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Domestic Violence and Duress: In Search of a Contextual Approach

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Case commented on:

R v Ryan, [2013 SCC 3](#)

On Friday January 18, the Supreme Court released its decision in *R v Ryan*. In a decision written by Justices LeBel and Cromwell, the Court held that Nicole Doucet (formerly Ryan) could not avail herself of the defence of duress in circumstances where she attempted to hire someone to kill her abusive husband. This ruling followed Ms Doucet's acquittal for counselling murder at trial, which was upheld by the Nova Scotia Court of Appeal. Although the Supreme Court paid some attention to Ms Doucet's circumstances by ultimately staying the proceedings against her (with Fish, J dissenting on this point), its analysis of the defence of duress was sorely lacking in context.

According to the Supreme Court, "the defence of duress is available when a person commits an offence while under compulsion of a threat made *for the purpose of compelling* him or her to commit it" (at para 2, emphasis in original). Like the defence of necessity, duress is an excuse, and both are based on the moral involuntariness of the accused's conduct (at para 17). Duress and necessity involve third party victims, unlike self-defence, where the victim is the aggressor. Self-defence is also unique in that it is a justification rather than an excuse of wrongful conduct – in other words, self-defence is lawful if its preconditions are met (at paras 18-20). Moreover, self-defence is codified in the *Criminal Code*, RSC 1985, c C-46, while the defence of duress has both common law and statutory aspects (at para 28). These differences suggested to the Court that self-defence should be more readily available than duress (at para 26). They also led the Court to reject the Nova Scotia Court of Appeal's reasoning that it would be unprincipled and ironic if Doucet could have attacked Ryan herself and then availed herself of a self-defence argument, while being unable to argue duress because the aggressor and victim were the same person (at paras 13, 16). The Supreme Court held that even though Ryan had repeatedly threatened to kill Doucet and her daughter, she was not "being threatened for the purpose of compelling her to have him killed" (at para 2; see also para 31). The excuse of duress was thus unavailable, and the Court did not think it appropriate to extend the law in a way that it perceived would amount to "judicial amendment" (at para 32). Self-defence was not led as a defence on appeal, and the Supreme Court did not decide whether it would apply on the facts, although it strongly suggested that it would not: "In a case where there was a threat without compulsion, the accused cannot rely on duress simply because he or she did not employ direct force and thus, was excluded from relying on the self-defence provisions of the *Code*." (at para 30).

The Court's entire discussion of duress as a possible defence (at paras 13-33) is very abstract, with no reference at all to the domestic violence context. In what might be seen as rather odd organization of its reasons, after dismissing duress as a defence and discussing the appropriate

remedy in the case at hand, the Court went on to clarify the law of duress. Here too, its discussion was abstract without attention to context. It was only at the stage of considering the remedy that the majority gave some weight to Ms Doucet's situation, stating that it was "disquieting" that "the authorities were much quicker to intervene to protect Mr. Ryan than they had been to respond to her request for help in dealing with his reign of terror over her" (at para 35). The Nova Scotia courts had found that Ms Doucet repeatedly sought the protection of the police and victim services, but was rebuffed (see 2010 NSSC 114 at paras 47, 162; 2011 NSCA 30 at para 129). The "enormous toll" of the abuse and the proceedings against Doucet, and the fact that the Crown changed its position on the law of duress on appeal, were found to make this an "exceptional situation", such that the interests of justice required a stay of proceedings (SCC at para 35).

This decision is reminiscent of another recent ruling by the Supreme Court, *R v JA*, [2011 SCC 28](#), where the Court analyzed the issue of advanced consent in sexual assault cases in a way that ignored the abusive relationship between the accused and victim (see my post on that case [here](#)). *Ryan* and *JA* are a far cry from earlier rulings of the Court such as *R v Lavallee*, [1990] 1 SCR 852 and *R v Malott*, [1998] 1 SCR 123, where the Court took a contextual approach to the issue of self-defence in cases involving battered women.

In *Ryan*, the Court also declined to use the *Charter* as an interpretive tool in developing the common law related to duress. There was some acknowledgement that previous decisions had struck down aspects of the statutory defence of duress based on *Charter* arguments (see the discussion of *R v Ruzic*, 2001 SCC 24 at paras 38-42), but the *Charter* was not invoked in *Ryan* itself. The Canadian Association of Elizabeth Fry Societies (CAEFS) and the Women's Legal Education and Action Fund (LEAF) intervened in *Ryan* (see their factum [here](#)) to argue that if the defence of duress were interpreted consistently with sections 7, 15 and 28 of the *Charter*, it should be available in Ms Doucet's circumstances. Conversely, if duress was not available at law, this would create a gap that would leave abused women who counselled homicide in circumstances of moral involuntariness without a defence (at paras 17-18). In spite of these arguments, the Court seemed to indicate that direct *Charter* arguments were required to challenge the current law on duress. This led Elizabeth Sheehy and Carissima Mathen to suggest that "Advocates for battered women in the future will need to be prepared to launch Charter challenges where defences like self-defence or duress fail to provide equal benefit of the law to battered women" (see [Op-Ed: Battered women's defences still in question](#), Ottawa Citizen, 18 January 2013).

Another aspect of the Court's decision that is wanting is its failure to cite international legal norms establishing due diligence obligations on states in the context of domestic violence. These norms were cited by CAEFS-LEAF in its factum (at note 46), and arguably support an approach to duress that is informed by women's rights to security of the person and equal right to be free from violence (see e.g. [Jessica Lenahan \(Gonzales\) et al v United States](#), Case 12.626, Report No. 80/11 (Inter-American Commission on Human Rights, 17 August 2011) and my post on that case [here](#)). The Court also failed to cite any secondary literature on state obligations in the context of violence against women or on domestic violence more broadly.

The full factual context, the *Charter*, international law, and relevant scholarly writing should be approached as stronger sources when it comes to interpreting provisions of the *Criminal Code* and common law principles in the context of interpersonal violence. Violence against women is a recognized form of discrimination, and so is the failure to take it seriously by the government

(see *Lenahan, supra*). The judicial branch has a critical role to play in ensuring that such discrimination is not further perpetuated by an acontextual approach to such violence.

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