The Criminal Law Quarterly

Volume 62, Number 4 October 2015

Editorial

Vandalizing the *Criminal Code* with Irrational and Arbitrary Restrictions on Provocation

The *Zero Tolerance for Barbaric Cultural Practices*, S.C. 2015, c. 29 not only adds to the *Criminal Code*, it vandalizes it.

The controversial though apparently politically popular new law adds to the *Criminal Code* by providing for new criminal offences for those involved in forced marriages or marriages of those under 16 years of age (including potentially the coerced parties) and for peace bonds to prevent such practices. It also provides for immigration exclusion of those engaged in polygamy.

In a little noticed move, the new law essentially vandalizes the *Criminal Code* by placing new and arbitrary restrictions on the already beleaguered provocation defence. It does so by replacing the existing s. 232(2) of the *Criminal Code* with the following:

> Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool. S.C. 2015, c. 29 s. 7

Immigration Minister Chris Alexander defended this restriction in Parliament as designed to ensure that provocation would not apply in cases of honour killings and in many spousal homicides. In the lead up to the election, the government argued that its bill demonstrated it took honour based violence seriously and other parties did not. Nevertheless, the restrictions it imposes on the provocation defence are blunt, arbitrary and unnecessary. Their arbitrariness and overbreadth likely violate s. 7 of the Charter.

The government designed the act in a manner that seems willfully blind to the Supreme Court's recent and restrictive approach to the provocation defence. We are a long way from the days of *R. v. Thibert* (1996), 104 C.C.C.

(3d) 1, [1996] 1 S.C.R. 37, 45 C.R. (4th) 1 (S.C.C.), where people could reasonably raise concerns that provocation could excuse spousal violence. Cases such as *R. v. Tran* (2010), 261 C.C.C. (3d) 435, [2010] 3 S.C.R. 350, 80 C.R. (6th) 1 (S.C.C.) suggest that the courts were capable of factoring in Charter and equality values without a push from Parliament. In *Tran*, the Court stressed the need to administer the defence in a manner consistent with the Charter including its equality values. The Court specifically rejected the idea that "antiquated beliefs" and "inappropriate conceptualizations of 'honour'" can ground the provocation defence. *Ibid*., at para. 34.

Similarly, the Court disallowed the provocation to a wife abuser in *R. v. Cairney* (2013), 302 C.C.C. (3d) 1, [2013] 3 S.C.R. 420, 2013 SCC 55 (S.C.C.). Courts of Appeal have also been resistant to any hints of honour based claims in cases such as *R. v. Nahar* (2004), 181 C.C.C. (3d) 449, 20 C.R. (6th) 30, 2004 BCCA 77 (B.C. C.A.) and *R. v. Humaid* (2006), 208 C.C.C. (3d) 43, 37 C.R. (6th) 347, 81 O.R. (3d) 456 (Ont. C.A.), leave to appeal refused (2006), 227 O.A.C. 398 (note), 361 N.R. 389 (note), 2006 CarswellOnt 7132 (S.C.C.). Without this amendment, the Canadian criminal justice system treated so-called honour killings as murder. See *R. v. Sadiqi*, 2013 ONCA 250, 305 O.A.C. 150, 2013 CarswellOnt 4587 (Ont. C.A.), *R. v. Singh*, 2013 BCSC 1336, 2013 CarswellBC 2270, [2013] B.C.J. No. 1632 (B.C. S.C.).

Parliament should have left the issue to case-by-case development by the courts. There was no need to restrict the defence to exclude honour killings.

A Justice official admitted at the Senate hearings that the provocation defence has never succeeded in a honour killing case but speculated that the restriction could reduce its use in cases involving the killing of women. This, however, is not a professed objective of the law. In any event, the law addresses this concern most indirectly through the blunt category of the new offence requirement.

Henceforth, a provocative act must not only meet the objective requirement of being of such a gravity as to cause an ordinary person to lose control and have cause the accused subjectively to lose control, but it must also constitute an indictable offence punishable by five years imprisonment.

The new provision will require a narrow focus on whether a specific act of provocation also constitutes an indictable offence punishable by fives years imprisonment. It is inconsistent with the more contextual jurisprudence that views acts and insults in the context of a total relationship including contextual factors included in the government's own self-defence reforms in s. 34(2) of the Code.

The most likely — indeed perhaps the only — offence to qualify under this provision is assault, but this raises the question of why accused would

rely on provocation when he or she in such a case could claim self-defence if they can argue under s. 34 that they also acting to defend themselves and their acts are reasonable in the circumstances. For example, a woman provoked into killing an abusive partner could under s. 34 lead evidence of a past pattern of assaults whereas now under s. 232 the only question will be whether the person who provoked her also assaulted her at the same time.

The most plausible crimes other than assault that might also constitute provocation all seem to be precluded by the utterly arbitrary five year imprisonment requirement. For example, an accused could not claim provocation if her ex-partner forcibly entered her house (committing an offence punishable under s. 73 of the Code by two years imprisonment) or breached a court order relating to child custody (breaching s. 127 of the Code) and made comments that would otherwise constitute provocation.

The provocation defence would also not apply if an accused shot a person engaged in an indecent act or exposing genitals (breaching s. 173) or engaging in hate speech (breaching s. 319) or delivering false or indecent information (breaching s. 372) even if the comments would have caused an ordinary person to lose self control and caused the accused to lose such control. Again such regressive effects of the new restrictions were likely unanticipated.

Provocation would also be precluded if a person makes provocative comments while carrying a gun at a public meeting because that offence under s. 89 of the Code is punishable only as a summary conviction offence. Similarly provocative comments made while obstructing a police officer or disrupting a religious services would not give the police officer or a member of the religious congregation a provocation offences because the offences under ss. 129 and 176 of the Code are only punishable by two years imprisonment.

The requirement that provocation also amount to an offence is overbroad to Parliament's objective in precluding the provocation defence in cases of honour killings. Parliament could have addressed the honour killing issue directly by providing appropriate and tailored examples of conduct that does not constitute provocation (as is done with consent s. 273.1). Nevertheless, as suggested above, this is not necessary given the courts performance on the issue.

The government has defended the new restrictions on the basis of public safety, but it is far from clear that they will achieve that result. Judges and jurors may well expand the self-defence in cases where the provocation defence would have previously applied. This would mean that the accused would be acquitted of a killing rather than being convicted of manslaughter, which is the consequence of a successful provocation defence.

This new restriction on provocation will, as is true of so much recent criminal legislation, result in Charter litigation. It is an open question

whether Parliament could repeal the provocation defence in its entirety without violating the Charter. The Ontario Court of Appeal's decision in *R. v. Cameron* (1992), 71 C.C.C. (3d) 272, 12 C.R. (4th) 396, 7 O.R. (3d) 545 (Ont. C.A.), leave to appeal refused (1992), 75 C.C.C. (3d) vi (note), 59 O.A.C. 380 (note), 144 N.R. 304 (note) (S.C.C.) suggests that murder might survive without the provocation defence.

Arbitrary and overbroad restrictions on the provocation defence are, however, ripe for Charter challenge under the Court's expanded principles of fundamental justice. The denial of the provocation defence violates the right to liberty by exposing the accused to mandatory life imprisonment.

The denial of the provocation defence in all cases where the accused's acts do not also constitute an indictable offence punishable by five years imprisonment or more is arbitrary because there seems to be "total disconnect" (*R. v. Smith* (2015), 323 C.C.C. (3d) 461, 2015 SCC 34, 386 D.L.R. (4th) 583 (S.C.C.), at para. 25) between Parliament's objective and the broad means used. Even if the court does not accept this, the categorical restriction on provocation is overbroad given how far the restrictions on the defence overshoot Parliament's objective in ensuring that honour killings are treated as murder.

The courts may eventually repair the vandalism that Parliament has done to the provocation defence, but it will take years of litigation (and consequent uncertainty) for this result to be achieved. The new restrictions that Parliament placed on the provocation defence are totally unnecessary and should not have been enacted.

K.R.