The Contribution of Thornton's Five Stages of the Drafting Process to the Rule of Law in the Commonwealth Caribbean

*Shaquille K. Newton**

Abstract

The rule of law is a universally accepted concept. While the rule of law is indeterminate in nature as a concept, it is now possible to identify accepted principles of the rule of law. This article argues that the use of and adherence to Grant Thornton's five stages of the drafting process in drafting legislations promotes and safeguards many accepted principles of the rule of law in the Commonwealth Caribbean.

Keywords: drafting process, rule of law, Thornton.

A Introduction

I Rule of Law

The rule of law is best described as a concept in search of a definition. Robinson et al. assert:

> The rule of law represents a standard that is 'universally accepted' and yet what it means is often disputed. A common criticism is that the rule of law is invoked 'promiscuously' today as magic words to support just about any claim relating to law, democracy, human rights and good governance.[1]

Formal conceptions of the rule of law focus on how the law is made and applied. Tamanaha adopts such a conception of the rule of law; he asserts it is more useful to conceptualize the rule of law by its minimum content, where there lays no disagreement. To this end, he states:

> The rule of law means that government officials and citizens are bound by and abide by the law … it is the minimum content of the rule of law. A society in

* Shaquille K. Newton, LL.B. (Hons) LL.M. (UWI), LL.M. (London), LEC (HWLS), Attorney-at-Law, email: shaquillenewton1811@gmail.com. He is employed as Legislative State Counsel in the Office of the Attorney General of Barbados and was awarded the LL.M. in Drafting Legislation, Regulation and Policy with Distinction from the Institute of Advanced Legal Studies, University of London. The views and opinions contained in this article are those of the author and do not necessarily reflect the views and opinions of any entity which they represent.

1 Tracy Robinson, Arif Bulkan and Adrian Saunders (eds), *Fundamentals of Caribbean Constitutional Law* (2nd ed., Sweet and Maxwell 2021) 293.

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> which government officials and citizens are bound by the rule of law is a society that lives under the rule of law.[2]

This is a fitting functional definition of the rule of law as it aligns naturally with what the rule of law by its very nomenclature suggests at first encounter with the concept – the law is used to rule and order society. Lord Bingham adopts a substantive conception of the rule which focuses on the content of the law, emphasizing that laws should be fair and just. He has identified the following eight principles which are essential to the rule of law:

1 The law must be accessible and, so far as possible, intelligible, clear, and predictable.
2 Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3 The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
4 Ministers and public officers at all levels must exercise the powers conferred on them in good faith, and fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
5 The law must afford adequate protection of fundamental human rights.
6 Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
7 The adjudicative procedures provided by the state should be fair.
8 The rule of law requires compliance by the state with its obligations in international law as in national law.

Bingham's first principle of the rule of law – that the law must be accessible and, so far as possible, intelligible, clear, and predictable – has much bearing on legislation.[3] Reasoning by analogy, Bingham states this first principle of the rule of law is necessary for three reasons. First, to comply with the law, persons must be able to understand the law. Second, and similar to the first reason, the law being a source of rights to persons, to claim these rights persons must be able to understand what these rights are. Finally, if the law regulates activities of persons and society, persons must have some reasonable ability to foresee the effect of the law on their daily conduct and, thus, the law must have a degree of certainty and predictability.

Without laws, government cannot govern. Everywhere, through the efforts of a handful of policymakers, governments purport to channel the behaviours of swarms of governmental employees and the citizenry at large.[4] Sales writes, 'the modern world is the Age of Statutes, as it has been called. The legal environment in every area is filled with legislation'.[5] This statement is reflective of the

2 Brian Tamanaha, 'The History and Elements of the Rule of Law' (2012) SJLS 232.
3 Tom Bingham, *The Rule of Law* (Penguin Books 2010) 37.
4 Ann Seidman, Robert Seidman and Nalin Abeysekere (eds), *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International Ltd. 2001) 13.
5 Philip Sales, 'The Contribution of Legislative Drafting to the Rule of Law' (2018) 77 *Cambridge LJ* 630.

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Commonwealth Caribbean where legislation is the main source of law. All of the Commonwealth Caribbean Constitutions grant to these jurisdictions' national parliaments the power to make law, for example, Section 48 (1) Barbados Constitution states: 'Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Barbados'.

Furthermore, an explicit commitment to the rule of law is expressed in the preambles to most Caribbean Constitutions and is also infused throughout the Constitution[6]; for example, the Preamble of the Constitution of the Bahamas states:

> AND WHEREAS the people of this Family of Islands recognize that the preservation of their Freedom will be guaranteed by a national commitment to Self-discipline, Industry, Loyalty, Unity and an abiding respect for Christian values and the Rule of Law.

In light of the aforesaid Constitutional provisions and preambles, it is axiomatic that the enactment legislation contributes to the rule of law in the Commonwealth Caribbean and, as a corollary to this, legislative drafters can definitively be regarded as the 'custodians of the rule of law'.

Seidman advances three compelling reasons by drafters bear an obligation to maintain the rule of law. First without clarity, precision, and consistency, the law has no predictability. Beyond the drafters' duty to rest their bill's substance on reason informed by experience, the duty of assuring the law's clarity and precision alone would place the drafters' task at the very heart of good governance and development. Second, the fact the drafter's task arises from the desire of governments to use legislation as a means of regulation – for example, to change problematic behaviours and to ensure non-arbitrary decision-making – also makes them the custodian of the rule of law. Finally, by virtue of drafters' special obligation to ensure that their bills induce the prescribed behaviours by officials, they are the custodians of the rule of law.[7]

I assert that the use of Thornton's stages of the drafting process safeguards and strengthens the rule of law in the Commonwealth Caribbean. In this article, I argue that should legislative drafters within the Commonwealth Caribbean adhere to Thornton's stages of the drafting process, many aspects of the rule of law will be served by legislation and the drafting process. To prove these arguments, an examination of Thornton's stages of the drafting process will be undertaken to show how each stage of the drafting process contributes to various principles of the rule of law.

The rule of law being a broad and indeterminate concept, this article seeks to illustrate how Thornton's drafting process contributes to what, for the purposes of simplicity, may be described as 'principles and tenets' of the rule of law which have gained acceptance by jurists.

6 Robinson et al. (n 1), 297.
7 Seidman et al. (n 4), 343.

This article will rely on a synthesis of existing literature and case law surrounding legislative drafting and the rule of law to show the nexus between Thornton's stages of the drafting process and the rule of law, with a specific focus on the contribution of the drafting process to the rule of law within the Commonwealth Caribbean. In this article, each of Thornton's stages in drafting process will be examined and there will be an analysis of the stage in relation to its contribution to the rule of law. Finally, the conclusion will present the findings of this research and show how the stages of Thornton's drafting process collectively contribute specifically to the rule of law within the Commonwealth Caribbean and generally to common law jurisdictions.

II Thornton's Stages of the Drafting Process

Prior to embarking on an individual analysis of the stages of Thornton's drafting process, it is only appropriate to establish who Thornton was and the significance of his conceptualization of the drafting process by means of a general overview. Grant Thornton, one of the leading experts and innovators in the discipline of legislative drafting, categorizes the legislative drafting process into five stages:

1 Understanding the proposal
2 Analysing the proposal
3 Designing the law
4 Composing and developing the draft
5 Verifying the draft.

The five stages do not consist of five watertight compartments; they are better regarded as recognizable areas of the process as a whole. Progress from stage 1 to stage 5 is usually neither smooth nor regular, and frequently it necessary to return to an earlier stage and try again.[8] Thornton's renowned five-stage drafting process is a widely accepted formula that serves as a guide for rule for the production of good-quality legislation. The process not only shows the journey of a bill from the beginning, starting as a plain white paper, but it also emphasizes the importance of every person who is involved in the drafting process.[9]

B Understanding the Proposal

In the Commonwealth Caribbean, the drafting process is usually commenced by Cabinet's approval of the sponsoring Ministry's instructions to draft legislation. The first stage of the drafting process is understanding the proposal. Thornton asserts:

> The first task for the drafter is to understand what they are about. Patently [it] is vital to gain a thorough and complete understanding of the purposes of the required legislation. The drafter must be certain as to the mischief and defect

8 Helen Xanthaki, *Thornton's Legislative Drafting* (5th ed., Bloomsbury Professional Ltd 2013) 146.
9 Noor Azlina Hashim, 'Consultation: A Contribution to the Efficiency of Drafting Process in Malaysia' (2012) 14 *Eur JL Reform* 142.

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> intended to be remedied. To gain this necessary understanding may require time, patience, great care, and not a little tact. The drafter may have to work very hard to achieve an accurate and complete understanding of the goals of the sponsors of the proposed legislation.[10]

From Thornton's statement it is clear that understanding the proposal is assisted by the innate attributes and training of the legislative drafter. Few lawyers have the special combination of skills, aptitudes, and temperament necessary for a competent draftsman.[11] There are two main things that might contribute to and enhance the drafter's understanding of the proposal – that is, clear and precise drafting instructions, and discussion and consultation with the instructing officer.[12]

I Role of Drafting Instructions

Drafting instructions are a set of data that policymakers make available to these drafters to help drafters to draft an effective legislation within the confines and parameters developed by policymakers.[13] Drafting instructions establish the nexus between the drafter and the policy and legal officers. This is the opportunity of policy and legal officers to inform the drafter on the policy that government intends to put into effect. This is where the link between the regulatory aims and the legislation is established.[14]

Academics in the field of legislative studies agree that legislation may be regarded as written rules to prescribe the conduct, order, and behaviour of members of society and government. Xanthaki asserts that legislation is a tool for regulation and notes: 'Legislation is a mere tool for governing, or else a mere tool of regulation. This is the relationship between regulation and legislation. Legislation is one of many choices offered to governments in their pursuit of putting their policies into effect'.[15]

This functionalist view of legislation is unequivocally supported by an examination of the role and use of legislation in any society. Consequently, the ability of legislation to achieve the regulatory aim of the policy is largely dependent on the quality of the drafting instructions because, unless legislative drafting instructions and the theory that underpins them guide the drafters in making an adequate empirical study of their countries' relevant social realities, their bills' impact in changing problematic behaviours will depend on plain luck.[16]

10 Xanthaki (n 8), 146.
11 Vincent Crabbe, *Legislative Drafting* (Cavendish Publishing 1993) 16.
12 Hashim (n 9), 148.
13 Joseph Kobba, 'Criticisms of the Legislative Drafting Process and Suggested Reforms in Sierra Leone' (2008) 10 *Eur JL Reform* 219.
14 Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing 2014) 24.
15 *Ibid*., 4.
16 Seidman et al. (n 4), 39.

II Consultation

Rarely do written instructions or a concept paper contain sufficient detail or clarity to enable a drafter to begin drafting.[17] Thornton asserts, 'in all but very simple cases, a through and wide-ranging discussion with the instructing officer is a necessary part of the understanding stage of the process'.[18] Elliot has rightly argued that the fundamental elements of a good legislative products remain a collaborative effort with a good teamwork between the instructing officers and drafters.[19] Consequently, consultation on the part of drafters with instructing officers facilitates a better understanding of the proposal and ensures a smooth continuity between the policy process and the legislative process.

The inaugural holder of the office of England's First Parliamentary Counsel, Henry Thring, started the myth that drafters never deal with policy which spread and became pervasive in common law jurisdictions for most of the twentieth century. Stefanou has soundly disproven Thring's myth and has correctly asserted that in the context of the small jurisdictions there is a more relaxed mingling of drafters and policymakers mainly as a result of the drafters' multitasking in their capacity as civil servants.[20] This is particularly true within most of the jurisdictions of the Commonwealth Caribbean where for numerous practical reasons drafters are more intertwined in matters of policy than their counterparts in large jurisdictions. Resultantly, consultation is done with a view to better understand the policy to be furthered through legislation and clarify drafting and legal difficulties which may have arisen from the drafting instructions. Miers and Page correctly state: 'In theory the Minister has the last word on matters of policy and the draftsman the last word on matters of form and law, but the dividing line between policy and drafting, substance and form, is not a sharp one and the draftsman is inevitably drawn into policy decisions'.[21]

III Analysis of Understanding the Proposal in Relation to the Rule of Law

Metaphorically speaking, the rule of law, examined under the most basic jurisprudential microscope, is shown to be primarily concerned with the regulation of government and citizens within a polity. In addition, if one accepts the view that legislation is but a mere tool for regulation, then the conclusion can be properly made that legislation is the primary tool through which the tenets of the rule of law are maintained and enhanced.

The term that best reflects what drafters do is legislative counsel. They don't just draft; they also advise.[22] Understanding the proposal is the stage at which drafters particularly in the Commonwealth Caribbean are wrangled into the policy

17 *Ibid*.
18 Xanthaki (n 8), 151.
19 David Elliot, 'Getting Better Instructions for Legislative Drafting, Pre-Conference Clinic' (Just Language Conference, British Columbia, 21 October 1992).
20 Constantin Stefanou, 'Drafters, Drafting and the Policy Process' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Routledge 2008) 321.
21 David Miers and Alan Page, *Legislation* (Sweet and Maxwell 1982) 85.
22 Ronan Cormacain, 'Legislative Drafting and the Rule of Law' (PhD Thesis, Institute of Advanced Legal Studies, School of Advanced Study, University of London 2017).

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process, and, at this stage, they must bring to bear their thoughts on the policy not in their capacity as drafters but as lawyers. A good draft is above all an indication that the drafter has understood well the issues/circumstances involved, as well as what is required of him/her according to instructions. In the process of understanding the proposal, drafter's interrogation of the policy and advice to the sponsors of legislation can help to shape the policy which may pose no offence to the rule of law but can be better tailored to uphold its tenets and principles. This is significant because, after the initial stages of the drafting process, particularly once an initial draft has been produced, there is understandably very little appetite on the part of policymakers to make revisions to the policy.[23] Therefore, the earlier the policy is tested for its deficiencies, the more likely any deficiencies can be remedied and, thus, the policy is more likely to further the rule of law.

Understanding the proposal in Thornton's stages of the drafting process is the departure point of analysis of how the legislative proposal seeks to regulate the conduct of government and citizens and the implications the proposal has on the many substantive aspects of the rule of law. The initial thoughts of the drafter in stage 1, are further researched, developed, and refined in the analysis stage where on a conceptual spectrum there can be no clear divide. At this stage, the drafter conducts preliminary scrutiny of the policy to determine whether it conforms to the rule of law and if ostensibly there is offence to the rule of law, which is further investigated in stage 2 – analysis of the proposal.

C Analysing the Proposal

Driedger asserts:

> A good draftsman is more than a mechanical word polisher; he is one of the creative participants in the legislative process. *Indeed, the hardest part of the draftsman's task in producing a bill is finished before the drafting of it begins*.[24]

Driedger's assertion is now regarded as sacrosanct by drafters and academics in the field of legislative studies. Xanthaki concurs that 'it is Thornton's stage two that marks the beginning of the real work for drafters. Stage two is analysis of the proposal'.[25] This stage of the drafting process may be considered the most critical stage of the drafting process, because the effectiveness of the legislation largely rests on the collaborative choices that the drafter and policy officers will make together, to refine what at this stage may be considered raw policy into refined written rules of regulation. Like other lawyers, drafters, too, have a responsibility

23 George Engle, 'Bills Are Made to Pass as Razors Are Made to Sell: Practical Constraints in the Preparation of Legislation' (1983) 1983 *Statute L Rev* 7.

24 Elmer Driedger, *The Composition of Legislation: Legislative Forms and Precedents* (2nd ed., Ministry of Supply and Services Canada 1976) 1.

25 Xanthaki (n 14), 38.

to assure their clients that their legal product will function as promised,[26] and, to ensure this, the drafter must conduct rigorous analysis of the legislative proposal.

Thornton states, 'legislative proposals must be subjected to careful analysis in relation to existing law, special responsibility areas and practicality'.[27] However, if one accepts that the role of the drafter is to transform policy into legislation, the natural departure point of analysis in relation to the legislative proposal must be analysis for the necessity of legislation. After this, analysis of the proposal with respect to Thornton's identified analysis criteria may be undertaken.

I Analysis for Necessity of Legislation

The idea that legislation can be used to achieve great changes in society is very attractive to politicians. They seem to believe that anything can be achieved by legislation.[28] This is particularly true within the context of the Commonwealth Caribbean where, regrettably, legislation is abused as a panacea for every issue that occurs and serves as an easy means of the political directorate to appear to be addressing the issues. However, legislation is

> but one of the many weapons in the arsenal of governments for the achievement of their desired regulatory results.[29] In light of factors such as the innate limitations of legislation as a product which can produce desired regulatory results, the complexity of actually producing effective legislation, and the availability of other regulatory tools, legislation should be a solution of last resort.

Drafters must engage in analysis to determine the necessity of the proposed legislation to safeguard against the unnecessary bloat of the statute book that leads to incomprehensibility and, ultimately, to ineffectiveness. Greenberg starkly asserts, 'far from being paid for productivity, therefore, drafters should be paid for non-productivity'.[30] Miers and Page correctly opine that there are only two instances where it may be easily concluded that there is need for legislation. First, where the realization of the policy necessitates a change to an existing law, and, second, where parliamentary approval expressed in the formal of legislation is required for the levying of taxation.[31] In all other instances, the drafter must exercise restraint in finding that legislation is indeed necessary.

II Existing Law

Thornton advises that every new law should be viewed as amending in nature.[32] The draftsperson must endeavour therefore to local existing and common law provisions which may be affected by the bill and take steps to make clear the precise nature of that effect, to present amendments to statutory provisions in as clear

26 Robert Seidman, 'Drafting for the Rule of Law: Maintaining Legality in Developing Countries' (1987) 12 *Yale J Int L* 84.
27 Xanthaki (n 8), 151.
28 Crabbe (n 11), 19.
29 Helen Xanthaki, 'The Limits of Legislation as a Product' (2017) 11 *Hukim J Legislation* 153.
30 Daniel Greenburg, *Laying Down the Law* (Sweet and Maxwell 2011) 155.
31 Miers and Page (n 21), 16.
32 Xanthaki (n 8), 151.

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and orderly a fashion as possible, and to adopt consistent terminology and linguistic usage where appropriate.[33] The legal sources of law in the Commonwealth Caribbean are (a) the Constitution, (b) legislation, (c) the common law and judicial precedent, (d) custom, (e) international law (including the law of regional treaties), and (f) equity.[34]

In the context of the jurisdictions of the Commonwealth Caribbean, the drafter must conduct an analysis of all the existing laws from the various sources of law in order to fit the legislation first within the statute book and, second, within the overarching legal framework of the jurisdiction. Failure to do so could easily result in one bill throwing the entire legal system of a jurisdiction into anarchy. Dickerson paints an appropriate visual of the drafter's analysis in relation to existing law, and he states:

> A competent architect would not dream of remodeling a house without first taking a close look at it. Similarly, the draftsman of a legal instrument should closely examine all relevant existing instruments, if any, to see what to amend, what to repeal, what to supplement. Failure to do this results in implied repeals, overlaps, and inconsistent terminology; in a word – confusion.[35]

III Special Responsibility Areas

The drafter as the custodian of the rule of law has a role of special responsibility. Thornton asserts, 'this responsibility is particularly great in certain areas of potential dangers. The dangers will be apparent to the drafter who has a duty to be sure that instructors are also aware of these dangers'.[36] Thornton's areas of special responsibility include:

i Proposals affecting personal rights
ii Proposals affecting property rights
iii Proposals to delegate to the executive a power to impose taxation
iv Proposals for retrospective legislation
v Proposals inconsistent with international obligations and standards
vi Proposals which are unnecessarily bureaucratic
vii Proposals affecting prerogative powers.

It is asserted that there can never be an exhaustive list of 'special responsibility areas'; however, what Thornton has presented are the areas where the neglect of analysis on the part of the drafter can produce the most detrimental effects on the polity of the state and the rights of the citizenry. These are areas which fall within substantive conceptualizations of the rule of the rule of law, and, thus, it is clear that the drafter's duty here is to safeguard against legislation which may run afoul of the tenets of the rule of law and, by extension, good governance.

33 Miers and Page (n 21), 79.
34 Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd ed., Routledge 2008) 96.
35 Reed Dickerson, *The Fundamentals of Legal Drafting* (Little Brown and Company 1965) 40.
36 Xanthaki (n 8), 152.

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It must be stressed at this point that identification of such danger areas in the legislative proposal does not signify automatically an abandonment of the plan for regulation or even legislation in the field.[37] Having identified a potential area of danger, the legislative counsel's ethical responsibility is to alert the Attorney-General and the sponsoring Ministry to area of danger. These circumstances give rise to occasion where, by virtue of the drafter's role, they might be required to assist in the refinement of policy.

IV Practicality

Thornton does not elaborate much on what he means by 'practicality'. Perhaps this is an effort to avoid tempting drafters to overstep the parameters of their role and usurp the primary functions of policy officers. Of most significance, he writes:

> A drafter needs at this early stage to study most rigorously the practical aspects of the legislation proposed and be satisfied that the scheme will work, that the machinery proposed is practical and that the legislation will be capable of enforcement.[38]

Assessing this statement, it is possible to discern that a proper analysis on the part of the drafter requires conceptually exploring and testing the legislative proposal for its ability to work in practice, in order to ensure that the legislative proposal is not a useless addition to the statute book becoming mere words on paper of meaningless effect or, worse, yet another addition to the statute book that results in anarchy. Draftspersons become familiar with the administrative implications of different kinds of proposals and rely on the experience of civil servants to inform them of what is involved in the day-to-day implementation of particular provisions.[39]

On this point of analysis for practicality, the issues of 'retrospectivity and retroactivity' come to the fore. While overlapping with special responsibility areas, the issue of time in legislation falls under analysis for practicality because the factor of time potential to affect the application of the law has both practical and legal ramifications for the subjects of legislation. The rule is that legislation is prospective in nature. However, legislation being a tool for regulation, there may be indeed compelling reasons when the drafter needs to reach back in time and regulate past events or their effects.

It must be noted that the terms 'retrospectivity' and 'retroactivity' are often used interchangeably and the distinctions between them blurred. Xanthaki best makes the distinction between retroactivity and retrospectivity. Retroactive provisions travel back to the past and change the law as they stood at the time of enactment: they require the intervention of a magic pen that travels back in time to delete and rewrite the provision. Retrospective provisions do not alter the past:

37 Xanthaki (n 14), 50.
38 Xanthaki (n 8), 156.
39 Miers and Page (n 21), 88.

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they simply alter the future effects of past events. A retrospective provision is prospective, but it attaches new consequences to past actions.[40]

V Analysis of 'Analysing the Proposal' in Relation to the Rule of Law

In *R v Secretary of State for the Home Department*, Lord Steyn stated, 'unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law'.[41] From the aforesaid, it is evident this stage of Thornton's drafting process makes a solid contribution to safeguarding and promoting many aspects of the rule of law and it is at this juncture that drafters properly assume their position as the 'custodian of the rule of law'. Consequently, a careful analysis of the legislative proposal by the drafter can indeed ensure that legislation does not run afoul of the rule of law, as neglecting such an analysis is a dereliction of the drafter's duty of competence.

The tradition of central drafting office's independence rests on the notion that drafters can, and should, refuse to draft bills that apparently contravene the rule of law;[42] on this notion, it is pertinent here to recall Keyes' assertion, 'there is undoubtedly a point at which it is not sufficient merely to give advice and stand back'.[43] Regrettably, in the Commonwealth Caribbean, unlike in the United Kingdom, drafters do not enjoy the same independence and privileges of immunity to refuse to draft in such circumstances.

Nonetheless, analysis of the legislative proposal by drafters in the Commonwealth Caribbean in relation to the aforementioned points of analysis can and do safeguard and promote the rule of law. While an assessment of mechanisms to insulate the drafter from pressure and safeguard their independence is outside the scope of this article, this opportunity is seized to make the point that implementing such mechanisms can only bode well for the rule of law and for better-quality legislation within the Caribbean.

1 Analysis for Necessity of Legislation

This point of analysis is critical to the maintenance and order of the statute book and, as will be further illustrated in the following text, serves the rule of law with respect to certainty of the law. However, the greatest contribution of analysis of necessity of legislation is to the substantive conception of the rule of law regarding the liberty and freedoms of the citizenry. By definition, regulation is a breach of human liberty. Legitimately or not, every time a government regulates a new activity, they chip away at their citizens' freedom to act as they please.[44]

The stained history of the Caribbean illustrates that the legislation has been used as an instrument of oppression and abuse of the citizen; this must remain in the forefront of the Caribbean drafter's mind, and it is acknowledged that this analysis for the need for legislation overlaps with special responsibility areas.

40 Xanthaki (n 14), 217-218.
41 [1998] AC 531, 591.
42 Seidman et al. (n 4), 45.
43 John Keyes, 'Professional Responsibilities of Legislative Counsel' (2011) 5 *JPPL* 11.
44 Xanthaki (n 14), 46.

Given the fact that governments of the Commonwealth Caribbean have a penchant for resorting to legislation that is often of questionable quality and implemented as a 'quick fix' to societal problems when other tools sometimes as simple as moral suasion can suffice, there now exists a culture of overregulation. Therefore, analysis of necessity of legislation safeguards the substantive concept of the rule of law that citizens must be afforded as much liberties and freedoms as would be possible in a democratic society and can help to kerb the overregulation of citizenry.

2 Analysis of Existing Law

It is accepted that the rule of law demands that laws be certain so that citizens can regulate their conduct, and Dickerson's warning that lack of analysis of existing law will throw the law into a state of confusion must be heeded by the drafter. It can be unequivocally concluded that analysis of existing law promotes certainty of the law by ensuring that every piece of legislation achieves a proper fit within the statute book and the entire legal system of a jurisdiction thereby preventing the creation of conflicting obligations, rights, and duties imposed by the law. I concur with Cherkewhich's assertion: 'Through ensuring the seamless integration of new laws and identifying inconsistencies and incoherence within existing laws, legislative counsel routinely work to shield from one of democracy's vital institutions; its law'.[45]

3. Analysis of Special Responsibility Areas

It is arguable that analysis for special responsibility areas is the criteria in Thornton's analysis of the proposal stage that makes the greatest contribution to the protection and promotion of the rule of law. This is because special responsibility areas run the gamut of the tenets of the rule of law. The proposals identified by Thornton that touch and concern areas of special responsibility are largely covered in the Commonwealth Caribbean by the jurisdictions' written constitutions. Recalling that the preambles of these jurisdictions' constitutions make explicit commitment to the rule of law – which is demonstrable by the manner in which the machinery of state is organized in keeping with core tenets of the rule of law (e.g. separation of powers), coupled with the codification of 'fundamental rights and freedoms' to the citizen in the Bill of Rights of these Constitutions – it can be concluded that the analysis of special responsibility areas in the Caribbean is covered largely by analysis of constitutionality.

The recent Jamaican case of *Roshaine Clarke v. AG of Jamaica*,[46] which concerned *inter alia* the restriction on the freedom of movement, will be utilized for heuristic purposes for the contribution of analysis of special responsibility area to the rule of law. In this case, Regulation 22 of the Emergency Powers Regulations 2018 allowed a competent authority to prevent 'a person who was suspected of acting, having acted or being about to act in a manner to public safety, public peace' from residing in or entering into any particular area, as the competent authority saw fit.

45 Teri Cherkewich, 'By Sword and Shield: Legislative Counsel's Role in Advancing and Protecting Democracy One Word (and Client) at a Time' (2015) 36 *Statute L Rev* 253.

46 [2002] JMFC Full 3.

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The regulatory aim of Regulation 22 was to curb crimes, particularly gang-related crimes prevalent in certain areas of Jamaica. The Court in scrutinizing Regulation for compatibility with *Section 13(3) (f) Jamaica Constitution* which grants the right to freedom of movement found that the Regulation had a legitimate provision to curtail crime; however, the category of persons it applied to was too broad and the failure of the Regulation to specify a time period within which the restriction may take place opened the door for abuse by authorities. For these reasons, the Court ruled that the legislation was unconstitutional and, by extension, ran afoul of the rule of law.

It impossible to know the 'behind the scenes' crafting of Regulation 22 – but, assuming the drafter had identified this as a legislative proposal concerning special responsibility area, that is, freedom of movement, and subsequently engaged in a proper analysis with support from sponsors of the legislation willing to heed the drafter's advice – it is demonstrably easy to see that Regulation 22 could have furthered the regulatory aim by being drafted in a manner that narrowly specified that category of persons to which it was to be applied and imposed time limits for the curtailment of the freedom of movement. This could have resulted in Regulation 22 being deemed constitutional and efficacious to curb crime.

4 Analysis for Practicality

Analysis for practicality with respect to the identified areas of retroactive and retrospective legislation safeguards the certainty and predictability of the law. Once again, since citizens must know what the law demands of them in order to comply with the law, careful scrutiny of legislation for retrospective or retroactive ramifications safeguards against the arbitrariness of the law and its application in an unjust manner. This is because this type of analysis can safeguard against the past conduct of citizens by the implementation of legislation being deemed to be in noncompliance with the law with the possibility of sanction.

Recalling that many of the principles of the rule of law are infused in Commonwealth Caribbean Constitutions, the requirement of legal certainty is exemplified in the constitutional proscription of retrospective criminal laws such as *Section 18 (4) of the Barbados Constitution*. Therefore, analysis of these overlapping practical considerations and areas of danger is imperative for the legislative counsel in the Commonwealth Caribbean.

D Designing the Law

The drafting instructions understood, careful analysis of the legislative proposal undertaken and the determination to proceed with the drafting of the legislation having been made, the drafter proceeds to stage 3 of Thornton's drafting process, which is designing the law. Thornton instructs:

> The design stage should be regarded as an opportunity to look at the material as a whole, to weigh up the relative importance of topics, to bring together in

> the mind those elements that are related, and to consider how the material can best be presented.[47]

Resultantly, it is axiomatic that the design stage is primarily concerned with the structure of legislation.

I Structure of Legislation

Structure refers to how parts of a particular a legal instrument or principle are connected together, arranged, or organized; it points to a particular arrangement of parts, in other words.[48] Dickerson asserts, 'the chief aim in arranging an instrument is to make the final product as clear and useful as possible'.[49] He argues there is no 'all-purpose arrangement' and advises:

> What may be the best arrangement from one point of view may not be the best from another. The draftsman should make sure that he is reflecting the point of view that best advances the purpose of his client.[50]

As the field of legislative studies has developed, Dickerson's early musings on structure have proven correct, and, coupled with the acceptance that legislation is a means of communication, structure may properly be regarded as critical to the conveyance and receipt of the regulatory messages contained with the legislative text. Xanthaki states:

> Prioritizing the provisions within the legislative text ensures that the prime message of the communication that is drafting can be placed at the very beginning of the text, where the reader's attention is at its prime.[51]

Ironically, the Commonwealth Caribbean remains shackled to the traditional structure of legislation, even though the birthplace of the traditional structure of legislation – the United Kingdom – has departed from the traditional structure of legislation in favour of a 'layered approach' to structure. The traditional structure of legislation arranges various provisions of legislation into three basic categories in the following descending order: preliminary provisions, substantive provisions, and final provisions. Moreover, there is very little emphasis on arrangement of the regulatory messages of the legislative text in accordance to its importance to the users of legislation, and the deficiency of this 'traditional style' as a means of communication has been recognized.

A bill might run to severed hundred clauses, with a number of parts or chapters (or divisions if used) and additional schedules, and it is important that the drafter

47 Xanthaki (n 8), 157.
48 Oxford Learners Dictionary, www.oxfordlearnersdictionaries.com/definition/english/structure_1 (accessed 7 August 2022).
49 Dickerson (n 35), 55-56.
50 *Ibid*.
51 Xanthaki (n 14), 61.

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considers at the outset the structure of the bill and how it reads in outline.[52] Thus, structure extends beyond the division of an act into preliminary, substantive, and final provisions and includes the layers of descending division of an act with a view to dissect the many regulatory messages to be conveyed and at the same time enhance the cohesion and comprehensibility of the regulatory messages when the act is read as a whole.

II Analysis of Designing the Law in Relation to the Rule of Law

It is a sacrosanct principle of the common law tradition that the subject is bound by the law whether they know it or not. The result is that it is of enormous importance that laws are made accessible to the public as soon as possible.[53] As previously stated, Bingham's first principle of the rule of law insists that the law must be accessible and, so far as possible, intelligible, clear, and predictable. In *Sunday Times v. UK*, the Court suggests that accessibility of the law goes beyond physical access to legislation and includes an assessment of whether citizens can reasonably be expected to understand the text of legislation and its application to their lives.[54] On this basis, it seems that accessibility includes access in the normative sense of the word (i.e. how readily available the law is to citizen?) as well as 'intelligibility' (how easy is it to understand the law?).

Foregoing the semantic quibbles surrounding accessibility and intelligibility, what is demonstrable is that the design stage of Thornton's stages of the drafting process contributes to both accessibility and intelligibility of the law. Moreover, if these values are readily recognizable for their potential to ease up the application of the law by individuals tasked to do so, it can be concluded that the more intelligible the law is, the easier it should be to apply.

Voermans argues that the structure of an act can act as a roadmap for users who want to find the relevant provisions and that a well-conceived structure leads the user to the place of interest and, therefore, the overall accessibility of legislation.[55] Despite the shortcomings of the traditional structure of legislation, it still provides a well-conceived structure, and, while it may initially intimidate the lay user, through repetition of use, the lay user becomes familiar with the location of the legislative messages – that is, the information sought from the legislative text – and, therefore, accessibility is served even if not in the best manner.

The structure of legislation also contributes to the clarity of the law. Engel asserts that the design aspect of the drafting process being concerned with the internal organization of each particular schedule or clause, it can be concluded that good design in this sense is the essence a well-drafted bill.[56] Even if the simplest and clearest terms are utilized in the legislative provisions, if the organization of

52 Impact Justice Project, *Drafting Legislation in Caricom Member States – A Manual on Legislative Style and Practice* 12.

53 Daniel Greenberg, *Craies on Legislation: A Practitioner's Guide to the Nature Process and Effect and Interpretation of Legislation* (12th ed., Sweet & Maxwell 2021) 524.

54 [1979-1980] 2 EHRR, 245.

55 Wim Voermans, 'Styles of Legislation and Their Effects' (2011) 32 Statute L Rev 38.

56 Engle (n 23).

legislative sentences in relation to each other is poor in design, the law cannot be clearly understood.

E Composing and Developing the Draft

The composition and development stage of Thornton's drafting process may be described as the textual writing of the legislative instrument. Thornton notes, 'it is a matter of converting what is comprehensible and clear to the drafter to the shape and form most easily and unequivocally comprehensible to the reader'.[57] Transforming government policy into law is the prime function of Parliamentary Counsel; therefore, it is the composition and development stage of the drafting process at which this function is fulfilled.

Professor Crabbe's sentiments on legislation are meritorious, as the following quotation properly illustrates what the function of the legislative text is when regarded as a command or what in recent times more aptly described by Xanthaki as rules for regulation. He states:

> An Act of Parliament expresses legal relationships. It is also a form of communication. It lays down our rights and obligations, our powers, our privileges and our duties. In this it tells us what to do and what not do. It is a command to others. There should, therefore, be no misunderstanding as to the message that it seeks to convey. It is part of the language of a people. It is part of the language of a people. It will be understood as language of that jurisdiction is understood. In that respect, an Act of Parliament should be drafted in accordance with principles that govern language as a means of communication in that particular jurisdiction.[58]

Therefore, the drafter in composing and developing the drafting must utilize clear, precise, and unambiguous language and, as far as practicable, plain language to convey the regulatory messages of the legislation.

I Clarity, Precision, and Unambiguity

Keyes identifies an obligation for the drafter to ensure that the law is clearly stated in accordance with drafting conventions and to avoid undue or deliberate 'vagueness' or 'ambiguity'.[59] Ambiguity in legislation exists when words can be interpreted in more than one way.[60] Vagueness, on the other hand, occurs when there is doubt as to where the word's boundaries are or when the word has an open-textured meaning.[61] This also means that a legislative draftsperson need not go to extremes to reduce the risk that the statute draft will be misread. The law now

57 Xanthaki (n 8), 164.
58 Crabbe (n 11), 27.
59 John Keyes, 'Professional Responsibilities of Legislative Counsel' (2011) 5 *JPPL* 11.
60 Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate-Dartmouth 2008).
61 George Christie, 'Vagueness and Legal Language' (1963) 48 *Minn L Rev* 885.

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accepts, for the most part, the normal presupposition of communication that language has been used in its usual sense.[62] Dickerson asserts that legislative language has several largely curable diseases.[63] Clarity, precision, and unambiguity may properly be regarded as cures to ills that legislative language commonly falls victim to.

Clarity is defined as 'clearness or lucidity as to perception or understanding; freedom from indistinctness or ambiguity'.[64] Legislative drafting is the process of constructing a text of legislation;[65] thus, in this context of legislation, it is proper to presuppose that a word on its own has no meaning and its meaning is derived from the context in which it is used.[66] Therefore, in constructing the legislative content, the drafter must strive for clarity, which necessitates the arrangement of words in such a manner that the legislative message can be understood by the reader.

Precision means the 'exactness of expression or detail'. It has been described as making the greatest effort to 'say all'; to leave nothing to the imagination, never to presume upon the reader's intelligence.[67] Seidman et al. have correctly observed that drafters should try to make their sentences mean precisely what they intend them to mean, so that even the person reading the law with the intent to subvert it cannot successfully twist the meaning to serve another purpose or a vested interest.[68]

II Plain Language

Plain language may be viewed as a tool to serve clarity, precision, and unambiguity. Plain language means various things to various people, and it must be noted that the terms 'plain language' and 'plain English' are used interchangeably to describe the same concept within the discipline of legislative drafting. The agreed consensus in the field of legislative drafting is that plain English or plain language (whichever term used) is use of language in such a manner that the message is easily understood to the audience. Eagleson notes:

> Plain English is clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence structure. It is not baby talk, nor is it a simplified version of the English language.[69]

62 Reed Dickerson, 'The Diseases of Legislative Language' (1964) 1 *Harv J on Legis* 5.
63 *Ibid*.
64 See C. Soanes (ed.), *Compact Oxford English Dictionary* (Oxford University Press 2003) 193.
65 Helen Xanthaki, 'Legislative Drafting: A New sub-discipline Is Born' (2013) 1(1) *IALS Stud L Rev* 57.
66 Crabbe (n 11), 43.
67 Ester Majambere, 'Clarity, Precision and Unambiguity: Aspects for Effective Legislative Drafting' (2011) 37 *Commw L Bull* 417.
68 Seidman (n 3), 261.
69 R.D. Eagleson, *Writing in Plain English* (Commonwealth of Australia 1990) 4.

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III Analysis of Composing and Developing the Draft in Relation to the Rule of Law

From the foregoing discussion, it should be discernible that Thornton's composition and development stage, which utilizes the necessary legislative drafting principles of clarity, precision, and unambiguity and is aided by plain language, furthers Bingham's first principle of the rule of law: 'the law must be accessible and so far as possible intelligible, clear and predictable'. Cormacain has argued that legislative drafting principles can be derived from Bingham's first principle of the rule of law.[70]

In relation to formal conceptions of the rule of law which, as previously stated, focus on how the law is made and applied, it is indisputable that in order for persons to comply with the written rules of regulation – that is, legislation – they must know what the law is. Consequently, the drafters' pursuit of clarity, precision, and unambiguity when composing the legislative text makes the law intelligible, clear, and predictable. In order for addressees to do what is commanded of them, in response to commands, the commands must be prospective, not contradictory or non-congruent, and not physically, mentally, or circumstantially impossible for human beings addressed to follow.[71]

Legal certainty as a principle of the rule of law also means that the law must be stable and not in a state of flux. The rationale and importance of legal certainty has been recognized by the Judicial Committee of the Privy Council, with respect to judge-made law, that is, the common law. Lord Hoffman warns that precedent should not be departed from lightly as 'the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean'.[72] Likewise, legislation as a source of law must foster the legal certainty of the law, which means it must not be unnecessarily capable of wide and varying interpretation. In *Sabapathee v The State*, it was stated that legislation that is hopelessly vague must be struck down as unconstitutional.[73] As such, the use of the tools of clarity, precision, and unambiguity in composing legislation safeguards against vague laws which are susceptible to wide interpretation and imbues the law with certainty.

In its substantive conception, traditionally the rule of law calls for narrow grants of discretion. Recalling that Bingham's fourth principle of the rule of law states, 'ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably'. Drafters must write laws that simultaneously grant discretionary power to the appropriate officials and induce them to use that power for the common weal as defined by the statutory language.[74] If the discretionary power granted via legislation is to be properly exercised within its confines, there can be no room for indeterminacy as to the scope and the manner in which it is to be exercised. Therefore, these species

70 Cormacain (n 22).
71 Margaret Radin, 'Reconsidering the Rule of Law' (1989) 69 *BU L Rev* 781.
72 *Lewis v. AG* (2000) 57 W.I.R. 275 at 308.
73 [1999] 1 W.L.R. 1836 (PC Maur) at 1843, 1840.
74 Robert B. Seidman, 'Drafting for the Rule of Law: Maintaining Legality in Developing Countries' (1987) 12 *Yale J Int L* 84.

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of legislative provisions must be unequivocal, and as such the tools of clarity, precision, and unambiguity safeguard against opening the door to the arbitrary exercise of power due to the indeterminacy of the legislative provision.

F Verifying the Draft

The 'final draft' of the bill having been produced, the drafter must resist the temptation to go no further. This stage of the drafting process requires drafters to somehow take a critical and objective gaze at the finished product.[75] Legislative drafting is an extremely onerous, exacting, and highly skilled task.[76] The task requires hours of intellectual concentration, planning, and strategy. Ministerial requests for legislation come with 'urgent' or 'immediate' flags.[77] As such, the door is open for mistakes to occur in the drafting of the legislative text. This stage is the opportunity for drafters to reduce, if not eliminate, mistakes within the legislative text.

Furthermore, Thornton notes, 'with the help of the instructing officer, the draft should be tested by applying it to various hypothetical circumstances'.[78] It is submitted that this practical testing can reveal the merits and demerits of the policy, the capacity of the draft to actually work in practical operation, and any implications of the policy and the draft on the rule of law.

I Analysis of Verifying the Draft in Relation to the Rule of Law

The verification stage presenting the opportunity to detect and eliminate errors within the draft can contribute to the intelligibility, clarity, and predictability of the law, which is in keeping with Bingham's first principle of the rule of law. Obviously, a bill that contains errors cannot be clear, precise, and unambiguous and may lead to unintended, and perhaps catastrophic, implications on the law. One example where better credence to Thornton's verification stage could have resulted in the state of the law being more intelligible and certain is Barbados' Section 19 Sexual Offences Act which seemingly aims to criminalize prostitution.

Section 19 reads:

> 19. (1) A person who
> *(a)* knowingly lives wholly or in part of the earnings of prostitution; or
> *(b)* in any place solicits for immoral purposes
> is guilty of an offence and is liable on summary conviction to a fine of $5000 or to imprisonment for 5 years or to both.

Here, subsection *(b)* is not clear; the verb 'solicits' is not accompanied by any noun and, resultantly, subsection *(b)* is unintelligible, with no offence being created. This

75 Xanthaki (n 8), 200.
76 Crabbe (n 11), 16.
77 *Ibid*., 11.
78 Xanthaki (n 8), 200.

has had the effect of the law surrounding prostitution being uncertain in Barbados and clearly this provision being a useless addition to the statute book.

Laws explains that '[o]ne way in which legislative drafters seek to strike the balance [between law and politics] is by testing their drafts against certain identifiable values in the law'.[79] In other words, legislative counsels 'avoid producing legislation that cuts across the grain of the values of the law'.[80] This is exactly what the verification stage represents, as it is the final opportunity for the detection of any aspects of the bill that may offend substantive conceptions of the rule of law and, with respect to the legislative text, whether it passes muster with respect to formal conceptions of the rule of law, such as intelligibility and comprehensibility.

In the context of the Commonwealth Caribbean, where jurisdictions currently have ambitious legislative agendas to be serviced by a paucity of professional legislative counsels, the heavy demands on drafters mean that there is usually insufficient time to properly fulfil the requirements of the verification stage. Concomitantly, a basic examination of the legislative processes of the Commonwealth Caribbean reveals that it is a process that to a large extent serves as mere formality to the passage of the bill, with the majority of the members of the jurisdictions' legislatures in debating the bill, rarely assessing bills for their effect on the rule of law, good governance, and, in general, the quality of the bill before happily voting in favour of the bill. Therefore, the verification stage truly is the final opportunity to ensure the bill is not contrary to the accepted values of the law.

Moreover, what is demonstrable from the previously discussed case law is that there is a worrying pattern in the Commonwealth Caribbean that legislations flagrantly inconsistent with cardinal tenets of the rule of law are enacted. Supporting this assertion is the fact that the Judicial Committee of the Privy Council (the Privy Council), which serves final Court of Appeal for some of the jurisdictions in the region, has created the doctrine of anticipatory judicial review in relation to legislation. The Privy Council in *Bahamas Methodist Church v Symonette*[81] stated that normally judicial review is conducted only after the law has been passed but that it may forego this tradition under exceptional circumstances; for example, in situations where it sees 'the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice'. It is evident that the verification stage is the practical mechanism to ensure legislation in breach of the rule of law never has the opportunity to see the light of day because, after this stage of the drafting process, the bill is usually introduced in parliament and enters into the public domain.

79 Stephen Laws, 'Legislation and Politics' in David Feldman (ed.), *Law in Politics, Politics in Law* (Hart Publishing Ltd. 2015) 95.

80 *Ibid.*, 96.

81 59 W.I.R. 1, [2000] 5 L.R.C. 196 (PC Bah).

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G Conclusion

Thornton asserts that the drafting process needs to be seen in a wider context for it to be fully understood.[82] This article has sought to view the drafting process in a wider context, looking at it both in relation to its contribution to the rule of law and to the tenets in what is aptly classified as formal and substantive conceptions on the rule of law. It is impossible to do so exhaustively, but it has demonstrably illustrated the legislation, being a tool of regulation and also as the primary source of law, must serve the rule of law in the sense that it is the vehicle through which legal rules are implemented and enforced. As a corollary, the drafting process must serve the rule of law, or the end-product, that is, legislation, will invariably result in breaches of the accepted principles of the rule of law. The drafting process is the means whereby government policy is transformed into legislation, but it is indeed more than putting pen to paper to construct legislative sentences that implement government policy. Indeed, Thornton further asserts, 'a common experience is that the drafting process itself tests the policy, helps refine it, and generates a better sense of the practical operation of the proposed scheme'.[83]

The discussion in this article has shown that the policy is tested in relation to the rule of law particularly in stages 1 and 2 of Thornton's drafting processes which are, respectively, understanding the proposal and analysis of the proposal. Then the policy is yet again and concomitantly tested with the end-product of legislation in Thornton's stage 5 of the drafting processes, that is, verifying the draft. These aforementioned stages primarily contribute to ensure that the policy to be transformed into legislation does not breach the rule of law in its substantive conception. Stages 3 and 4 which are, respectively, designing the law and composing and developing the draft, promote the formal conceptions of the rule of law and mainly the accepted principle that the law must be accessible and, so far as possible, intelligible, clear, and predictable.

While this article assessed the contribution of Thornton's drafting processes to the rule of law within the context of the Commonwealth Caribbean, the legislative and drafting processes being the largely the same within jurisdictions of the Commonwealth which follow the common law legal tradition, the analysis and findings of this article are highly applicable to these similar jurisdictions.

82 Xanthaki (n 8), 141.
83 *Ibid*.