification no matter what language is used by the legislature to describe it. The question is why this should be so? A person who uses lethal force to

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[1]2013 SCC 3 (S.C.C.), reported above at p. 223 [*Ryan*].

[2][1984] 2 S.C.R. 232, 42 C.R. (3d) 113 (S.C.C.).

[3]Consider Kent Roach, "A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions" (2011) 16 C.C.L.R. 275 at 281.

repel an attack, and is then called upon to explain herself, is more likely to say "I had no choice" than "the legislature permitted me to act as I did." Yet the former explanation seems to appeal to moral involuntariness and thus to the excusability of the conduct rather than its permissibility. And what is one to make of the suggestion of the Ontario Court of Appeal, in *Bedford v. Canada (Attorney General)*,[4] that unnecessarily broad limitations on the ability of individuals to defend themselves can offend s. 7 of the *Charter*? The Supreme Court has never constitutionalized a substantive criminal defense on the basis that a certain course of conduct must be *justifiable*. But if a hard-and-fast distinction between justifications and excuses is to be maintained (other jurisdictions have not been so dogmatic), and if the Court continues to assume that self-defence is inherently justificatory, it may become difficult to escape such a radical result. In that sense, the decision raises questions about the moral limits of the criminal law in the same way as rulings like *R. v. Butler*, *R. c. Labaye*, or *R. v. Malmo-Levine*.[5] It does so, though, not by suggesting that there might be constitutional limits on what offences Parliament can create, but by hinting that Parliament must recognize certain justificatory defences.

It is striking that, in a case that so clearly engaged domestic violence against women, the Court only referred to such issues in reference to remedy and not at all in its doctrinal analysis of defences. To grant a stay of proceedings notwithstanding a successful Crown acquittal is rare. The Court issued a remarkably pointed rebuke to provincial authorities, in effect charging them with being more committed to ensnaring Nicole Ryan than with protecting her. It is unclear, though, exactly how that unresponsiveness factored into the analysis governing the stay of proceedings. It is, therefore, difficult to draw conclusions for the future — other than to put the state on notice that, to the extent it fails to meet the needs of battered women and then tries to prosecute them for "self-help," it may face judicial criticism. To be sure, the Court referenced other factors for the stay: the lack of clarity in the law and the potential prejudice to Ryan

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[4](2012), 91 C.R. (6th) 257 (Ont. C.A.).

[5]*R. v. Butler*, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137 (S.C.C.) and *R. c. Labaye*, [2005] 3 S.C.R. 728, 34 C.R. (6th) 1 (S.C.C.) (interpreting legislation in such a way that it is directed at harmful acts); *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 16 C.R. (6th) 1 (S.C.C.) (holding that the harm principle is not a principle of fundamental justice).

having to launch a response on the basis of self-defence when she had already tipped her hand on duress. But the interrelationship between these factors was not explained.

It is unfortunate that the Court did not consider the different ways in which a battered woman's situation might give rise to a valid substantive defense. *Ryan* is the first case involving a battered female defendant to reach the Court since *R. v. M. (M.A.)*,[6] and only the second such case since *R. v. Lavallee*[7] itself. Had Ryan proceeded to argue her case on the basis of self-defence rather than duress, would she have succeeded? The Court of Appeal was surely right to say that it would be strange to acquit Lavallee but convict Ryan. Given that the Supreme Court stripped away the imminence requirement for self-defence in cases involving battered women's syndrome, it is difficult to see why Ryan could not be acquitted as well. But the Court did not say that it would have been open to the trier of fact to reach that result. It is understandable that the Court did not want to needlessly address the vexed question of whether Parliament has granted permission to people, under any circumstances, to take out hits on each other. It does not change the fact that women in Ms Ryan's position are out there, and are no better informed of their legal position.

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[6][1998] 1 S.C.R. 123, 12 C.R. (5th) 207 (S.C.C.).

[7][1990] 1 S.C.R. 852, 76 C.R. (3d) 329 (S.C.C.).