

1 December 2010

An open letter to Members of Parliament concerning C-389

Bill C-389, *An Act to amend the Canadian Human Rights Act and the Criminal Code* by adding “gender identity” and “gender expression” to prohibited grounds of discrimination and hate crimes provisions, should be rejected by Parliament. For this claim I will offer three related supporting reasons:

First, the terms in question, which are left undefined, are unlike other terms in the lists into which this bill enrols them. Which is to say, they do not represent particular objective conditions, whether biologically determined (as in sex or race, for example) or determined by association with recognizable social institutions (as in national origin, marital status, or religion). What these terms represent – though it is difficult to say precisely, when they are left undefined – are subjective or subjectively determined conditions: mere attitudes towards oneself, or attitudes combined with behaviours (cross-dressing, say, or elective surgery) intended to express or alleviate those attitudes. This subjective realm may be important, but it is not one into which the law should readily venture; once venturing, it is likely to find no logical stopping point. Additions to the list of prohibited grounds or protected categories can only grow longer and longer, until the whole idea of such laws becomes meaningless. Arguably, of course, we started down this road when we added “sexual orientation” – as the French version of the bill suggests, with its trilogy of “l’identité, l’expression ou l’orientation sexuelles.” But do we really mean to press on? If so, how far will we go? Good law and sound public policy cannot be built on the shifting sands of the subjective.

Second, this bill, while deceptively simple in its wording, has large-scale implications for Canadian law and public policy that have not been properly acknowledged or examined. Proponents of C-389 argue that it serves the best interests of the “transsexual” or the “transgendered,” while opponents deny that it *is* in their best interests. Be that as it may, and there is a raging argument about it in medicine and psychiatry, as well as in the larger public sphere – an argument that Parliament ought not to be short-circuiting – this bill will do much more than create certain rights or protections for such people. It will entrench in Canadian law the notion that sex and/or gender are basically social constructs, products of a series of human choices, based not in the natural order but in more or less arbitrary acts of interpretation. It is beyond the scope of a letter such as this to explain the impact of this notion on everything from law to medicine, and on the very concept of human rights. Suffice it to say that the impact would be difficult to overestimate. Parliament, in any case, has no mandate from the people of Canada to endorse and entrench the social constructionist principle, which is at odds with the beliefs and assumptions of the great majority of citizens, statements from activists in this or that council or professional association notwithstanding.

Third, this bill – like all such Trojan Horse bills – will have immediate disruptive consequences. When in Massachusetts people undertook to examine the practical consequences of a similar bill, H1728, they managed to stop it in its tracks, at least for

now. H1728, being much wordier, does at least offer a definition: “The term ‘gender identity or expression’ shall mean a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.” Quite apart from the question as to why we should accept either the term or the definition, however, it is perfectly reasonable to ask – of C-389 as of H1728 – just what behaviour it has in mind. Shall a male who self-identifies as a female be allowed in the ladies’ room? Alternatively, shall businesses and schools and universities and churches and hospitals, etc., be forced to supply (at whose expense?) unisex washrooms in addition to separate-sex washrooms? Shall they be compelled to make other provisions for “gender-related” appearances and behaviours with which perhaps they do not agree, or which they regard as disordered or even dangerous, that precludes all stigmatization or inconveniencing of those who exhibit such behaviour? Shall physicians and surgeons be required to do the same, in violation of their principles and oaths? What will be the impact on freedom of religion and freedom of conscience – that is, on the more fundamental provisions of the Charter? What, for that matter, will be the economic impact? Shall over-stretched public healthcare systems be required to provide expensive surgeries and associated therapies for those who choose them?

What a can of worms Mr Siksay’s bill opens up! The can, it is true, is already half open, and the courts are hard at work either prying the lid up or forcing it back down, as they see fit. But C-389 is likely to rip the lid right off. We need forethought, prudence, and courage from the people’s representatives in dealing with this legislation. Speeches on the bill have been anodyne at best, deliberately deceptive at worst. I urge every MP who still has something of the requisite virtues to stand up and vote against this bill.

A handwritten signature in black ink, appearing to read 'Douglas Farrow', with a long horizontal flourish extending to the right.

Douglas Farrow
Professor of Christian Thought, McGill University