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A Theory of Quasi-Constitutional Legislation

Vanessa MacDonnell

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A Theory of Quasi-Constitutional Legislation

Abstract

Since the 1970s, the Supreme Court of Canada has treated a small number of statutes as quasi-constitutional. Despite the longstanding presence of quasi-constitutional statutes in Canadian law, however, the Court has yet to articulate comprehensive criteria for recognizing a statute or regulation as quasi-constitutional. In this article, I argue that quasi-constitutional legislation or more accurately, some provisions in quasi-constitutional legislation should be understood as implementing constitutional imperatives. I use the term constitutional imperatives to refer to constitutional obligations of varying degrees of specificity that emanate from the rights-conferring aspects of the Constitution, as well as from those aspects of the Constitution that establish the institutions and procedures of government. Understanding quasi-constitutional legislation as implementing constitutional imperatives has several implications. First, it suggests that quasi-constitutional legislation is a much larger category than the existing case law implies. Second, it emphasizes the importance of politicians as constitutional actors. And third, it helps us understand that the Constitution influences non-constitutional law in ways that go beyond establishing the boundaries of permissible lawmaking. I conclude by showing that quasi-constitutional legislation in Canada is different in kind than the now much-discussed constitutional statute in the United Kingdom.

Keywords

Constitutional law; Canada

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A Theory of Quasi-Constitutional Legislation

VANESSA MACDONNELL*

Since the 1970s, the Supreme Court of Canada has treated a small number of statutes as quasi-constitutional. Despite the longstanding presence of quasi-constitutional statutes in Canadian law, however, the Court has yet to articulate comprehensive criteria for recognizing a statute or regulation as quasi-constitutional. In this article, I argue that quasi-constitutional legislation—or more accurately, some provisions in quasi-constitutional legislation—should be understood as implementing constitutional imperatives. I use the term constitutional imperatives to refer to constitutional obligations of varying degrees of specificity that emanate from the rights-conferring aspects of the Constitution, as well as from those aspects of the Constitution that establish the institutions and procedures of government. Understanding quasi-constitutional legislation as implementing constitutional imperatives has several implications. First, it suggests that quasi-constitutional legislation is a much larger category than the existing case law implies. Second, it emphasizes the importance of politicians as constitutional actors. And third, it helps us understand that the Constitution influences non-constitutional law in ways that go beyond establishing the boundaries of permissible lawmaking. I conclude by showing that quasi-constitutional legislation in Canada is different in kind than the now much-discussed constitutional statute in the United Kingdom.

* Associate Professor, University of Ottawa Faculty of Law (Common Law Section). This article was first presented at a Symposium on Constitution-Making and Constitutional Design hosted by the Clough Center for the Study of Constitutional Democracy at Boston College on October 31, 2014. I would like to thank Richard Albert for bringing together such a dynamic group of scholars. I am grateful to Leo Russomanno, Peter Oliver, Carissima Mathen, Michael Pal, Julia Hughes, Jena McGill, Kate Glover, Adam Dodek, Elizabeth Sheehy, Cintia Quiroga, and Richard Albert for helpful conversations and comments on the topic discussed in this article. I am also grateful to Bayly Guslits, Oliver Fitzgerald, and Jared Porter for research assistance. This research was funded by the Research Development Program at the University of Ottawa and by an Emerging Researchers Fellowship at the University of Ottawa Faculty of Law.

Depuis les années 1970, la Cour suprême du Canada a traité un petit nombre de statuts comme quasi-constitutionnels. Malgré la présence depuis longtemps de statuts quasi-constitutionnels dans la législation canadienne, la Cour n'a cependant pas encore entièrement expliqué dans quelles circonstances un statut ou un texte réglementaire doit être considéré quasi-constitutionnel. Dans cet article, je soutiens que la législation quasi-constitutionnelle ou, plus précisément, certaines dispositions de la législation quasi-constitutionnelle doivent être réputées s'accompagner d'impératifs constitutionnels. J'utilise le terme impératifs constitutionnels pour désigner des obligations constitutionnelles de divers degrés de spécificité qui émanent des dispositions de la Constitution du Canada qui confèrent des droits, de même que des dispositions qui établissent les institutions et les procédures du gouvernement. Considérer que la législation quasi-constitutionnelle met en œuvre des impératifs constitutionnels comporte de nombreuses implications. Cela suggère tout d'abord que la législation quasi-constitutionnelle constitue une catégorie beaucoup plus vaste que ne semble l'indiquer la jurisprudence. Cela insiste ensuite sur l'importance des politiciens comme acteurs constitutionnels. Troisièmement, cela nous permet de comprendre que la Constitution influence le droit non constitutionnel d'une manière qui dépasse l'établissement des frontières du processus législatif permmissible. Je conclus en montrant que la législation quasi-constitutionnelle n'a pas au Canada la même nature que le statut constitutionnel qui fait aujourd'hui au Royaume-Uni l'objet de nombreuses discussions.

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SINCE THE 1970S, THE SUPREME COURT OF CANADA (SCC) has treated a small number of statutes as quasi-constitutional. These statutes, which the Court has described as "not quite constitutional but certainly more than ordinary,"¹ include

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1. *Ontario Human Rights @Commission v Simpson-Sears*, [1985] 2 SCR 536 at 547, 52 OR (2d) 799 [*Simpson-Sears*]; Pierre Bossett & Michel Coutu, "Acte fondateur ou loi ordinaire? Le statut de la Charte des droits et libertés de la personne dans l'ordre juridique québécois" (June 2015) RQDI 37. I will distinguish between ordinary, quasi-constitutional, and constitutional laws throughout.

human rights acts, privacy and official languages legislation,² and statutory bills of rights such as the *Canadian Bill of Rights* and the Quebec *Charter of Human Rights and Freedoms*.³ Although quasi-constitutional statutes are enacted in the same way as other laws,⁴ they are interpreted in the broad and generous manner usually reserved for constitutional rights.⁵ They also trump later, conflicting ordinary laws unless those laws provide otherwise.⁶ This trumping rule has significant consequences for laws that fall short of the guarantees found in quasi-constitutional statutes.

Despite the longstanding presence of these statutes in Canadian law, however, the Court has yet to articulate comprehensive criteria for recognizing a statute or regulation as quasi-constitutional.⁷ Some quasi-constitutional statutes contain supremacy clauses mandating the application of the trumping rule described above and signalling to courts that Parliament intended the law to be treated as quasi-constitutional.⁸ Just as often, however, the Court's decision to treat a statute as quasi-constitutional flows from the close relationship between these statutes and constitutional rights.⁹ Much more work remains to be done to develop a theory of quasi-constitutional statutes in Canada.

In this article, I argue that quasi-constitutional legislation—or more accurately, some provisions in quasi-constitutional legislation¹⁰—should be

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2. Leonid Sirota, "Quasi-Constitutional Rights?" (22 April 2012), Double Aspect (blog), online: <www.doubleaspectblog.wordpress.com/2012/04/22/quasi-constitutional-rights>.
 3. Walter Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed (Toronto: McClelland & Stewart, 1975); André Morel, "La Charte québécoise: un document unique dans l'histoire législative canadienne" (1987) 21:1 RJT 1 at 20-21.
 4. Mélanie Samson, "L'interprétation constitutionnelle et l'interprétation discalé, encore aux antipodes?" (2010) 15:2 Lex Electronica 1.
 5. *Thibodeau v Air Canada*, 2014 SCC 67, [2014] 3 SCR 340 [*Thibodeau*]; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis Canada, 2014) at 497-508.
 6. Sullivan, *ibid*; Sirota, *supra* note 2; Tarnopolsky, *supra* note 3; Claire Mummé, "At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases" (2012) 9 JL & Equality 103; Luc B Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal: McGill-Queen's University Press, 1997) at 88.
 7. Sirota, *supra* note 2.
 8. Tremblay, *supra* note 6.
 9. *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2003] 1 SCR 66; Tremblay, *supra* note 6.
 10. See *infra* for a discussion of terminology.

understood as implementing constitutional imperatives.¹¹ I use the term “constitutional imperatives” to refer to constitutional obligations of varying degrees of specificity. These obligations emanate from the rights-conferring aspects of the Constitution¹² as well as from those aspects of the Constitution that establish the institutions and procedures of government.

Understanding quasi-constitutional legislation as implementing constitutional imperatives has several implications. First, it suggests that quasi-constitutional legislation is a much larger category than the existing case law implies. This raises the question of whether the rules of interpretation that apply to quasi-constitutional legislation should be reconsidered. Second, because it emphasizes the role of the executive and the legislature in constitutional implementation, this conception of quasi-constitutional legislation reaffirms that politicians are important constitutional actors. Constitutional scholarship continues to focus disproportionately on courts.¹³ Finally, the study of

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11. On constitutional implementation, see Matthias Kumm, “Who’s Afraid of the Total Constitution?” in Agustín José Menéndez & Erik Oddvar Eriksen, eds, *Arguing Fundamental Rights* (Dordrecht, Netherlands: Springer, 2006) 113 at 115. See also Mark Tushnet, “Institutions for Implementing Constitutional Law” in Ian Shapiso et al, eds, *Rethinking Political Institutions: The Art of the State* (New York: NYU Press, 2006) 241 [Tushnet, “Institutions for Implementing”]; Jennifer Nedelsky, “Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives” in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) 93 at 95, 121.
 12. I use the term “Constitution” here in the same broad sense as the SCC in *Re Resolution to amend the Constitution*, [1981] 1 SCR 753 at 874, 125 DLR (3d) 1. The majority explained that the Constitution consists of “the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.” *Contra Constitution Act, 1982*, pt VII, s 52(2), Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (defining “Constitution of Canada” much more narrowly). Generally, see Adam Dodek, “Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the *Constitution Act, 1982*” in Emmett MacFarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) [forthcoming].
 13. Vanessa MacDonnell, “The Constitution as Framework for Governance” (2013) 63:4 UTLJ 624 at 625-26 [MacDonnell, “Constitution as Framework”]; William N Eskridge Jr & John A Ferejohn, “Super-Statutes: The New American Constitutionalism” [Eskridge & Ferejohn, “Super-Statutes”] in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) 320 at 325; Amy Gutmann, “Foreword: Legislatures in the Constitutional State” in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) ix at xiii; Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014) at 153.

quasi-constitutional legislation helps us understand that the Constitution influences non-constitutional law in ways that go beyond establishing the boundaries of permissible law-making.¹⁴

In analogous fashion, courts in the United Kingdom have struggled over the past twenty-five years to give meaning to the concept of constitutional legislation. The UK case law and academic commentary contain important insights for scholars seeking to understand the significance of quasi-constitutional legislation in Canadian law. I therefore engage with the British concept of constitutional legislation to help clarify the meaning of quasi-constitutional legislation in Canada, though I ultimately conclude that the two types of legislation are distinct.

I begin this article by defending the view that quasi-constitutional legislation is best understood as legislation that implements constitutional imperatives. In Part II, I argue that this view is supported by insights derived from comparative engagement with the concept of constitutional legislation in the United Kingdom. Part III problematizes the current “trumping” rule that applies when quasi-constitutional legislation conflicts with ordinary statutes. In Part IV, I discuss how studying quasi-constitutional legislation reveals new insights about institutional constitutional implementation. I conclude in Part V.

I. IMPLEMENTING CONSTITUTIONAL IMPERATIVES

Canadian courts have not provided much in the way of an overarching theory of quasi-constitutional statutes, despite applying them with some frequency. However, it is possible to piece together a basic description of these statutes through a review of the case law.

A. QUASI-CONSTITUTIONAL LEGISLATION IMPLEMENTS CONSTITUTIONAL IMPERATIVES

The concept of the quasi-constitutional statute, if not the term, seemed to gain the approval of a majority of the Court in the 1970 case of *The Queen v Drybones*.¹⁵ There, the majority refused to apply a provision of the *Indian Act*¹⁶ on the ground that it infringed the accused’s equality rights under the *Canadian Bill of*

14. Eskridge & Ferejohn, “Super-Statutes,” *ibid* at 321. For a similar argument, see Mark Elliot, “Constitutional Legislation, European Union Law and the Nature of the United Kingdom’s Contemporary Constitution” (2014) 10:3 *Eur Const L Rev* 379 at 380 [Elliot, “UK’s Contemporary Constitution”].

15. [1970] SCR 282, 3 CCC 355 [*Drybones*].

16. RSC 1952, c 149.

Rights.¹⁷ The majority relied on the *Bill of Rights*' supremacy clause in reaching its decision. Although Luc B. Tremblay argues that the same result could have been reached by applying the doctrine of implied repeal given that the *Indian Act* was an earlier statute, the majority's reasons suggest that something more motivated its decision.¹⁸ In rejecting the argument that the *Bill of Rights*' provisions should be regarded as mere interpretative guidelines, the majority explained that such an approach would "convert [the *Bill of Rights*] from its apparent character as a statutory declaration of the fundamental human rights and freedoms which it recognizes, into being little more than a rule for the construction of federal statutes."¹⁹ The fundamentality of the rights recognized thus seemed to do some work of its own.²⁰

A member of the Court first used the term quasi-constitutional in the 1975 decision of *Hogan v The Queen*.²¹ Chief Justice Laskin, writing in dissent, explained that the *Canadian Bill of Rights*

is a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument. It does not embody any sanctions for the enforcement of its terms, but it must be the function of the Courts to provide them in the light of the judicial view of the impact of that enactment.²²

In *Ontario Human Rights Commission v Simpson-Sears*, decided in 1985, the Court characterized human rights legislation in a similar way, noting that it has a "special" character that distinguishes it from other legislation:

The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment, and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary—and it is for the courts to seek out its purpose and give it effect.²³

17. *Drybones*, *supra* note 14.

18. *Tremblay*, *supra* note 6 at 89, 104.

19. *Drybones*, *supra* note 15 at 293.

20. See generally, Sirota, *supra* note 2.

21. [1975] 2 SCR 574, 18 CCC (2d) 65.

22. *Ibid* at 597-98.

23. *Simpson-Sears*, *supra* note 1 at para 12.

The Court reached much the same conclusion later that year in *Winnipeg School Division No 1 v Craton*.²⁴ In the 1992 decision of *Frenette v Metropolitan Life Insurance Co*, a unanimous Court finally adopted the term, noting that the Quebec *Charter of Human Rights and Freedoms* provides “quasi-constitutional protection” to the right to privacy.²⁵

There is now a short list of statutes that are considered quasi-constitutional. Some quasi-constitutional statutes, such as the *Canadian Bill of Rights* and the Quebec *Charter of Human Rights and Freedoms*, are statutory bills of rights that overlap considerably with the *Canadian Charter of Rights and Freedoms*.²⁶ They are quasi-constitutional in the sense that they secure a catalogue of basic rights. While the *Canadian Bill of Rights* has largely fallen into disuse, with some notable exceptions in the context of administrative law,²⁷ the Quebec *Charter of Human Rights and Freedoms* is often applied alongside the *Canadian Charter*.²⁸

Other quasi-constitutional statutes implement positive rights conferred by the Constitution. For example, the federal *Official Languages Act*²⁹ implements the executive’s obligations under the official language rights provisions of the

24. [1985] 2 SCR 150, 21 DLR (4th) 1. See Tremblay, *supra* note 6 at 106; Adam Perry, “Constitutional and Quasi-Constitutional Statutes,” (24 April 2015), International Journal of Constitutional Law Blog (blog), online: <www.iconnectblog.com/2015/04/constitutional-and-quasi-constitutional-statutes>.

25. [1992] 1 SCR 647 at 673, 89 DLR (4th) 653, citing *Charter of Human Rights and Freedoms*, RSQ c C-12. For an example of how the SCC also employed the term in describing a planning document, see *Old St Boniface Residents’ Association Inc v Winnipeg (City)*, [1990] 3 SCR 1170, 75 DLR (4th) 385. I have omitted this reference in the chronology since in my view it does not reflect the same use of the term as I intend, or the understanding of the term that has come to prevail.

26. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

27. See generally Lorne Sossin, “The Quasi-Revival of the Canadian Bill of Rights and its Implications for Administrative Law” (2004) 25 Sup Ct L Rev (2d) 191. See also Gus Van Harten, Gerald Heckman & David Mullan, *Administrative Law: Cases, Text, and Materials*, 6th ed (Toronto: Emond Montgomery, 2010) at 106-07.

28. At least some of the Court’s approach seems to be dictated by the way the applicant frames the claim. See, e.g., *Loyola High School v Quebec (AG)*, 2015 SCC 12 at para 66, [2015] 1 SCR 613. But see *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791. Here Deschamps J held that the Quebec *Charter* should be applied in preference to the Canadian *Charter* in Quebec.

29. RSC 1985, c 31 [*Official Languages Act*].

Charter.³⁰ Like the *Charter*, the Act states that individuals have the right to use the official language of their choice in Parliament and in the federal courts,³¹ as well as to receive services from the federal government in either English or French.³² As the Federal Court of Appeal explained in *Canada (Attorney General) v Viola*,³³ cited with approval by the SCC in *Lavigne*:³⁴

The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that *Charter* as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the *Charter*, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects “certain basic goals of our society” and must be so interpreted “as to advance the broad policy considerations underlying it.”³⁵

The *Canada Elections Act* might also be characterized as implementing an affirmative constitutional obligation.³⁶ In *Opitz v Wrzesnewskyj*, a majority of the SCC explained that “[t]he Act ... sets out detailed procedures for voting that turn the constitutional right of citizens to vote into a reality on election day.”³⁷ While the Court has not explicitly characterized the *Elections Act* as quasi-constitutional, it has interpreted it in the same generous manner as quasi-constitutional

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30. *Supra* note 25, ss 16-23. I am grateful to Adam Dodek for pointing out to me that the *Official Languages Act* was enacted before the *Charter* entered into force. See *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 21, [2002] 2 SCR 773 [*Lavigne*]; *Charlebois v Saint John (City)*, 2005 SCC 74 at para 13, [2005] 3 SCR 563. Constitutional obligations ultimately belong to the executive, and must be implemented in some fashion, legislation being one option. While the legislature is notionally in charge of enacting legislation, the reality is that the executive usually drives the legislative process. See Part IV, below.
31. *Official Languages Act*, *supra* note 29, ss 4, 14.
32. Some exceptions apply. See *Charter*, *supra* note 26, s 20(1); *Official Languages Act*, *supra* note 29, pt IV.
33. [1991] 1 FC 373, 24 ACWS (3d) 189 (FCA) [*Viola*].
34. *Lavigne*, *supra* note 30 at para 23.
35. *Viola*, *supra* note 32 at 386.
36. I am grateful to Carissima Mathen for raising the question of whether the *Canada Elections Act* fits within my description of quasi-constitutional legislation. See *Canada Elections Act*, SC 2000, c 9 [*Elections Act*]. See also Dodek, *supra* note 12.
37. 2012 SCC 55 at para 12, [2012] 3 SCR 76 [*Opitz*].

legislation.³⁸ Thus, in *Opitz*, the majority reiterated the following interpretative guideline first articulated by Justice Cory in a concurring opinion in *Haig*: “The courts have always recognized the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it.”³⁹

Some quasi-constitutional statutes implement rights that are not generally thought to impose affirmative obligations on the state. For example, the federal *Privacy Act*⁴⁰ has been characterized as quasi-constitutional because it secures aspects of the right to privacy guaranteed by section 8 of the *Charter*,⁴¹ though the Court has never suggested that section 8 imposes a positive obligation on political actors to enact legislation that secures individuals’ privacy interests.⁴²

Some quasi-constitutional statutes defy easy classification. Ontario’s *Freedom of Information and Protection of Privacy Act*⁴³ and the federal *Access to Information Act*⁴⁴ are quasi-constitutional statutes.⁴⁵ The constitutional right of access to information was first recognized in 2010 in *Ontario (Public Safety and*

38. The *Canadian Bill of Rights* is a notable example of a quasi-constitutional statute that the courts did not interpret generously. See Berend Hovius, “The Legacy of the Supreme Court of Canada’s Approach to the Canadian Bill of Rights: Prospects for the Charter” (1982) 28:1 McGill LJ 31; The Constitutional Law Group, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery, 2010) at 714-17.

39. *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1049, 105 DLR (4th) 577 [*Haig*], Justice Cory cited *Cawley v Branchflower (1884)*, 1 BCR (Pt II) 35 at 37 (SC); *Re Lincoln Election (1876)*, 2 OAR 316 at 323. Justice Cory, citing *Cawley v Branchflower (1884)*, 1 BCR (Pt II) 35 at 37 (SC) and *Re Lincoln Election (1876)*, 2 OAR 316 at 323. While Justice Cory wrote a concurring opinion in *Haig*, these guidelines were endorsed by the majority: see *Opitz*, *supra* note 37 at para 37.

40. RSC 1985, c P-21.

41. *Lavigne*, *supra* note 30 at para 25. Section 8 of the *Charter* protects the right to be free from unreasonable search and seizure. See *Charter*, *supra* note 26, s 8. The SCC has held that section 8 “protect[s] a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.” See *R v Plant*, [1993] 3 SCR 281 at 291-93, 84 CCC (3d) 203.

42. See e.g. *Hunter v Southam*, [1984] 2 SCR 145, 11 DLR (4th) 641.

43. RSO 1990, c F31.

44. RSC 1985, c A-1.

45. This conclusion is implied in *Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 SCR 66. See also *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306 at para 79, LeBel J.

Security) v Criminal Lawyers' Association.⁴⁶ There, the Court explained that the right of access to information would be infringed where the government did not hand over information which “[is] shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.”⁴⁷ However, the Court also emphasized that “there is no general right of access to information.”⁴⁸

At first glance, then, access to information legislation seems to have more in common with the *Privacy Act* than with the *Official Languages Act*. After all, it implements a right which the Court frames in negative terms.⁴⁹ But a right of access to information necessarily requires political actors to take positive action.⁵⁰ Perhaps the Court does not want to be seen to be creating a positive right of access to information since affirmative constitutional obligations are

46. 2010 SCC 23, [2010] 1 SCR 815 [*CLA*]. See also Daniel Guttman, “*Criminal Lawyers’ Assn. v. Ontario*: A Limited Right to Government Information under Section 2(b) of the Charter” (2010) 51 Sup Ct L Rev (2d) 199 [Guttman, “*CLA*”].

47. *CLA*, *ibid* at para 5.

48. *Ibid* at para 35.

49. This framing is obvious in the Court’s decision in *CLA*, *supra* note 45. A similar pattern can be observed in the Court’s section 2(d), section 7, and section 15 *Charter* jurisprudence. See Vanessa MacDonnell & Julia Hughes, “The German Abortion Decisions and the Protective Function in German and Canadian Constitutional Law” (2013) 50:4 Osgoode Hall LJ 999; Vanessa MacDonnell, “The Protective Function and Section 7 of the *Canadian Charter of Rights and Freedoms*” (2012) 17:1 Rev Const Stud 53 [“MacDonnell, “Protective Function”]; Mark Tushnet, “State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations” (2002) 3:2 Chicago J Int’l L 435 [Tushnet, “State Action”]; Cass R Sunstein, “State Action Is Always Present” (2002) 3:2 Chicago J Int’l L 465; Anthony Robert Sanguiliano, “Substantive Equality As Equal Recognition: A New Theory of Section 15 of the *Charter*” (2015) 52:2 Osgoode Hall LJ 601.

50. Sunstein, *ibid* at 467; MacDonnell & Hughes, *ibid*; MacDonnell, “Constitution as Framework,” *supra* note 13; Stephen Holmes & Cass R Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: WW Norton & Company, 2000) at 52; Keith Ewing, “The Unbalanced Constitution” in Tom Campbell et al, eds, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 103 at 115; Debra Parkes, “Baby Steps on the Way to a Grown-Up *Charter*: Reflections on 20 Years of Social and Economic Rights Claims” (2003) 52 UNBLJ 279 at 286; Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38:2 UBC L Rev 539 at 549; *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 320, [2002] 4 SCR 429, Arbour J, dissenting [*Gosselin*].

highly contested in Canadian constitutional law.⁵¹ Whatever the reason for the Court's characterization of the right, however, its status as a positive right is incontrovertible.⁵² This means that access to information legislation actually has more in common with the *Official Languages Act* than the *Privacy Act*.

Similar challenges present themselves in classifying human rights legislation. On the one hand, the SCC has been quite clear that positive measures may sometimes be required to ensure that individuals are treated equally.⁵³ This suggests that the right to equality imposes affirmative obligations on political actors. On the other hand, it can be argued that political actors have no obligation to enact human rights laws.⁵⁴

B. QUASI-CONSTITUTIONAL STATUTES ARE "FUNDAMENTAL" IN NATURE

One of the themes that runs through the Canadian jurisprudence on quasi-constitutional statutes is that these laws are "fundamental" in character.⁵⁵ By invoking fundamental law, the SCC prompts us to think about how quasi-constitutional statutes are linked to the legal rules, norms, and institutions that comprise the Constitution. But how do we identify legislation that is "basic or fundamental enough to count as [quasi-]constitutional"?⁵⁶

Courts have been judicious in characterizing legislation as quasi-constitutional. Given that judges must routinely categorize legislation (*i.e.*, determine whether it is ordinary or quasi-constitutional) to apply the rules of statutory interpretation, it cannot be said that this is insignificant. Indeed, it can be inferred that courts understand quasi-constitutional legislation to be a narrow, if not entirely defined, category. If we examine the category further,

51. See Guttman, "CLA," *supra* note 44 at para 49. Guttman states that this view has roots in the case law and notes that "[i]t is well accepted that section 2(b) generally imposes a negative obligation on government rather than a positive obligation of protection or assistance." He rightly points out, however, that the courts have also acknowledged that in "exceptional circumstances," section 2(b) might confer positive rights. See also *Haig*, *supra* note 39 at 1035.

52. MacDonnell & Hughes, *ibid.*

53. *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*]; *R v Kapp*, 2008 SCC 41 at para 15, [2008] 2 SCR 483.

54. *Vriend*, *ibid.*

55. *Drybones*, *supra* note 15; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27 at para 27, [2000] 1 SCR 665; Sirota, *supra* note 2.

56. Tarunabh Khaitan, "'Constitution' as a Statutory Term" (2013) 129:4 Law Q Rev 589 at 605-06.

however, it becomes clear that a great deal of legislation could be characterized as quasi-constitutional.

Provincial and federal human rights codes are clear examples of fundamental laws. No one would doubt that these statutes have as their goal the promotion of equality and the protection of civil liberties. But what about the criminal law, for example?⁵⁷ The *Charter* tends to be invoked in the criminal process to provide the accused with procedural protections. But it is also possible to view at least some of the criminal law in a different way: as protecting individuals' fundamental constitutional interests, including the interest in being free from physical violence.⁵⁸ On this reading, the criminal law secures the interests protected by section 7 of the *Charter*, among others.⁵⁹

If we accept that some sections of the *Criminal Code* have a fundamental dimension,⁶⁰ we might be willing to characterize them as quasi-constitutional. The same might be said about many other forms of federal law.⁶¹ The more we characterize legislation as quasi-constitutional, however, the more the exceptional nature of this label is compromised. This poses interpretative challenges. Should all quasi-constitutional legislation be interpreted generously? Should it always be given priority over non-fundamental law when the two conflict? I deal with these questions in the next Part.

C. IMPLEMENTING CONSTITUTIONAL IMPERATIVES

In this article I argue that quasi-constitutional legislation is fundamental in the sense that it implements constitutional imperatives. I use the term "constitutional imperatives" to refer to constitutional obligations of varying degrees of specificity. These obligations emanate from the rights-conferring aspects of the Constitution, as well as from those aspects of the Constitution that establish the institutions and procedures of government. Following David Feldman, it is my view that

57. Frank Michelman, "The Protective Function of the State in the United States and Europe: The Constitutional Question" in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 156 at 157 [Michelman, "Protective Function"]; MacDonnell, "Protective Function," *supra* note 50 at 73, 80.

58. Michelman, "Protective Function," *ibid.* See also MacDonnell, "Protective Function," *ibid.*

59. *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 64, 68, [2015] 1 SCR 331; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 55, [2000] 2 SCR 307.

60. See generally Benjamin Berger, "Constitutional Principles in Substantive Criminal Law" in Markus D Dubber & Tatjana Hörnle, eds, *Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 422.

61. Kumm, *supra* note 11 at 115.

quasi-constitutional legislation can include delegated legislation where such legislation implements constitutional imperatives.⁶² Following Feldman,⁶³ Mark Elliot,⁶⁴ and the *Supreme Court Act Reference*,⁶⁵ it may be more useful to think of individual provisions as having this status as opposed to a statute or regulation in its entirety.

As should be apparent, this definition of quasi-constitutional legislation is broad. It may render the concept too broad to be of great use as an interpretative principle. It does not, however, render it meaningless or “trivial[].”⁶⁶ On the contrary, this definition sheds light on a significant amount of previously unrecognized quasi-constitutional law.⁶⁷

What is the justification for adopting this definition of quasi-constitutional legislation? The Court’s characterization of quasi-constitutional legislation as fundamental suggests that some legislation is shaped by and embodies constitutional norms and imperatives. This is different from the usual assertion that all legislation must be constitutionally compliant to be valid. It suggests, in short, that statutes play a role in implementing constitutional imperatives, either because governments must implement these imperatives or because it is merely a good idea or good policy.

Here it is useful to refer to German constitutional theory, which suggests that constitutional rights have different “dimensions.”⁶⁸ In addition to their “negative” or “subjective” dimension,⁶⁹ which tends to be the focus of most constitutional

62. David Feldman, “The Nature and Significance of ‘Constitutional’ Legislation” (2013) 129:3 *Law Q Rev* 343 at 344.

63. *Ibid* at 352-53.

64. Elliot, “UK’s Contemporary Constitution,” *supra* note 14 at 386.

65. *Reference Re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 [*Supreme Court Act Reference*].

66. Frank Michelman, “Residual Liberty and Constitutional Comparison” (2009) [unpublished] at 25, citing *Riding in the Woods* (1989), BVerfGE 80, 137 (Germany), Grimm J, dissenting [on file with author]. I will use this term throughout.

67. Eskridge & Ferejohn “Super-Statutes,” *supra* note 13 at 336-39.

68. Dieter Grimm, “The Protective Function of the State” in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press 2005) 137 at 142.

69. *Ibid* at 144.

scholarship, constitutional rights also serve as “an objective order of values.”⁷⁰ In this capacity, they influence all aspects of lawmaking.⁷¹ In *Dolphin Delivery*,⁷² the SCC recognized that *Charter* rights serve a similar function. There, the Court’s focus was on how the *Charter* influences the common law, but the Court’s reasoning can easily be applied to the legislative process.⁷³ After all, the constitutional values must have implications for governance and public policy.⁷⁴

I do not mean to suggest that all or even most legislation is the product of a process by which the executive assesses its constitutional obligations and takes steps to implement those obligations “proactive[ly].”⁷⁵ This is likely the case with at least some legislation, however. Many other laws could be said to have constitutional dimensions, even if the process by which they came into being was not the product of a conscious decision by the executive to advance a rights-based policy agenda.

Feldman, writing in the UK context, acknowledges that a significant volume of legislation—or at least legislative provisions⁷⁶—could be characterized as

70. Donald P Kommers & Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 2012) at 442, translating *Lüth* (1958), BVerfGE 7, 198 (Fed Const Ct) (Germany) [*Lüth*]. See also Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010) at 391; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) [Fredman, *Human Rights Transformed*]. Eskridge and Ferejohn present a similar version of this argument as the “Aristotelian perspective” on constitutions. See Eskridge & Ferejohn, “Super-Statutes,” *supra* note 13 at 329. They write:

Rather than expressing a set of positive rules negotiated by long-deceased framers, the central metaphor of a large C Constitution as social contract, the Aristotelian small *c* constitution embodies fundamental values to which our polity is or ought to be committed. And constitutionalism is reasoning from those values to address new problems confronted by the nation.

71. *Lüth*, *ibid*; MacDonnell & Hughes, *supra* note 50 at 1009.

72. *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at para 25, 33 DLR (4th) 174 [*Dolphin Delivery*].

73. Janet Hiebert, *Charter Conflicts: What is Parliament’s Role?* (Montreal: McGill-Queen’s University Press, 2001) at 8-9.

74. Vanessa MacDonnell, “The Civil Servant’s Role in the Implementation of Constitutional Rights” (2015) 13:2 Int’l J Const L 383 [MacDonnell, “Civil Servant’s Role”].

75. Fredman, *Human Rights Transformed*, *supra* note 70; Sandra Fredman, “Breaking the Mold: Equality as a Proactive Duty” (2012) 60 Am J Comp L 265 [Fredman, “Breaking the Mold”]; Gillian MacNaughton & Paul Hunt, “A Human Rights-Based Approach to Social Impact Assessment” in Frank Vanclay & Ana Maria Esteves, eds, *New Directions In Social Impact Assessment: Conceptual and Methodological Advances* (Cheltenham, UK: Edward Elgar, 2012) at 360.

76. Feldman, *supra* note 62 at 353.

fundamental,⁷⁷ though he would reject the view that constitutional legislation in the United Kingdom includes legislation that implements basic rights. One of the reasons why Feldman is reluctant to confer constitutional status on legislation that secures basic rights is that “the category of fundamental rights is not closed.”⁷⁸ My approach to quasi-constitutional legislation accommodates the possibility of changes in our understanding of the scope and content of constitutional rights. While the rights contained in the *Charter* may be regarded as relatively fixed, the content of quasi-constitutional legislation is by no means so. On the contrary, the content of this type of legislation could be expected to change over time. This is consistent with the living tree conception of Canadian constitutionalism.⁷⁹

To summarize, when we talk about the influence of constitutional law—and, specifically, charters of rights—on legislation, we need to think beyond rights infringement. Charters of rights do not simply demarcate the permissible boundaries of lawmaking.⁸⁰ They also guide lawmakers in elaborating the content of government policy.⁸¹ In other words, legislation reflects fundamental rights, whether consciously or unconsciously, and to varying degrees of sufficiency.

D. THE ROLE OF FUNDAMENTAL INSTITUTIONS IN THIS THEORY

At this point, it should be noted that fundamental rights are only part of the story. While the Court’s approach to quasi-constitutional statutes has been decidedly rights-based, it has nevertheless recognized that statutes that set out the structures of institutions or procedures can also have constitutional dimensions. In *Ontario (Attorney General) v OPSEU*,⁸² for example, civil servants who wished to play an active role in an upcoming federal election challenged provisions of Ontario’s *Public Service Act*⁸³ on federalism grounds. The Act placed strict limits on public servants’ political involvement. The majority had no trouble concluding that the impugned provisions were a valid exercise of provincial power. Unlike the trial court and the Court of Appeal, however, a majority of the SCC held that

77. *Ibid* at 352.

78. *Ibid* at 345-46. See also Eskridge & Ferejohn, “Super-Statutes,” *supra* note 13 at 8-9.

79. *Edwards v Canada (Attorney General)*, [1930] AC 124, 1929 UKPC 86; Richard Albert, “Nonconstitutional Amendments” (2009) 22:1 Can JL & Jur 5 at 16-19. See also Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Brussels, New York: PIE Peter Lang, 2009) at 222.

80. MacDonnell, “Constitution as Framework,” *supra* note 13 at 628-30; MacDonnell, “Civil Servant’s Role,” *supra* note 74.

81. *Lüth*, *supra* note 70; *Dolphin Delivery*, *supra* note 72 at paras 29-30.

82. [1987] 2 SCR 2, 59 OR (2d) 671 [*OPSEU*].

83. RSO 1970, c 386.

the Act was “an amendment of the constitution of the province” within the meaning of section 92(1) of the *Constitution Act, 1867* and “related to the tenure of provincial officers” within the meaning of section 92(4), rather than labour legislation enacted under the province’s jurisdiction over property and civil rights in the province under section 92(13).⁸⁴

The majority explained that a law would be considered a constitutional amendment for section 92(1) purposes “when it bears on the operation of an organ of the government of the province”;⁸⁵ that is, where it “determine[s] the composition, powers, authority, privileges and duties of the legislative or of the executive branches or their members”; “regulate[s] the interrelationship between two or more branches”; or “set[s] out some principle of government.”⁸⁶ Since the *Public Service Act* implemented the principle of responsible government, of which public service neutrality is an essential component, the legislation was properly characterized as an amendment to the Constitution of the Province.

In reaching its decision, the majority noted that Ontario’s Constitution “is partly contained in a variety of statutory provisions. Some of these provisions have been enacted by the Parliament at Westminster,” while “[o]ther provisions relating to constitution of Ontario have been enacted by ordinary statutes of the Legislature of Ontario.”⁸⁷ With these words, the majority affirmed that ordinary laws can have constitutional dimensions, though the wider significance of its pronouncement was unclear. It remained to be seen, for example, how the Court would characterize *federal* legislation that “bears on the operation of an organ of the government.”⁸⁸

The recent *Supreme Court Act Reference* dealt with a related set of questions.⁸⁹ The reference was prompted by an application for judicial review of the appointment of Marc Nadon, a justice of the Federal Court of Appeal, to one of the three reserved Quebec seats on the SCC. The applicant argued that to be eligible for the appointment, the *Supreme Court Act* required that Nadon either

84. *OPSEU*, *supra* note 82 at paras 61, 81. Section 45 of the *Constitution Act, 1982* provides that, “Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.” Section 92(1) was repealed in 1982. See *Constitution Act, 1982*, s 45, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

85. *OPSEU*, *ibid* at para 90.

86. *Ibid* at para 77. The majority added that such legislation could not be “otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union” or “explicitly or implicitly excepted from the amending power bestowed upon the province by s 92(1).” *Ibid*.

87. *Ibid* at para 74.

88. *Ibid* at para 90.

89. *Supra* note 63.

be a judge of a superior court of Quebec or a current member of the Quebec bar for at least ten years. Since he satisfied neither of those conditions, it was argued, he should not have been appointed.

The federal government took two actions in response to the judicial review application. First, it sought to resolve any interpretative ambiguity by introducing declaratory legislation affirming that both current and former members of the Quebec bar for at least ten years were eligible for appointment,⁹⁰ and second, it initiated a reference to the SCC. The Reference posed two questions: First, was the interpretation of the *Supreme Court Act* advanced in the application for judicial review correct? And second, was it within Parliament's competence to enact the declaratory legislation?

The majority relied on a series of historical developments, up to and including the patriation of the Constitution and the creation of a domestic amending formula, to conclude that the SCC has "constitutional status."⁹¹ It elaborated:

Essential features of the Court are constitutionally protected under Part V of the *Constitution Act, 1982*. Changes to the composition of the Court can only be made under the procedure provided for in s. 41 of the *Constitution Act, 1982* and therefore require the unanimous consent of Parliament and the provincial legislatures. Changes to the other essential features of the Court can only be made under the procedure provided for in s. 42 of the *Constitution Act, 1982*, which requires the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces.⁹²

Thus, both *OPSEU* and the *Supreme Court Act Reference* suggest that legislation that sets out the precise features of institutions is constitutionally significant. In *OPSEU*, the Court explained that provincial laws of this nature form part of the Constitution of the Province.⁹³ In the *Supreme Court Act Reference*, the Court held that the amendment rules set out in Part V of the *Constitution Act, 1982* might be triggered where the government sought to make changes to statutory features of the state's central institutions—here, the SCC.⁹⁴

90. *Economic Action Plan 2013 Act No 2*, SC 2013, c 40, ss 471-72.

91. *Supreme Court Act Reference*, *supra* note 65 at para 76.

92. *Ibid* at para 74. Justice Moldaver, who dissented, expressed agreement with the majority that changing Quebec's number of seats on the court would engage the s 41 amending formula.

93. *OPSEU*, *supra* note 82 at para 135.

94. *Supreme Court Act Reference*, *supra* note 65. See also *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704; Dodek, *supra* note 12.

E. THE DIFFERENCE BETWEEN CONSTITUTIONAL AND QUASI-CONSTITUTIONAL LEGISLATION

In an important sense, the statutes described in *OPSEU* and the *Supreme Court Act Reference* differ from the statutes the SCC has characterized as quasi-constitutional. While both sets of statutes share the fact of being influenced by the Constitution, the former contain provisions that have actually been held to be constitutional in nature.⁹⁵ Thus, in the *Supreme Court Act Reference*, the majority explained that sections 5 and 6 of the Act, which together set out the pre-requisites for appointment to one of the Quebec seats on the SCC, could only be altered by formal constitutional amendment.⁹⁶ In doing so, the Court confirmed that sections 5 and 6 form part of the Constitution of Canada, or, in the Court's words, are "constitutionally protected."⁹⁷

The amending formula refers explicitly to institutions—including the SCC—whose features are elaborated in ordinary statutes. There are also institutions which are not referred to explicitly but which are subject to the general amending formula.⁹⁸ Once the central features of these institutions were settled (a fact that can now be taken as a given in many cases), subsequent changes would be considered constitutional amendments.

This is not true of quasi-constitutional legislation. For example, while the *Canadian Human Rights Act* might be said to implement the right to equality, changes to or even the abolition of the Act would not trigger the amending formula. This is because the *Canadian Human Rights Act* is not part of the Constitution. Whether such changes would be consistent with the *Charter* right to equality would be a different question,⁹⁹ but no one would suggest that the government was seeking to amend part of the Constitution by amending the *Canadian Human Rights Act*. It would appear, then, that there are actually two categories of legislation with constitutional dimensions in Canada: legislation that is part of the Constitution, like the provisions of the *Supreme Court Act* at issue in the *Reference*, and quasi-constitutional legislation, like some provisions of the *Canadian Human Rights Act*. The distinction between the two turns on

95. I am grateful to Peter Oliver for helping me to work this out.

96. *Supreme Court Act Reference*, *supra* note 65. The Court was unanimous in characterizing s 6 as constitutional.

97. *Ibid* at para 19.

98. Dodek, *supra* note 12.

99. See *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134; *Vriend*, *supra* note 53; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577.

whether the legislation forms part of the Constitution or simply implements a constitutional imperative.

It is conceivable that a change to a peripheral provision of the *Supreme Court Act* would not engage the amending formula but should still be characterized as implementing a constitutional imperative.¹⁰⁰ Such a provision would be quasi-constitutional under the theory I propose. Thus, individual provisions of laws that implement institutional and procedural elements of the Constitution might be characterized as either: (1) part of the Constitution, (2) quasi-constitutional, or (3) ordinary.

As a general matter, it is less difficult to make the case for recognizing institutional or procedural provisions as quasi-constitutional. Institutions that are referenced or implied in the Constitution must be designed and given the tools necessary for their functioning.¹⁰¹ Now, the degree to which the Constitution prescribes the features of any given institution is another question entirely. I am inclined to believe, as a preliminary view, that the Constitution has relatively little to say about the features of any individual institution of government, especially where the obligation to create that institution is merely implied, though the level of prescription found in the constitutional text is obviously an important consideration.¹⁰²

F. AN ADDITIONAL REFINEMENT TO THE THEORY OF QUASI-CONSTITUTIONAL LEGISLATION

At this stage, it is necessary to further refine the theory of quasi-constitutional legislation I set out in this article. Tremblay usefully explains that quasi-constitutional statutes come in two forms; in fact, he would refer to only one as quasi-constitutional. Some statutes, he says, are quasi-constitutional by virtue of their containing an express trumping provision. According to this “orthodox position,”

100. *Reference re Senate Reform*, *supra* note 94. See also Dodek, *supra* note 12; Kate Glover, “Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*” (2014) 67 *Sup Ct L Rev* (2d) 221.

101. Fredman, *Human Rights Transformed*, *supra* note 70 at 69. See also Holmes & Sunstein, *supra* note 51; Sunstein, *supra* note 50 at 467; Jamie Cameron, “Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v Quebec*” (2003) 20 *Sup Ct L Rev* (2d) 65 at 71; Ewing, *supra* note 51 at 115; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 72, [2011] 2 SCR 3; *Gosselin*, *supra* note 51 at para 320, Arbour J, dissenting.

102. Khaitan, *supra* note 56.

Characterizing ... statutes as “quasi-constitutional” has nothing to do with the importance of their content, be they in relation to fundamental rights and freedoms or in relation to speed limits. The characterization is merely based on the fact that it is intended that the statute have supremacy over all other inconsistent ordinary enactments that do not fulfil the required conditions.¹⁰³

Other statutes, which he refers to as “special nature legislation,”¹⁰⁴ do not contain trumping provisions, but the courts have nevertheless treated them as quasi-constitutional. The first category of statutes would include the *Canadian Bill of Rights*, while the second would include human rights statutes.¹⁰⁵

Tremblay ultimately concludes that the mere presence of a trumping provision should not be sufficient to render a statute quasi-constitutional.¹⁰⁶ This raises the question of how my theory would characterize statutes that do not, on their face, appear to implement any constitutional imperative, but which contain the telltale trumping provision. Tremblay identifies entrenchment as the major quality that renders the first set of statutes quasi-constitutional on the orthodox view.¹⁰⁷ I prefer Farrah Ahmed and Adam Perry’s use of the term “quasi-entrenched” in the UK context.¹⁰⁸ I would suggest that quasi-entrenchment is not sufficient to establish that legislation is quasi-constitutional. Rather, the legislation must also implement a constitutional imperative. It is by virtue of the application of this second requirement that fundamentality is assured.

The preceding discussion suggests that quasi-constitutional legislation is not well understood in Canada. This is surprising, given that the concept has been part of Canadian law for more than 40 years. It seems clear that whatever the meaning of this concept, it is not a simple or monolithic one. In the next Part, I ask what additional insights about quasi-constitutional legislation might be gained by examining how the concept of “constitutional legislation” has developed in the United Kingdom.

103. Tremblay, *supra* note 6 at 88. See also *ibid* at 266, n 189.

104. *Ibid* at 104.

105. *Ibid* at 88, 104.

106. *Ibid* at 266, n 189.

107. *Ibid* at 88.

108. Farrah Ahmed & Adam Perry, “The Quasi-Entrenchment of Constitutional Statutes” (2014) 73:3 Cambridge LJ 514.

II. “CONSTITUTIONAL LEGISLATION” IN THE UNITED KINGDOM

In the past few decades, UK courts have similarly struggled to articulate the relationship between legislation and the UK Constitution. The issues in the UK context are not identical, both because of the stronger historic pull of parliamentary sovereignty and because the UK Constitution is uncodified.¹⁰⁹ Nevertheless, examining the evolution of the UK jurisprudence on constitutional legislation sheds light on where legislation fits within the larger constitutional matrix. In this Part, I trace the trajectory of the jurisprudence on constitutional legislation and examine the scholarly literature which has emerged in response to the case law.

The first discussion of constitutional legislation in the United Kingdom appeared in the early 2000s in a case called *Thoburn*.¹¹⁰ In *Thoburn*, the Administrative Court was asked to determine the validity of the *Units of Measurement Regulations 1994*, delegated legislation promulgated to gradually phase out the use of imperial measures in the United Kingdom, in compliance with EU law.¹¹¹ The Regulations were promulgated on the authority of the *European Communities Act 1972*,¹¹² which incorporates European Union law into UK law. The Regulations amended the *Weights and Measures Act 1985*,¹¹³ which permitted the exclusive use of imperial measures in the sale of loose goods. The question for the Administrative Court was whether the *Weights and Measures Act 1985*, which was enacted after the *ECA*, had impliedly repealed the section of the *ECA* that authorized the promulgation of the Regulations, thereby rendering them invalid.¹¹⁴

Lord Justice Laws concluded that “there is no inconsistency” between the relevant provisions of the *ECA* and the *Weights and Measures Act 1985*.¹¹⁵ He then went on to deal, in *obiter dicta*,¹¹⁶ with the argument that the *ECA* could not be impliedly repealed. Normally, a subsequent inconsistent enactment would

109. Elliot, “UK’s Contemporary Constitution,” *supra* note 14.

110. *Thoburn v Sunderland City Council*, [2002] EWHC 195 (Admin), [2003] QB 151 [*Thoburn*].

111. SI 1994/2866.

112. (UK), c 68 [*ECA*].

113. (UK), c 72.

114. *Thoburn*, *supra* note 110 at para 43.

115. *Ibid* at para 48.

116. Ahmed & Perry, *supra* note 108 at 516; Khaitan, *supra* note 56 at 593; Mark Elliot, “Embracing ‘Constitutional’ Legislation: Towards Fundamental Law?” (2003) 54:1 N Ir Legal Q 25 at 27 [Elliot, “Towards Fundamental Law?”].

be taken to have impliedly repealed the earlier enactment. But the *ECA*, Lord Justice Laws noted, is a “constitutional statute.”¹¹⁷ A constitutional statute, he explained, “is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.”¹¹⁸ Relying in part on the House of Lords’ decisions in *Factortame No 1*¹¹⁹ and *Factortame No 2*,¹²⁰ he found that constitutional statutes could only be repealed where it could be “shown that the legislature’s *actual*—not imputed, constructive, or presumed—intention was to effect the repeal or abrogation.”¹²¹ He went on to say that “the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible.”¹²²

Regarding *Factortame No 1*, Lord Justice Laws explained that “the House of Lords effectively accepted that s. 2(4) [of the *ECA*] could not be impliedly repealed, albeit the point was not argued.”¹²³ In *Factortame No 2*, the House of Lords dealt with the issue more explicitly, with Lord Bridge of Harwich stating:

If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitations of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.¹²⁴

In the 2012 case of *H v Lord Advocate*,¹²⁵ the UK Supreme Court held (also in *obiter*) that the Scottish devolution statute could only be expressly repealed, owing to what Lord Hope called the “fundamental constitutional nature of the settlement that was achieved by the *Scotland Act*.”¹²⁶ Ahmed and Perry point out

117. *Thoburn*, *supra* note 110 at para 62.

118. *Ibid.*

119. *R (Factortame Ltd) v Secretary of State for Transport*, [1989] UKHL 1, [1990] 2 AC 85 [*Factortame No 1*].

120. *R (Factortame Ltd) v Secretary of State for Transport (No 2)*, [1990] UKHL 13, [1991] AC 603 [*Factortame No 2*].

121. *Thoburn*, *supra* note 110 at para 63.

122. *Ibid.*

123. *Ibid* at para 61.

124. *Factortame No 2*, *supra* note 120 at 658-59, cited in *Thoburn*, *supra* note 110 at para 65.

See also Ahmed & Perry, *supra* note 108 at 515-16; Elliot, “Towards Fundamental Law?” *supra* note 115.

125. *H v Lord Advocate*, [2012] UKSC 24, [2013] 1 AC 413].

126. *Ibid* at para 30. See also Ahmed & Perry, *supra* note 108 at 515.

that this is a higher standard than Lord Justice Laws articulated in *Thoburn*.¹²⁷ Perry suggests that “[t]he Supreme Court may now be having second thoughts” about *H v Lord Advocate*. “In *HS2*,” the case to which I now turn, “the Court cited *Thoburn* approvingly, but did not mention its decision in *H*.”¹²⁸

*HS2*¹²⁹ is the most recent word from the UK Supreme Court on constitutional legislation. It is also the first case in which the court discusses *Thoburn*.¹³⁰ *HS2* involved a challenge to a high-speed rail line, HS2, that is being built in the United Kingdom. The government sought development approval for the project through the legislative process—specifically, using two “hybrid” bills.¹³¹ Groups opposed to the line’s proposed route brought an application for judicial review arguing that the government had not complied with EU environmental impact assessment requirements at the planning stage for the line. They also argued that the hybrid bill process did not satisfy the consultation requirements mandated by EU law for these types of projects.

In addressing the second issue, Lords Neuberger and Mance, with whom the remaining Lords concurred, noted that it is a long-established principle of British constitutional law, enshrined in Article 9 of the *Bill of Rights 1689*, that courts are “preclude[d]” from “impeaching or questioning ... debates or proceedings of Parliament.”¹³² The appellants, Lords Neuberger and Mance explained, were urging the court to interpret EU law in a manner that would require precisely this type of inquiry. Such an interpretation would create a potential “conflict” between two “constitutional instruments,”¹³³ the *Bill of Rights 1689* and the *ECA* (the latter of which incorporates EU law into domestic law). The Lords rejected this interpretation of the relevant EU directive.¹³⁴ They noted, however, that if such a conflict were to be put squarely before the court in a future case, the

127. *Ibid* at 520.

128. Perry, *supra* note 24.

129. *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*, [2014] UKSC 3, [2014] PTSR 182 [*HS2*].

130. Elliot, “UK’s Contemporary Constitution,” *supra* note 14 at 384.

131. As Lord Reed explained in *HS2*, “[A] hybrid bill proceeds as a public bill, with a second reading, committee report and third reading, but with an additional select committee stage after the second reading in each House, at which objectors whose interests are directly and specifically affected by the bill (including local authorities) may petition against the bill and be heard.” See *HS2*, *supra* note 129 at para 57. See also Elliot, “UK’s Contemporary Constitution,” *supra* note 14 at 382.

132. *HS2*, *ibid* at para 203.

133. *Ibid* at para 208.

134. *Ibid* at para 209.

ECA would not automatically trump by virtue of its being enacted after the *Bill of Rights 1689*:

It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognized at common law, of which Parliament when it enacted the *European Communities Act 1982* did not either contemplate or authorize the abrogation.¹³⁵

Lords Neuberger and Mance then made a number of additional points about constitutional instruments. They designated a list of constitutional instruments, “including” the *Magna Carta*, the *Petition of Right 1689*, the *Act of Settlement 1701*, the *Act of Union 1707*, the *ECA*, the *Human Rights Act 1998*, and the *Constitutional Reform Act 2005*.¹³⁶ They noted that “[t]he common law itself also recognises certain principles as fundamental to the rule of law.”¹³⁷ And, for the first time, they acknowledged Lord Justice Laws’s discussion of constitutional legislation in *Thoburn*, describing it as “penetrating.”¹³⁸

In a separate line of cases on devolution, the House of Lords and UK Supreme Court have dealt with the question of how constitutional statutes should be interpreted.¹³⁹ As Tarunabh Khaitan explains, the interpretative consequences of characterizing legislation as constitutional have not been straightforward.¹⁴⁰ In the 2002 decision of the House of Lords in *Robinson v Secretary of State for Northern Ireland and Ors*,¹⁴¹ Lord Bingham of Cornhill stated that a statute devolving powers to Northern Ireland “should be interpreted consistently with the language used, be interpreted generously and purposively, bearing in mind

135. *Ibid* at para 207.

136. *Ibid*. Their use of the word “including” suggests this list is not exhaustive.

137. *Ibid*.

138. *Ibid* at para 208. See also Elliot, “UK’s Contemporary Constitution,” *supra* note 14 at 385.

Elliot explains that the Lords “signalled a degree of approval of—whilst stopping short of straightforwardly adopting—the judgment of Laws LJ in *Thoburn*.” See also Paul Craig, “Constitutionalising Constitutional Law: *HS2*” (2014) 3 PL 373.

139. For a useful discussion of these cases, see Khaitan, *supra* note 56. Devolution involves the transfer of powers by statute to Scotland, Northern Ireland, or Wales.

140. *Ibid*.

141. [2002] UKHL 32, [2002] NI 390 [*Robinson*].

the values which the constitutional provisions are intended to embody.”¹⁴² In the subsequent case of *Imperial Tobacco Ltd v The Lord Advocate (Scotland)*,¹⁴³ however, the UK Supreme Court was unanimous in expressing scepticism about the need for special rules in interpreting the *Scotland Act 1998*, which devolves powers to Scotland. Lord Hope stated that the Act “must be interpreted in the same way as any other rules that are found in a UK statute,” and that it should be “construed according to the ordinary meaning of the words used.”¹⁴⁴ He also stated, however, that the Act “was intended, within carefully defined limits, to be a generous settlement of legislative authority.”¹⁴⁵

The problem with Lord Bingham’s statement in *Robinson*, Khaitan explains, is that he “uses ‘generous’ and ‘purposive’ approaches in the same breath, as if they were always compatible, if not interchangeable. However, they can sometimes pull in different directions.”¹⁴⁶ It is also significant, he notes, that the court in *Imperial Tobacco* did not cite *Robinson*.¹⁴⁷ Khaitan suggests that the subject matter of the legislation can be used as a guide to interpretation: “One could say that a generous interpretative approach is appropriate for provisions which are framed in a general and vague language, or which embody broad legal principles normally found in preambles to constitutions and Bills of Rights.”¹⁴⁸ The stricter mode of interpretation might be used where the court is construing “provisions in a constitutional statute which embody a detailed rule where the scope for indeterminacy is minimal.”¹⁴⁹ “Both approaches,” he notes, “are ‘purposive.’”¹⁵⁰

The fact that these rules of interpretation have been carved out in the devolution context may explain some of the double-speak that appears in the decisions. Devolution cases involve statutes that distribute powers between

142. *Ibid* at para 11. Khaitan suggests that the UK Supreme Court “endors[ed] this approach” in the 2011 decision in *AXA General Insurance v Lord Advocate*, [2011] UKSC 46, [2012] 1 AC 868. In that case, the court noted that “the carefully chosen language in which [certain provisions of the *Scotland Act*] are expressed is not as important as the general message that the words convey. The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature.” See Khaitan, *supra* note 56 at 595.

143. [2012] UKSC 61, 2013 SCLR 121 [*Imperial Tobacco*]. See also Khaitan, *ibid* at 594-95.

144. *Imperial Tobacco*, *ibid* at para 14. See also Stephen J Dimelow, “The Interpretation of ‘Constitutional’ Statutes” (2013) 129:4 Law Q Rev 498 at 499; Perry, *supra* note 24.

145. *Imperial Tobacco*, *ibid* at para 15.

146. Khaitan, *supra* note 56 at 594.

147. *Ibid* at 595.

148. *Ibid* at 596.

149. *Ibid*.

150. *Ibid*.

governments rather than confer individual rights. It is difficult to know what it would mean to interpret such a statute generously, other than perhaps in favour of the government to whom powers are being devolved. In these cases, moreover, it is evident that the Lords were driven by a desire to keep the underlying political compact intact.¹⁵¹ Adam Tomkins refers to *Robinson* as “an extraordinary decision, in which by the narrowest of margins a majority of the law lords ruled that an unlawful election was lawful, in order to keep Northern Irish devolution afloat and so as to prevent the DUP and Sinn Fein from obtaining office.”¹⁵² He explains that given that *Robinson* “has not been followed in subsequent [UK] Supreme Court case law[,] ... it is perhaps best understood as having been confined to its facts.”¹⁵³

In sum, then, labelling legislation as constitutional means that the usual rules of implied repeal do not apply. Constitutional legislation may or may not be interpreted generously. This is not entirely out of step with Canadian law. In *Lavigne*, the SCC explained that

[t]he *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that this Court has recognized them as having. However, that status does not operate to alter the traditional approach to the interpretation of legislation ... [whereby] “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”¹⁵⁴

151. For Canadian examples of this phenomenon, see *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 SCR 1148, 40 DLR (4th) 18 [*Reference re Bill 30* cited to SCR]. See also *Adler v Ontario*, [1996] 3 SCR 609, 252 DLR (4th) 10 at para 29. Justice Iacobucci explains for the majority in *Adler* that “Section 93 [which preserves the rights of denominational schools in Quebec and Ontario] is the product of an historical compromise which was a crucial step along the road leading to Confederation.” This meant that the rights created by section 93 could not be the subject of an equality challenge under section 15 of the *Charter*, even though the provisions may “sit uncomfortably with the concept of equality embodied in the *Charter*.” See *ibid* at para 38, Iacobucci J, citing *Reference re Bill 30*, *supra* note 150 at 1197. See also SM Corbett, “*Adler v. Ontario*: The Troubling History of a Compromise” (1997) 8:3 Const Forum Const 64 at 65.

152. Adam Tomkins, “Confusion and Retreat: The Supreme Court of Devolution,” (17 February 2015), British Government and the Constitution (blog), online: <www.britgovcon.wordpress.com/2015/02/17/confusion-and-retreat-the-supreme-court-on-devolution/>.

153. *Ibid*.

154. *Lavigne*, *supra* note 30 at para 25, citing EA Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87.

As in the UK context, Canadian courts often refer to the relevant approach to interpretation as being as generous and purposive one, which as Khaitan points out is not always particularly helpful.¹⁵⁵

What are the limits of the British account, for our purposes? One significant limit is that the statutes at issue in these cases do not implement *a priori* constitutional imperatives so much as they are a part of the uncodified British Constitution. In this respect, the truest analogy is between British constitutional statutes and Canadian legislation like the *Supreme Court Act*, some provisions of which have been deemed constitutional by the SCC. But this does not mean that the British cases and commentary are unhelpful when it comes to studying quasi-constitutional legislation in Canada. On the contrary, many of the classification and interpretation questions raised by these two types of legislation overlap.

It is unquestionable that some of the wrangling over the meaning of constitutional legislation in the United Kingdom stems from the fact that it is not possible to point to a single, codified constitutional document.¹⁵⁶ But this fact does not make the UK Constitution so different from its Canadian counterpart. Both the UK and Canadian constitutions contain important written and unwritten elements. More to the point, legislation is an important source of fundamental law in both countries. The fact that the Canadian Constitution is anchored in a few key written documents has obscured the need to clarify or conceptualize the role of legislation in Canadian constitutional law, but such a need still exists. The presence of a written constitution should not be understood as relieving courts and scholars of the task of articulating the place of legislation in the broader constitutional framework.¹⁵⁷

The UK jurisprudence and secondary literature demonstrates that it can be challenging to define the boundaries of constitutional legislation.¹⁵⁸ Lord Justice Laws would define constitutional legislation to include instruments that “(a) condition[] the legal relationship between citizen and state in some general, overarching manner, or (b) enlarge[] or diminish[] the scope of what we would now

155. *Supra* note 56 at 594; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, *supra* note 55; *Thibodeau*, *supra* note 5; Sullivan, *supra* note 5.

156. Elliot, “UK’s Contemporary Constitution,” *supra* note 14 at 386.

157. For some useful thinking on this subject in the context of the amending formula, see Dodek, *supra* note 12; Glover, *supra* note 100.

158. Elliot, “UK’s Contemporary Constitution,” *supra* note 14 at 386; Feldman, *supra* note 62 at 356; Craig, *supra* note 138.

regard as fundamental constitutional rights.”¹⁵⁹ Feldman critiques Lord Justice Laws’s definition on the grounds that it is “both over- and under-inclusive.”¹⁶⁰ It is under-inclusive, he argues, because it fails to include legislation that creates institutions.¹⁶¹ Moreover, by including legislation that secures rights, he argues, Lord Justice Laws’s definition of constitutional legislation is over-inclusive. In Feldman’s view, only this “secondary” or “framework” legislation should qualify as constitutional.¹⁶²

Even if we can agree on general criteria for identifying quasi-constitutional or constitutional legislation, Khaitan raises a further set of concerns. “The first problem,” he explains,

is to determine with some certainty which institutions of the state are basic or fundamental enough to count as constitutional. ... Parliament has characterised the monarchy, Parliament and aspects of the judiciary as constitutional. But are the army, civil service, the Court of Appeals, the Bank of England, city councils, Mayors etc. also constitutional institutions? How can we tell?¹⁶³

Similar issues arise, he says, in sorting out how far such recognition extends. Even if we agree that a particular institution is constitutional, how do we determine where its constitutional aspects stop and its non-constitutional aspects begin?¹⁶⁴ These are questions Canadian scholars will need to sort out in defining both quasi-constitutional and constitutional legislation.

III. THE PROBLEM WITH THE TRUMPING RULE

At this stage, something more should be said about the interpretive quandary posed by the fact that, under the theory I propose, quasi-constitutional legislation is much more prevalent than the SCC has acknowledged. In this Part, I consider whether there is simply too much quasi-constitutional legislation to accommodate a trumping rule—that is, a rule that provides that quasi-constitutional legislation prevails over ordinary law in the event of a conflict. I also deal with the concern that if we were to interpret all quasi-constitutional legislation in a large and liberal manner, a great deal of legislation would be read this way.

159. *Thoburn*, *supra* note 110 at para 62.

160. Feldman, *supra* note 62 at 357.

161. *Ibid.*

162. *Ibid.* at 355.

163. Khaitan, *supra* note 56 at 605-06.

164. *Ibid.* at 606.

The UK literature is helpful on the latter point. Khaitan notes that UK courts have struggled to articulate a single set of rules for interpreting constitutional legislation, though they have consistently interpreted constitutional legislation purposively.¹⁶⁵ While it might make sense to read legislation that implements individual rights in a “large and liberal” manner, it is less logical to read legislation that implements the institutional and procedural dimensions of the Constitution in this manner.¹⁶⁶ The Canadian *Interpretation Act*¹⁶⁷ suggests that remedial legislation should be read in a “large and liberal manner.”¹⁶⁸ This lends support to the argument that only rights-implementing legislation should be construed generously.

The issue with the trumping rule cannot be so easily resolved. As it now stands, quasi-constitutional statutes simply prevail over other, ordinary laws. But such a trumping rule could not easily be applied if quasi-constitutional legislation is understood in the manner I propose. Not only would a great deal of legislation be interpreted in this manner, but provisions in quasi-constitutional legislation might frequently come into conflict with one another.¹⁶⁹ Some rule would be required to resolve the problem that would arise when two pieces of quasi-constitutional legislation conflicted.

In *HS2*, Lords Neuberger and Mance commented, in *obiter*, about the issues that present themselves when two pieces of constitutional legislation come into conflict. They explained that if the *ECA* were to conflict with the *Bill of Rights 1689*, the Court would not assume that the *ECA* had impliedly repealed the *Bill of Rights 1689*. This demonstrates that the Lords were conscious of the need to give more thought to the matter before applying the implied repeal rule. Elliot suggests that conflicts between constitutional legislation could “be resolved by reference to their respective fundamentality.”¹⁷⁰ Statutes deemed “equally fundamental,” he says, would require an additional rule.¹⁷¹

165. *Ibid* at 596.

166. *Ibid*.

167. RSC 1985, c I-21.

168. *Ibid*, s 12. Section 12 states, “Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.” See also Sullivan, *supra* note 5 at 488; Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2011) at 531.

169. Elliot, “UK’s Contemporary Constitution,” *supra* note 14.

170. *Ibid* at 387-88.

171. *Ibid*.

In my view, it would be very difficult for courts to design a satisfactory approach to determining “respective fundamentality.”¹⁷² This does not mean, however, that they could not attempt to interpret the statutes in a manner that avoided a conflict, where possible.¹⁷³ This approach to interpretation might offer a partial solution to the concerns raised by conflicting quasi-constitutional legislation. Moreover, it may be that there would be fewer conflicts in practice than there are in theory. Where the issue could not be resolved through interpretation, the best approach would be to adopt the implied repeal rule and to leave it to politicians to deal with whatever undesirable consequences this might cause.

IV. INSTITUTIONAL ACTORS IN CONSTITUTIONAL IMPLEMENTATION

The executive plays a central role in determining how constitutional imperatives are transformed into law. Of course, Members of Parliament play an important role in the formal enactment of legislation. But the executive, not Parliament, is the more influential constitutional actor between the two, at least in a majority government.¹⁷⁴ The process of translating abstract guarantees into quasi-constitutional legislation is a complex one,¹⁷⁵ and I only touch briefly on that process in this article. The process would involve the executive assessing the scope of its constitutional obligations as a whole and developing a way to “prioritize”¹⁷⁶ those obligations according to their relative importance. The executive might do this by considering the acuteness of the risk of harm to

172. *Ibid.*

173. I am grateful to Peter Oliver for pointing this out to me. This is a general principle of statutory interpretation. See *Thibodeau*, *supra* note 5 at para 89. See also Craig, *supra* note 138 at 385. It is also familiar in the federalism context.

174. Sandra Feldman, “Scepticism Under Scrutiny: Labour Law and Human Rights” in Tom Campbell et al, eds, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 197 at 208; James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: UBC Press, 2005) at 247; David Feldman, “Parliamentary Scrutiny of Legislation and Human Rights” 2002 2 PL 323 at 347; Mark Tushnet, “Interpretation in Legislatures and Courts: Incentives and Institutional Design” in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 355 at 364-65, n 33 [Tushnet, “Interpretation”].

175. William N Jr Eskridge & John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven: Yale University Press, 2013) at 6.

176. Tom Campbell, “Introduction” in Tom Campbell, KD Ewing & Adam Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 1 at 6.

constitutionally protected interests, for example. It might also consider whether some harms to constitutional interests exacerbate individuals' vulnerabilities or marginalization, or leave them unable to make ends meet.¹⁷⁷

The theory of quasi-constitutional legislation I have described implies a certain level of intentionality on the part of the executive. We know, of course, that the executive is often not primarily or even significantly engaged with the process of securing rights. As Mark Tushnet has explained, politicians are typically concerned with re-election and with developing or supporting measures that are likely to find favour with their constituents.¹⁷⁸ The extent to which this is true appears to depend on who is in power. A brief survey of the current legislative calendar suggests that today's executive is concerned with securing basic rights.¹⁷⁹ Whether it has done a good job of reconciling competing rights claims is a more complex question.¹⁸⁰ Whatever the executive's level of intentionality, it seems clear that much legislation is in fact quasi-constitutional in nature.

The study of quasi-constitutional legislation also reveals that there is a great deal of constitutionally significant activity that scholars of Canadian constitutional law spend very little time analyzing.¹⁸¹ Not only is it important to be attentive to the constitutional dimensions of lawmaking, it is also important to examine what this tells us about the roles of constitutional actors. The executive has a great deal of control over how constitutionally significant institutions are designed and constitutional rights are implemented.

V. CONCLUSION

This article demonstrates that the interaction between the Constitution and ordinary law is more robust than the typical account suggests. It also shows that the current rules that apply to the interpretation of quasi-constitutional legislation are problematic. Following Khaitan, I have suggested that the best course of

177. MacDonnell, "Civil Servant's Role," *supra* note 74; Julia Hughes, Vanessa MacDonnell & Karen Pearlston, "Equality & Incrementalism? The Role of Common Law Reasoning in Constitutional Rights Cases" (2014) 44:3 *Ottawa L Rev* 467.

178. MacDonnell, "Constitution as Framework," *supra* note 13 at 649-50; Tushnet, "Interpretation," *supra* note 174 at 362; Tushnet, "Institutions for Implementing," *supra* note 11 at 247.

179. See Grégoire Webber, "The *Charter* Party and the work of Parliament," (27 January 2016), Policy Options (blog), online: <www.policyoptions.irpp.org/2016/01/27/the-charter-party-and-the-work-of-parliament/>.

180. See generally Jennifer Bond, "Failure to Report: The Manifestly Unconstitutional Nature of the Human Smugglers Act" (2014) 51:2 *Osgoode Hall LJ* 377.

181. MacDonnell, "Constitution as Framework," *supra* note 13; Hirschl, *supra* note 13 at 154.

action is to interpret quasi-constitutional legislation purposively. A trumping rule could be easily applied if a few pieces of legislation were quasi-constitutional in nature. As I have explained, however, there is much more quasi-constitutional legislation than the SCC has recognized. For this reason, courts should strive to interpret this type of legislation to avoid conflicts where possible. Otherwise, they should revert to the implied repeal rule and leave it to the political branches to amend legislation if the implied repeal rule leads to undesirable consequences from the standpoint of constitutional implementation.

The fact that legislation is shaped in significant part by constitutional imperatives also means that we ought to adapt our existing theories of Canadian constitutional law to better recognize the key role played by the executive branch in advancing constitutional rights. We must also critically assess the constitutional role that we have assigned to courts. It is clear that, to the extent that legislation reflects the executive and the legislature's best efforts to implement constitutional rights, these efforts are deserving of deference.¹⁸² Given that such legislation is pervasive, it appears that deferential judicial review of legislation should be the norm.

The volume of quasi-constitutional legislation does not render the characterization meaningless.¹⁸³ On the contrary, it demonstrates how deeply constitutional norms influence legislation. This conclusion should not be surprising; we know, for example, that the *Charter* has been given a significant role in the evolution of common law principles since 1982. It is time that we recognize that the same is true with respect to legislation.

182. MacDonnell, "Constitution as Framework," *ibid* at 644-45.

183. Grimm, *supra* note 68.