

Why and How Canadians Should Refuse to Recognize C-38

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When I gave testimony before the Legislative Committee on C-38 on June 7th (the brief is available at www.enshrinemarriage.ca/english/news.aspx) I told the committee that, were C-38 to be passed, I for one would not recognize it as a valid law. That is a position I now urge on my fellow-Canadians and, in particular, on the representatives of religious and ethnic communities, from whom courageous leadership is required.

This position is not the result of resentment, though it would be easy enough to allow resentment to prevail: resentment of the shameless machinations of lobbyists, lawyers, courts, political parties, media lords, and government officials high and low, who (with praiseworthy exceptions) made every effort to see that Canadians never really understood what is at stake in same-sex marriage, and who in the end simply ignored the great many Canadians who do. And, yes, resentment too of the placing of personal and party interests ahead of the public good even by supposed stalwarts of the pro-marriage movement in the Commons, who must bear their share of responsibility for the passage of C-38. But I will not dwell on these things. One day someone will document them and the sorry tale of the manipulators and the manipulated will be told, to our collective shame. The present moment, however, cries out for a constructive response to C-38.

That response should begin with a refusal to recognize C-38 as a valid law and a refusal to cooperate with the impending C-38 regime. This, I submit, is the most constructive response available, and though it entails a form of civil disobedience it must not be confused with rebellion or anarchy or even with libertarianism. I will try to give some account of it, offering an *apologia* in two parts before making particular recommendations about its implementation. In conclusion I will allude to positive steps

towards the rebuilding of our social and political culture, but the task of rebuilding requires first of all a clear “No” to C-38.

In his posthumous foreword to *Recognizing Religion in a Secular Society* (2004), Claude Ryan offers a brief but penetrating analysis of our situation. He speaks of controversies that will lead to political decisions “binding upon all, even though they may not accord with the views of some groups.” These decisions must be accepted, he says; nevertheless, the debate must go on because “the democratic process is an unending one.” He is right on both counts. But in the present case, the case of C-38, I contend that we are faced with a decision that takes the form of *illicit* legislation, the binding nature of which must be contested.

C-38 is *ultra vires* Parliament

The first thing to be said is that Canadians are under no obligation to adopt the positivist view that a law is valid simply because it is passed by a duly constituted authority (Parliament in this case). That this is the view of many academics, judges and politicians may be granted. But it has no constitutional standing. Canadian constitutional history and the Canadian legal tradition is not based on the positivist view. Indeed, the preamble to the *Canadian Charter of Rights and Freedoms* recognizes that our system of law belongs to the classical tradition, by explicitly linking belief in the rule of law to belief in the sovereignty of God.

On the classical view, to be valid a civil law must, *inter alia*, be compatible with moral law – that is, it must not be unjust – and it must not exceed the proper authority of the body that enacts it. The positivist view does not dispense with these concerns but, by reason of its subjectivist or constructionist approach to morality, it admits few givens, and no firm limits, for political or juridical authority. Contrary to what passes for popular wisdom today, it is therefore much more susceptible to tyrannical developments. Even where it sets out certain givens in the form of a charter of rights, its refusal to say how these rights are grounded makes possible endless permutations to their content, not to speak of their application. Almost anything can be “read in” and,

through adjudication of the inevitable conflicts, almost anything can in effect be “read out” (denials notwithstanding).

I repeat that there is nothing in Canada’s constitutional documents that compels us to accept the positivist view. When, therefore, the government asks the Supreme Court whether Parliament may change the definition of marriage, and the Supreme Court answers in the affirmative, it must be asked whether the court itself is acting lawfully. Who, in other words, gave the court this power? On the positivist view, such a question arises only in connection with arguments about the division of powers. On the classical view, it arises as a question about natural law and about the limits of state authority. And on the classical view the state has no authority or power, in either its legislative or its judicial arm, to alter the fundamental meaning of marriage or to make the family as such a creature of the state.

C-38 represents a crisis for the Canadian state in part because it brings us to a decisive point in the process of replacing the classical view with the positivist, a point of no return. If the state can redefine “marriage,” not to mention “parent” and “parent-child relationship,” there is virtually nothing it cannot redefine. There are no more givens. On the classical view we would be morally wrong – not to say, fools – to agree that the state has such power. We might, of course, do so nonetheless. There is nothing that prevents Canadians from adopting the positivist view and all of its implications. But what cannot be said is that Canadians have already done so, and that we must therefore accept C-38 as something that goes with the territory. Were we now to agree to do so, those of us who dissented would have to opt out of the new positivist social contract, at whatever cost or peril. It might then be that we could no longer endorse the Canadian state as a legitimate one, and would have in conscience to give up our citizenship.

But things have not yet come to that. The classical tradition has been badly eroded by recent developments in the law schools and in Charter jurisprudence, but it has not been repudiated formally. No act of the Canadian people (certainly the Crown could never consent without ceding dominion) has been proposed or recognized as such a repudiation. No Canadian, then, is obliged to submit to the view that the meaning of marriage or the shape of morality is something that is, or may be, determined by a vote

in the Commons. (This was not the view of Trudeau, by the way, when he introduced legislation legalizing sodomy; indeed he argued for its legalization on *classical* grounds, appealing to the distinction between sin and crime.) But if we do not submit, it follows that C-38 is *ultra vires* Parliament, and no preference for the positivist view on the part of the Supreme Court of Canada can alter that fact.

C-38 is not a valid law, and it is our duty as citizens to refuse to recognize it. This duty does not arise because we do not like C-38 or because we think it a bad law. C-38 is poorly constructed and internally inconsistent, a fact well documented by the debates in Hansard and by the briefs to the legislative committee. Arguably it is also pernicious. None of this constitutes a legitimate reason for refusing to recognize it, however, much less a duty. We have a duty not to recognize it, not because it is a bad law but because it is an invalid law, and the recognition of invalid laws undermines the rule of law as such.

C-38 contravenes natural rights

Recognizing C-38 would not only undermine the rule of law, it would undermine certain natural rights and freedoms. This is to be expected in the case of an invalid law, but it is helpful to identify the threat more directly. I want to touch on two sets of natural rights: those related to the family and those related to religious communities, both of which are now susceptible to tyrannical extensions of state power.

With regard to the family, we may take Article 16 of the *Universal Declaration of Human Rights* as a point of reference. It declares that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” What happens, however, when “the right to marry and to found a family” – that is, to establish a procreative unit that has an *a priori* standing over against the state – is transformed into a right to establish something that is defined not by nature but by the state itself? What happens when a law is passed that changes the language of law, so that “natural parent” becomes “legal parent,” and “natural parent-child relationship” gives way to “legal parent-child relationship”? What happens is that the natural and fundamental group unit of society disappears as an entity with prior rights that the

state must honour, and in its place is put a legal construct – a malleable abstraction – controlled by the state. The rights and freedoms belonging to those who happen to fit that construct are not brought *to* the state but are received *from* the state. This has grave implications for such basic rights as the right of a child to its own natural parents, and of parents to their own natural children. It also has implications for society as a whole, which must ultimately become a creature of the state along with the “family,” since the latter no longer presents any barrier or limit to state intrusion and authority.

With regard to religious communities something analogous can be said. These communities virtually disappear as an important “other” with which the state must respectfully cooperate, only they are not absorbed into the state but are excluded by it. How so? C-38 relies on a complete detachment of civil from religious marriage. Religious marriage there may be, but it has naught to do with marriage for civil purposes. This is not, as some pretend, an ordinary application of the doctrine of the separation of church and state – which is not a Canadian doctrine, in any case – but a doctrine of the *divorce* of church and state. It stands in direct contradiction to the Charter assertion that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.” In this most fundamental sphere, C-38 denies any relevance either to natural law or to revealed law. It insists that in the matter of marriage the state need not take any account of its religious communities, the communities that seek to interpret natural and revealed law. And if not here, then where? If in the matter of marriage for civil purposes they may safely be ignored, on what sort of civil matter might the state conceivably acknowledge their existence and contribution, recognize their wisdom, and submit to its guidance or restraint? More to the point, if they are to be deprived for civil purposes of anything they can recognize as marriage, will they not be forced for civil purposes to do without marriage? What will that do to their rights and freedoms? Where will this kind of thinking stop? As if these communities did not actually inhabit – indeed, largely constitute – the civil society that the state is meant to serve!

In sum, C-38 must not be recognized because it attacks and marginalizes the state’s main competitors, faith and the family, which provide a home for natural rights. It thus threatens to subjugate and absorb civil society itself. To recognize C-38 would be to

hand over to the state what does not belong to it, and so to cultivate tyranny. That this handing over is demanded in the name of equality rights only makes it a more cynical exercise of illegitimate power.

As article 3 of the EMC Declaration on Marriage insists, “No one has the right to redefine marriage so as intentionally to impose a fatherless or motherless home on a child as a matter of state policy” (www.enshrinemarriage.ca/english/declaration.aspx). See further Cere and Farrow, *Divorcing Marriage*, 97ff.; F. C. DeCoste, “Courting Leviathan,” *Alberta Law Review* 42.4 (also available at www.marriageinstitute.ca/pages/articles.htm); and Farrow, *Recognizing Religion in a Secular Society*, chapter 9. See also William Gairdner, *The War against the Family* (1993) and *The Trouble with Democracy* (2001).

Recommendations

With these things in view, I turn to recommendations respecting the implementation of the refusal to recognize C-38 as a valid law. Other recommendations than these should certainly be invited and considered, so long as they themselves are built on respect for the rule of law. But I dare to hope that the following will be considered with some urgency by all who believe, as I do, that justice and the rule of law are gravely threatened in Canada by C-38, amendments to the bill notwithstanding. Each of these recommendations is aimed at non-cooperation with the C-38 regime, in the hope that their collective effect will be to force the government to recognize that this law is not received or endorsed by the people of Canada, is unconscionable and unenforceable, and must be repealed.

(1) Clergy should make public immediately, through their official representatives and collective organs, their rejection of C-38’s understanding of marriage for civil purposes and of C-38 itself. They should not relinquish their right to preside over civil marriages, but continue acting in the manner they have always acted, using the same forms they have used in the past, mailing them in even if the state rejects them. □Those who have already compromised by using the unisex forms demanded in some provincial jurisdictions should cease to do so immediately. Of course, it must be made clear to those being married that the state may not recognize their marriages, and efforts must be made to provide counsel to them as to how to cope in that event. (Some joint work should be undertaken on this without delay.) It will also need to be explained that, for

anyone who intends to oppose C-38, adding what it falsely proposes as “civil marriage” to what is done in church or synagogue or temple is not an option.

This recommendation is a refusal either to be co-opted or to be excluded. (Lessons in the perils of each, particularly the former, might well be taken from the French Revolution.) Marriage commissioners who adopt the same stance may, in some jurisdictions, have to pay a higher price. If they choose to do so, their colleagues among the clergy should offer them the fullest possible support. The clergy must not fail to show leadership; their vocation carries with it a greater degree of responsibility.

(2) Academics, politicians, journalists, clergy, educators, other professionals, and citizens in general should resist every effort to suppress their freedom of speech on any and all of the issues surrounding C-38, including the most controversial ones (such as the nature of homosexuality, for example, though this is now a secondary rather than a primary issue). That will have to be done with great care, and sometimes with legal counsel. Some will no doubt face sanctions, as *per* the recent Kempling ruling. But freedom of speech has become implicated in the struggle over C-38. Concessions here are fatal to the cause of freedom generally. On the other hand, careless and irresponsible speech that justifies a charge of discrimination will also be highly injurious to the cause.

Neither carelessness *nor* concessions, in other words. As William Gairdner rightly reminds me, same-sex marriage exponents “are embarked on an evangelistic mission to rid society of all natural differences rooted in biology, human nature, religion, tradition, or any other form of authority formerly considered legitimate as a moral support for publicly understood differences in the treatment of individuals and/or groups of citizens... If we miss this clear evangelical mood, we miss the underlying motive of the whole business.”

(3) Parents and communities should refuse to submit to orders and decrees respecting the care and education of children, if those orders are explicitly based on C-38 or otherwise infringe on natural parental rights. In this they will need the active support of all those mentioned above. A fund to support legal intervention on behalf of parents and children should be set up as soon as possible. (Perhaps it could be called the Paul Martin Sr. Family Defence Fund.) More scholarly attention to family law from those sympathetic to the present concerns is also required.

For a place to begin, see Daniel Cere, *The Future of Family Law: Law and the Marriage Crisis in North America* (2005).

(4) Education is likely to prove the preferred field of conflict in the inevitable attempt to entrench the C-38 regime. That is because most schools are state schools, and even those that are not are partly dependent on state support or in some fashion subject to state supervision. Acclimatizing children – our children! – to this regime is the best hope for overcoming resistance to it in the long run. This battlefield will have to be fiercely contended for, respecting both public and private education. Joint task forces need to be established to develop strategies and resources. Parents and educators need to make themselves aware of other strategies that are already in play.

I am not thinking only of radical proposals such as that of Michelangelo Signorile, for example, who suggested in OUI magazine that the agenda is “to fight for same-sex marriage and its benefits and then, once granted, [to] redefine the institution of marriage completely, to demand the right to marry not as a way of adhering to society’s moral codes, but rather to debunk a myth and radically alter an archaic institution” (December 1994). More modest proposals may be no less subversive in the end. See, for instance, Ian Macgillivray’s *Sexual Orientation and School Policy* (2004). Peter Lauwers has offered an even-handed assessment of the current state of this battleground in his brief to the Legislative Committee on C-38 (8 June 2005).

(5) Last but not least, I believe that we should fight for a constitutional amendment on marriage. Nothing short of a constitutional amendment will settle an issue that takes us to the heart of what is “natural and fundamental to society.” As Enshrine Marriage Canada’s website points out: “Section 91(26) of the 1867 Constitution Act enumerates marriage and divorce as federal powers, but it doesn’t define either term because, in 1867, ‘marriage’ was clearly defined and understood in common law. An amendment to define marriage in the same or similar terms would not add anything new or revolutionary to the Constitution – it would merely make explicit the definition that has been implicit for centuries.” That would not only spell the end of C-38; it would strike a major blow against manipulative Charter jurisprudence.

See further www.enshrinemarriage.ca. EMC recommends that Section 91 be amended to read: “marriage, which is the union of one man and one woman, and divorce.”

Beyond all of this, there is an urgent need for participation in the political and legal processes by which this land is governed. That means something more than casting a vote in the next election against those who are complicit in the attempt to impose C-38. It means taking up the citizen’s responsibility to engage in the selection of parliamentary candidates. It means support for alternative media outlets. It means lending a hand, wherever possible, to efforts to rebuild the infra-structure of civil

society and, in particular, to restore integrity to the practice of marriage. It means rethinking our *laissez-faire* attitude about children, which has developed apace with the contraceptive mentality, the practice of abortion, our divorce culture, and day-care parenting. It means active engagement in the sphere of education, public and private, and support for effective marriage and family life ministries in local communities. For a few, it may even mean participation in a fight to take back the law schools, or to provide new ones. For many, it will mean taking their own religious tradition and commitments and resources more seriously, while cooperating more closely with those of other traditions. For all, it will mean vigilance against the growing statism that, under the cover of a perverted “rights” discourse, now threatens us with a new and dangerous Leviathan.